

**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  
SHULTZ,**

Respondent.

Case No. CVCV009311

**PETITIONER'S REPLY BRIEF IN  
SUPPORT OF TEMPORARY  
INJUNCTIVE RELIEF**

**COME NOW** Petitioners, the American Civil Liberties Union of Iowa and the League of United Latin American Citizens of Iowa, by and through the undersigned counsel, and in support of their Reply to Respondent Matt Shultz's Resistance to Motion for Temporary Injunctive Relief, respectfully submit this brief.

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## **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. Petitioners pray for temporary injunctive relief. *See* Brief in Support of Petition for Judicial Review.

## **STANDARD OF REVIEW**

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

## **ARGUMENT**

Petitioners respectfully ask this Court to grant their request for temporary injunctive relief, and deny Respondent's motion in resistance. Because Petitioners are not required to exhaust all administrative remedies before seeking judicial review in this case, this Court has proper jurisdiction. Moreover, Petitioners have demonstrated a likelihood of success on the merits, that they will suffer irreparable injury if relief is not granted, and that relief is in the public interest and will ensure the integrity of the upcoming election by protecting and promoting access to the polls by qualified, eligible voters.

**I. Petitioners Are Not Required to Exhaust Administrative Remedies Before Seeking Judicial Review, and This Court Has Jurisdiction Over the Controversy.**

Respondent incorrectly states the circumstances under which this Court can exercise judicial review of administrative actions. *See* Brief in Support of Resistance to Motion for Temporary Injunctive Relief. Respondent is correct in stating that the petition is governed by Iowa Code § 17A.19, but is incorrect in his assertion that Petitioners must “first seek temporary relief with the Secretary of State” before the court has jurisdiction to grant injunctive relief. Respondent’s Resistance to Motion for Temporary Injunctive Relief ¶ 3-4. While it is generally true that a plaintiff must seek a stay from the agency itself before seeking judicial review, both the Iowa Code and the Iowa Supreme Court have noted a number of exceptions to this rule, at least two of which exist in the present action. These exceptions, discussed more fully below, were detailed in the Petition. *See* Petition for Judicial Review. Respondent did not refute them in his response. *See* Brief in Support of Resistance to Motion for Temporary Injunctive Relief.

First, as stated in the Petition, Petitioners are seeking judicial review of agency action as a violation of the rulemaking process. The Iowa Supreme Court has stated that administrative remedies need not be exhausted 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). Here, parties agree that this challenge is brought under Iowa Code § 17A.19. The Petition asserts that the Secretary violated the rulemaking procedures of the Iowa APA in three ways: (1) by utilizing emergency rulemaking procedures in a non-emergency situation; (2) by exceeding his authority in promulgating the rules unilaterally by circumventing the Voter Registration Commission; and (3) by providing inadequate process to ensure that qualified electors were not stripped of their right to vote. Petition for Judicial Review at 21-37. Respondent acknowledges this, and nowhere does

Respondent claim that the challenge is not based on the Secretary's alleged violation of the rulemaking procedures set forth in the Iowa APA. Brief in Support of Resistance to Motion for Temporary Injunctive Relief. Since the challenge is based on an agency violation of the proper rulemaking procedures, Petitioner were not required to exhaust administrative remedies and can in fact seek judicial review without ever even contemplating seeking administrative remedies, especially if doing so would have been futile.<sup>1</sup>

A second exception to the requirement that administrative remedies be exhausted exists in this case. Where "application to the agency for a stay or other temporary remedies is an inadequate remedy, the court may grant relief." 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"). Thus, exhaustion of administrative remedies is not necessary where administrative remedies would not provide an adequate remedy. As discussed in the Petition, no adequate result can be achieved by petitioning the Secretary for a stay or other administrative remedy because the harms are already occurring and will continue to occur prior to any resolution of such a petition. Brief in Support of Petition for Judicial Review at 14-16. The rules are already in effect, and the Secretary has already taken action to identify individuals he suspects are non-citizens at the time of registering to vote, based on records from the Iowa DOT. *See* Affidavit of Secretary of State Matt Schultz. Additionally, as the Petitioners' supporting affidavits state, the

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<sup>1</sup> Petitioners note that they requested a stay of these rules from the Secretary on August 17, 2012. *See* Request for Administrative Stay. The Secretary of State formally denied Petitioners' Request for an administrative stay on August 21, 2012 and specifically stated that, even if the request had been made prior to Petitioners filing this lawsuit, his office still would have denied the request. *See* Denial of Request for Administrative Stay. In addition to the formal exhaustion of administrative remedies, the Secretary's numerous public statements to the press, on the record, and his filing of this motion to dismiss indicate that no remedy is forthcoming from the Secretary's office. *See* Matt Schultz, *Iowa Secretary of State Matt Schultz Comments on Recent Rule Change* (Media Release), Aug. 9, 2012, available at [http://sos.iowa.gov/news/2012\\_08\\_09.html](http://sos.iowa.gov/news/2012_08_09.html).

Secretary's action has already had a chilling effect on voter registration by causing eligible voters to forgo registering to vote for fear of the likely, although unwarranted, criminal prosecution they might face, the financial costs associated with defending such prosecutions, and the damage to their reputations simply for exercising their right fundamental right to vote. *See* Affidavit of Joe Henry. *See also* Affidavits of New Citizens.

As is further laid out in the Petition, the Voter Registration Commission (VRC) cannot provide an adequate remedy, even were it to have unquestioned authority to stay the rules unilaterally promulgated by the Secretary. *See* Brief in Support of Petition for Judicial Review at 14-16. The VRC is only required to meet quarterly throughout the year and need not address a request for administrative relief until the second meeting after the request is received. *Id.*, Iowa Admin. r. 821—1.3(7). Although the dates of the meetings are not readily available, even assuming the most recent meeting was held on the day the Petition was filed (August 10, 2012) the VCR would not have had to consider a request for relief until after the November 6, 2012 election. The harm to erroneously stricken voters, as well as the harms to qualified electors who fear being targeted by the Secretary and thus forgo registration or voting, are likely to occur prior to any VCR action. The harms to Petitioners in their efforts to register Latinos to vote in Iowa are already occurring. *See* Affidavit of Joe Henry. Therefore, even if granted, an administrative remedy would be inadequate.

Also, the Supreme Court repeatedly has ruled that a plaintiff need not exhaust administrative remedies or undergo any other action prior to challenging the denial of a constitutional right if doing so would be fruitless. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974) (“One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.”) (internal quotation marks omitted); *See also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) (“The Supreme Court has

long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds.”). This exception to the doctrines of ripeness and exhaustion requires a plaintiff to show that undergoing a particular act would indeed be futile. *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

Because petitioners assert both a violation of the Iowa APA rulemaking process 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 or would otherwise be futile, judicial review is proper at this stage, and the court has jurisdiction under the Iowa APA.

## **II. Petitioners Have Demonstrated that Injunctive Relief is Warranted.**

When considering an application for a stay of final administrative action, the court should consider the balance of four factors laid out by statute:

- 1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter;
- 2) The extent to which the applicant will suffer irreparable injury if relief is not granted;
- 3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings;
- 4) The extent to which the public interest relied on by the agency is sufficient to justify the agency’s action in the circumstances.

Iowa Code § 17A.19(5)(c). As discussed in the Petition and below, the balance of these four factors strongly supports a stay of administrative action.

### **1. Petitioners are Likely to be Successful in Each of Their Claims**

Petitioners have identified three grounds upon which they should succeed on the merits: (1) the Secretary’s use of emergency rulemaking powers was improper; (2) the Secretary lacked statutory authority to promulgate the rules; and (3) the rules are too vague and lack safeguards to ensure against the erroneous deprivation of the fundamental right to vote. As is illustrated in the Petition, petitioners are likely to succeed on all three stated grounds. *See* Brief in Support of Petition for Judicial Review. As discussed below, Respondent’s arguments to the contrary are unpersuasive.

**a. The Secretary's use of emergency rulemaking powers was improper.**

Respondent's argument in support of the use of the emergency rulemaking power is that time constraints made the use of emergency rules "necessary." ("There simply was not enough time between July 17 and November 6 to promulgate these rules under the procedure in 17A.4(1).") Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 13. This is a grave misunderstanding of what the term "necessary" means in the context of exercising emergency powers under Iowa Code § 17A.4(3).<sup>3</sup> Iowa Code §17A.4(3) states that the requirement 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." (emphasis added.). On its face, the statute is unconcerned with whether the rule is "necessary" to effectuate the purported purpose, but rather whether *notice and public participation* are "unnecessary."<sup>4</sup> Notice and public participation in the rulemaking process are only unnecessary where the change is routine or ministerial, such as changing a phone number or address. See Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. at 862. Far from being ministerial, the rules promulgated by the Secretary alter in significant and fundamental ways Iowa's voting and election laws. As such, notice and public participation were not "unnecessary," and the Secretary's use of emergency powers to promulgate them was improper.

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<sup>3</sup> Although not the primary issue, the timeline laid out in the Secretary's affidavit raises serious questions about the "necessity" of the process he ultimately chose, even under the general definition of the term. The Secretary had two full legislative sessions to petition the general assembly for the power he has now granted himself. Indeed, members of the general assembly were surprised by his actions, and when the Legislative Administrative Rules Committee requested that the Secretary attend a recent meeting and explain his exercise of emergency powers, "he declined to publicly defend his actions." Rob Boshart, *Secretary of State 'Undermining' Iowans' Voting Rights, Senate Leader Says*, WATERLOO CEDAR FALLS COURIER, Aug. 15, 2012, available at [http://wcfcourier.com/news/local/govt-and-politics/secretary-of-state-undermining-iowans-voting-rights-senate-leader-says/article\\_a9d4a506-e6d9-11e1-9195-001a4bcf887a.html](http://wcfcourier.com/news/local/govt-and-politics/secretary-of-state-undermining-iowans-voting-rights-senate-leader-says/article_a9d4a506-e6d9-11e1-9195-001a4bcf887a.html) (last visited 8/19/12).

<sup>4</sup> For extensive discussion of emergency rulemaking under the Iowa APA'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).



Although the Secretary did not say so in his statement (preamble) to the emergency rules, Respondent's reply seems to argue that notice and public participation would have been "impracticable" in this situation. Respondent seems to assume that "impracticable" means the same thing he argues "necessary" meant: that, had the Secretary begun the normal rulemaking process for adopting these rules on July 20, 2012, it would have been too late for them to become effective before the November 6, 2012 election.<sup>5</sup> ("'Good cause' exists here because notice and public comment of both the Voter Complaint Rule and the Voter Purge Rule were impracticable due to the limited amount of time between the promulgation of the rules and the November election.") Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 12. Again, this is a fundamental misunderstanding of the Iowa APA. "Impracticable" in the context of Iowa Code § 17A.4(3) does not mean there simply isn't enough time to do what Respondent desires through the normal rulemaking process. Within the context 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. As stated in the Petition, 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

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<sup>5</sup> Again, it is unclear why the Secretary waited so long before finally declaring an emergency and passing the rules unilaterally. Respondent's petition claims that the reason for the delay is that the Secretary wanted to ensure that he would have access to the SAVE database before carrying out the Voter Purge Rule. Brief in Support of Resistance to Motion for Temporary Injunctive Relief. Yet the rule itself makes no reference to the SAVE database, so it is unclear why the Secretary did not seek to pass the Rule through the normal rulemaking process during any of his first eighteen months in office. Beyond that, the Secretary's Affidavit includes a timeline that demonstrates he was seeking access to the SAVE database at least as of March 30, 2012, notably while the legislature was still in session, and with over six months before the 2012 General Election. See Affidavit of Secretary of State Matt Schultz at Exhibit 1. The Secretary still does not have access to the SAVE database, nor does he expect to have access in time to use it for the November 6, 2012 election, so it remains unclear why the Secretary chose to act on July 20, 2012, 554 days after he assumed office and only 109 days before the November 6, 2012 election. Finally, whatever emergency the Secretary believed existed as to his claims of a rampant voter fraud problem were purportedly discovered on March 27, 2012, when the Iowa DOT provided the Secretary with a purported list of "3000 foreign nationals ...registered to vote in Iowa." *Id.* The rules which he claims were promulgated pursuant to that emergency were enacted only after Iowa's June primaries. *Id.*

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. *See* Brief in Support of Petition for Judicial Review.

To find that notice is "contrary to public interest," Respondent would have to show 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. Respondent does not attempt such a showing in his reply brief..

The Secretary improperly waived the thirty-five day waiting period for effectiveness. In order to make a rule effective before the waiting period, "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)(1-3) (2011). Respondent argues that the Voter Purge Rule conveys a benefit to the public because it "provides due process" for challenged voters by creating "safeguards" to ensure that voters are not stripped of their voting rights based on inaccurate information. Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 14. Regardless of the Secretary's intentions, the Voter Purge Rule, as written, does no such thing. The foreseeable effect of the Voter Purge Rule is to chill voter registration among Latinos in Iowa and to place an additional restriction on naturalized U.S. citizens who are erroneously identified by the Secretary and/or the underlying data upon which he intends to rely. *See* Brief in Support of Petition for Judicial Review.

Likewise, respondent claims that the Voting Law Complaint Rule confers a benefit on the public in that it provides a "transparent, uniform system for investigating and removing ineligible voters from the registration records." Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 14. However, a "transparent and uniform system for removing ineligible voters from

the registration records” already exists under Iowa law. *See* Iowa Code § 48A.14(1) (2011). The Voting Law Complaint Rule in fact removes the benefits conferred by Iowa Code § 48A.14(1), most notably the requirement that an individual sign an oath under penalty of criminal prosecution for brining a false allegation against a qualified elector. The Voting Law Complaint Rule strips citizens of the important safeguards of credibility and reliability of information found in Iowa Code § 48A.14(1), and opens them up to criminal investigation based on mere speculation, political or ideological aspirations, racial or ethnic bigotry, or any other host of invalid reasons. *See* Election Complaint Form. Thus, the rules in fact *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. Therefore, the publication period should not have been waived.

Moreover, the circumstances that would allow for emergency rulemaking did not exist in this case. The only exigency claimed by Respondent, that of the short amount of time before the November 6, 2012 election was entirely of the Secretary’s creation. The date of the November 2012 election is common knowledge and the Secretary had 18 months in office during which he could have attempted to pass these rules through the normal rulemaking process or petition the general assembly for the powers he now bestows himself. The requirement that an emergency or exigency truly exists before using emergency rulemaking procedures is a substantive and vital requirement that ensures appropriate notice and public comment and protects citizens from the adoption of misguided rules or rules that exceed the agency’s authority. Rules that implicate the fundamental right to vote must be particularly safeguarded by these due process protections. [case cite?]

Finally, Respondent’s brief does not address Petitioner’s argument that the legislature specifically delineated the circumstances in which the Secretary could exercise emergency powers. *See* Petition at 31-32. By statute, the Secretary’s emergency rulemaking powers can only be invoked in

times of real, immediate, and severe crisis, and can never be based on mere political or administrative convenience. Examples which the legislature states warrant the use of emergency rulemaking powers include “a natural or other disaster,” “an armed conflict involving the United States armed forces,” or where a court has found that “there were errors in the conduct of an election making it impossible to determine the result.” Iowa Code § 47.1(2) (2011); Iowa Admin. r. 721—21.1. None of these circumstances existed in the present case. Even if such an emergency did exist, the Secretary can only take such actions as are necessary to “permit the election to be conducted.” Iowa Admin. r. 721—21.1(4). The Rules promulgated by the Secretary have nothing to do with permitting the November 6, 2012 election to be conducted, and the harms they purport to address do not rise to anywhere near the level of a natural disaster or armed conflict. This level of specificity demonstrates the legislature’s intent to narrowly define and limit the Secretary’s emergency rulemaking powers. The vital importance of a democratic process to change election and voting laws is self-evident. The right to vote is fundamental, and without a strict interpretation of the delineated emergency powers, those powers may be abused to suppress the votes of qualified electors.

**b. The Secretary exceeded his statutory authority by promulgating the rules.**

By statute, the Secretary is the state commissioner of elections and is charged to “prescribe uniform election practices and procedures.” Iowa Code § 47.1(1) (2011). Further, the Secretary is the state registrar for voters, and is responsible for preparing, preserving and maintaining voter registration records. Iowa Code § 47 (2011). However, the Code does not give the Secretary authority to edit or purge the voter registration records, nor does it grant him the ability to create rules to do so. *See* Iowa Code § 47 (2011). Instead, the legislature expressly granted the power to adopt new rules to the Voting Rights Commission. Iowa Code § 47.8(1) (2011) (the Voting Rights Commission was created to “make and review policy, adopt rules, and establish procedures to be followed by the registrar in discharging

the duties of that office.”). Quite simply, the Voting Rights Commission adopts the policy rules governing registration, and the Secretary (in his capacity as registrar) enforces those rules. The Secretary can only exercise his registrar powers “in accordance with the policies of the voter registration commission.” Iowa Admin. Code r. 821—1.2 (2011).

The Administrative Rules have already created a process for ensuring that only eligible applicants have their voter registration applications approved. Iowa Admin. Code r. 821—15 (2011). As Petitioners correctly state, the Administrative Rules also delineate several instances in which the Secretary is granted authority to compare this list to other specified lists to ensure that ineligible voters do not remain registered: comparing Iowa’s voter registration lists with voter lists of other states to prevent duplicate voting (Iowa Admin. Code r. 721—28.3(3); comparing the list with a list of convicted felons (Iowa Admin. Code r. 721—28.4(1). These examples show that the legislature is well aware of how to give the Secretary authority to remove ineligible voters from the list and could have granted him such authority if provided with sufficient and justifiable reasons to do so. Respondents’ argument that the Secretary only lacks authority to promulgate rules that directly contradict already enacted rules leads to absurdity. It would require that the legislature anticipate and codify every potential abuse of power in order to prevent the Secretary from exceeding his authority.

Finally, Respondent contends that the Voter Law Complaint Rule “merely implements” the procedure laid out for challenging a voter’s registration in Iowa Code § 48A.14. Respondent’s Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 10. However, the form forgoes the essential protection against frivolous challenges created by the legislature: namely, the form does not require the reporting individual to swear to the truth of his or her allegations under penalty of criminal prosecution. *See* Election Violation Form; Iowa Code § 48A.14(3). The complaint procedure laid out in the Code further requires that the reporting individual be a registered voter and reside in the same county

as the individual they are challenging. *See* Iowa Code § 48A.14. Rather than “merely implementing” the process laid out in the Code, the Voter Law Complaint Rule creates a new procedure for challenging the registration of another, one that is lacking in the procedural protections and safeguards that the legislature intended. *See* Brief in Support of Petition for Judicial Review at 35-37.

Because the Secretary clearly did not possess the authority to unilaterally act on behalf of the legislature, including the administrative rules review committee, and VRC, to vest himself with the authority to promulgate the challenged rules, Petitioners should be successful on the merits of this claim.

**c. The challenged rules create a substantial likelihood that qualified Iowa electors will be erroneously deprived of their fundamental right to vote in violation of federal and state laws.**

Respondent’s brief does not address the Petitioners’ assertion that the rules as written are too vague and lack safeguards to ensure against the erroneous deprivation of the fundamental right to vote. Instead, Respondent merely states that no action has yet been taken by the Secretary to enforce these rules. Respondent’s Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 14-15. However, the Secretary’s actions directly contradict this assertion. Notably, the Secretary of State has already engaged in the process of using state agency records to identify purported foreign nationals on the voting rolls. *See* Affidavit of Secretary of State Matt Schultz. Additionally, the Election Complaint Form is already posted electronically on the Secretary of State’s website. *See* Election Violation Form. Also, as briefed elsewhere, future harm is sufficient to grant standing and jurisdiction in this case. *See* Brief in Support of Petitioners’ Resistance to Respondent’s Motion to Dismiss at 13-16.

**2. Petitioners Will Suffer an Irreparable Injury if a Stay is Denied**

In arguing that Petitioners will not suffer irreparable harm, Respondent repeats his assertion that Petitioners do not have standing. To the contrary, LULAC of Iowa, the ACLU of Iowa, and their respective members possess standing to bring this action. *See* Brief in Support of Petitioners’ Resistance

to Respondent's Motion to Dismiss. Respondent argues that even if standing exists, "none of their members' right to vote has been compromised by the promulgation of these rules." However, the court need not find that injury has already occurred to grant a stay, but instead must only consider the "extent to which the applicant *will* suffer irreparable injury." Iowa Code § 17A.19(5)(c). Petitioners need not show that injury has already happened, only that it is likely to occur in the absence of a stay. *See Godfrey v. State*, 752 N.W.2d 413, 421 (Iowa 2008); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983) (cited in Brief in Support of Petitioners' Resistance to Respondent's Motion to Dismiss at 12-14). Indeed, injunctive relief is specifically designed to prevent future harm from occurring. As detailed in the Petition, 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. Finally, as shown in the attached affidavits, a number of LULAC of Iowa's members have already been harmed by the chilling effect of the Voter Purge Rule, insofar as qualified electors are foregoing registration for fear of the financial costs, reputational damage, and potential criminal charges they might face for exercising their fundamental right to vote. Affidavit of Joe Henry. Affidavit of New Citizens. Thus, both the rights of the individuals and the efforts of LULAC of Iowa to register Latino voters have already been harmed by the promulgation of these rules, and they will continue to be harmed until the Secretary's actions are enjoined.

### **3. Other Parties Will Not be Harmed by the Grant of a Stay.**

Respondent claims that both Rules confer a benefit on the public, and that staying enforcement of the Rules would "remove transparency from the process and compromise voter's faith in the voter registration system." Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 15. As discussed above and in the Petition, neither rule conveys a benefit to the public. Respondent contends that the Voter Purge Rule provides safeguards for individuals suspected of

registering illegally. In reality, the plain language of the Voter Purge Rule allows the Secretary to attack the registration of a voter based on their inclusion on some unidentified and potentially unreliable state or federal list. Rather than provide these individuals with adequate notice and a meaningful opportunity to challenge their removal from the voter rolls, as the Respondent contends,<sup>6</sup> the rule places the burden of proof on such individuals before they can exercise their most fundamental right to vote. Even if the rules actually restricted the Secretary to just the actions he is purporting to take, (comparing Iowa DOT records with the federal SAVE database) Petitioners have already identified individuals who obtained a driver's license in Iowa, and subsequently obtained citizenship and registered to vote. Affidavits of New Citizens. Under the Voter Purge Rule, they may be required to expend time, energy, and resources refuting the Secretary's allegations before they can exercise their right to vote. And if they simply do not have the time or ability to do so within 14 days,<sup>7</sup> they will be subject to removal from the voter registration lists despite being qualified electors.

Likewise, The Voting Law Complaint Rule does not convey a benefit to the public, but simply provides an alternative means for challenging the registration of a voter that lacks the requirement of a sworn affidavit and the penalty of criminal prosecution for making false allegations. Because the process outlined in Iowa Code § 48A.14(1) already provides an adequate procedure for individuals who seek to challenge a voter's qualifications no such challenger will be harmed by a stay.

#### **4. The Secretary Did Not Rely on the Public Interest in Promulgating These Rules.**

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<sup>6</sup> Respondent's reply states multiple times that the new rules increase the amount of due process afforded to an individual voter who is suspected of voter fraud. This is true only in the most literal of senses: by creating a second procedure through which individuals can be removed from the registration lists, there is also a new "process" to refute the claims. But the new procedures lack many of the safeguards of Iowa Code § 48A.14 and increase the likelihood that an eligible person will be denied the right to vote.

<sup>7</sup> It is significantly possible that individuals who are flagged to be wrongfully purged from the voting rolls will be unable to challenge their removal within the 14 day period because they are not physically present during the time of notification or because they recently moved and the mail forwarding may not reach them until it is too late to challenge their removal from the rolls.



Respondent contends that the Rules further the public interest in that they provide additional due process for voters suspected of registering illegally. Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 15. As discussed in the Petition, a process designed to remove registered voters from the voter registration lists is contrary to the public policy and Iowa's broad and progressive voter registration laws. *See* Iowa Code § 48A.5 (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."); *see also* Iowa Code § 48A.7A (2011) (providing for election-day and same-day registration).

In fact, rather than show the Secretary's intent to provide additional due process and protections, Respondent's affidavit timeline instead shows months of stalling and secrecy in attempting to purge the voter registration files of alleged non-citizens. Affidavit of Secretary of State Matt Schultz. The timeline shows that the Secretary suspected over 3000 foreign nationals may be registered to vote in Iowa based on evidence he obtained on March 27, 2012.<sup>8</sup> Affidavit of Secretary of State Matt Schultz at Exhibit 1. At that time, the Secretary could have brought his concerns to the general assembly and requested authority to address the perceived problem; he could have sought authorization from the Voting Registration Commission; or he could have initiated the normal rulemaking process. Instead, the Secretary waited until July 20, 2012 before taking any action to obtain authority. Only at that late date,

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<sup>8</sup> The Secretary further obfuscates the issues by stating that, when his office compared the DOT's list of foreign nationals who had obtained a license with the state's voter registration records, the "comparison revealed that 1,208 foreign nationals voted in the 2010 election." Respondent's Affidavit ¶7. This is simply not true. At most, such a comparison could only show that 1,208 individuals who were foreign nationals at the time they applied for a driver's license subsequently voted in the 2010 election. At no point did this comparison attempt to account for individuals who had obtained citizenship subsequent to obtaining a driver's license, and a comparison of these two lists alone cannot show that even a single foreign national voted in the 2010 election.

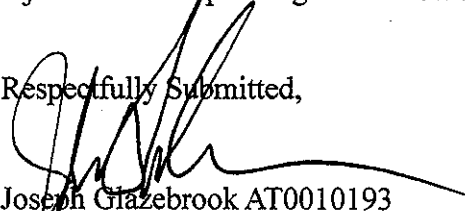
the Respondent claimed that those 115 days of inaction somehow justify the further lack of transparency and public participation in promulgating the emergency rules.

Finally, Respondent states that the Rules are necessary to prevent uncertainty, confusion, and mistrust in the election process, but he does not offer any evidence to support this assertion. Respondent's Brief in Support of Resistance to Motion for Temporary Injunctive Relief at 16. Moreover, many of Iowa's county auditors have indicated they do not suspect rampant voter fraud in Iowa.<sup>9</sup> To the contrary, Petitioners' affidavits show that the Rules themselves have in fact *created* confusion and mistrust about the registration process and upcoming election. Affidavit of Joe Henry. Affidavits of New Citizens.

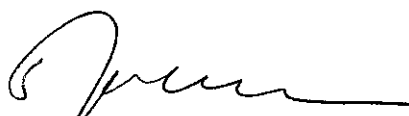
### CONCLUSION

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

Respectfully Submitted,



Joseph Glazebrook AT0010193  
Glazebrook & Moe, LLP  
118 SE 4<sup>th</sup> St. Ste. 101  
Des Moines, IA 50309  
Phone: 515-259-1110  
Fax: 515-259-1112  
[joseph@glazebrookmoe.com](mailto:joseph@glazebrookmoe.com)



Dan L. Johnston AT0010420  
Glazebrook & Moe, LLP  
118 SE 4<sup>th</sup> St. Ste. 101  
Des Moines, IA 50309  
Phone: 515-259-1110  
Fax: 515-259-1112  
[Djohn1945@aol.com](mailto:Djohn1945@aol.com)

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<sup>9</sup> *No Evidence for Voter Fraud Obsession*, DES MOINES REGISTER, Aug. 16 2012, available at <http://www.desmoinesregister.com/article/20120817/OPINION03/308170035/1024/basu/?odyssey=nav%7Chead> (last visited 8/19/2012).

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

NANCY ABUDU\*\*  
American Civil Liberties Union Foundation, Inc.  
230 Peachtree Street, Suite 1440  
Atlanta, GA 30303  
Phone: (404) 523-2721  
Fax: (404) 653-0331  
[nabudu@aclu.org](mailto: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](mailto: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](mailto:rita.bettis@aclu-ia.org)

*\*\* 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 24 day of August, 2012 by U.S. mail.

  
Joseph Glazebrook

Persons Served:  
Iowa Attorney General's Office  
1305 E. Walnut St.  
Des Moines, IA 50319