IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AMERICAN CIVIL LIBERTIES UNION OF IOWA, and LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA, Petitioners, v. MATT SCHULTZ, Respondent.	)	Case No. CVCV009311 **BRIEF IN SUPPORT OF PETITIONER'S RESISTANCE TO MOTION TO INTERVENE AS DEFENDANTS**

COME NOW the 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 Motion to Intervene as Defendants, respectfully submit this brief.

TABLE OF CONTENTS

STATEMENT OF THE CASE

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.

ARGUMENT

Proposed Intervenors are not entitled to intervention as of right because they fail to assert a true legal interest in the outcome of the litigation, nor will their intervention prevent additional litigation, nor will it promote an efficient disposition of the case. Proposed Intervenors fail to provide any arguments in support of their request for the court's discretion to grant permissive intervention, other than their intent to make identical arguments to those already asserted by Respondent. In so doing they demonstrate both the adequacy of the Respondent's representation on the issues they raise, and the inappropriateness of their intervention. The interests they assert—having the rules remain in effect, and in a free and fair election, are adequately represented by Respondent, in the case of the former, and Petitioner, in the case of the latter. Additionally, Proposed Intervenors will unnecessarily increase the expenditure of time and resources for all parties hereto as well as this Court. Finally, Proposed Intervenors misunderstand the role of amicus curiae and are unsuited to submit briefs on that basis.

I. Proposed Intervenors are not entitled to intervention as of right, and permissive intervention is not called for in the case

The Iowa Rules of Civil Procedure authorize intervention of right "[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Iowa R. Civ. P. 1.407(1)(b). An applicant seeking intervenor status must show "(1) her application was timely; (2); she has interest in the subject matter of the action; (3) she is so situated that her ability to protect that interest may be impaired or impeded by the disposition of the action, and (4) her interest is not adequately represented by the existing parties." *In re K.P.*, 814 N.W.2d 623, at *5. Iowa courts liberally construe intervention statutes to insure adequate protection of parties' interests. *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744 (Iowa 1979); *State v. Van Wyk*, 320 N.W.2d 599, 602 (Iowa 1982).

However, "[a]lthough courts are to liberally construe the rule governing intervention, they must be certain that the applicant has asserted a legal right or liability that will be directly affected by the litigation." *In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000) (citing Iowa R. Civ. P. 75) (finding former foster parents did not possess sufficient interest to intervene in parent-child termination proceedings). Moreover, an indirect, speculative, or remote interest does not grant a right to intervene in litigation. *Id.* The purpose of the rule requiring intervening parties to have a legal interest in litigation is "to reduce litigation by involving as many interested persons as possible and to expeditiously dispose of lawsuits." *State ex rel. Miles v. Minar*, 540 N.W.2d 462 (Iowa. Ct. App. 1995) (citing Iowa R. Civ. P. 75) (finding the district court was within its discretion in denying a motion to intervene filed by the spouse of a father in a child support case brought by the mother, because the father could adequately represent the interests of their shared

children, intervention would not reduce litigation, and the involvement of the father's spouse would not assist in the efficient disposition of the case.).

1. **Proposed Intervenors do not assert a true legal interest in this case, nor will they be impeded in exercising any interest as a result of litigation.**

This court should deny Proposed Intervenors' Motion to Intervene, because Proposed Intervenors have not shown a true legal interest that is at stake in this case. The Proposed Intervenors assert the following interests in this case: (1) "an interest in exercising their right to challenge ineligible persons' voter registrations under the Rules"; (2) "the right to vote without having their votes diluted by ballots cast by persons who should not be registered to vote." Brief in Support of Motion to Intervene as Defendants at 5, 6.

Proposed Intervenors state that their interest in the Voting Law Complaint Rule is that "If the challenged Rules are not enjoined, I intend to challenge, pursuant to Section 721—21.100 of the Iowa Administrative Code, the qualifications of any registered voters in Iowa whom I believe in good faith are not legally entitled to vote in Iowa." See Affidavit of Ellen L. Markham in Support of Motion to Intervene. Stated alternatively, "I am not adequately represented in this suit by the Iowa Secretary of State. . . . [T]he Secretary does not share my interest as an individual who wishes to file good faith complaints pursuant to Section 721—21.100 of the Iowa Administrative Code." See Affidavit of Christopher M. McLinden in Support of Motion to Intervene. It should not be necessary to point out that citizens do not have a legitimate interest in acting pursuant to an agency regulation that violates Iowa law or one which wrongfully or erroneously accuses another citizen of a crime. As briefed extensively by Petitioners, Iowa law *already* protects their right to challenge the qualifications of another voter in their county, so long as they are prepared to swear to the truth of that challenge, under penalty of an aggravated misdemeanor for those that are not challenging in "good faith." Iowa Code § 48A.14(1). Thus,

Proposed Intervenors were free to bring good faith challenges to the registration of other voters in their county before the Voting Law Complaint Rule was promulgated by the Secretary, and will remain able to do so even if the court enjoins the rule. Instead, only an interest in filing complaints that are anonymous, not based on personal knowledge, and not in good faith is at stake in the outcome of this litigation. Like their claimed interest in a vote undiluted by those people who the secretary has through inaccurate and unreliable means identified as noncitizen voters, this is not a legitimate, cognizable interest that Proposed Intervenors can claim.

Proposed Intervenors' have a legitimate interest in an "undiluted" vote in the sense that only U.S. citizens should be voting. All parties agree that only qualified, eligible, U.S. Citizens in Iowa should be registering and voting in Iowa. All parties here share this interest; as do those individuals whom the Secretary has erroneously identified as noncitizen voters, those Latino U.S. Citizens with the same names as lawful immigrants who obtained drivers licenses, and all Latino voters who fear registering or voting, for fear of the persecution, including possible criminal prosecution, that result from the Secretary's actions. However, Proposed Intervenors do not have a legitimate interest in the wrongful exclusion of other qualified Iowa voters, even though more total votes would in a sense "dilute" their vote. In asserting the "dilution" of their vote, they rely on a leap in logic that the Secretary of State himself makes, along the following lines:

1. That the immigration status information about people obtaining drivers licenses obtained from the Iowa DOT[1] is accurate and up to date;
2. That people who are not citizens at one point in time never become naturalized citizens;

[1] The Iowa DOT is not an agency primarily interested in maintaining accurate information about immigration status of Iowans, and most driver's licenses need only be renewed every five years.

3. That, therefore, those people who appear on the list of registered voters or list of persons who voted in 2010 did not obtain citizenship prior to registering and voting;
4. That this conclusion is true despite no successful identification of a voter impersonation fraud problem in Iowa or in the country thus far.[2]

Proposed Intervenors cite *Mandicino v. Kelly*, 158 N.W2d 754, 757 (Iowa 1968) to support their proposition that "Iowa courts have in the past allowed interested parties to intervene on the government's side when a plaintiff's suit, if successful, would result in the dilution of their electoral influence. Brief in Support of Motion to Intervene as Defendants at 6. In fact, *Mandicino* was a legislative apportionment scheme challenge where the Supreme Court held that a county board of supervisors must embody the principal of one man, one vote. *Mandicino*, 158 N.W.2d at 763-64 (finding the scheme whereby the Sioux City township containing 80 percent

---

[2] The Secretary of State is claiming that he has identified thousands of people who registered to vote despite being non-citizens. The likelihood that this data is correct is extremely low. The analysis of 2,068 reported fraud cases by News21, a Carnegie-Knight investigative reporting project, found 10 cases of alleged in-person voter impersonation since 2000. Natasha Khan and Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, NEWS21, Aug. 12, 2012, *available at* http://votingrights.news21.com/article/election-fraud/. With 146 million registered voters in the United States, those represent about one instance for every 15 million prospective voters. *Id.*

Rather, as extensively briefed by Petitioners elsewhere, the Secretary has more likely identified people who either (1) obtained drivers licenses, (2) then became U.S. Citizens sometime in the 5 years that an individual's license remains valid; (3) then registered to vote, or those individuals who have the same or a very similar name to individuals who fall into the first category. Indeed, between 2000 and 2008 an average of 629,000 individuals obtained U.S. Citizenship each year. *See* Jimménez, Immigrants in the United States: How Well are They Integrating into Society at 12, Migration Policy Institute, *available at* www.migrationpolicy.org/pubs/integration-Jimenez.pdf.

But by alleging a totally unsubstantiated voter fraud problem, by enacting these rules, and by taking the steps he already has, (which began in March 2012, far before these rules were promulgated – to compare IDOT records to the voter lists, *See* Affidavit of Secretary of State Schultz) the Secretary has suppressed the votes of potentially thousands of qualified, eligible Iowans. Without relief, the chilling effects of the Secretary's actions will continue.

of the county's population, but only representing two of five seats on the board, violated the Equal Protection Clause, because it was invidiously discriminatory against urban residents and had in fact resulted in minimizing or cancelling out the voting strength of the population majority.) Plaintiffs were citizens and qualified voters of Sioux City, both on their own behalf and on behalf of other citizens, residents and electors of their class. *Id.* at 757. Defendants were the county auditor and members of the county board. *Id.* Intervenors were the Farm Bureau Federation and the Woodbury County Farm Bureau. *Id.* Opposite to Proposed Intervenors' assertion, Defendants and Intervenors did not argue dilution of their vote (rather, the Plaintiffs made that argument). *Id.* at 759-65 (presenting and disagreeing with Defendants' and Interevenors' arguments, which were that county boards are not "legislative" in nature and that it was *not a dilution of plaintiffs' votes* to have unequal apportionment, because the duties of the office were to serve all members of the county equally, vigilantly, and responsively). The opinion does not address the rationale for intervention at all, in fact. But certainly, Proposed Intervenors' assertion that it was based on the argument that *intervenors' votes would be diluted* is simply misstated. *Id.* Dilution of unjustly held electoral power, by virtue of the court's restoration of fairness and equal representation to other citizens under the principal of one man one vote, is not dilution of a rightfully held interest in the first place.

Proposed Intervenors next cite *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 870 (Iowa 2005) to support the position that as individuals willing to file challenges pursuant to the Voting Law Complaint Rule, they have an interest "different from the public generally." Brief in Support of Motion to Intervene as Defendants at 5. In *Alons*, the issue was whether a number of Iowa legislators had *standing*, rather than a right of *intervention*, to challenge the district court's grant of equitable remedies to terminate a civil union entered into in Vermont and declaring parties to

be single people with the rights of unmarried persons, and approving parties' stipulations regarding division of assets. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d at 864 (finding the legislators lacked standing).[3] Because questions of standing are intertwined with intervenor rights, however, it should be noted that the assertion which Proposed Intervenors attribute to *Alons* also does not support a claim that they have standing. *Id.* ("Nor have the plaintiffs shown that they have been injured in a special manner, different from that of the public generally.") (internal citation omitted). Beyond *Alons* not truly holding on the issue of their brief as cited, subsequent to *Alons* the Iowa court decided the *Varnum* case, as Proposed Intervenors are no doubt aware. There, after plaintiffs filed a petition asking the court to recognize their right to marry as a matter of due process and equal protection, applicants, again, a group of legislators opposing marriage equality--now recognized as protected under the Constitution of this state—similarly sought intervention. *Varnum v. Brien*, 2006 WL 4826212 (Iowa Dist., Aug. 9, 2006) (No. CV5965), at *3.

In *Varnum,* the district court denied the legislators' motion to intervene. *Id.* at *6. It cited *Alons* as precedential in finding that legislators did not have a sufficient stake in the case to interfere merely because they disagreed with the court's interpretation of law. *Id.* at *3 (citing

---

[3] Although one salient point from *Alons*, made in dicta, applies to this case. Chief Justice Lavorato quoted amici in that case, which included Petitioner, the ACLU of Iowa, in stating:

> Many people have strong opinions about marriage, as they do about divorce, child custody, zoning, and many other issues, but if everyone were allowed to petition for certiorari simply because of ideological objections or strongly held philosophical beliefs that an order should not have been entered, then there would be no limits to the petitions brought. Iowa law has never permitted such unwarranted interference in other peoples' cases. Simply having an opinion does not suffice for standing.

Alons, 698 N.W.2d at 873. The same point may be made to this attempt to intervene by Proposed Intervenors. Where they do not in fact have interests at stake, and where such interests as they assert are already adequately represented by the parties, allowing them to intervene would invite no end of mischief-making and political showmanship.

Alons, 698 N.W. 2d at 871-73. The court decided the legislators lacked a right to intervene because: (1) they lacked an interest in the subject matter of the action; (2) their interests would not be impeded or impaired by the litigation; and (3) their interests were adequately represented. *Varnum v. Brien*, 2006 WL 4826212 (Iowa Dist., Aug. 9, 2006) (No. CV5965), at *2-5. Petitioners lacked an interest in the subject matter of the action because they did not have a *legal right* that the proceeding would *directly affect*. *Id.* at *2. The court found that the interests they asserted were speculative and contingent. *Id.* at *2-3 (a decision they disagreed with in terms of policy did not in fact hamper their policy making ability as legislators within the bounds of the constitution; nor could individual legislators represent the whole legislature.) The district court found that the legislators had failed to show that their interests would be impeded by the litigation:

> Mere speculation that a case may have an impact on the state budget ...does not qualify as an interest of an individual legislator. . . Applicants' ability to fulfill their responsibilities will not be personally affected by any outcome in this case. "their rights to obtain marriage licenses and to marry will remain unaffected. ... Applicants may continue to advocate for legislation, constitutional amendments, and other public policy changes.

Varnum v. Brien, 2006 WL 4826212 (Iowa Dist., Aug. 9, 2006) (No. CV5965), at *4.

Similarly, these three Proposed Intervenors do not have an interest beyond the general public, and those interests will not be impeded by the outcome of this litigation. They have not been impeded in their efforts at voter registration and education, or fear being erroneously blocked from the ballot box, as do Petitioners, their members, and the third parties whose rights they assert. Nor may Proposed Intervenors represent the voting interests of all Iowans also immune to the voter purge by virtue of being U.S. Citizens at the time they obtained drivers licenses. While there has been no true showing of any dilution, since there has not been any evidence of voter fraud, whatsoever, demonstrated thus far, Proposed Intervenors would be in the

same position as the general population of all other eligible voting Iowans in terms of dilution from the alleged noncitizen votes cast. Proposed Intervenors may file challenges to voters according to the existing Iowa law governing the matter. Proposed Intervenors may still vote, and have their votes counted.

Proposed Intervenors further cite *Miller v. Blackwell*, 348 F.Supp.2d 916 919 n.3 (S.D. Ohio 2004) as analogous to this case, where the Ohio court found that "similarly-situated plaintiffs had a right to intervene." Brief in Support of Motion to Intervene as Defendants at 5-6. That case is entirely distinguishable from this case as to the propriety of intervention, and is neither precedential nor persuasive on the present litigation. In *Miller*, the intervening parties were two people who had brought challenges to their fellow Ohioans which were the subject matter of litigation alleging that their rights under the National Voter Registration Act and Due Process Clause were violated. *Miller*, 348 F.Supp.2d at 919 n.3. In addition, the intervenors had filed those challenges pursuant to Ohio law, and their interest in carrying out those challenges would be affected by the outcome of the litigation in that case. *Id.* at 919 n.4. Here, Proposed Intervenors have not filed challenges against the parties or their members, or the third parties whose interests Petitioners represent in the case, and their desire to do so in the future is in no way impeded by the present litigation, because they may still bring good faith challenges pursuant to existing Iowa law, which the Voting Law Complaint Rule contravenes. See Iowa Code § 48A.14. Unlike in *Miller,* the Proposed Intervenors have no legal interest in this case which will be impeded by the outcome of the litigation, they have no right to intervene in this matter.

2. The Proposed Intervenors' Interests Are Adequately Represented by the Respondent

An applicant seeking intervenor status must show that her interest is not adequately represented by the existing parties. *In re K.P.*, 814 N.W.2d 623, at *5. When a proposed intervenor argues that the government cannot zealously represent both public and private interests, she must cite specific reasons to explain why the existing party's representation is inadequate, such as: "showing collusion between the representative and an opposing party that the representative has an interest adverse to the [proposed intervenor], or that the representative failed in fulfilling to represent the applicant's interest." *Varnum*, 2006 WL 4826212 at *4-5 (internal citations omitted). *See also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) ("government officials charged with defending a law are presumed adequate for the task") (cited by *Varnum* at *5); *Standard Heating & Air Conditioning Co.,* 137 F.3d at 572 ("Where the interests asserted fall within the realm of 'sovereign interests,' and the government is a party, a presumption that the government adequately represents the interests of its citizens arises.") (cited by *Varnum* at *5); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) ("There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents.") (cited by *Varnum* at *5). Ultimately, "representation is 'presumed adequate when the objective of the applicant for intervention is identical to that of the parties.'" *Varnum* at *5 (quoting *San Juan County, Utah*, 420 F.3d 1197, 1212 (10th Cir. 2005). The trial court in *Varnum* stated that "When the proposed intervenor and an existing party 'have the same ultimate objective, a presumption of adequacy of representation arises." *Varnum* at *5 (citing *Prete*, 438 F.3d at 956). In *Varnum,* because the proposed intervenor legislators had the same objective as the government: to uphold then-current Iowa law discriminating between opposite sex and same sex marriages, their interests were adequately represented by the government.

Indeed, here, as in *Varnum*, the Proposed Intervenors' objectives are to uphold the very same challenged rules that the Respondent Secretary of State seeks to uphold. The Proposed Intervenors' interest in making truthful, good faith challenges in the upcoming General Election to the qualifications of voters in their county based on personal knowledge is not in fact affected by the outcome of this litigation because that interest is already protected by Iowa law. Iowa Code § 48A.14 (voter challenge procedure) (discussed *supra*). Where their asserted interest is in making challenges in the upcoming General Election pursuant to the Voting Law Complaint Rule, rather than the process authorized by the Iowa legislature in Iowa Code §48A.14, the Respondent Secretary of State is adequately representing that interest. The Secretary, in defending the legal justification for emergency rulemaking to keep the rule in effect, is arguing (and in his brief, has argued) for the same outcome Proposed Intervenors desire, and based on the same reasoning. *See* Brief in Support of Resistance to Motion for Temporary Injunctive Relief. Because the Proposed Intervenors' legitimate interest in the outcome of the litigation concerning the Voting Law Complaint Rule is not affected by the outcome of this litigation *vis a vis* existing law, and because their interest in making frivolous complaints is adequately represented by the Respondent in seeking to uphold the Voting Law Complaint Rule, they do not have a right to intervene in the litigation concerning that rule.

Likewise, Proposed Intervenors' purported second interest in the outcome of litigation—to have the Voter Purge Rule remain in effect and the Secretary act pursuant thereto—is adequately asserted and represented by the Respondent in his defense of the Rule. The Secretary of State has the identical objectives. Their purported interest in an undiluted vote in the upcoming General Election, insofar as the Voter Purge Rule would accurately identify and remove even a single noncitizen voter, is grossly outweighed by the harm to eligible voters swept

up in the process.[4] But what interest there may be in the elimination of the elusive fraudulent voter through the Voter Purge Rule, that interest is adequately asserted and represented by the Secretary/Respondent in his defense of emergency rulemaking to promulgate the rule.

3. The Proposed Intervenors' Interests Are Adequately Represented by Petitioners

Where the Proposed Intervenors' interests are in benefiting as citizens from a free and fair election, where all qualified and eligible voters in Iowa who wish to register to vote and cast a ballot may do so and have their vote counted equally to other voters, Petitioners share their objective and assert and represent those interests. Petitioners agree that only qualified eligible Iowans should be voting, and have brought this injunction to ensure that they may fairly do so.

4. Proposed Intervenors have failed to provide compelling reasons for permissive intervention in this case, and intervention would cause undue delay and burden.

Petitioners respectfully ask that this court exercise its discretion against permissive intervention in this case. Permissive intervention may be granted in the judge's discretion when a proposed intervenor shares a claim or defense in the litigation that have a question of law or fact in common. Iowa R. Civ. P. 1.407(2),(4). In exercising its discretion, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties." *Varnum*, at *5 (quoting *Alons*, 698 N.W.2d at 868 *and Valley Forge Christian Coalition*

[4] The Secretary of State has not provided any reliable evidence that "over one thousand illegally registered non-citizens have voted in Iowa since 2010" as asserted by Proposed Intervenors. Brief in Support of Motion to Intervene as Defendants at 6. In fact, as briefed by Petitioners, all the Secretary has done is provided evidence that individuals who at the time of obtaining their drivers licenses were non-citizens have voted in the last two years. Evidence from Florida and Colorado's voter purge efforts show the far more likely scenario is that those people were naturalized then began proudly exercising their right of citizenship to fully participate in our political and electoral system. And the lack of evidence is supported by existing adequate safeguards against noncitizen voting: it is already criminalized, both as perjury and voter fraud. Iowa Code Section 39A.2 *et seq.*; section 48A.5. No matter how enthusiastically an individual of sound mind feels about a political candidate, there is just not any likelihood they would be willing to go to prison to cast a single additional vote for that person. Petitioners do not have a legal right in the Secretary's suppression of qualified eligible voters.

v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) *and Bowers v. Bailey*, 237 Iowa 295, 300-01, 21 N.W.2d 773, 776 (Iowa 1946) ("The law does not permit mere intermeddlers to resort to the courts where no real reason exists and no rights are affected.").

In *Varnum*, the trial court declined to grant permissive intervention to the legislator applicants. *Varnum*, 2006 WL 4826212, at *6. It reasoned that applicants' wish to merely "weigh in" on the issues is not equivalent to a claim or defense. *Id.* Rather, the court pointed out, "in the context of permissive intervention, 'claims or defenses' must 'refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impeding law suit.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997)). Moreover "having an opinion about an action is not enough to allow interference in other peoples' cases because there would not be any limit to the number of petitions brought." *Id.* (quoting *Alons*, 698 N.W.2d at 874).

To that end, the trial court judge in *Varnum* found that allowing the legislators to intervene in the case would unnecessarily increase the expenditure of time and resources for all parties and the court. *Id.* Thus, Judge Hanson found that "granting permissive intervention would be inconsistent with the goals of Rule 1.407, which are to reduce litigation and expeditiously determine matters before the court." *Id.* (citing *Miner*, 540 N.W.2d at 465 (intervenor's presence would "have done little to assist in the efficient disposition of the case.").

Here, as in *Varnum*, Proposed Intervenors do not truly have a legal interest amounting to a claim or defense, but rather, wish to weigh in on the matter, as evident from their filings. Furthermore, as already is the case, their presence will only have the effect of papering parties and the Court, requiring significant resources from all, inviting further petitions from and indefinite number of additional Iowans who wish to weigh in, and without contributing to

judicial efficiency or ability to try the facts and decide on issues of law. Given the factors strongly weighing against permissive intervention, Petitioners respectfully request this court deny Propsed Intervenors' Motion.

II. Proposed Intervenors are unsuitable *amici curiae* in this case.

Alternatively, the Proposed Intervenors argue that they should be allowed to file briefs as *amici curiae*. The ACLU of Iowa has a long history of serving as a friend of the court on important constitutional rights cases, and certainly believes the traditional role of amici curiae in our court system is of vital importance to the well-considered jurisprudence of U.S. and Iowa courts. The amicus curiae status is not, however, an open-door, last resort alternative for would-be intervenors, or carte blanche for any individual or group to delay or burden the judicial process or offer information and arguments already before the court.[5] In this case, Proposed Intervenors are not well suited to serve as *amici curiae* in this matter.

It is highly unusual for amicus briefs to be considered at the district court level, or filed by individuals, and there are no local court rules for the Polk County District Court from which to draw. However, the Iowa Rules of Appellate Procedure provide the criteria for allowing amicus curiae briefs on appeal. Iowa R. App. P. 6.906(4). The court has wide discretion in

---

[5] In *Ryan v. Commodity Futures Trading Commission*, Justice Posner denied consideration of an amicus curiae brief, stating:

> After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, fish-eyed, fashion. The vast majority of *amicus* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect, merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062 (7th Cir. 1997).

allowing or excluding an amicus curiae brief. *Id.* The decision is based on "whether the brief will assist the court in resolving the issues preserved for appellate review." *Id.* The factors listed as those the court normally considers in deciding whether to grant amicus curiae status are:

> *a.* The court will ordinarily grant a motion for leave to file an amicus curiae brief if one of the following factors are present.
>
> (1) The party whose position the proposed amicus brief supports is unrepresented or has not received adequate representation.
>
> (2) The proposed amicus curiae has a direct interest in another case that may be materially affected by the outcome of the present case.
>
> (3) The proposed amicus curiae has a unique perspective or information that will assist the court in assessing the ramifications of any decision rendered in the present case.
>
> *b.* The court will ordinarily deny a motion for leave to file an amicus curiae brief if one of the following factors is present.
>
> (1) The proposed amicus curiae brief will merely reiterate the arguments of the party whose position the brief supports.
>
> (2) The proposed amicus curiae brief appears to be an attempt to expand the number of briefing pages available to the party whose position the brief supports.
>
> (3) The proposed amicus curiae brief attempts to raise issues that were not preserved for appellate review.
>
> (4) The proposed amicus curiae brief will place an undue burden on the opposing party.
>
> *c.* The court may also strike an amicus curiae brief filed with the consent of all parties if it appears the brief would not be allowed under the above criteria.

Iowa R. App. P. 6.906(4)(*a*)-(*c*).[6]

Under these factors, the court should reject Proposed Intervenors' Motion to submit amicus curiae briefs. Chief among the reasons is that the proposed amicus curiae briefs merely reiterate the arguments made by Respondents. Iowa R. App. P. 6.906(4)(b)(1), *supra.* In their Motions to Dismiss, specifically, Proposed Intervenors make the exact same arguments as

[6] While perhaps a technicality, Proposed Intervenors have not complied with Rules of Appellate Procedure governing the form of amicus curiae briefs, which require a table of authorities and a concise statement of the identity of the amicus curiae and its interest in the case, among other things. Iowa R. App. P. 6.906(3).

Respondents in their Motion to Dismiss, alleging that petitioners lack standing and have failed to exhaust administrative remedies. Similarly, the brief filed by Proposed Intervenors in support of their Opposition to Request for Temporary Injunction mirrors the Respondents in their Brief in Opposition to Request for Temporary Injunction; in fact, they echo Respondent's arguments and analyses right down to the mistaken statements of law concerning the appropriateness of emergency action. *See, e.g.,* Intervenor-Defendants' Brief in Opposition to Request for Temporary Injunction at 7-8 (misstating as Respondent does that the test is whether an action was "necessary" to achieve his desired outcome rather than whether public participation and notice were "unnecessary.") In addition to the limits provided for by the Iowa Rules of Appellate Procedure, case law supports denying motions to file as *amicus* because briefs do not supply arguments that are different from those already presented by the parties. *See Rathkamp v. Dep't of Community Affairs*, 730 So. 2d 866 (Fla. Dist. Ct. App. 1999); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177 (D. Nev. 1999). In 1990 the U.S. Supreme Court adopted the following rule to explain the inappropriateness and lack of helpfulness of this variety of *amicus*:

> An amicus curiae brief that brings to the attention of the relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is generally not favored.

Sup. Ct. R. 37(1). There seems to be only one instance where Proposed Intervenors' offer a slightly different argument than those made thus far by Respondents: that their votes will be diluted by the continuation of Iowa's law governing elections and voter registration lists. However, in making the argument they rely on a leap in logic that the Secretary of State himself has made: i.e., that despite no successful identification of a voter impersonation fraud problem in

Iowa or in the country thus far,[7] the persons identified as noncitizens by outdated Iowa Department of Transportation information remained noncitizens when they registered to voter or voted.[8]

Proposed Intervenors' have a legitimate interest in an "undiluted" vote in the sense that only U.S. citizens should be voting. All parties here share this interest; as do those individuals whom the Secretary has erroneously identified as noncitizen voters, those Latino U.S. Citizens with the same names as lawful immigrants who obtained drivers licenses, and all Latino voters who fear registering or voting, for fear of the persecution, including possible criminal prosecution, that results from the Secretary's actions. However, Proposed Intervenors do not

---

[7] The Secretary of State is claiming that he has identified thousands of people who registered to vote despite being non-citizens. The likelihood that this data is correct is extremely low. The analysis of 2,068 reported fraud cases by News21, a Carnegie-Knight investigative reporting project, found 10 cases of alleged in-person voter impersonation since 2000. Natasha Khan and Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, NEWS21, Aug. 12, 2012, *available at* http://votingrights.news21.com/article/election-fraud/. With 146 million registered voters in the United States, those represent about one instance for every 15 million prospective voters. *Id.*

Rather, as extensively briefed by Petitioners elsewhere, the Secretary has more likely identified people who either (1) obtained drivers licenses, (2) then became U.S. Citizens sometime in the 5 years that an individual's license remains valid; (3) then registered to vote, or those individuals who have the same or a very similar name to those individuals.

But by alleging a totally unsubstantiated voter fraud problem, by enacting these rules, and by taking the steps he already has, (which began in March 2012, far before these rules were promulgated – to compare IDOT records to the voter lists, *See* Affidavit of Secretary of State Schultz) the Secretary has suppressed the votes of potentially thousands of qualified, eligible Iowans. Without relief, the chilling effects of the Secretary's actions will continue.

[8] The logical fallacies inherent in Proposed Intervenors' argument to justify emergency rulemaking is noteworthy, because this also militates against the court's grant of their motion for amicus curiae status. Motions for amicus curiae status have been rejected for engaging in one-side presentations of information or data, or the presentation of information that has been generated solely for the purposes of litigation, because the effect is to confuse the role of amicus, which is one of objectivity, with that of advocate. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N. C. L. Rev. 91, 100 (1993).

have a legitimate interest in the wrongful exclusion of other qualified Iowa voters, even though more total votes would in a sense "dilute" their vote.

Proposed Intervenors state that their interest in the Voting Law Complaint Rule is there intent to challenge the qualifications of voters whom they suspect are noncitizens pursuant to the rule. See Affidavit of Ellen L. Markham in Support of Motion to Intervene ("If the challenged Rules are not enjoined, I intend to challenge, pursuant to Section 721—21.100 of the Iowa Administrative Code, the qualifications of any registered voters in Iowa whom I believe in good faith are not legally entitled to vote in Iowa.") and Affidavit of Christopher M. McLinden in Support of Motion to Intervene ("I am not adequately represented in this suit by the Iowa Secretary of State. . . . [T]he Secretary does not share my interest as an individual who wishes to file good faith complaints pursuant to , 721—21.100 of the Iowa Administrative Code.").

As discussed *supra* addressing Proposed Intervenors' failure to meet the criteria for intervention, citizens do not have a legal interest in an illegal agency regulation to accuse another citizen of a crime without adequate personal knowledge to support that assertion. As briefed extensively by Petitioners, Iowa law *already* protects their right to challenge the qualifications of another voter in their county; if they are prepared to swear to the truth of that challenge, under penalty of an aggravated misdemeanor for those that are not challenging in "good faith." Iowa Code § 48A.14(1). Thus, Proposed Intervenors will remain free to bring good faith challenges to the registration of other voters in their county pursuant to Iowa law if the court enjoins the rule.

Proposed Intervenors are also not able to claim that the position in their proposed amicus brief is unrepresented or has not received adequate representation. Iowa R. App. P. 6.906(4)(*a*)(1). This is because, as noted above, their position and objectives *are* those already represented by Respondent.

Lastly, the interest that Proposed Intervenors have in the outcome of this litigation in regards to the integrity of the electoral system is shared by all voters. Further, this interest is precisely articulated and represented by Petitioners. Petitioners do not represent the interests of fraudulent voters; Petitioners represent the interests of registered Iowa voters who are U.S. Citizens, just like Proposed Intervenors. And, as is apparent, their interest in the outcome of the litigation favoring the Secretary *is the same interest and objective* as the Respondent.

Because Proposed Intervenors are improper candidates for *amici curiae* status in this case, Petitioners respectfully request that their motion to be recognized as such be denied, and their briefs in Support of the Motion to Dismiss and in Opposition to Request for a Temporary Injunction not be accepted as amicus briefs with the court.

CONCLUSION

Proposed Intervenors are not entitled to, and should not, be granted intervenor-defendant status in this case; neither are they suitable amici curiae. For these reasons, Petitioners respectfully request this Court to deny their motions to intervene and submit amicus curiae briefs.

Respectfully Submitted,

Joseph Glazebrook AT0010193
Glazebrook & Moe, LLP
118 SE 4th St. Ste. 101
Des Moines, IA 50309
Phone: 515-259-1110
Fax: 515-259-1112
joseph@glazebrookmoe.com

Dan L. Johnston AT0010420
Glazebrook & Moe, LLP
118 SE 4th St. Ste. 101
Des Moines, IA 50309
Phone: 515-259-1110
Fax: 515-259-1112
Djohn1945@aol.com

M. LAUGHLIN MCDONALD**
American Civil Liberties Union Foundation, Inc.
Foundation, Inc.
230 Peachtree Street, Suite 1440
Atlanta, GA 30303
Phone: (404) 523-2721
Fax: (404) 653-0331
lmcdonald@aclu.org

NANCY ABUDU**
American Civil Liberties Union

230 Peachtree Street, Suite 1440
Atlanta, GA 30303
Phone: (404) 523-2721
Fax: (404) 653-0331
nabudu@aclu.org

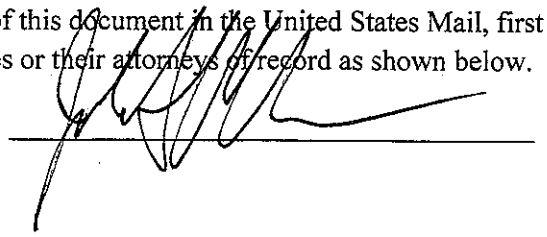
RANDALL WILSON
American Civil Liberties Union of Iowa
505 Fifth Avenue, Ste. 901
Des Moines, IA 50309-2316
Phone: (515) 243-3988 ext. 15
Fax: (515) 243-8506
randall-wilson@aclu-ia.org

RITA BETTIS*
American Civil Liberties Union of Iowa
505 Fifth Avenue, Ste. 901
Des Moines, IA 50309-2316
Phone: (515) 243-3988 ext. 15
Fax: (515) 243-8506
rita.bettis@aclu-ia.org

** 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.



For Respondent:
Iowa Attorney General Tom Miller
Att'n: Jeffrey Thompson & Meghan Gavin
Hoover State Office Bldg., 2nd Fl.
Des Moines, IA 50319
Ph: 515 281 6858

For Proposed Intervenors:
Mark A. Schultheis & Ryan G. Koopmans
Nyemaster, Goode, P.C.
700 Walnut St., Suite 1600
Des Moines, IA 50309-3899
Ph: 515 283 3100