

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, Christopher M. McLinden (hereinafter "Proposed Intervenors") filed a Motion to Intervene as Defendants and attendant to that a Motion to Dismiss.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted should be considered by the court in a manner which assumes all facts pled in the petition are true, and resolves all doubts and ambiguities in favor of the non-moving party. *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d. 192, 194 (Iowa 2007). "In consideration of a motion to dismiss, the petitioner's petition should be construed in the light most favorable to the petitioner, with all doubt resolved in the plaintiff's favor." *Raas v. State*, 729 N.W.2d 244 (Iowa 2007) (citing *Fitzpatrick*, 439 N.W.2d at 665).

ARGUMENT

Petitioners' respectfully ask this Court to deny Proposed Intervenors' Motion to Dismiss. Since Proposed Intervenors' arguments that Petitioners do not have standing and have not exhausted administrative remedies mostly repeat Respondant's arguments, Proposed Intervenors' Motion to Dismiss is largely addressed by Petitioner's Response brief to the Respondant's Motion to Dismiss and Petitioners' Reply Brief in Support of Temporary Injunctive Relief. As discussed briefly below and in detail in the above documents, Petitioners' have established standing to bring

this case and are not required to exhaust all administrative remedies before this court has jurisdiction over the matter.

I. Petitioners have established that they have standing both on their own and on behalf of their memberships under the Iowa Administrative Procedures Act, that they have third party standing, and that there is a great public interest in waiving standing.

The federal analysis for standing urged by Proposed Intervenors' has been rejected by the Iowa Courts in the context of the Iowa APA. *Iowa Bankers Assn. v. Iowa Credit Union Dep't.*, 335 N.W.2d 439, 443-44 (Iowa 1983). Instead, the correct test for standing to bring a claim that Petitioners' substantial rights have been prejudiced on the grounds of violating constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, or unreasonable, arbitrary, or capricious is whether the petitioner (1) has a specific personal, or legal interest in the litigation; and (2) whether the specific interest is adversely affected by the agency action in question. *Medco*, 553 N.W.2d at 562 (citing *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979)).¹

As detailed in Petitioner's Resistance to the Respondent's Motion to Dismiss, Petitioner's satisfy this test for standing in a number of ways. First, Petitioners' have standing both on their own and on behalf of their membership under the Iowa APA. See Petitioners' Brief in Support of Resistance to Motion to Dismiss at 4-16. Further, Petitioners' have also established third-party standing under *Godfrey*. See Petitioners' Brief in Support of Resistance to Motion to Dismiss at 17-18. Finally, even though Petitioner's have established standing, there is a great public interest in waiving the standing requirement in this case. See Petitioners' Brief in Support of Resistance to Motion to Dismiss at 18-21.

¹ See Petitioners' Brief in Support of Resistance to Motion to Dismiss for a detailed analysis.

However, even were Petitioners' required to meet the test for standing proffered by Proposed Intervenor—that Petitioners are required to allege that “at least one identified member” suffer harm, or will be likely to suffer harm—they have in fact done so. Petitioners have identified at least one member who has (1) obtained an Iowa driver's license; (2) subsequently obtained U.S. Citizenship, and (3) legally registered to vote in Iowa. *See* Affidavits of New Citizens. Further, Petitioners' have alleged that they and numerous members have been harmed by the chilling effect of the Secretary's actions. *See* Affidavit for Joe Henry.

II. Petitioners Are Not Required to Exhaust All Administrative Remedies Before Seeking Judicial Review.

Proposed Intervenor is incorrect in their assertion that this Court cannot yet hear this case because Petitioners must first exhaust all administrative remedies. *See* Proposed Intervenor's Brief in Support of Motion to Dismiss at 5. While it is generally true that petitioners must first exhaust administrative remedies before seeking judicial review of administrative action, at least two exceptions to the general rule apply here, allowing Petitioners to bring their claim without even contemplating administrative remedies.²

First, petitioners need not exhaust administrative remedies before seeking judicial review in instances where “plaintiff challenges, by way of *judicial review under Iowa Code section 17A.19*, an agency action as in violation of the rulemaking procedures set forth under the APA.” *IES Util. Inc. v. Iowa Dep't of Revenue & Fin.*, 545 N.W.2d 546, 539 (Iowa 1996) (citations omitted) (emphasis in original). Petitioners, Respondant, and even Proposed Intervenor all concur that Petitioners' challenge seeks judicial review of rulemaking procedures under Iowa Code section 17A.19, so this exception applies. Yet Proposed Intervenor fails to refute or even consider this

² For a more detailed discussion of the reasons judicial review appropriate, *see* Petitioners' Reply Brief in Support of Temporary Injunctive Relief, 4-7.

exception, discussed and argued in detail both in the initial Petition and the subsequent Reply Brief in Support of Temporary Injunctive Relief.

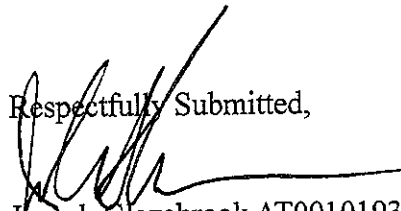
Additionally, Petitioners are not required to exhaust administrative remedies and can seek immediate relief from the court when an “application to the agency for a stay or other temporary remedies is an inadequate remedy” Iowa Code § 17A.19(5)(c). This exception has further been recognized by the Iowa Supreme Court. *See IES Util. Inc. v. Iowa Dep’t of Rev. & Fin.*, 545 N.W.2d 536, 539 (Iowa 1996) (allowing judicial review without exhaustion of administrative remedies where “[P]laintiff claims an adequate administrative remedy does not exist for the claimed wrong”). As detailed in the initial Petition and Petitioners’ Reply Brief in Support of Temporary Injunctive Relief, the harm Petitioners’ claim has already occurred, and will continue to occur until temporary relief is granted, so no adequate remedy could be achieved through an administrative remedy. *See* Petitioners’ Petitioners’ Reply Brief in Support of Temporary Injunctive Relief at 14-15.

Finally, even were the Proposed Intervenors correct in their assertion that Petitioners must exhaust administrative procedures before seeking judicial review, administrative procedures *have in fact* been exhausted. The Secretary formally denied Petitioners request for an administrative stay of the Rules on August 21, 2012. *See* Denial of Request for Administrative Stay. Therefore, even if the two exceptions discussed above did not exist, Petitioners may request judicial review at this time because administrative remedies have, in fact, been exhausted.

CONCLUSION

Because facts asserted by petitioners, taken as true, are sufficient to demonstrate standing, petitioners respectfully request this Court to deny respondent's motion to dismiss.

Respectfully Submitted,


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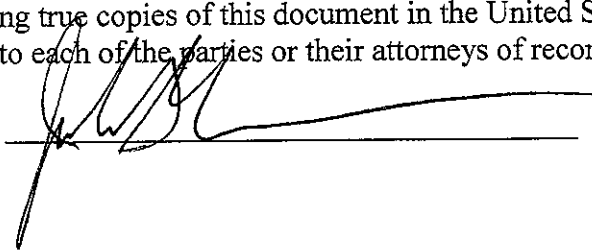
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** *Pro hac vice admission application pending.*

* *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 read 'Tom Miller', is written over a horizontal line.

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