

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**AMERICAN CIVIL LIBERTIES UNION
OF IOWA FOUNDATION, and LEAGUE
OF UNITED LATIN AMERICAN
CITIZENS OF IOWA,**

Petitioners,

vs.

**IOWA SECRETARY OF STATE MATT
SCHULTZ,**

Respondent.

CASE NO. CV 9311

RULING ON MOTION TO DISMISS

INTRODUCTION

The Respondent's Motion to Dismiss came before the Court for oral argument and submission on June 7, 2013. The Petitioners, American Civil Liberties Union of Iowa Foundation and League of United Latin American Citizens of Iowa, were represented by their counsel, Joseph Glazebrook, Dan L. Johnston, M. Laughlin McDonald, Nancy Abudu, Randall Wilson, and Rita Bettis. The Respondent, Iowa Secretary of State Matt Schultz, was represented by his counsel, Thomas J. Miller and Meghan Gavin. After considering the arguments of all parties, the Court now enters the following ruling:

BACKGROUND FACTS AND PROCEDURAL HISTORY

On July 20, 2012, Respondent Iowa Secretary of State Matt Schultz (hereinafter "Schultz") filed two new emergency rules. 35 Iowa Admin. Bull. 235-37 (Aug. 8, 2012). Emergency Rule 721-21.100 created a procedure for persons to file complaints about violations of election laws. *Id.* at 236. Emergency Rule 721-28.5 created a procedure for the Secretary of State to identify and remove foreign nationals from the voter registration list. *Id.* at 236-37.

These emergency rules took immediate effect, bypassing the ordinary waiting period for notice and publication. *Id.* at 235.

Also on July 20, 2012, Schultz used ordinary rulemaking procedures to file similar rules regarding voter complaints and the voter registration list. *Id.* at 226. This process of simultaneously filing similar rules under emergency and ordinary rulemaking procedures is known as “double-barreling.” (Mot. to Dismiss ¶ 3). On February 1, 2013, Schultz filed to rescind the complaint procedure in Rule 721-21.100, and to amend the voter identification and removal procedure in Rule 721-28.5. 35 Iowa Admin. Bull. 1380–82. Rescission of the emergency rules and adoption of the amended permanent Rule 721-28.5 took effect on March 27, 2013. *Id.*

The Petitioners filed their first Petition for Judicial Review on August 8, 2012, before rescission of the emergency rules. (1st Pet.). The Petitioners sought an injunction and a declaration the rules are invalid. (1st Pet. ¶ 24). On September 13, the Court issued a temporary injunction and stayed implementation of the rules. Ruling and Order on Petitioner’s Motion for Temporary Injunctive Relief (Sept. 13, 2012).

On March 29, 2013, the Petitioners filed their Second Amended Petition for Judicial Review, which expanded their claims to include permanent Rule 721-28.5. (2d Pet.). The Petitioners argue Schultz (1) improperly promulgated emergency rules when no emergency existed, (2) exceeded his statutory authority by promulgating emergency and permanent rules affecting the voter registration list, and (3) violated the right to vote with the emergency and permanent rules. (2d Pet. ¶¶ 37–39).

On April 9, Schultz filed this Motion to Dismiss. (Mot. to Dismiss). Schultz argues the emergency rules are not now and never will be in effect, and therefore all of the Petitioners' claims against the emergency rules are moot. (Mot. to Dismiss ¶¶ 5–6).

STANDARD OF MOTION TO DISMISS

The Court may grant a motion to dismiss only if the petition shows no possible right of recovery under the facts. *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003). A motion to dismiss will rarely succeed. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). When considering a motion to dismiss, courts assess the petition “in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in plaintiff’s favor.” *Robbins v. Heritage Acres*, 578 N.W.2d 262, 264 (Iowa Ct. App. 1998) (citation omitted). A petition must contain factual allegations sufficient to provide the defendant with “fair notice” of the claim asserted. *Id.* A petition satisfies the “fair notice” standard “if it informs the defendant of the incident giving rise to the claim and of the claim’s general nature.” *Id.* “The only issue when considering a motion to dismiss is the ‘petitioner’s right of access to the district court, not the merits of his allegations.’” *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (quoting *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001)); *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (“Both the filing and the sustaining [of motions to dismiss] are poor ideas.”).

ANALYSIS

The Iowa Supreme Court has outlined the standards for mootness:

An appeal is moot if it no longer presents a justiciable controversy because the contested issue has become academic or nonexistent. The test is whether the court's opinion would be of force or effect in the underlying controversy. As a general rule, we will dismiss an appeal when judgment, if rendered, will have no practical legal effect upon the existing controversy.

There is an exception to this general rule, however, where matters of public importance are presented and the problem is likely to recur. Under these circumstances, our court has discretion to hear the appeal. An important factor to consider is whether the challenged action is such that often the matter will be moot before it can reach an appellate court.

In re M.T., 625 N.W.2d 702, 704–05 (Iowa 2001) (internal citations, quotations, and alterations omitted).

Schultz argues the emergency rules at issue have been rescinded, and therefore any opinion on the emergency rules would have no legal effect. *See id.* However, the Petitioners allege the emergency rules have created a chilling effect on the right to vote by discouraging citizens from registering and voting. According to the Petitioners, this chilling effect survives rescission of the emergency rules, and only a court order can remedy this damage. This Court must accept these allegations as true when considering a motion to dismiss. *See Robbins*, 578 N.W.2d at 264. Because the Petitioners allege the chilling effect of the emergency rules remains, a ruling on the emergency rules may have legal effect and the issues are not moot. *See In re M.T.*, 625 N.W.2d at 704.

Even if the Petitioners' claims were moot, these issues qualify as "capable of repetition but evading review." *See Rhiner v. State*, 703 N.W.2d 174, 177 (Iowa 2005) (citing *In re M.T.*, 625 N.W.2d at 704–05). The alleged impact of the emergency rules on the right to vote is clearly a matter of public importance. *See In re M.T.*, 625 N.W.2d at 704–05; *see also Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978) ("The right to vote is a fundamental political right."). The problem is also likely to reoccur because nothing prevents Schultz from simply refiling these emergency rules before a future election. *See In re M.T.*, 625 N.W.2d at 704–05. If Schultz refiles these emergency rules before a future election, the same issues will arise of

whether he abused the emergency rulemaking process, exceeded his statutory authority, and violated the right to vote.

Schultz's use of "double-barrelling" means the emergency rules have a short effective life, which also favors judicial review. *See id.* By "double-barrelling" the rules, Schultz simultaneously filed similar rules under emergency and ordinary procedures. The emergency rules took immediate effect, and were then rescinded about nine months later when permanent Rule 721-28.5 took effect. With "double-barrelling," future emergency rules may only be effective for a few months before being replaced with permanent rules. Therefore, questions about these emergency rules are unlikely to reach the appellate courts in the few months the rules remain in effect, and the courts should hear the Petitioners' challenge to resolve the issues. *See id.*

ORDER

IT IS THEREFORE THE ORDER OF THIS COURT that the Respondent's Motion to Dismiss is DENIED.

Dated this 21st day of September 2013.

Scott D. Rosenberg, Judge,
Fifth Judicial District of Iowa.

Copies to:

All parties.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV009311
Case Title AMERICAN CIVIL LIB UNION ETAL VS MATT SCHULTZ, IA
SECR OF ST

So Ordered

A handwritten signature in cursive script that reads 'Scott D. Rosenberg'. The signature is written in black ink and is positioned above a horizontal line.

Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa