

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AMERICAN CIVIL LIBERTIES)	Case No. CVCV009311
UNION OF IOWA)	
and)	
UNITED LATIN AMERICAN CITIZENS)	
OF IOWA,)	
)	
Petitioners,)	
)	
v.)	BRIEF IN SUPPORT OF
)	PETITIONERS' RESISTANCE
IOWA SECRETARY OF STATE MATT)	TO POTENTIAL INTERVENORS'
SCHULTZ,)	OPPOSITION TO REQUEST FOR
)	TEMPORARY INJUNCTION
Respondant.)	

COME NOW Petitioners, the American Civil Liberties Union of Iowa and the League of United Latin American Citizens of Iowa, by and through the undersigned counsel, and in support of their Reply to Potential Intervenors Ellen L. Markham, Jeffrey K. Pigott, and Christopher M. McLinden's Motion to Dismiss, respectfully submit this brief.

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STATEMENT OF THE CASE

On August 10, 2012, Petitioners, the American Civil Liberties Union of Iowa (ACLU of Iowa) and the League of United Latin American Citizens of Iowa (LULAC of Iowa) filed a petition for Judicial Review of the Secretary of State’s emergency promulgation of two administrative rules on the basis that they are in violation of constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, and are unreasonable, arbitrary, or capricious. On August 22, 2012, Ellen L. Markham, Jeffrey K. Pigott, and Christopher M. McLinden (hereinafter “Proposed Intervenors”) filed a Motion to Intervene as defendants and attendant to that, filed a Brief in Opposition to Request for Temporary Injunction.

STANDARD OF REVIEW

As briefed by Petitioners, because the legislature did not clearly vest the Secretary of State with the interpretive authority as broadly as he has asserted in his promulgation of the challenged rules, the reviewing court must reverse the agency’s interpretation if it is erroneous. Iowa Code § 17A.19(10)(c)(2011); Brief in Support of Petition for Judicial Review. However, even if this Court finds that the Secretary has been clearly vested with interpretive authority, as applied to some or all of the challenged rules, the rules remain subject to judicial correction for being irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(l)(2011); Brief in Support of Petition for Judicial Review.

ARGUMENT

Petitioners respectfully request that this Court grant their request for temporary injunctive relief, and deny Proposed Intervenor's motion in resistance. Petitioners have argued that Proposed Intervenor should not be granted their motion to intervene or that it be considered an amicus curiae brief, and their brief is not properly before the court. However, the Proposed Intervenor's brief in resistance to Petitioners' Motion for a Temporary Injunction is addressed by Petitioners in the interest of the Court's time here. Because Proposed Intervenor's arguments in resistance to temporary injunctive relief mirror Respondent's arguments almost in their entirety, this brief will largely incorporate Petitioner's Reply Brief in Support of Temporary Injunctive Relief by reference, and will only directly address the few arguments Proposed Intervenor proffer that are unique from those offered by Respondent. As detailed in Petitioner's Reply Brief, Petitioners have demonstrated a likelihood of success on the merits, that they will suffer irreparable injury if relief is not granted, and that relief is in the public interest and will ensure the integrity of the upcoming election by protecting and promoting access to the polls by qualified, eligible voters.

I. Petitioners Have Demonstrated a Likelihood of Success on the Merits of Each of Their Claims

As discussed in Petitioners' Reply Brief, Petitioners are likely to succeed on the merits of each of their three arguments.¹ Additionally, this case falls within the exceptions to the exhaustion of administrative remedies requirement, and this Court has jurisdiction to hear the matter.

Moreover, Petitioners *have exhausted* administrative remedies.

1. The Secretary's Use of Emergency Rulemaking Powers was Improper.

The Secretary's use of emergency rulemaking to forego notice and public participation was improper. Proposed Intervenor makes the same misinterpretation of Iowa Code § 17A.4(3) as

¹ For a detailed analysis, see Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 7-14.

Respondant when they argue that it was “necessary” for the Secretary to promulgate the Rules through Emergency procedures in order to act on them before the November 6, 2012 election. *See* Proposed Intervenor’s Brief in Opposition to Injunctive Relief at 6-7. Noting that the Iowa Courts have not considered what types of necessity would allow for emergency rulemaking, Proposed Intervenor then draw on federal cases for clarity. *Id.* at 6-11. However, this divergence is unnecessary: the reason that Iowa Courts have not defined “necessary” within the context of Iowa Code § 17A.4(3) is that the code is wholly unconcerned with their proposed definition of “necessary.” On its face, the Code explicitly states that the emergency rulemaking process can only be used when, “notice and public participation would be *unnecessary*.” Code § 17A.4(3). As discussed in Petitioner’s Reply Brief, the issue is not whether emergency rulemaking was *necessary* to achieve Respondent’s desired outcome, but instead whether notice and public participation are *unnecessary*. Proposed Intervenor do not attempt to argue that notice and public participation are unnecessary. Instead, Proposed Intervenor simply misread the statute, and as such their analysis is unsupported by law.

The Secretary further improperly waived the thirty-five day waiting period prior to the Rules taking effect. Proposed Intervenor also argue that this waiver was proper, but since their argument is entirely encompassed within Respondant’s argument on this issue, Petitioner will not reiterate their response to Respondant here.²

2. The Secretary Exceeded His Authority by Promulgating the Rules.

The Secretary lacked statutory authority to promulgate the rules. Proposed Intervenor contend that the Secretary had authority to adopt the Rules, but they do not raise any arguments not already offered by Respondent in his Motion to Deny Temporary Injunctive Relief. Since all

² For an analysis of why the waiver of the waiting period was improper, *see* Petitioner’s Reply Brief in Support of Temporary Injunctive Relief at 10-11.

the arguments offered by Proposed Intervenors have already been refuted by Petitioners, Petitioners will not subject this Court to a repeat of their claims and Petitioners' arguments in response.³

3. Petitioners Are Likely to Succeed on the Merits that the Rules are Unconstitutional.

In their brief, Proposed Intervenors ask the court to find that Petitioners have waived constitutional claims, and argue that those claims are likely to fail. *See* Intervenor-Defendants' Brief in Opposition to Request for Temporary Injunction at 13-16. Quite the contrary to what Proposed Intervenors argue, by raising claims and offering facts to support those legal arguments, Petitioners preserve, rather than waive, those claims. Petitioners absolutely do not waive their claim that the challenged rules will violate the fundamental right to vote of eligible Iowans, equal protection, and due process under the Iowa and U.S. constitutions, and have asserted sufficient facts in their pleadings to allow the trier of fact to determine that they are likely to succeed on the merits at trial. *See* Brief in Support of Petition for Judicial Review at 21-39; Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 7-14. *See also* Affidavits for New Citizens; Affidavit of Joe Henry.

Petitioners do not allege that the voting rights of noncitizens are imperiled by the rules, as Proposed Intervenors allege, but rather, that the voting rights of U.S. citizens who are recently naturalized U.S. Citizen immigrants, and Latinos, are in jeopardy. *See* Brief in Support of Petition for Judicial Review at 37-38; Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 14-15. *See also* Affidavits of New Citizens; Affidavit of Joe Henry. Petitioners have pleaded sufficient facts to demonstrate the unacceptable procedural and substantive due process violations

³ For a complete discussion of why the Secretary lacked statutory authority to promulgate the rules, *see* Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 12-14.

the Voter Purge Rule poses to Latino and new U.S. Citizen Iowa voters. *See* Brief in Support of Petition for Judicial Review at 37-38; Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 14-15. *See also* Affidavits of New Citizens; Affidavit of Joe Henry.

II. Petitioners Will Suffer Irreparable Injury if a Stay is Denied

Proposed Intervenors argue that Petitioners would not face irreparable injury if a temporary injunction were denied. *See* Intervenor-Defendants' Brief in Opposition to Request for Temporary Injunction at 16-17. As discussed in detail elsewhere, Petitioners *have* asserted that injury has already occurred and that it will continue irreparably unless a temporary injunction is granted. *See* Brief in Support of Petition for Judicial Review at 17; Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 14-15. Further, Petitioners have provided affidavits that articulate how these harms have affected individual members and the broader membership as a whole. *See* Affidavits of New Citizens; Affidavit of Joe Henry. Finally, Petitioners have asserted and provided evidence that these harms are likely irreparable. *See* Affidavit of Della M. Arriaga.

III. Other Parties Will not be Harmed by the Grant of a Stay

Proposed Intervenors contend that temporary relief would harm both the Secretary and themselves. To the extent that this argument repeats Respondent's arguments claiming a harm to the general voting populace, Petitioners' have demonstrated that *the Rules* in fact harm the public's interest in free, fair, and accurate elections. *See* Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 15-16. To the extent that Proposed Intervenors assert other harms to themselves, Petitioners' have shown that Proposed Intervenors do not have a legal interest that could be impeded by the outcome of this litigation which are distinct from those interests of all

registered voters. *See* Petitioners' Brief in Support of Petitioners' Resistance to Motion to Intervene as Defendants at 3-10. Finally, to the extent that they claim a new harm to the Secretary that Respondent did not claim, it is sufficient to recognize that the Secretary cannot have a legally protectable interest in promulgating unconstitutional rules that violate the rulemaking procedures and exceed his statutory authority.

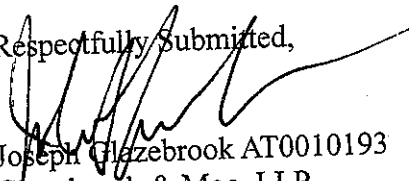
IV. The Secretary Did Not Rely on the Public Interest in Promulgating these Rules

Petitioners completely agree that "[t]he State of Iowa has an important, if not compelling, interest in protecting the integrity, fairness, and efficiency of its election process." Intervenor-Defendants' Brief in Opposition to Request for Temporary Injunctive Relief at 18, *citing Bowers v Polk County Bd. of Supervisors*, 638 N.W.2d 682, 693 (Iowa 2002). However, Petitioners disagree that this interest is advanced by the Rules promulgated by the Secretary. On the contrary, Petitioners have shown that, regardless of the Secretary's intentions, the Rules are far more likely harm the integrity, fairness, and efficiency of the election process by depriving qualified electors of their fundamental right to vote in a way that has a disproportionate impact on Latinos and new U.S. Citizens. *See* Brief in Support of Petition for Judicial Review at 17; Petitioners' Reply Brief in Support of Temporary Injunctive Relief at 16-18; *see also* Affidavits of New Citizens; Affidavit of Joe Henry, Affidavit of Della M. Arriaga. The promulgation of these Rules through emergency measures is in contradiction to Iowa's public policy and broad, progressive voter registration laws. *See* Iowa Code § 48A.1 (2011).

CONCLUSION

The Court has jurisdiction over this matter before it. The facts, Petitioners' interests, harm to fundamental rights, and likelihood of success on the merits overwhelmingly support temporary injunctive relief in this case. Therefore, Petitioners respectfully request this Court to grant temporary injunctive relief pending the outcome of judicial review.

Respectfully Submitted,


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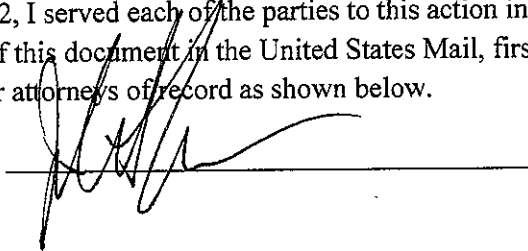
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** *Pro hac vice admission application pending.*

* *Bar Admission in Iowa pending.*

PROOF OF SERVICE

I certify that on Friday, August 31, 2012, I served each of the parties to this action in compliance with IRCP 1.442(7) by depositing true copies of this document in the United States Mail, first class postage prepaid, addressed to each of the parties or their attorneys of record as shown below.



A handwritten signature in black ink, appearing to be 'Tom Miller', is written over a horizontal line.

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