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 **BRIEF IN SUPPORT OF PETITIONER'S RESISTANCE TO RESPONDENT'S MOTION TO DISMISS**

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 Resistance to Respondent's Motion to Dismiss, 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 the Secretary's actions exceeded his constitutional or statutory authority, were in violation of agency rules, were enacted through an unlawful procedure, and are unreasonable, arbitrary, or capricious.

STANDARD OF REVIEW

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

ARGUMENT

Because the claims asserted by petitioners are sufficient to grant relief, dismissal would be improper in this case. Respondent's motion to dismiss argues that petitioners do not have traditional or organizational standing to bring their petition for judicial review, and that the great public importance exception to standing is inapplicable. *See* Brief in Support of Respondent's Motion to Dismiss. However, Petitioners assert facts sufficient to show a personal or legal interest in the action apart from the general interest of the public at large and specific, perceptible

harm caused by the Secretary's action. LULAC of Iowa, the ACLU of Iowa, and their respective memberships face real and perceptible harm from the Secretary's rules and actions already in effect. Thus, Petitioners meet the threshold requirement of standing. Petitioners also possess third party standing on behalf of those people who are unable to assert their own rights to challenge the Secretary's agency action. Furthermore, application of the great public interest exception to the standing requirement would also be appropriate in this case to protect the rights of voters.

I. Petitioners, both on their own and on behalf of their memberships, possess standing under the Iowa Administrative Procedures Act.

Petitioners have standing to bring this action because Respondent's adoption of the administrative rules in question have, and will, injuriously affect the specific personal interests of LULAC of Iowa and the ACLU of Iowa, as well as their members. The judicial review provisions of the Iowa Administrative Procedures Act ("Iowa APA") 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 Dep't of Revenue and Fin.*, 545 N.W.2d 536, 539 (Iowa 1996). Under the Iowa APA, 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), Iowa Code § 17A.20; *Iowans for WOI-TV, Inc. v. Iowa State Bd. of Regents*, 508 N.W.2d 679, 684-85 (Iowa 1993).

From this language, the Court has formulated a two-prong test for standing under the Iowa APA: the complaining party must (1) have a specific, personal, or 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, 419-20 (Iowa 2008) (finding the interest may be personal *or* legal, and need not be both); *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979). Respondent, citing to *Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004), assert the same standard in their motion to dismiss: "In order to pursue a claim, a plaintiff "must (1) have a specific personal [or legal] interest in the litigation and (2) be injuriously affected." Brief in Support of Motion to Dismiss at 2. As demonstrated below, the Petitioners meet both prongs of the standard requirement under the Iowa APA.

1. **The Threshold Issue of Standing is Broader Under the Iowa APA, and in any Case Subject to a Different Analysis, than Under the Federal APA.**

As an initial matter, Respondent argues that federal case law will often serve as persuasive authority in determining the applicability of Iowa's standing doctrine. However, while federal decisions may provide guidance, the decisions of Iowa courts on this issue are more precisely precedential to the issue of standing in this case, differ in important ways from the legal standard applied to cases under the federal APA, and are sufficient to decide the issue.

As Respondent states in his brief, Iowa's standing requirement is prudential; whereas in the federal context, it is jurisdictional. *Godfrey*, 752 N.W.2d at 418; *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 867, 869 (Iowa 2005). *See* Brief in Support of Motion to Dismiss at 3. More to the point, the Iowa Supreme Court has specifically rejected the applicability of the federal standing requirement under the federal APA urged by the Respondent, applying instead the more inclusive two-prong test above. *Iowa Bankers Assn. v. Iowa Credit Union Dep't.*, 335 N.W.2d

439, 443-44 (Iowa 1983). In *Iowa Bankers Assn.*, the state argued that petitioner lacked standing because it failed to meet the "zone of interests" test often used in federal APA standing analysis. *Id.* The Iowa Supreme Court rejected that argument, instead finding:

> Our statutory requirement on standing to seek judicial review of agency action does not contain the qualifying language present in the federal APA. Iowa Code § 17A.19 (1981). Interpretation of the Iowa statute is a question of law, of which this court is the final arbiter. We decline to read into the statute an intent or meaning not expressed therein, or extend its terms under the guise of construction.
> ...
> Agency action may have impact on persons other than those who are the immediate object of the act. We believe the legislature intended to make a judicial remedy available to any person or party who can demonstrate the requisite injury.

Iowa Bankers Assn. v. Iowa Credit Union Dep't., 335 N.W.2d 439, 443-44 (Iowa 1983) (internal citations omitted).

Here, case law from the Iowa court system provides adequate legal precedent as to the issue of standing, and given the differing standards under the federal APA and the Iowa APA, supplication of Iowa case law by federal opinions should be avoided.

2. The Challenged Emergency Rulemaking is "Other Agency Action."

Respondent claims that *WOI-TV v. Iowa State Board of Regents*, 508 N.W.2d 679 (Iowa 1993) is silent as to organizational standing, and further, that it is distinguishable from this case because both the ACLU of Iowa and LULAC of Iowa are pre-existing organizations. Brief in Support of Motion to Dismiss at 5. To the contrary, standing is, of course, always a threshold issue. Moreover, the Supreme Court specifically cited to *WOI-TV* as precedential on the issue of standing in *Medco*:

> Medco does however have standing to challenge this process. . . .The final decision of [the agency] falls within the broad residual category of administrative action known as "other agency action." Parties who are "aggrieved or adversely affected by agency action" may seek judicial review in district court to determine whether their "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. *See* Iowa Code §§ 17A.19(1), (8)(a)-(g); *Iowans for WOI-TV, Inc. v. Iowa State Bd. of Regents*, 508 N.W.2d 679, 684-85 (Iowa 1993); *see also* Iowa Code § 17A.20 (any final judgment of the district court is reviewable on appeal).

Medco Behavioral Care Corp. of Iowa v. State, 553 N.W.2d 556, 561-62 (Iowa 1996).

It is also evident that the distinction the Respondent makes in its brief leads to an absurd result. Under the Respondent's distinction, one could expect that an agency action specifically targeting the rights of a pre-existing organization would not be challengeable by that organization, whereas the same agency action would be challengeable by an ad hoc group consisting of identical membership. It suggests that the ACLU of Iowa and LULAC of Iowa, were they to form some new, after-the-fact group comprised entirely of all of their existing members, but simply named something else for the purpose of bringing a challenge to the proffered rules, would acquire standing even where Respondent argues they do not have it already under their own names.

In both *WOI-TV* and *Medco*, the Court found that petitioners had standing to challenge administrative action in situations not involving contested case hearings. In such a case, the inquiry is "whether their substantial rights had 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 unreasonable, arbitrary, or capricious." *WOI-TV*, 508 N.W.2d at 684-85 (citing Iowa Code § 17A.19(8)(a), (b), (c), (d), (g) (1991)).[1] Similarly, in *Medco*, the Iowa

[1] 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. *Iowans for WOI-TV v. Iowa State Bd. of Regents*, 508 N.W.2d 679, 680 (Iowa 1993). 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 suffer injury by virtue of

Supreme Court found that the awarding of a contract by DHS fell within the residual category of administrative action known as "other agency action." *Medco*, 553 N.W.2d at 562. It explained,

> The district court reviewed Medco's petition as other agency action, and Medco does not appear to dispute this characterization. Indeed this controversy cannot be said to involve a contested case proceeding. As we explained in *Sindlinger v. State Board of Regents:* "Contested case hearings as envisioned in § 17A.12 are those in which the legal rights, duties, or privileges of a party are required by constitution or statute to be determined by the agency after an opportunity for an evidentiary hearing. Iowa Code § 17A.2(2) (1991). If the agency establishes a less formal hearing procedure than is mandated by § 17A.12 in those situations in which there is no statutory or constitutional entitlement to a contested case hearing, any adjudication that takes place in that procedure is reviewed as "other agency action" and not as a contested case. 503 N.W.2d 387, 389 n. 1 (Iowa 1993).

Medco, 553 N.W.2d at 561 n. 4. *See also Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 387, 389-90 (Iowa 1993) (finding rulemaking reclassifying an agency employee's position was other agency action) (cited by *WOI-TV*, 508 N.W.2d at 685 and *Medco*, 553 N.W.2d at 561 n. 4).

Here, as in *Medco* and *WOI-TV*, there is no opportunity for a contested case hearing with the Secretary of State or the Voter Registration Commission, and thus, the emergency rulemaking challenged in this case is "other agency action." The threshold question of standing for judicial review of other agency action under the Iowa Code and case law, as provided above, is "whether their substantial rights had 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 unreasonable, arbitrary, or capricious." *See WOI-TV* and *Medco*, *supra.* The ACLU of Iowa and LULAC of Iowa challenge the Secretary's emergency rules as in violation of constitutional and statutory authority, made by unlawful procedure, and unreasonable, arbitrary, and capricious. *See* Petitioners' Brief in Support of Petition for Judicial Review.

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their membership's interests and their organizational mission, so too is the ACLU of Iowa, LULAC of Iowa, and their members.

3. Petitioners' Possess Adequate Standing to Challenge the "Other Agency Action."

Petitioners and Respondent both agree that the two-prong test for whether petitioners' substantial rights have been prejudiced on the grounds of violating constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, or unreasonable, arbitrary, or capricious is whether the petitioner (1) has a specific personal, or legal interest in the litigation; and (2) whether the specific interest is adversely affected by the agency action in question. *Medco*, 553 N.W.2d at 562 (citing *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979). The two prongs of standing are separate requirements, although the Court "acknowledge[es] these elements have much in common and are often considered together." *Godfrey*, 752 N.W.2d at 419.

a. Petitioners have a specific personal, or legal interest in the litigation, on behalf of themselves, and on behalf of their members.

LULAC of Iowa and the ACLU of Iowa, on their own behalf and on behalf of their members, have a specific personal interest in the litigation. Their interests in protecting the right to vote, registering individuals to vote, and their members' interests in voting, as well as protecting against racially discriminatory effects in voting laws and regulations, are greater and more personal than the general interest. The first prong of standing in seeking judicial review of administrative action is that the petitioner has a specific personal or legal interest—"as distinguished from a general interest." *Godfrey*, 752 N.W.2d at 419. In *Godfrey*, the court clarified that the allowance for a specific *personal* interest (as opposed to an interest that is *both personal and legal*), "has been especially significant in cases involving actions to vindicate the public interest though challenges to governmental action." *Id.* at 420 ("We no longer require the

litigant to allege a violation of a private right and do not require traditional damages to be suffered.").

Examples of cases in which the Court found that the first prong of the standing requirement was satisfied include *Hurd v. Odgard*, 297 N.W.2d 355 (Iowa 1980) (lawyers who were users of the county courthouse had standing to compel the county to repair it, despite the litigants' lack of monetary or traditional damages, by virtue of their status as users of the building), *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573 (Iowa 1990) (taxpayer had a sufficient personal stake to challenge a decision to grant a property tax exception to a privately-owned senior living center by virtue of being subject to the greater tax burden), *Elview Construction Co. v. North Scott Community School District*, 373 N.W.2d 138 (Iowa 1985) (taxpayer had sufficient personal interest to challenge action of school district to award construction contract as a violation of bidding procedures by virtue of living in the school district), and *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983) (petitioner had met first prong of standing to challenge a Credit Union Department share-draft rule by virtue of being a competitor business in providing the financial services contemplated by the rule).

In this case, the personal or legal interests of LULAC of Iowa and the ACLU of Iowa in the rules challenged are specific, and not general, meeting the first prong of the standing under the Iowa APA. LULAC of Iowa is active in the promotion of citizenship and voting rights. Affidavit of Joe Henry. LULAC of Iowa 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. Affidavit of Joe Henry; LULAC By-laws. LULAC of Iowa 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. Brief in Support of Petition for Judicial Review; Affidavit of Joe Henry. LULAC of Iowa is composed of approximately 400 members and is active through several councils in the state. Affidavit of Joe Henry. As part of its efforts to protect and promote the voting rights of Latino and Hispanic U.S. citizens in Iowa, LULAC of Iowa, 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. Affidavit of Joe Henry. LULAC of Iowa estimates it will have identified and registered tens of thousands of voters before the November 6, 2012, general election. Brief in Support of Petition for Judicial Review; Affidavit of Joe Henry.

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. 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 personal interest in protecting the voting rights of its members and all Iowans, which is one of its most important organizational

functions. *See* 2012 Examples of ACLU of Iowa Voter Empowerment and Education Materials *and* 2005 Amicus Brief.

If emergency rules IAC §§ 721-21.00 and 721-28.5 had been promulgated through normal rulemaking procedures, Petitioners would have actively participated in any public meetings regarding the rules and encouraged their members to participate as well. Thus, the unlawful manner in which the Secretary created and seeks to enforce these rules resulted in Petitioners losing an opportunity to have their voices heard and further violated the whole concept of transparency in government. Therefore, LULAC of Iowa and the ACLU of Iowa, as well as their respective members, have a specific personal interest in the challenged rules and the outcome of this litigation and satisfy the first prong of the standing requirement under the Iowa APA.

b. Petitioners' interests are adversely affected by the agency action in question.

Petitioners meet the second prong of standing under the Iowa APA, because their interests are adversely affected by the emergency rules they are challenging, and those injuries will be redressed by a favorable outcome in this action for judicial review. A number of cases provide guidance as to the second prong of the standing issue, which addresses injury. A petitioner's interest must be adversely affected, and must be "injured in fact." *Godfrey*, 752 N.W.2d at 419 ("This requirement recognizes the need for the litigant to show some 'specific and perceptible harm' from the challenged action, distinguished from those citizens who are outside the subject of the action but claim to be affected.") For example, in *Medco*, while the Court noted that "generally an unsuccessful bidder lacks standing to [challenge the bidding process] without some specific grant of authority," it went on to find that standing had been met in the context of a challenge to other agency action under the Iowa APA. *Medco*, 553 N.W.2d at

561-62. The court found that Medco "easily satisfies both prongs." *Id.* at 562 ("As an unsuccessful bidder on the managed mental health care contract, Medco possessed a specific, personal, and legal interest in being awarded the contract that was adversely affected when DHS initially decided to award the contract to Value.")

So long as the injury is specific to the complaining party, it is sufficient to confer standing. *Godfrey*, 752 N.W.2d at 419. 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. 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 also Godfrey*, 752 N.W.2d at 420-21.

Respondents argue that it is inadequate to assert future injury, and describe Petitioner's injuries as wholly speculative and purely hypothetical. Brief in Support of Motion to Dismiss at 5, 8. To this end, Respondents state that "the Petitioners have not identified any of its members that have been directly affected by the promulgation of the challenged rules." Brief in Support of Motion to Dismiss at 5. Petitioners respectfully point out this misconstrues both the requirement of injury, and facts as asserted by Petitioners. While injury may not be "abstract," it may be future. *Godfrey*, 752 N.W.2d 413, 421. In *Godfrey*, the Iowa Supreme Court explained that the difference goes to whether a favorable decision by the action for judicial review will likely address the injury (meeting the second prong), or whether it is merely speculative if a favorable result would redress the injury. *Id.* ("To borrow from the federal language, the injury was not

"fairly traceable" to the challenged action."). In fact, "[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).

In *Iowa Bankers Ass'n*, the Court found that the petitioner had met the first prong of the test—distinguishing its interest from that of the community as a whole. *Id.* at 444, discussed supra. However, the Court found that petitioner had failed to meet second prong on one of its challenges—injury or potential injury to that interest, because it asserted only that *some* banks had lost business as a result of a competitor business, and not that it had, or potentially would, suffer injury as a result of the rules it was challenging. *Id.* This case is distinguishable from *Iowa Bankers Ass'n*, because unlike in that case, the chilling effect of the actions the Secretary—both in using an inaccurate outdated Iowa DOT records to determine citizenship status and begin the process of investigating those individuals, and creating an alternative process for challenging voters' qualifications leading to possible criminal investigation—have already taken place, and are particularly likely to already have identified a disproportionately high number of Latinos, especially those who acquired citizenship and registered to vote after acquiring Iowa drivers' licenses. *See* Affidavit of New Citizens; *see also* Affidavit of Joe Henry; *see also* Frequency of Latino Names. Moreover, LULAC of Iowa is already suffering the effects of the rules in its voter registration and empowerment efforts. *See* Affidavit of Joe Henry.

In *City of Des Moines*, 275 N.W.2d 753 (Iowa 1979), the Court held that the petitioner had met both prongs of standing to challenge the agency action that mandated binding arbitration between a public employer and a certified organizations. *City of Des Moines*, 275 N.W.2d at 755. The Court found that as a public employer, the City of Des Moines had met the first prong of the standing test, the special interest requirement. *Id.* at 759. It also found that the City of Des

Moines had met the second prong, requiring injury to that interest, by arguing that it would be involved in future negotiations affected by the agency action. *Id.* ("And the fact that it will be involved in future negotiations affected by the decision of the Board in this matter establishes that its interest has been specially and injuriously affected.")

In this case, LULAC of Iowa meets the injury prong of the standing test. LULAC of Iowa has identified members of its organization that have (1) acquired Iowa drivers' licenses prior to acquiring citizenship; (2) subsequently acquired citizenship; and (3) then registered to vote. *See* Affidavits from New Citizens. The Iowa Department of Transportation list, as it has been described by the Secretary of State, is likely to erroneously identify these LULAC members as foreign nationals disqualified from voting. *See* Affidavit of Secretary of State Matt Schultz. LULAC has already experienced the chilling effect of these rules in its efforts to register Latino voters. *See* Affidavit from Joe Henry. LULAC members are in some cases fearful of wrongful criminal prosecution on account of the Secretary of State's promulgated rules. *See* Affidavit from Joe Henry.

The ACLU of Iowa's mission includes eliminating voter suppression, facilitating open government and democracy, and challenging laws with racially discriminatory effects. *See, e.g.,* 2012 ACLU of Iowa Voter Empowerment and Education Materials. *See also* ACLU of Iowa 2005 Amicus Brief. The rules, already in effect, if upheld, confer broad authority to a subordinate member of the executive branch to promulgate rules without statutory basis, in secret, without public participation, and despite its effects on the fundamental rights of Iowans or its disparate effect on racial or ethnic minorities. This injury, both personal and borne by its members, is both present and future.

Paired with its assertion that future injury is not injury to meet the second prong of standing for judicial review under the Iowa APA, the Respondent suggests that "a qualified voter removed from the registration records—or even notified of the *possibility* of removal—would be in the best position to challenge the disputed rules." Brief in Support of Motion to Dismiss at 8. As demonstrated in Petitioner's Briefs and Affidavits, the due process available to individuals identified as non-citizens by the Secretary of State is wholly insufficient to redress erroneous identification; moreover, Petitioners assert that in creating a list of suspected noncitizen voters from the Iowa DOT records, the Secretary of State has already harmed the interests of LULAC of Iowa in registering Latinos in Iowa to vote, and its members, especially new citizens, who have acquired citizenship subsequently to obtaining their drivers' licenses. *See* Affidavits by Joe Henry and New Citizens.[2]

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[2] It is important to note too that while Petitioners in this case have asserted sufficient facts to show both current and future injury, which satisfy the second prong of the standing inquiry, hypothetical inquiries of agency action on judicial review under § 17A are not in all cases barred. In *City of Des Moines*, the Court explained that the court may properly consider even moot questions when they are of great public importance and likely to recur. *City of Des Moines*, 275 N.W.2d. at 758-59 (citing *Catholic Charities of Archdiocese of Dubuque v. Zalesky,* 232 N.W.2d 539, 542-3 (Iowa 1973); *Danner v. Hass,* 257 Iowa 654, 659-60, 134 N.W.2d 534, 538-9 (1965)). Petitioners note that the facts they present are real and concrete, as well as future. But it is important to note that on a case-by-case basis, even hypothetical facts may warrant judicial review:

> In addition, it is open to question whether mootness is an appropriate issue in this case. Section 17A.9 contemplates declaratory rulings by administrative agencies on purely hypothetical sets of facts. *See West Des Moines Education Ass'n v. PERB,* 266 N.W.2d 118, 121 (Iowa 1978); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process,* 60 Iowa L.Rev. 731, 822 (1975) [hereinafter cited as *Bonfield*]. And it provides that such rulings will be the subject of judicial review. *Cf. State Dept. of Health v. Barr,* 359 So.2d 503, 505 (Fla.App.1978) (construing similar provisions of Model State Administrative Procedure Act as enacted in Florida); *Bonfield* at 823-24; § 17A.19(1), The Code, (providing for appeal from "any final agency action"); § 17A.2(9) (defining

II. Petitioners have third-party standing.

In addition to traditional standing, LULAC of Iowa and the ACLU of Iowa have third-party standing. *In Godfrey*, the Court provided that third-party standing normally requires a litigant to establish that the parties not before the court who have a direct stake in litigation are either unlikely or unable to assert their rights. *Godfrey*, 752 N.W.2d 413, 424. However, third-party standing does not dispense the requirement of a personal injury or stake in the application of the challenged statute. *Id; See Sierra Club v. Morton*, 405 U.S. 727 (1972). As demonstrated above, both Petitioners and their members have standing to seek judicial review of the Secretary's promulgation of two voting rules on an emergency rulemaking basis. In addition, they are able to litigate the issue where other individuals who also have a direct stake in the case but are unlikely and unable to assert their rights are not.

These individuals would include those people on the Secretary's list of suspected fraudulent voters who are not in fact fraudulent, but rather, new citizens who lack the resources or knowledge to bring this type of litigation. It would include those people who are Latino

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> agency action as including a "statement of law or . . . decision. . . "; a declaratory ruling under § 17A.9 is a final statement of law or decision).
>
> Unlike the federal courts which are constrained by specific constitutional provisions, *see Preiser v. Newkirk,* 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272, 277-8 (1975), mootness does not affect the *power* of a court of this state to act. Instead the refusal to rule on moot questions is a self-imposed rule of restraint.
>
> The questions decided by administrative agencies under the § 17A.9 declaratory ruling process may be moot at their inception. But the importance and nature of the questions so decided will ordinarily justify foregoing judicial restraint to allow review by the courts of this state.

City of Des Moines, 275 N.W.2d. at 758-59. Thus, the importance of the issue at stake, quite opposite to what Respondents argue, may play a role in traditional standing considerations for judicial review of agency action under the Iowa APA, where it does not under the federal APA.

citizens with common last names—like Gomez, Garcia, Rodriguez, and Martinez—who feel chilled in their ability to exercise their right to vote for fear of hassle and wrongful criminal investigation for voter fraud. *See* Frequency of Latino Names. Because the Secretary promulgated the rules in secret, those individuals would include people who would have been able to express all of their objections to the rule and hopefully deter the Secretary had he given them a chance to do so. Because the Secretary is apparently using the Iowa DOT list without waiting for access to SAVE, in conjunction with the reassignment of an Iowa DCI major crimes investigator, to require county auditors to challenge the criteria of identified persons he suspects of being non-citizens, those individuals also include people who will be targeted, but who are not yet ascertainable, until the Secretary releases the list.[3]

III. While Petitioners Assert Facts Sufficient to Demonstrate Standing, there is a Great Public Interest in Waiving Standing Requirements in this Case if Necessary.

While Petitioners have demonstrated both traditional standing and third-party standing, the residual exception to standing when there is a great public interest should apply in this case. Respondent argues that this Court should refrain from finding the exception occurs in this case, despite the fundamental right to vote being directly at issue, because to waive standing to resolve the constitutionality of another branch of government would "put the court in a position of authority over the acts of another branch of government." Respondent's Brief in Support of

[3] The Secretary of State has indicated that, because he will not have access to SAVE in time to use these rules to purge voters before the upcoming election, he is proceeding to send lists of individuals he identified through Iowa DOT records to the county auditors for the purpose of challenging their eligibility. Kurt Allemeier, *Scott Co. to Receive Flagged Voter List*, Quad City Times, Aug. 18, 2012, *available at* http://qctimes.com/news/local/scott-co-to-receive-flagged-voter-list/article_fe8f8d7a-e8f7-11e1-b788-0019bb2963f4.html (last visited 8/19/2012).

Motion to Dismiss at 6 (quoting *Godfrey* at 427). *Godfrey* actually takes a more nuanced position than the Respondent argues. Indeed, the Court provided that:

> While this policy of standing has no specific constitutional basis in Iowa, as it does in federal law, it is compatible with the overall constitutional framework in this state and properly reflects our role in relationship to the other two coequal branches of government. This ultimate power to decide disputes between the other branches of government and to determine the constitutionality of the acts of the other branches of government does not exist as a form of judicial superiority, but is a delicate and essential judicial responsibility found at the heart of our superior form of government.

Godfrey, 725 N.W. at 425. However, the careful consideration due before waiving standing to consider the constitutionality of other branches of government is not an absolute bar, and the importance of the interests at stake must also be considered:

> We believe our doctrine of standing in Iowa is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government. . . .Moreover, our doctrine of self-imposed restraint was not created to keep us from deciding critical public issues of the day.

Id. The Court in *Godfrey* provided a specific illustration for deciding when waiving standing to consider the constitutionality of a coordinate branch of government would be appropriate: "The absence of an allegation or claim by Godfrey that implicates fraud, surprise, personal and private gain, or other such evils inconsistent with the democratic legislative process diminishes our need to intervene to determine if the legislature has violated a constitutional mandate." *Godfrey,* 752 N.W.2d at 427 (finding that Godfrey had not alleged that the manner in which the challenged statute was passed was unconstitutional, but rather, had alleged that its form violated Iowa's single-subject law by grouping more than one subject into a piece of legislation). In this case, Petitioners allege that the manner in which the Secretary of State promulgated the voting rules—in secret, on an emergency basis, and to the surprise of Iowans, legislators, and county auditors alike—seriously undermined the democratic process. *See* Brief in Support of Petition for Judicial

Review. Ultimately, while the Respondent is correct that any waiver of standing for matters in the great public interest must be carefully considered in light of the separation of powers doctrine, it is not accurate to say that separation of powers will in all cases trump the public interest in seeking judicial review of agency action. Rather, *Godfrey* indicates that the importance of the public interest involved and the manner in which the action took place must also be duly weighed. Here, the fundamental right to vote has been and will be infringed upon if the rules, enacted through inappropriate emergency measures, are allowed to remain in effect. Respondent acknowledges that the right to vote is a paramount issue. Brief in Support of Motion to Dismiss at 7.

The Respondent additionally argues against the application of the exception to standing in this case because Petitioners assert their members' right to vote, not their own. Brief in Support of Motion to Dismiss at 8. Respondent argues further that only once a voter has been notified of the Secretary's plan to purge them from the voting rolls, or upon actual removal, would that individual have standing. Brief in Support of Motion to Dismiss at 8. The Court has provided that a waiver to the standing requirement for issues of great public importance should not undermine the purposes of standing, one of which is to ensure litigants are true adversaries. *Godfrey*, 752 N.W.2d at 425. Petitioners argue they have standing based on a myriad of interests and injuries, including but not limited to the right of members to vote, as well as third-party standing. See *supra* (e.g., special interest in voting rights of Latinos in Iowa, special interest in registering Latino U.S. Citizens to vote in Iowa, special interest in upholding access to the polls for underrepresented minorities, special interest in educating the public about voting rights, and working to expand voting rights in Iowa, special interest in asserting the rights of already-identified, but not yet disclosed, suspects of illegal voting by the Secretary of State); Brief in

Support of Petition for Judicial Review. Respectfully, petitioners are true adversaries of the Secretary of State in his promulgation of the challenged rules and thus-far fruitless efforts to locate purported voter fraud in Iowa. This case is highly distinguishable from *Godfrey* because of the fundamental nature of the right at stake, Petitioners and their members' specific and unique interests in the case, 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.

CONCLUSION

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

Respectfully Submitted,

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** *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.

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