IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND 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 **BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION UNDER IOWA CODE §17A**

COME NOW Petitioners, American Civil Liberties Union of Iowa Foundation and the League of United Latin American Citizens of Iowa, and by and through their attorneys of record, state the following for their Brief in Support of Petition for Judicial Review of Agency Action.

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INTRODUCTION:

Petitioners, American Civil Liberties Union of Iowa Foundation and League of United Latin American Citizens of Iowa challenge the adoption and promulgation by Respondent, Iowa Secretary of State Matt Schultz, of two administrative rules implemented on or about July 20, 2012. The rules in question were adopted outside the standard administrative rulemaking process outlined in Iowa Code §17A.4(1) because, in the view of Respondent, there was not enough time or public need to proceed with the normal process prior to the upcoming election on November 6, 2012. The rules in question were adopted for the stated purpose of helping the Secretary investigate and resolve complaints related to voting and elections. Petitioners assert the new administrative rules are invalid for two primary reasons. First, the new rules were not adopted through the standard process laid out in Iowa Code §17A.4 and no emergency or countervailing interest was present to justify deviation from that process. Second, the new rules exceed Respondent's statutory authority in adopting administrative rules. Moreover, while this petition focuses on the Secretary's violation of state administrative rules, petitioners note that if these rules were to be enforced, it is highly likely that qualified voters in Iowa would be unlawfully deprived of their fundamental right to vote in violation of federal and state law.

STATEMENT OF FACTS:

On July 20, 2012, Iowa Secretary of State Matt Schultz promulgated two administrative rules on an emergency rulemaking basis. Addendum 1. The first emergency rule, Iowa Admin. Code r. 721—21.00 (39A,47) (2012) (hereinafter "the Voting Law Complaint Rule"), implements a procedure for any person to file a complaint alleging a violation of any provision

of Iowa Code chapters 39 through 53 (collectively concerning election and voting laws). The second emergency rule, Iowa Admin. Code r. 721—28.5 (47,48A) (hereinafter "Voter Purge Rule") creates a mechanism to purge the voter registration list of purported non-citizens.

The Voting Law Complaint Rule provides that: "A person who wishes to file a complaint concerning an alleged violation of any provision of Iowa Code chapters 39 through 53 shall: (1) File a written complaint with the secretary of state, on the form provided by the secretary of state's office; (2) Include the complainant's signature and contact information. Complaints lacking this information may be dismissed by the secretary of state's office without further investigation." Iowa Admin. Code r. 721—21.100 (a). The rule further specifies the complaint will be "forwarded to the appropriate Iowa agency for further investigation and follow-up as deemed necessary." Iowa Admin. Code r. 721—21.100(b).

The Voter Purge Rule requires the Secretary of State to "periodically" obtain lists of foreign nationals from unspecified state and federal agencies and to attempt to match those names to voter registration records using unspecified "predetermined search criteria." Iowa Admin. Code r. 721—28.5(1). After producing such a list, the regulations provide for the Secretary to "turn the list of likely matches over to the appropriate Iowa agency" for additional follow-up and a determination as to whether the voter registration is a match. Iowa Admin. Code r. 721—28.5(2). As there is no Iowa agency presently tasked with this role, it is expected that the Secretary of State will likely also take on the responsibility for citizenship verification. The regulation further provides that the Secretary of State must then determine whether the registrant has obtained citizenship status subsequent to the date in the record. Iowa Admin. Code r. § 721—28.5(2). No procedure is specified for making this determination. *Id.* Thus, the one check

outlined in the rule is illusory and will, if the experience in other states is repeated in Iowa, result in lists consisting primarily of validly registered voters.[1]

Upon the Secretary's determination that a registered voter matches a name on a list provided by some unidentified source, the Secretary will send notice to the voter that the Secretary has obtained information that the registered voter may not be a citizen and may be illegally registered to vote, advising the individual that illegally registering to vote is a class D felony under Iowa law, and that the registrant should accordingly cancel his or her voter registration. Iowa Admin. Code r. 721—28.5(3)(a). If the voter believes he or she is legally registered to vote, the onus is on him or her to send a notice within 14 days disputing the information, essentially requiring the voter to prove that he or she registered legally.[2] Iowa Admin. Code r. 721—28.5. If the voter does not respond timely, the Voter Purge Rule allows the Secretary to take a number of actions against the voter, including informing county election officials that the Secretary believes the voter registered illegally, *id.* r. 721—28.5(3)(b), instructing election officials to challenge the voter's absentee ballot, *id.* r. 721—28.5(3)(d), and

[1] As widely publicized, Florida's Secretary of State is currently conducting a similar voter purge by mailing registered voters who have been identified as potential non-citizens letters similar to those described in the Voter Purge Rule. This list, at least in the state's largest county, have proven to be at least 30 percent inaccurate. *See, e.g.,* Alvarez, *Florida Defends Search for Ineligible Voters,* N.Y. TIMES, June 6, 2012, *available at* http://www.nytimes.com/2012/06/07/us/florida-vows-to-continue-its-search-for-ineligible-voters.html?_r=3&ref=politics (last visited Aug. 5, 2012).

[2] After similar letters were mailed to nearly 1600 registered voters in Miami-Dade County, Florida, giving them 30 days to respond, over 1000 individuals still had not responded within the time period. *See, e.g.,* Alvarez, *Florida Defends Search for Ineligible Voters,* N.Y. TIMES, June 6, 2012 *available at* http://www.nytimes.com/2012/06/07/us/florida-vows-to-continue-its-search-for-ineligible-voters.html?_r=3&ref=politics (last visited Aug. 5, 2012).

even allowing the Secretary to strike the voter's name from the eligible voter's list pursuant to Iowa Code § 48A.14-16. Iowa Admin. Code r. 721—28.5(3)(c)1.

STANDING

Petitioners have standing to bring this action because Respondent's adoption of the administrative rules in question have undermined the rights of Petitioners and their members. The judicial review provisions of the Iowa Administrative Procedures Act ("IAPA") provide the exclusive means by which a person may seek judicial review of an agency rulemaking action. Iowa Code § 17A.19; *IES Utils. Inc. v. Iowa Dept. of Revenue and Fin.*, 545 N.W.2d 536, 539 (Iowa 1996). Under the IAPA, any person or party "aggrieved or adversely affected by agency action" may seek judicial review in district court to determine whether her or his "substantial rights . . . have been prejudiced" because the action in question was in violation of constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, or was unreasonable, arbitrary, or capricious. *Medco Behavioral Care v. State Dep't of Human Servs.*, 553 N.W.2d 556, 562 (Iowa 1996) at 562.*See also* Iowa Code §§ 17A.19(1), 17A.19(8)(a)-(g); *Iowans for WOI-TV, Inc. v. Iowa State Bd. of Regents*, 508 N.W.2d 679, 684-85 (Iowa 1993); Iowa Code § 17A.20 (any final judgment of the district court is reviewable on appeal).

From this language, the Court has formulated a two-prong test for standing under the IAPA: the complaining party must (1) have a specific, personal, and legal interest in the litigation; and (2) the specific interest must be adversely affected by the agency action in question. *Godfrey v. State*, 752 N.W.2d 413, 418-19 (Iowa 2008); *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979).While a plaintiff need not allege a

violation of a private right or that it suffered damages, it must demonstrate some injury different from the population at large. *Godfrey,* 752 N.W.2d at 420. . This standard is broadly construed, in accordance with the statutory intent to allow for near-universal standing. *See* Arthur E. Bonfield, *The Iowa Administrative Procedure Act. Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 893 (1975). So long as the injury is specific to the complaining party, it is sufficient to confer standing. *Godfrey*, 752 N.W.2d at 419.

In *Hurd v. Odgaard*, 297 N.W.2d 355 (Iowa 1980), for example, the Iowa Supreme Court determined that attorneys who were users of the County Courthouse had standing in an action in mandamus to require the county to repair the courthouse. Similarly, in *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573 (Iowa 1990), the court held that taxpayers had standing to challenge a decision to grant a tax exemption because it would place a greater tax burden on the plaintiff. *See Godfrey*, 752 N.W.2d at 420-21. Further, "[o]nly a likelihood or possibility of injury need be shown. A party need not demonstrate injury will accrue with certainty, or already has accrued." *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983).

Additionally, when a petitioner "seek[s] to resolve certain questions of great public importance and interest in our system of government," the court may grant an exception to the injury requirement altogether. *Godfrey*, 752 N.W.2d at 426. The right to vote is and has long been considered of "great public importance and interest" to a functioning democracy, and the court should grant Petitioners standing even if it finds that no specific injury has occurred. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society"). Limitations on standing may be

completely inapplicable when "the issue is of utmost importance and the constitutional protections are most needed." *Id.* at 427

In this case, the clear public interest and constitutional protections for the voting rights of Iowans would, if necessary, suggest such a waiver of traditional standing restrictions is appropriate.. Such a waiver has been considered only two other times by the Court of Appeals, and not granted in either case. *Quaker Oats Co. v. Main*, No. 9-896/08-1507 (Iowa Ct. App. 2010) (unpublished) (untimely challenge to a statute passed by the Iowa Legislature based on the Iowa Constitution's single-subject requirement did not rise to the "great public importance" requirement to waive standing), *George v. Schultz,* No. 1-733/11-0691 (Iowa Ct. App. 2011) (unpublished) (challenge to *format* of a judicial retention ballot did not meet the level of "great public importance" required to waive standing) (emphasis added). This case is highly distinguishable from *Godfrey*, *Quaker Oats*, and *George*, because of the fundamental nature of the right at stake and the clear public interest in preventing these Rules from taking effect through emergency rulemaking. The right to vote demands rigorous constitutional protection, and if necessary, the court should exercise its discretion to waive the rigors of the standing requirement in this case.

Moreover, nonprofit advocacy organizations have been found to have standing when they are organized to accomplish a mission which is adversely affected by final agency action. In *Iowans for WOI-TV v. Iowa State Bd. of Regents,* the Petitioner was deemed to have standing. 508 N.W.2d 679 (Iowa 1993). Iowans for WOI-TV was a non-profit corporation organized for the purposes of group action challenging the Regents' attempted sale of Iowa State University's WOI-TV. *Id.* at 680. Members of the group consisted of staff and faculty whose educational programs were affected by the university's operation of the television facility, alumni, and other

interested persons "who believe[d] that the sale of the television facility [would] diminish the educational mission of the university." *Id.* at 680. As Iowans for WOI-TV and its members were positioned to be most affected by changes made by the Board of Regents, the ACLU, LULAC, and their members are similarly positioned to be most affected by changes to voting rules and regulations.

The ACLU is an organization specifically dedicated to civil rights, and thus its interest is more personal than the general public at large. The ACLU of Iowa is a private, nonprofit membership corporation founded in 1935 as an affiliate of the American Civil Liberties Union. The ACLU of Iowa has over 3,500 members within the State of Iowa. The mission of the ACLU of Iowa and the common interest of its members are to preserve and protect fundamental constitutional rights such as those embodied within the federal Bill of Rights, including the right to vote and protection against racially discriminatory laws. Historically, the ACLU and its affiliates have given priority to cases and issues protecting the right to vote. The ACLU of Iowa believes that democracy works best when all who are capable of participating responsibly are allowed to do so. To this day, the ACLU maintains a national project office devoted exclusively to the protection and restoration of voting rights. The ACLU of Iowa has extensively lobbied the executive and legislative branches to protect the rights of eligible voters in Iowa, and has a significant interest in protecting the voting rights of its members and all Iowans. .

The League of United Latin American Citizens ("LULAC"), founded 83 years ago, is the largest national Latino and Hispanic civil rights and advocacy group in the United States. LULAC works to improve opportunities for Hispanics and Latin Americans across a wide range of issues. LULAC is active in the promotion of citizenship and voting rights. LULAC promotes active participation of all eligible Latinos in the democratic process by registering to vote and

voting, and encourages all legislative, judicial, and educational efforts to promote voter participation and advocacy. LULAC aims to ensure that voters' rights are safeguarded on Election Day by preventing potential voting rights violations, such as intimidation at the polls, unworkable voting equipment and other civil rights violations. Iowa LULAC is the statewide affiliate of National LULAC. Iowa LULAC is composed of approximately 400 members and is active through several councils in the state. As part of its efforts to protect and promote the voting rights of Latino and Hispanic U.S. citizens in Iowa, Iowa LULAC, led by Council 307 in Des Moines, has engaged in a statewide voter identification and registration drive of Latino and Hispanic U.S. citizens this year. Iowa LULAC estimates it will have identified and registered at least 40,000 voters before the November 6, 2012, general election.

Because Petitioners and their members will be adversely affected by the new rules promulgated by Respondent, and because the issues raised are of great public importance, Petitioners respectfully request this Honorable Court find that Petitioners possess standing.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A party must exhaust its administrative remedies before seeking declaratory judgment from the district court when "[a]n adequate administrative remedy [exists] for the claimed wrong, and the statutes . . . expressly or impliedly require that remedy to be exhausted before resort to the courts." *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729, 731 (Iowa 1985) (interpreting rule then numbered as Iowa Rule of Civil Procedure 261).

Exhaustion is required in all but the following cases: (1) where the plaintiff challenges, by way of judicial review under Iowa Code § 17A.19, an agency action as in violation of the

rulemaking procedures set forth under the IAPA; (2) where the plaintiff claims an adequate administrative remedy does not exist for the claimed wrong or, stated another way, the plaintiff will suffer "irreparable injury of substantial dimension" if not allowed access to district court prior to exhausting all administrative remedies; or (3) where the plaintiff claims the applicable statute does not expressly or implicitly require that all adequate administrative remedies be exhausted prior to bringing an action in district court. *IES Util. Inc. v. Iowa Dep't of Revenue & Fin.*, 545 N.W.2d 536, 539 (Iowa 1996) (citations omitted).

In this case, Petitioners challenge the aforementioned new administrative rules as a violation of the rulemaking procedures set forth in the IAPA, because the Secretary (1) did not meet the criteria for emergency rulemaking -; (2) lacked the requisite statutory authority to promulgate the rules; and (3) afforded inadequate process before promulgating rules that would strip qualified Iowans of their fundamental right to vote. No adequate administrative remedy exists in this case because any such remedy would be insufficient in light of the emergency rules promulgated with an immediate effective date. Addendum 1. Here, any potential further remedies that might be sought with the Secretary's office would be inadequate because the injury caused by the adoption of the new rules is already occurring. If the Rules are allowed to continue in full effect and be enforced, the foreseeable harm to voting rights will occur prior to the resolution of any potential efforts to petition the Secretary.

It may be argued that administrative remedies through the Voter Registration Commission ("VRC") should be exhausted prior to bringing a judicial action. However, even this potential assertion is somewhat ambiguous because the Secretary himself bypassed the VRC in the promulgation of the rules. Regardless, the administrative remedy available through the VRC merely requires the Commission to hear the matter not later than the second regular

meeting following receipt, and the VRC is only required to meet quarterly throughout a year. Iowa Admin. r. 821—1.3(7). In this case, the Secretary, in carrying out the substance of the challenged rules, must act prior to the general election on November 6, 2012, which is before the VRC would be required to meet and address any petition that was filed in response to the new rules. Addendum 1 ("[A] formal procedure is needed prior to the November 6, 2012 Presidential Election . . ."). The harm to erroneously stricken Iowa voters (including a comparison of unspecified federal and state databases to identify alleged non-citizen voters, the mailing of notification with a possible chilling effect on voting, and affording voters a mere 14 days to produce evidence of their citizenship or face removal from the rolls) is likely to occur prior to any potential VRC action. Therefore, the remedy that may be available through VRC is inadequate.

Because Petitioners assert both a violation of the IAPA and because what administrative remedies that may or may not be available are inadequate to address the threatened harm to Iowa's voters and the integrity of its elections, judicial review is proper at this stage.

REQUEST FOR TEMPORARY INJUNCTION

While the filing of a petition for judicial review does not stay the enforcement of a rule, a party may seek an application for a stay or a temporary restraining order until the court can issue a final judgment. Iowa Code § 17A.19(5) (2011). Petitioners have sought such a temporary injunction in the previously filed petition in this matter. In considering the motion for injunctive relief, the court should balance the applicant's likelihood of prevailing on the merits, whether the applicant will suffer irreparable harm, the extent to which the grant of relief will harm other

parties to the proceedings, and the extent to which the Secretary relied on the public interest in the rulemaking. *Id.*

Here, a balancing of the factors strongly favors the granting of injunctive relief. As set forth in the Argument section *infra*, a challenge to the rulemaking procedure is likely to succeed. There is significant potential for harm if the Secretary proceeds to send notices to qualified Iowa voters in an effort to remove them from the voting lists based on inaccurate or out-of-date information. Moreover, even the threat of removal from a letter by the Secretary will chill voter registration and voting, particularly amongst the Latino community. Although the Secretary claims a public interest, his significant delay in taking action demonstrates that there is no exigency.[3] Finally, a process to remove registered voters from the voter registration lists is in contradiction to public policy and Iowa's broad and progressive voter registration laws. Iowa Code § 48A.1 (2011) ("It is the intent of the general assembly to facilitate the registration of eligible residents of this state through the widespread availability of voter registration services. This chapter and other statutes relating to voter registration are to be liberally construed toward this end."); Iowa Code §§ 48A.5, 48A.5A (2011) (person does not need to be an Iowa domiciliary to register to vote, but only consider Iowa his or her "home," including students from other states); Iowa Code § 48A.7A (2011) (providing for election day and same-day registration).

Further, the Iowa Code provides that the court can grant equitable relief where the plaintiff's substantial rights have been prejudiced because of an action that is either beyond the authority delegated to the agency, Iowa Code §17A.19(10)(b) (2011), or "was taken without

[3] Respondent was elected on November 2, 2010 and assumed office on January 14, 2011. The new administrative rules which are the subject of this lawsuit were not promulgated until July 20, 2012, which is 554 days after he assumed office and only 109 days before the Nov. 6, 2012 election.

following the prescribed procedure or decision making process." Iowa Code §17A.19(10)(d) (2011).

Respondent is proceeding to implement the new voter purge procedures despite the fact that there is: (1) no Iowa law vesting him with the statutory authority to act unilaterally and without approval by the Voter Registration Commission; (2) no proper basis under Iowa law to use emergency rulemaking procedures in lieu of notice and public participation; (3) imminent irreparable harm to likely and qualified voters; (4) widely-reported information showing that the targeting procedure is highly inaccurate; and (5) strong opposition from numerous Iowa county auditors.

Petitioners have no plain, speedy, or adequate remedy at law other than the relief requested in this Petition. Unless enjoined by this Court, Respondent will begin or continue to illegally enforce the new voter purge procedures against registered voters within Iowa's ninety-nine counties.

STANDARD OF REVIEW

Iowa Code § 17A.19(10) (2011) governs judicial review of agency decisions. *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 255 (Iowa 2012); *see also NextEra Energy Resources LLC v. Iowa Utilities Board*, 815 N.W.2d 20, 36 (Iowa 2012). When a reviewing court is asked to review an agency's interpretation of law, the level of deference afforded to an agency's interpretations of law depends on whether the authority to interpret that law has "clearly been vested by a provision of law in the discretion of the agency." *Burton*, 813 N.W.2d at 256 (comparing Iowa Code § 17A.19(10)(c) (2011), *with id.* § 17A.19(10)(*l*) (2011)). If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a

statute, then the reviewing court must reverse the agency's interpretation if it is erroneous." *Burton*, 813 N.W.2d at 256 (citing Iowa Code § 17A.19(10)(c) (2011)); *NextEra*, 815 N.W.2d at 37.If the agency *has* been clearly vested with the authority to interpret a statute, then a court may only disturb the interpretation if it is "irrational, illogical, or wholly unjustifiable." *Id.* § 17A.19(10)(*l*) (2011). Here, Respondent has not been clearly vested with the authority to interpret the statute in the manner in which Respondent has done. The Supreme Court has provided that the level of deference owed to any agency's interpretations should be determined on a case-by-case basis. *See, e.g.*, *Burton*, 813 N.W.2d at 256 (citing *Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co.*, 787 N.W.2d 75, 80 n.3 (Iowa 2010)). The Court considers an agency's interpretive authority for each particular phrase under consideration. *Andover Volunteer Fire Dep't*, 787 N.W.2d at 80. Although the legislature may explicitly vest the authority to interpret an entire statutory scheme with an agency, the mere fact that the agency has been granted rulemaking authority does not give it the authority to interpret all statutes. *NextEra*, 815 N.W.2d at 37. Moreover, "broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010).

Iowa administrative law does not require the agency to be *expressly* vested with the authority to interpret a statute; instead, it only requires that the interpretive authority be *clearly* vested in the agency. *See Burton*, 813 N.W.2d at 256; *see also Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 133 (Iowa 2010) ("In the absence of such an explicit grant of authority, we must determine whether the legislature, nevertheless, 'clearly' vested the agency with the power to interpret the statute by implication.") (citations omitted).

When determining whether an agency has been clearly vested with the authority to interpret a provision of law,

> [w]e do not focus our inquiry on whether the agency does or does not have the broad authority to interpret the act as a whole. Instead, when determining whether the legislature has clearly vested the agency with authority to interpret, "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes."

Burton, 813 N.W.2d at 257 (citing *Andover Volunteer Fire Dep't,* 787 N.W.2d at 79-80 (quoting *Renda,* 784 N.W.2d at 13) (internal citation omitted)).

When a term is not defined in a statute but the agency must necessarily interpret the term in order to carry out its duties, the Court is more likely to conclude the power to interpret the term was clearly vested in the agency. *See Burton*, 813 N.W.2d at 257; *Renda*, 784 N.W.2d at 12. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." *Renda*, 784 N.W.2d at 14. However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute. *Id.*

To conclude that an agency is "clearly vested" with the authority to interpret a statute, the court:

> must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

Burton, 813 N.W.2d at 259-60; *Renda*, 784 N.W.2d at 11 (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 63 (1998)).

As argued throughout this brief, the legislature did not clearly vest the Secretary of State with interpretive authority as broad as he has asserted it in his promulgation of the challenged rules. *See* Addendum 1. Here, Respondent asserts he is empowed to enact the rules in question under Iowa Code chapters 39A, 48A, 49, 53. Addendum 1. However, these sections of the code do not clearly authorize Respondent to act in the way he did.[4] Even if the 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, and wholly unjustifiable.

ARGUMENT

The emergency rules, filed and adopted without any notice, public participation, or publication, let alone statutory authorization, represent a profound change in the way that elections and voter registration law are administered in Iowa. If experiences in other states where similar attempts at a non-citizen purge have recently been attempted are any indication, this scheme will deprive numerous qualified Iowa electors of their fundamental right to vote. The implications of allowing the Secretary of State to achieve a fundamental sea change in voting law through emergency rulemaking, without legislative approval or due process through regular bureaucratic procedures, cannot be overstated. This Court should grant an injunction against their implementation because: (1) none of the criteria for emergency rulemaking exist in this case; (2) the Secretary lacked statutory authority to promulgate the rules through even

[4] *See infra* Section II of Argument.

regular rulemaking; and (3) the rules themselves are too vague and lack safeguards to ensure against the erroneous deprivation of the fundamental right to vote.

I. THE SECRETARY OF STATE'S USE OF EMERGENCY RULEMAKING WAS IMPROPER IN THIS CASE.

In promulgating the Voter Purge Rule and the Voting Law Complaint Rule through emergency rulemaking, the Secretary of State violated the Iowa Administrative Procedures Act ("IAPA"). None of the criteria by which an agency may suspend normal rulemaking procedures were present in this case.

The Secretary claimed the authority to promulgate both rules through emergency rulemaking procedures provided in the IAPA, Iowa Code § 17A.4(3), *et seq.* (2011). *See* Addendum at 1. Accordingly, the rule became effective upon its filing on July 20, 2012. The rulemaking procedure outlined in the IAPA is similar to both the federal and model Administrative Procedure Act.[5] Typically, an agency may promulgate rules only after a period for notice and public comment. Iowa Code § 17A.4 (2011). Yet, the IAPA contains emergency rulemaking procedures as well. Iowa Code § 17A.4(2) (2011), 17A.5(2)(b) (2011).

The IAPA creates two mechanisms that can be used to reduce the normal delay caused by the rulemaking process. Iowa Code § 17A.4(3) describes circumstances under which the notice requirement can be eliminated, while Iowa Code § 17A.5(b) lists instances in which the publication period can be disregarded. Since there are two different parts to the rulemaking process—notice and participation, and publication—there are also two procedural prerequisites

[5] For extensive discussion of emergency rulemaking under the IAPA's proper construction, *see* Arthur E. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law. The Rule Making Process*, 60 Iowa L Rev. 731, 887–88 (1979).

to reduce or dispense with the process. As explained below, neither exception applies to the Secretary's promulgation of these rules.

Normal rulemaking takes a minimum of 108 days, including publication delays, and typically lasts as long as six months. To engage in emergency rulemaking, an agency must satisfy the following criteria:

> a. To eliminate the notice requirement, the agency must find that notice and public participation would be unnecessary, impracticable or contrary to the public interest;

Iowa Code § 17A.4(3) (2011).

> b. To eliminate the publication period, the agency must find either that the advance effective date is authorized by statute, or that the rule confers a benefit or removes a restriction; or that the rule is necessary due to an imminent peril to the public health, safety, or welfare.

Iowa Code § 17A.5(2)(b) (2011).

> c. To make a rule effective prior to publication, the agency must find either that the statute so provides; the rule confers a benefit or removes a restriction on the public; or that the effective date is necessary because of an imminent peril to the public health, safety, or welfare.

Iowa Code § 17A.5(2)(b)(1),-(b)(3) (2011).

a. Notice and public participation were improperly eliminated in this case, because they were not unnecessary, impracticable, or contrary to the public interest.

Iowa Code § 17A.4(3) states that the requirements of notice can be shortened or eliminated "[w]hen an agency for good cause finds that notice and public participation would be unnecessary, impracticable, or contrary to the public interest." Notice and public participation are central to well-considered agency rulemaking and fundamental fairness and become all the more essential the more significant the liberty interests at stake. In the case of a qualified elector's ability to exercise her right to vote, the most fundamental right of our democracy, notice and an opportunity to have input in the bureaucratic process is necessary in order to avoid

an erroneous deprivation of that right. This principle is a central tenet to the determination of the amount of procedure that is due in any agency rulemaking. It is an idea that was expounded upon by Iowa's preeminent administrative law scholar, Arthur Bonfield:

> Advance public notice of agency rulemaking and an opportunity to participate therein . . . is desirable for a variety of reasons. . . . Most important is the fact that such public participation helps to elicit, from those who are in the best position to provide it, the information necessary for intelligent action by the agency making rules. Also significant is the fact that such participation is one of the most important ways in which individuals can attempt to defend themselves against an exercise of rulemaking power that may be detrimental to their interests.

Arthur Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the A.P.A.*, 23 Admin. L. Rev. 101, 104 (1970-1971).

In the preamble of the adopted administrative rules, the Secretary appears to have asserted the claimed necessity only of the Voting Complaint Law Rule, and not the Voter Purge Rule, stating:

> These amendments are necessary to establish a formal procedure for investigating and resolving complaints and information received by the Secretary of State involving but not limited to the following subject matters: election administration, absentee voting, fraudulent voting and electioneering.

See Addendum 1. However, even if the statement could be read as applying to both rules, it does not actually go to the meaning of necessity for purposes of suspending normal rulemaking. Notice of a new rule is only "unnecessary" when the change is routine or ministerial, such as changing a phone number. *See* Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. at 862. The question is not whether the amendments are necessary, as the Secretary provided, but whether it is unnecessary to provide notice and public participation in the rulemaking process. Thus, necessity goes to the significance of the change for the affected

public, and the more significant that change is, the more necessary procedural safeguards become.

In this case, far from being merely ministerial, the Voter Purge Rule will: (1) disqualify registered voters by running their names through databases "of foreign nationals who are residing in Iowa from a[n unspecified] federal or state agency;" (2) have their citizenship status verified through an unspecified means by the secretary; (3) notify the individuals caught up in the sweep (without indication of how notification will be accomplished or the individual successfully located) of the finding and criminal liability that may or may not already be attached; and (4) if no objection is made by the individual within 14 days, they will be purged. The burden of proving citizenship status in that exceedingly short time window is placed on the identified individual, rather than placing the burden of proving ineligibility on the Secretary. Iowa Admin. Code r. 721—28.5 (2012); Addendum. Similarly, the Voting Law Complaint Rule provides an alternative means of challenging an elector's qualifications or alleging voter fraud, without any of the requirements intended to ensure reliability of information currently in place in voter challenges (i.e., an oath affirming the information provided is true under penalty of significant criminal liability). *See* Iowa Code §48A.14(1) (2011). Both rules alter, in significant, fundamental ways, our voting and election laws in Iowa. Therefore, notification and public participation are not "unnecessary."

Further, notice of an intent to change the rules governing the maintenance and purging of the voter registration list and to create a formal complaint procedure would not be "impracticable." For the purposes of administrative procedure, impracticable means that notice and public participation would limit the agency's ability to function. *See* Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. at 862. The secretary does not even provide in

the preamble that normal rulemaking would be impracticable in the case of these rules. *See* Addendum 1. It is sufficient to note that the agency has been functioning without these rules for all of its history, and that notice and public participation on the substance of these rules would not appear to limit the functioning of the Secretary's office any more than the proper rulemaking procedures as adopted in the regular course of carrying out its functions.

Last, to find that notice would be "contrary to public interest," the Secretary would have to determine that the benefits of implementing the rule earlier would outweigh the considerable value of notice and public participation in the adoption process. *See* Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. at 862. The Secretary has asserted that "notice and public participation are contrary to the public interest because a formal procedure is needed prior to the November 6, 2012 presidential election to ensure that all complaints received by the Secretary are treated uniformly, investigated properly, and if necessary, forwarded to the appropriate officials for prosecution." *See* Addendum 1. First, this basis appears only to apply to the Voting Law Complaint Rule in substance, rather than the Voter Purge Rule. Addendum 1. Second, as shown in the previous section, Iowa law already provides a mechanism to challenge the qualifications of voters, such that, at least as applied to those complaints, the Voting Law Complaint Rule is both redundant and in conflict with existing Iowa election law. Iowa Code §48A.14(1) (2011). Additionally, because the rule does not actually create any formal, uniform procedure for complaints, but rather authorizes officials in their discretion to forward the complaints "for further investigation and follow-up as deemed necessary," the rule could not possibly be understood to confer the benefit it purports to confer. *See* Addendum 1.

In the case of the Voter Purge Law, the Secretary has not apparently made the same public determination that normal rulemaking would in fact be contrary to the public interest. At

least, he has failed to state any grounds on which such a finding could be based. The potential for an erroneous deprivation of the fundamental right to vote through effectuation of the Voter Purge Rule is significant, given the various unspecified databases and lists that may be used for citizenship verification, the unspecified process through which the Secretary will determine citizenship status, and the wholly inadequate and vague voter notification procedures. The ministerial convenience of foregoing opportunities for public input is illusory, as the inevitable problems of misidentification of suspected non-citizen voters can be expected to occupy at least as much time as following regular and proper rulemaking procedures to resolve ambiguities and to make the policy concrete and transparent. Moreover, the importance of the right to vote is so high that the benefit of implementing the rule earlier does not outweigh its protection.

Because any finding by the Secretary that normal rulemaking as applied to these rules would be unnecessary, impracticable, or contrary to the public interest is either absent, illogical, irrational, or wholly unjustifiable, and in all cases erroneous, notice and public participation should have been provided prior to the effective date. Because the rules have already taken effect despite their procedural and substantive defects, an injunction against their further effectuation is necessary.

b. The publication period was improperly eliminated in this case because no advance date is authorized by statute, the rules neither conferred a benefit nor removed a restriction, and there was no imminent peril to public health, safety, or welfare.

To reduce or eliminate the publication period, an agency must make a finding that the immediate effective date is authorized by statute; that the rule confers a benefit or removes a restriction; or that the rule is necessary due to an imminent peril to the public health, safety, or welfare. Iowa Code §17A.5(b) (2011). None of the statutorily required situations exist. *See* Iowa Code §§39A, 48A, 49, 53. Indeed, the only finding pertaining to the elimination of the

publication period appears to address the Voting Law Complaint Rule only, and not the Voter Purge Rule:

> These amendments confer a benefit upon the voting public by ensuring there is a legitimate procedure in place for investigating and resolving complaints involving but not limited to the following subject matters: election administration, voter registration, absentee voting, fraudulent voting and electioneering.

Addendum 1. Nevertheless, the findings required to reduce or eliminate the publication period are not met as applied to either rule.

An immediate effective date, as to either rule, is not authorized by statute. The statutes the Secretary purports to be effectuating consist of all of Iowa Code §§ 39–53, *see* Addendum 1, none of which authorize an immediate effective date for these rules (and do not, as argued *infra*, in fact authorize the Secretary to promulgate these rules himself even through the regular rulemaking process). On its face, Sections 39 through 53 do not provide for any applicable accelerated effective date, so Section 17A.5(b)(1) (2011) simply does not apply. Likewise, the rules in question neither "confer a benefit" nor "remove a restriction." The foreseeable effect of the Voter Purge Rule is to deprive qualified individuals of the fundamental right to vote and to place an additional restriction on naturalized U.S. citizens who are erroneously identified by the Secretary and purged from the voter rolls.

The effect of the Voting Law Complaint Rule, at least as it pertains to complaints alleging voter fraud, is to circumvent the very reasonable and prudent requirements in the existing Iowa voter challenge law, such as an oath under penalty of criminal prosecution for false allegations or assertions. Iowa Code §48A.14(1) (2011). Instead, an alternative procedure is put in place that removes those important safeguards of credibility and reliability of the information. Addendum 1. Rather than confer a benefit, the Voting Law Complaint Rule subjects qualified

voters to allegations of voter fraud by other citizens based on the basis of personal grudges, political or ideological aspirations, race, ethnicity, language, or even for no reason at all. Thus, to the contrary, the rules *remove* the public benefit of a fair election free of voter suppression wrought by an ill-conceived and illegitimate methodology and *add* a restriction on access to the polls.

Finally, emergency rulemaking for either rule could not be justified on the grounds of imminent peril to the public health, safety, or welfare. The current election laws in place prior to the adoption of these rules as well as any other voting or election conditions in existence at the time of the adoption of the new rules did not place any member of the public in peril or jeopardize the integrity of Iowa's electoral system.[6] Rather, the offending rules have the potential to eliminate duly qualified electors from the voting rolls and distort election results by excluding groups which are more likely to be erroneously stricken, including Latino citizens,[7] naturalized U.S. citizens, those for whom the Secretary has no valid address or contact information, and those who, due to travel, age, disability, illness, or some other impairment, will be unable to respond with documentation of citizenship prior to the 14-day period lapsing.[8] This

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[6] *See* Addendum 1, citing no specific instances of voter fraud the new rules sought to address.

[7] Even if the risk of erroneous name-matching were comparable across racial or ethnic groups and there is reason to believe that it is not, Latinos run a higher risk of erroneous purging from slipshod citizenship verification procedures because of the higher non-citizenship rate for this group. The U.S. Census Bureau American Community Survey's 5-Year historical estimates for 2006 to 2010 reflects that there are approximately 136,932 Latinos in Iowa, 40,572 are estimated to be non-citizens. U.S. Census Bureau, 2006-2010 American Community Survey Estimates, Citizenship Status in the United States for Latinos [B05001]. That is a 26.93% non-citizenship rate.

[8] As has been widely reported, Florida's current attempt to carry out a similar voter registration purge provides an arresting illustration. Of the roughly 1600 voters in Miami-Dade county who were sent letters informing them of the Secretary of State's determination that they had registered illegally, over 500 have already proven that they are in fact U.S. citizens who are

exceedingly short time window does not afford voters an adequate safeguard against erroneous removal from the rolls.[9] Quite contrary to their putative purpose, these rules treat the voting rights of naturalized and particularly Latino citizens in a reckless manner and threaten the integrity of Iowa's elections.

There is no showing of exigency or emergency to forgo the normal rulemaking process. The Preamble to the rules cites a purported necessity to ensure proper procedures are in place for

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eligible to vote. *See, e.g.,* Alvarez, *Florida Defends Search for Ineligible Voters,* N.Y. Times, June 6, 2012 *available at* http://www.nytimes.com/2012/06/07/us/florida-vows-to-continue-its-search-for-ineligible-voters.html?_r=3&ref=politics (last visited Aug. 5, 2012). That is a known error rate of at least 30% for Florida's attempted purge. Further, the list generated by Florida's Secretary of State is 61% Latino in composition, despite Latinos making up only 14% of all registered voters in Florida. By contrast, only 16% of the people on the list are white, even though whites account for 70% of all registered voters. *Id.*

[9] State voter purge procedures that have been upheld against challenges generally afford voters 30 days or more to respond to notice that their names will be removed from registration rolls. *See, e.g., Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1265 (D. Colo. 2010) (upholding a state procedure providing that an individual deemed "not registered" because of an address challenge shall have 90 days to respond to a confirmation card and be reinstated to "active" status and noting that during the 28 days before an election, the voter may be reinstated by appearing in person at the county clerk's office); *Teel v. Darnell*, 1:07-CV-271, 2008 WL 474185, at *8 (E.D. Tenn. Feb. 20, 2008) (holding that process was sufficient where voters received notice that their registrations had been purged and were given 30 days to seek reinstatement); *Ortiz v. City of Philadelphia Office of City Com'rs Voter Registration Div.*, 824 F. Supp. 514, 518 (E.D. Pa. 1993) *aff'd*, 28 F.3d 306 (3d Cir. 1994) (upholding a state procedure that required voters to respond to "notice of failure to vote within two years" with a written request submitted ten days prior to the next election); *Williams v. Osser*, 326 F. Supp. 1139, 1141-42 (E.D. Pa. 1971) (denying motion for preliminary injunction against a state procedure that instructed a person who has received notice that his registration may be purged to file a written request for reinstatement within ten days, but also granting requests for reinstatement up to and on Election Day). *See also Michigan State UAW Cmty. Action Program Council v. Austin*, 387 Mich. 506, 519-20 (1972) (striking down a state procedure for removing from registration rolls those who had not voted in the previous two years, where challenged voters had 30 days to respond to notices they received, due to a lack of a compelling state interest). Michigan now provides that voters must respond to notice that their registration has been purged because of an address challenge with a card postmarked 30 days or more before the next election. MICH. COMP. LAWS ANN. § 168.509aa.

citizens' complaints prior to the upcoming General Election. *See* Addendum 1. But the reality is any exigency is purely of the Secretary's own doing. The Secretary was fully aware of all election dates and had ample opportunity to follow regular rulemaking procedures to issue the offending rules.[10] Such unnecessary delay cannot be allowed to manufacture the circumstances that would justify emergency rulemaking. The requirement of an exigency or emergency in order to issue emergency regulations is a substantive and vital requirement aimed at ensuring appropriate notice and public comment and preventing the adoption of misguided rules or rules that exceed an agency's authority. Rules implicating the fundamental right to vote must be particularly safeguarded by these due process protections.

It is useful to note that the legislature has specifically delineated the circumstances under which the Secretary can exercise emergency powers for electoral administration, none of which apply in this case. Iowa Code § 47.1(4) (2011). The Secretary's emergency rulemaking powers are only invoked in times of real and severe crisis and are never based on mere political or administrative convenience. The legislature has provided examples of the circumstances which would warrant emergency rulemaking powers: "a natural or other disaster or extremely inclement weather," "an armed conflict involving the United States armed forces," or where an

[10] In an interview on Iowa Public Radio, the Secretary stated that this is "a concern I've had before I was elected Secretary of State." *Iowa Secretary of State Checking Voter Rolls for Non-Citizen* Immigrants (Iowa Public Radio broadcast Jul. 20, 2012), *available at* http://news.iowapublicradio.org/post/iowa-secretary-state-checking-voter-rolls-non-citizen-immigrants. However, he waited a year and a half before taking any action prior to the June 5, 2012 primary elections or the Iowa Caucuses. The regulation was filed on an emergency basis on July 20, 2012, only once the time for a regular rule to take effect before the election had passed.

Members of Iowa's Legislature's Administrative Rules Review Committee had no notice of the rules, and have questioned Schultz's decision to enact them without any public notice or input. Ryan Foley, *Lawmakers rip lack of input in Iowa voting rules*, Associated Press, Aug. 9, 2012, *available at* http://www.desmoinesregister.com/viewart/D2/20120809/NEWS/308090093/Lawmakers-rip-lack-input-Iowa-voting-rules.

election court finds that "there were errors in the conduct of an election making it impossible to determine the result." Iowa Code § 47.1(2) (2011); *id.* r. 721—21.1 (2011) (same).

Moreover, in such cases of actual emergency, the Secretary is required to declare the emergency due to natural or other disaster or extremely inclement weather *prior to* modifying the conduct of the affected election. *Id.* r. 721—21.1(3)–(4) (2011). Even then, the specific authorized modifications are delineated: "relocation of the polling place, postponement of the hour of opening the polls, postponement of the date of the election if no candidates for federal offices are on the ballot, reduction in the number of precinct election officials in nonpartisan elections, or other reasonable and prudent modifications that will permit the election to be conducted." *Id.* r. 721—21.1(4) (2011). Those permitted modifications are further limited by law. *Id.* r. 721—21.1(5)–(14) (enumerating modifications including but not limited to requiring the new polling place to be as close as possible to the one it was relocated from, requiring postponement of the election date not occur beyond the following Tuesday of the date it was originally scheduled for, or requiring that absentee ballots continue to be delivered until the new date of the postponed election).

This level of specification demonstrates a legislative intent to narrowly define and limit the Secretary's powers pertaining to elections and voting, even in an emergency context. The vital importance of a democratic process to change election and voting laws is self-evident. The Voter Purge Rule should only be allowed to take effect following statutory authorization by the legislature (*see infra*), strict adherence to due process in rulemaking, and with the oversight of the Voter Registration Commission. The right to vote is fundamental; without a strict interpretation of the delineated emergency powers, those powers may be abused to suppress lawful and qualified voters.

II. THE SECRETARY OF STATE EXCEEDED HIS STATUTORY AUTHORITY IN PROMULGATING THE RULES.

The Secretary lacked the requisite statutory authority to promulgate both the Voter Purge Rule and the Voting Law Complaint Rule. As to the Voter Purge Rule, the Voter Registration Commission, not the Secretary alone, is vested with the authority to promulgate rules concerning procedures for maintaining the voter registration list in Iowa. The Voting Law Complaint Rule, as applied to complaints alleging voter fraud or otherwise attacking voters' qualifications, similarly contravenes existing law and is inconsistent with legislative intent to protect voters from frivolous, erroneous complaints and disfranchisement.

a. The Secretary of State lacked authority to promulgate the Voter Purge Rule.

In promulgating the Voter Purge Rule, the Secretary cited his authority as state commissioner of elections under Iowa Code § 47.1 (2011). However, the Voter Registration Commission ("VRC"), not the Secretary of State, is vested with the authority to promulgate policies and rules to maintain and purge the voter registration list. Because the VRC has not authorized the Secretary's actions in this case, he has no authority to act by fiat alone.

The Secretary is the state commissioner of elections and is charged with supervising the county commissioners. Iowa Code § 47.1(1) (2011). As such, the Secretary has the authority to "prescribe uniform election practices and procedures, shall prescribe the necessary forms required for the conduct of elections, shall assign a number to each proposed constitutional amendment and statewide public measure for identification purposes, and shall adopt rules, pursuant to chapter 17A, to carry out this section." Iowa Code § 47.1(1) (2011). Likewise, the Secretary is the chief state election official responsible for ensuring that the state complies with the National Voter Registration Act of 1993. Iowa Code § 47.1(3) (2011). The Secretary is also

the state registrar of voters, charged with preparing, preserving, and maintaining voter registration records. Iowa Code § 47 (2011).

However, the Secretary can only exercise his state registrar powers "in accordance with the policies of the voter registration commission." Iowa Admin. Code r. 821—1.2. The legislature created the VRC to "make and review policy, adopt rules, and establish procedures to be followed by the registrar in discharging the duties of that office, and to promote interagency cooperation and planning." Iowa Code § 47.8(1) (2011). As the state commissioner of elections, the Secretary serves as chairperson for the VRC. Iowa Code § 47.8(1)(c) (2011). However, he is not the *whole* commission. The VRC consists of four members: the state commissioner of elections, and the chairpersons of the two state political parties whose candidates for either President of the United States or for Governor in the most recent general election received the greatest number of votes, or their designees, and a person appointed by the president of the Iowa State Association of County Auditors. Iowa Admin. Code r. 821—1.1 (2011). A quorum of the commission is four members, and no official action may be taken in the absence of a quorum. *Id.* r. 821—1.3(7) (2011). To prevail, a motion, declaratory ruling, or ruling in a contested case must receive the votes of a majority of commissioners present and voting. *Id.*

The Secretary is charged with being the state's voter registrar, but rules and regulations regarding voter registration are solely the purview of the VRC. Iowa Code § 47.8(1); Iowa Admin. Code r. 821—1.2. The Voter Purge Rule usurps the Iowa legislature's authority, which has specifically legislated the exclusive means of maintaining voter registration lists. Iowa Code §§ 48A.28, 48A.30. The VRC has the responsibility to "make and review policy, adopt rules, and establish procedures to be followed by the registrar [i.e. the secretary of state acting in his capacity as the state registrar of voters] in discharging the duties of that office. . . ." *Id.* § 47.8

(2011). The Secretary is charged with being the state's voter registrar, but rules and regulations regarding voter registration are solely within the purview of the VRC. Iowa Code § 47.8(1); Iowa Admin. Code r. 821—1.2.

Thus, rules pertaining to the purging of voter registration lists should be established by the VRC, not the Secretary of State. There has been no policy determination or other action by the VRC authorizing the Voter Purge Rule's promulgation, and therefore, the Secretary exceeded his statutory authority.

b. The Secretary of State lacked authority to promulgate the Voting Law Complaint Rule.

The Secretary's actions are also precluded by the General Assembly, which has already created the exclusive mechanism for challenging a registered voter's registration. Iowa Code § 48A.14 (2011). An agency may not adopt rules that are contravened by statute. *See, e.g., Barker v. Iowa Dep't of Transp., Motor Vehicle Dep't*, 431 N.W.2d 348, 350 (Iowa 1988) (holding the Iowa Department of Transportation lacked authority to promulgate rule establishing a "margin of error" for breath alcohol concentration test, when statute failed to designate one or authorize Department to make this designation); *S & M Fin. Co. Fort Dodge v. Iowa State Tax Comm'n*, 162 N.W.2d 505, 510 (Iowa 1968) ("The commission itself is powerless to adopt rules inconsistent with, or in conflict with, the law to be administered."). The legislature has implemented a system under which any registered voter may challenge the registration of another voter in his or her county by submitting a written statement to the commissioner. Iowa Code §§ 48A.14(1), 49.79 (2011). Notably, the legislature sets a very high bar for challenging the registration of another voter: the individual must swear and affirm that all information he or she alleges is true, and must risk prosecution for an aggravated misdemeanor for knowingly including false information in the challenge. Iowa Code § 48A.14(3) (2011). By creating the

risk of criminal prosecution for falsely accusing a voter of registering illegally, the legislature demonstrated an intent to protect qualified Iowa voters from frivolous challenges to their voting rights.

The Voting Law Complaint Rule, as applied to complaints of alleged voter fraud or challenges to a voter's qualifications, directly undermines Iowa Code § 48A.14 (2011). Rather than implementing Iowa Code §§ 39–53 (2011), it contravenes it. The Voting Law Complaint Rule provides no safeguard against frivolous complaints.[11] Unlike the process for challenging

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[11] The Secretary of State has long made known his intentions to address the thus-far unsubstantiated, but often asserted, problem of voter fraud. In 2012, he held a press conference unveiling a draft of a new "Voter ID" law, which was never formally filed as proposed legislation in the face of a clear lack of support from a sufficient number of legislators, as well as county auditors throughout the state. He has repeatedly stated the rationale for Voter ID in Iowa is an allegedly rampant voter fraud problem. Despite the existing serious criminal sanctions facing the theoretical voter who knowingly engages in voter fraud and, thus far, the complete lack of evidence to support his assertions, the Secretary of State has, for example, repurposed the old 1-888-SOS-VOTE number, long used as an Election Hotline to help answer voters' questions, as a new "Voter Fraud Hotline" where complaints of alleged voter fraud can now be reported to the secretary's office. *See* Iowa Secretary of State Website, Voter Fraud Email, *available at* https://sos.iowa.gov/elections/voterfraud/index.aspx.

An open records request filed by the Associated Press showed that despite his efforts, the Secretary of State has yet to uncover proven instances of the voter fraud problem in Iowa. Ryan Foley, *Iowa elections chief seeks to prove voter fraud*, ASSOCIATED PRESS, July 14, 2012, , *available at* http://www.sfgate.com/news/article/Iowa-elections-chief-seeks-to-prove-voter-fraud-3707053.php. ("'I would like to emphasize that the individuals reported to our office were not found to have participated in any intentional wrongdoing that could be classified to the level of 'fraudulent','" Angela Davis, the staff attorney in Schultz's office, wrote to AP, which asked for records related to all voter fraud investigations.") The Secretary of State said other instances that were not disclosed had been sent to the Iowa Division of Criminal Investigation and local prosecutors for investigation. *Id.*

On Wednesday, August 9, 2012, the Secretary of State informed Iowa's county auditors that he had assigned an Iowa Division of Criminal Investigation agent Daniel Dawson to a two-year term in the Secretary of State's office to investigate voter fraud. *DCI agent investigating 2,000 Iowa voters,* ASSOCIATED PRESS, Aug. 10, 2012, *available at* http://www.kcci.com/news/central-

another Iowan's right to vote enacted by the legislature, the Voting Law Complaint Rule has no requirement of an oath or penalty for false filings. Moreover, non-frivolous complaints have no guarantee of further process or action by the agency, which is left with unfettered discretion to "forward for further investigation and follow-up as deemed necessary."

The Voting Law Complaint Rule, while not only unnecessary given the provisions of Iowa Code § 48A, actively and unquestionably undermines the language and requirements set forth in Iowa Code § 48A as applied to voter challenges. Because it directly undermines the statutory standard for challenges to voter eligibility, the Secretary exceeded his statutory authority to make rules implementing Iowa Code §§ 39–53 (2011).

III. EVEN IF PROPERLY PROMULGATED AND ADOPTED UNDER IOWA ADMINISTRATIVE LAW, ENFORCEMENT OF THE CHALLENGED RULES POSE A SUBSTANTIAL LIKELIHOOD THAT QUALIFIED IOWA ELECTORS WILL BE ERRONEOUSLY DEPRIVED OF THEIR FUNDAMENTAL RIGHT TO VOTE IN VIOLATION OF FEDERAL AND STATE LAWS.

A consistent line of decisions by the United State Supreme Court in cases involving attempts to deny or restrict the right of suffrage has made indelibly clear that any alleged infringement on the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Even though the claims asserted in this petition focus on the Secretary's violation of administrative rules in promulgating the Voter Purge Rule and the Voting Law Complaint Rule, the underlying impact of enforcing these rules would be the increased

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iowa/DCI-agent-investigating-2-000-Iowa-voters/-/9357080/16052502/-/xm1vdo/-/index.html. County auditors related to the press that Dawson had already indicated at least 2,000 registered Iowa voters were under investigation. *Id.*

likelihood that eligible voters will be unlawfully removed from the voter rolls and denied the right to cast a ballot. As such, the challenged rules raise serious equal protection and due process concerns, as well as possible violations of other federal and state laws.

More specifically, the Voter Purge Rule allows the Secretary to use unspecified but "predetermined" procedures to match the names of registered voters with unspecified lists of foreign nationals and direct any matching names to "appropriate" agencies that are not identified. This rule also allows the Secretary to rely on an agency's list without setting any concrete standards, guidelines, or policies even if the list is known to be outdated or to contain insufficient cross-checking information to guard against database-matching errors. The Secretary would also enjoy unfettered discretion as to the manner and frequency of voter roll purges. The annual list maintenance process spelled out in the Iowa Code is given a clear time frame for action. However, the Voter Purge Rule would grant the Secretary total discretion with respect to the manner and timing of voter purges, regardless of how close to an election the purge is performed. And equally egregious, the rule shifts the burden to voters to prove their eligibility and only provides a short 14-day window within which a person can do that, assuming the person receives notice of their possible removal from the rolls in the first place.

Another serious and detrimental impact of applying these rules is the chilling effect they would have on voters who otherwise would be able to exercise their fundamental right to vote. The Voter Purge Rule grants the Secretary new authority to send intimidating letters to voters which will likely decrease participation among citizens who receive such notices despite being qualified electors and who might cancel their registration based on threatening language in the notification, or who simply choose not to vote out of fear that doing so will bring about an unnecessary criminal investigation that will cost the voter time and money. Therefore, given the

substantial risk that the challenged rules will result in an unlawful deprivation of voting rights to eligible citizens coupled with the chilling effect these rules pose to the exercise of this right, an injunction to prevent the Secretary from enforcing the Voter Purge Rule and the Voting Law Complaint Rule is warranted.

CONCLUSION & PRAYER FOR RELIEF

For the reasons set forth in the Brief in support of Petition for Judicial Review of Agency Action, Petitioners respectfully request the following relief:

1. Injunctive relief enjoining Defendant, his successors in office, agents, employees, attorneys and those persons acting in concert with him or at his direction from using and implementing the new voter purge procedures, and ordering Defendant to employ his full authority to direct all county auditors to cease purging the voter lists pursuant to the Voter Purge Rule.
2. Injunctive relief enjoining Defendant, his successors in office, agents, employees, attorneys, and those persons acting in concert with him or at his direction from using and implementing the Voting Law Complaint Rule.
3. Engage in affirmative, corrective measures, including but not limited to sending letters rescinding its previous correspondence to county auditors relating to the Voter Purge Rule, the Voting Law Complaint Rule, and any policies or procedures set forth to implement those rules, and to report immediately to this Court any county that refuses to comply;
4. An order of this court retaining jurisdiction over this matter until Defendant has complied with all the orders and mandates of the Court;

5. The costs of this suit, including reasonable attorneys' fees; and

6. Such other and further relief as this court may deem just and proper.

Injunctive relief is requested both in the form of temporary injunctive relief as well as permanent injunctive relief. Petitioners also maintain their request for an expedited briefing schedule and an expedited hearing on the request for temporary injunction.

WHEREFORE, Petitioner respectfully requests this Honorable Court grant the relief requested herein and grant any other relief in the interest of justice.

Respectfully submitted,

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** Pro hac vice admission application pending.

*Bar Admission in Iowa pending.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties in the above case to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the 10 day of August, 2012 by U.S. mail.

Joseph Glazebrook

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