



September 19, 2017

Eric R. Gookin  
Election Administrator  
Office of the Secretary of State  
First Floor, Lucas State Office Building  
Des Moines, Iowa 50319

Delivered by U.S. Mail and email to: [eric.gookin@sos.iowa.gov](mailto:eric.gookin@sos.iowa.gov)

**Re: Comments on ARC 3282C**

Dear Mr. Gookin:

These comments are made jointly on behalf of the Iowa-Nebraska NAACP State Area Conference of Branches, League of Women Voters of Iowa, League of United Latin American Citizens of Iowa, Disability Rights Iowa, One Iowa Action, Interfaith Alliance of Iowa, Iowa Developmental Disabilities Council, and American Civil Liberties Union of Iowa.

They pertain to ARC 3282C: the published Notice of Intended Action to amend Chapter 21, "Election Forms and Instructions," Chapter 22, "Voting Systems," Chapter 26, "Counting Votes,"

and Chapter 28, "Voter Registration File (I-Voters) Management" of the Iowa Administrative Code.

The proposed rules must interpret the newly enacted House File 516 in a manner which, consistent with the laws and constitutions of the state of Iowa and the United States, protects the voting rights of all eligible voters. The following amendments are necessary to avoid confusion and unlawful restrictions on the right to vote in Iowa where they can be avoided in the implementation of enacted House File 516.

- 1. Proposed Item 2 unduly limits the acceptable IDs shown by Election Day registrants to vote. The proposed rules must clarify that election day registrants are considered "registered" voters.**

Item 2 of the proposed regulation treats the identification requirements to vote for election day registrants more harshly than pre-registered voters. Proposed rule 21.3(2) attempts to limit the means by which "Election day registrants" may prove their identity with an Iowa driver's license or nonoperator ID, military or veterans ID, or U.S. passport. By contrast, proposed rule 21.3(1) allows "persons other than election day registrants" to show either those IDs, or a voter identification card newly created pursuant to House File 516, section 18, or any of the other forms of IDs allowed under 48A.7A, which include student IDs, out of state IDs, and employer IDs as laid out in House File 516, section 27, which importantly also includes the oath of another registered voter in the precinct or a sworn affidavit of identity from the voter.

The enormous problem with that interpretation is that it doesn't flow from House File 516 itself, which allows those critical, additional, and reliable forms of ID for "a person who is registered to vote but is unable to present a form of identification listed under subsection 2" (the narrow class of Iowa driver's license or nonoperator ID, military or veterans ID, or passport). House File 516 did not, however, change the definition of "registered voter" in Iowa law. Iowa Code section 39.3(11) defines "registered voter" to mean: "a person who is registered to vote pursuant to Chapter 48A." A registered voter under Iowa Code chapter 48A includes voters who pre-registers either in-person or by mail and those who register on election day.

House File 516, section 27 is specifically limited to requiring that registered voters, not those who are applying to register to vote on Election Day, prove identity and residence in order to vote. Section 27 does not apply to persons who are applying to *register to vote on Election Day*.

If lawmakers had wanted to restrict the forms of ID Election Day registrants must show to vote so that they were different or more limited than for pre-registered voters, they would have made that change. But they did not.

Therefore, under current Iowa Code both pre-registered voters and election day registrants are "registered voters." That means all registered voters, whether they register on Election day or before, must be permitted to take advantage of the expanded class of acceptable forms of

identification, including student IDs, out of state IDs, and employer IDs under House File 516, section 27 (3)(b), and when they don't have those, sign a sworn affidavit of their identity under House File 516, section 27 (8) or present the oath of a fellow voter registered in the precinct under House File 516, section 27 (4).

The Secretary has repeatedly assured the public that House File 516 will not impact Iowa's voter registration. Indeed, House File 516 did not change the definition of "registered voter." But the rules attempt to go further than House File 516 did in restricting the types of identification allowed by Election day registrants to vote.

In order to conform the regulations to the law, and avoid disenfranchising election day registrants in Iowa, we propose that the Secretary make clear that "registered voter" in House File 516 means that exact same thing as "registered voter" in Iowa Code section 39.3. This is important to ensure that House File 516 and the rules are not read to conflict with Iowa Code section 39.3 by those who administer elections, including County Auditors and pollworkers. In addition, this is important in ensuring that all eligible voters are able to use the types of IDs allowed by Iowa Code section 48A.7A, like student IDs and out-of-state IDs, which have long been recognized as reliable to prove identity, and other documents to prove residence, as contemplated by House File 516.

We believe that the rule change was also made in an inappropriate place in the existing regulations. Existing regulations 21.3(1) and (2) set out identification required to register to vote, but the proposed rule change seeks to incorporate the identification required to be furnished a ballot, once registered, under the new 2017 Acts, section 516.

While the law treats the identification requirements to *register* to vote differently for Election Day registrants and Pre-registrants, it does not treat the identification requirements to actually vote differently under 2017 Iowa Acts, House File 516, section 27 (New Iowa Code section 49.78).

Accordingly, we propose that existing rule 21.3(1) and 21.3(2) remain the same, since, as the Secretary assured the public repeatedly in the preceding legislative session, identification documents needed to register to vote did not change with the new law. Then, add the following *new* provision to govern the identification documents required to actually furnish a ballot to the voter (to vote), as consistent with the new law.

ITEM 2. Adopt the following **new** rule 721--### (49, 48A):

721—## (39.3, 49.78) Identification documents accepted for voters, once registered, (both Election Day and Early/Pre-Registered Voters) to be furnished a regular ballot.

- a. Before a precinct election official furnishes a ballot to a voter under section 49.77, the voter shall provide any of the following forms of identification:

- (1) An Iowa driver's license or nonoperator's identification card
  - (2) Veterans and military identification cards
  - (3) A United States passport
  - (4) Voter identification cards issued pursuant to 2017 Iowa Acts, House File 516, section 18
  - (5) An out-of-state driver's license or nonoperator's identification card
  - (6) An identification card issued by an employer
  - (7) A student identification card issued by an Iowa high school or an Iowa postsecondary educational institution
  - (8) Written oath of a person who is also registered to vote in the precinct pursuant to 2017 Iowa Acts, House File 516, section 27, subsections 4 and 5
  - (9) Signed oath of the voter attesting to the voter's identity pursuant to 2017 Iowa Acts, House File 516, section 27, subsection 8.
- b. A registered voter includes voters who pre-registers either in-person or by mail and those who register on election day pursuant to Iowa Code section 39.3 and 48A.

**2. Proposed Item 25 violates the NVRA, and is likely to erroneously identify new U.S. citizens as unqualified voters and purge them from the voter registration lists because of jury declination forms.**

First, the proposed rule contained in Item 25 violates the National Voter Registration Act (NVRA) in a number of ways. Under the NVRA, while the state can remove "ineligible voters," there is no basis to believe that jury declinations will serve as an adequate basis to determine ineligibility if subject to a legal challenge. Jury declinations have not been shown to be sufficiently accurate, both as a record keeping matter, and because people who are eligible to vote may misrepresent their status to avoid jury duty. What's more, using "predetermined search criteria" is wildly insufficient for removals. This list match process is likely to include a number of false positive matches, and would likely be discriminatory in its effect, either on the basis of race (due to disproportionate impact on Hispanic or Latino citizens) or national origin (due to impact on naturalized citizens). We would urge the Secretary to strike the rule and abandon this process altogether.

The second way that proposed Item 25 violates the NVRA is that it allows for removal during the 90 day "quiet period" required by the National Voter Registration Act. Specifically, the matches and removals cannot be undertaken "monthly" throughout the year, because systematic list maintenance of this sort is prohibited within 90 days of a federal election (which would include March 5 to June 5 and August 6 to November 6, 2018).

As you know, the NVRA only allows states to conduct three types of removals during the final 90 days before a federal election: (1) at the request of the registrant; (2) as provided by State law, by reason of criminal conviction or mental incapacity; and (3) upon death of the registrant. See *id.* § 1973gg-6(c)(2)(B) (citing *id.* § 1973gg-6(a)(3)-(4)).

The jury list match that the rules describe is a systematic program prohibited during the 90 day quiet period. See *Arcla v. Sec’y of Fla.*, 772 F.3d. 1335, 1344-45 (11th Cir. 2014).

Therefore, if the rule is maintained at all, which it should not be, the rule should be changed to require (1) that the jury declination date occurred *after* the voter registration date; and (2) that the state specify the match criteria between voter registration files and juror declination files in a manner that comports with the requirements of the NVRA. For example, using only name and date of birth would not comply.

We are also concerned about the potential impact of the proposed cancellation and restoration of voter registration due to jury declination process on Iowans who have recently become U. S. citizens as laid out in proposed item 25, which is proposed rule 721—28.6. A person’s immigration status is fluid and, depending on individual circumstances, can be adjusted. For example, a person who is a lawful permanent resident of the United States may be able to become a U.S. citizen through the federal immigration laws. We are concerned about the potential disenfranchisement of recent U.S. citizens who may not have been U.S. citizens when they were called for jury service, but who have since become U.S. citizens.

One of our concerns is centered around the currency of the data used by the Secretary to produce the list of likely matches of ineligible voters. The proposed rule 721—28.6 requires the Secretary to, on a monthly basis, compare the list of declined jurors against the list of registered voters, and send a county-specific list of purported non-citizens to each County Auditor. The proposed rule then requires the County Auditor to, within 15 days of receipt of the list, review the list for accuracy, cancel the registration of those ineligible to vote, notify persons whose registration has been cancelled and notify the Secretary when the County Auditor finds an inaccuracy in the list.

The proposed rule, however, does not specify how *recent* the jury declination form must be in order for the Secretary of State to use it as a legitimate basis to determine that a voter is not a U.S. Citizen. The proposed rule also does not require the Secretary to use the most current data to produce the list nor does the proposed rule provide any timeframe for when the Secretary must provide the list to County Auditors. In *ACLU of Iowa and LULAC of Iowa v. Schultz*, it was shown that there were a number of Iowa voters who, since getting their Iowa driver’s licenses used as a basis to seek to disqualify them and purge them from Iowa’s registered voter list, had actually become U.S. Citizens, and thus, were qualified voters. Here, similarly, there is a significant and increasing risk of erroneously eliminating new U.S. citizen voters, the less recent the jury declination forms are that are used.

It may be that short of contemporaneous cross-reference, there is no way to prevent this serious deprivation of voting rights. But at minimum, the rule must specify that jury declination records are very recent.

We propose that the subrule include these essential elements. The subrule should require the Secretary to use data from within the previous 7 days to produce the county-specific lists. The subrule should also require the Secretary to provide the list to County Auditors no later than 5 days after the list is produced.

Our final concern centers around the timeframe for curing an erroneous voter registration cancellation. The proposed rule does provide for notice of the cancellation to the voter and an opportunity for the voter to prove their citizenship. The voter has the opportunity to have the County Auditor “review any relevant information that establishes the voter’s eligibility to vote.” The proposed rule, however, does not provide any timeframe for when the County Auditor must complete this review. This has the potential to deprive new U.S. citizen voters from being able to vote, as well as represents a significant infringement of voters’ due process, especially if the cancellation occurs close to election day.

We propose that the subrule require County Auditors to complete their review of the relevant information provided by the voter as soon as the information is presented to the County Auditor.

**3. Proposed New Rule 21.3(6) included in Proposed Item 2 must be clarified to prevent the unlawful screening out of people with disabilities during the signature verification procedure.**

Proposed New Rule 21.3(6), as drafted, risks confusing poll-workers into systematically screen for changes of signature that are due to disability, age, or medical condition in violation of federal and state laws. When Congress enacted the Americans with Disabilities Act (ADA), it explicitly acknowledged that society has historically isolated and segregated individuals with disabilities and that discrimination against individuals with disabilities continues to persist in many critical areas, including voting. See 42 U.S.C. § 12101(a)(2–3). Title II of the ADA prohibits discrimination by public entities on the basis of disability:

“no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” “Public entities must ensure that they do not have policies, procedures, or practices in place that interfere with or prohibit persons with certain disabilities from registering to vote or voting based on their disability.” The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, U.S. Department of Justice  
[https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm).

Specifically, the regulations implementing the ADA explicitly prohibit public entities from imposing eligibility criteria that would screen out individuals with disabilities:

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Similarly, Section 504 of the Rehabilitation Act prohibits any state or local government from excluding participation, solely on the basis of disability, in an activity receiving federal financial assistance based on a disability. 29 U.S.C. 794(a). The Iowa Civil Rights Act also prohibits state and local governments from discriminating on the basis of disability. Iowa Code 216.2(13)(b) and 216 .7.

While we believe the intent of the proposed regulation was likely to protect against challenges to signatures that are inconsistent due to disability, age, or medical condition, it was drafted in such a way as to be unclear, and can be reasonably construed to require the opposite.

In this case, the proposed regulation as drafted would screen out or tend to screen out individuals with disabilities from fully and equally enjoying voting if a precinct official could make a determination that the individual is not eligible to vote based on the official's perception that the individual's appearance or signature has changed based on the individual's disability or medical condition.

Finally, the precinct officials cannot use changes in age to determine eligibility to vote because the only legal basis for a challenge to a voter's eligibility based on age is if there are grounds to believe that the individual is less than 18 years old. Iowa Code § 49.79(2)(b).

We propose the following changes to subrule 21.3(6), in Item 2:

21.3(6) *Determination of identity and residency.* Proof of identity and residence of persons offering to vote is presumed valid unless the precinct election official determines the proof offered does not match the voter. In determining whether a person offering to vote is eligible under Iowa Code section 48A.7A and Iowa Code chapter 49, precinct election officials shall consider all of the information presented by the person offering to vote prior to determining that the person is not eligible. Precinct election officials shall not ask the individual whether any changes in a signature are caused by age, disability or a medical condition. The ~~following are only~~ factors that shall be considered by precinct election officials in making the determination:

- a. ~~Changes to the physical appearance or signatures that are caused by age, disability, or medical conditions, except that a precinct election official's perception of a person's mental capacity shall not be considered unless there is documented proof that the person has been adjudged mentally incompetent to vote,~~
- b. Time has elapsed since the proof was generated, subject to the Iowa Code sections that govern the validity and expiration timelines of the proof,
- c. Discrepancies between the signature in the offered proof and other documentation documents allowable under Iowa Code chapter 48A to prove the facts in question that the individual is eligible to vote.

We believe these changes are needed to clarify the intent of the proposed regulation for County Auditors and poll workers.

**4. Proposed New Rule 21.306 should include that the “best means available” rule apply to ballot affidavits and return envelopes.**

Finally, regarding absentee ballot signature matches in Item 14 rule 721-21.306(53), we suggest that the same requirement that officials contact voters by the “best means available” that apply to absentee ballot applications (related to Iowa Acts, House File 516, section 30) should also apply to ballot affidavits and return envelopes, per Iowa Acts, House File 516, section 31.

**Conclusion**

House File 516, Iowa’s new Voter ID law, remains unnecessary—a seemingly solution in search of a problem—expensive, and threatens to disenfranchise hundreds of thousands of Iowans. Voter ID laws deprive many voters of their right to vote, reduce participation, and stand in direct opposition to our country’s trend of including more Americans in the democratic process. As the Secretary has pointed out numerous times, and independent research confirms, Iowa is one of the very best states in the nation for voter integrity. We are aware of zero documented instances of voter impersonation fraud in Iowa, the type of fraud Voter ID laws seek to prevent. These proposed rules, which would implement House File 516, must be no more restrictive than the state or federal constitutions or statute permit. We urge the Secretary to modify the rules in order to avoid confusion and unlawful restrictions on the right to vote in Iowa and protect the voting rights of all eligible Iowa voters.

If you have any questions about these needed amendments, please don’t hesitate to contact Daniel Zeno, ACLU of Iowa policy counsel at (515) 207-3417 and [daniel.zeno@aclu-ia.org](mailto:daniel.zeno@aclu-ia.org).

Sincerely,

Betty C. Andrews  
President  
Iowa-Nebraska NAACP  
[bettycandrews@yahoo.com](mailto:bettycandrews@yahoo.com)  
(515) 288-7171

Daniel Hoffman-Zinnel  
Executive Director  
One Iowa Action  
[daniel@oneiowa.org](mailto:daniel@oneiowa.org)  
515-288-4019, ext 1

Mary Rae Braggs  
President  
League of Women Voters of Iowa  
[bragg.maryrae388@gmail.com](mailto:bragg.maryrae388@gmail.com)  
563-583-0525

Connie Ryan  
Executive Director  
Interfaith Alliance of Iowa  
[connie@interfaithallianceiowa.org](mailto:connie@interfaithallianceiowa.org)  
(515) 279-8715

Joe Enriquez Henry  
State Director  
LULAC of Iowa  
[joehenry@iowalatinos.org](mailto:joehenry@iowalatinos.org)  
(515) 208-7312

Rik Shannon  
Public Policy Manager  
Iowa Developmental Disabilities Council  
[rshanno1@dhs.state.ia.us](mailto:rshanno1@dhs.state.ia.us)  
(515) 288-0443

Jane Hudson  
Executive Director  
Disability Rights Iowa  
[jhudson@driowa.org](mailto:jhudson@driowa.org)  
(515) 278-2502 x20



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Mark Stringer  
Executive Director  
ACLU of Iowa  
505 Fifth Avenue, Ste. 901  
Des Moines, IA 50309  
[mark.stringer@aclu-ia.org](mailto:mark.stringer@aclu-ia.org)  
515-243-3988, x 111