

IN THE IOWA DISTRICT COURT 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. CVCV009311

**PETITIONERS' BRIEF
IN SUPPORT OF
THEIR MOTION FOR REVIEW ON
THE MERITS, AND, IN THE
ALTERNATIVE,
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 Motions for Review on the Merits/Summary Judgment, and in the alternative, in support of their Motion for Temporary Injunctive Relief, respectfully submit this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether Petitioners are entitled to the Summary Judgment/Review on the Merits on their claim that the Voter Removal Rule Exceeds the Authority granted to the Secretary of State by law.
- II. Whether a temporary injunction is warranted to preserve the status quo of the parties and prevent harm to voters pending the final outcome of this case.

Petitioners note that only the one of their three total claims, which is stated above, concerning the agency's legal authority to promulgate the challenged rule, underlies this brief, the accompanying motion for summary judgment/review on the merits, and motion

for temporary injunctive relief. This claim, if decided in favor of petitioners, is sufficient to resolve the dispute and dispose of the action. However, in addition to this claim, Petitioners maintain and preserve their remaining claims concerning the illegal nature of emergency rulemaking and the likelihood that the challenged rules will erroneously deprive qualified Iowans of their constitutionally protected right to vote, which have been previously fully briefed and cited, or are pending further development of the record through discovery.

In support of this proposition, the petitioners cite the following cases, statutes, and other authorities pursuant to this Court's direction. Order Establishing Schedule for Conduct of Proceedings Pursuant to I.R. Civ. P. 1.1603(2) (May 7, 2013).

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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 (LULAC of Iowa), filed an Amended Petition on August 10, 2012 for Judicial Review of the Secretary of State's emergency promulgation of two administrative rules on the basis that they were in violation of constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, and are unreasonable, arbitrary, or capricious. The first rule, Iowa Administrative Code rule 721—21.00 ("Voting Law Complaint Rule"), allowed for anonymous challenges to registered voters, and the second, Iowa Administrative Code rule 721—28.5, allowed for the commencement of removal proceedings based on Respondent's comparison of the Iowa list of registered voters with unspecified state and federal databases which, in Respondent's view, indicated a likelihood of non-citizenship. (Appendix exhibits 1-3, pp. 1-8).

These rules were adopted and made effective immediately pursuant to emergency rulemaking on or about July 2, 2012, at which time the Respondent used the redundant "double barreling" procedure to simultaneously commence the slower, normal rulemaking process pursuant to Iowa Code § 17A.4(1).

Petitioners made three claims: (1) that the use of emergency rulemaking powers under Iowa Code § 47.1, § 17A.4 (3), and 17A.5(b) to adopt both rules was improper; (2) that Respondent exceeded his statutory authority in adopting the rules in question; (3) even if the Respondent's invocation of emergency rulemaking was proper, and Respondent had not exceeded his statutory authority in adopting the rules, that the rules were vague and posed a substantial risk of erroneously depriving qualified voters in Iowa of their fundamental right to vote. Br. in Supp. of Pet. for Judicial Review of Agency Action Under Iowa Code § 17A (Aug.10, 2012). Petitioner at that time requested temporary and permanent injunctions, declaratory relief, costs of the suit and reasonable attorney's fees. *Id.*

Following extensive briefing and a hearing on September 6, 2012, the Court issued a Ruling and Order, denying Respondent's first Motion to Dismiss, and Granting Petitioner's Motion for Temporary Injunctive Relief against both Rules on the basis of their claim that emergency rulemaking was improper, finding that the Petitioners had demonstrated a sufficient likelihood of harm under the Rules. *ACLU v. Schultz*, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012).

On October 22, 2012, Respondent filed a second Motion to Dismiss, requesting that the temporary enjoining of emergency rules on September 13, 2012 rendered the lawsuit moot. Resp'ts Mot. to Dismiss (Oct. 22, 2012). On November 29, 2012, Petitioners filed a Motion for Summary Judgment, which is still outstanding, and which Petitioners renew and supplement at this time. Respondent filed a resistance to that motion on December 11, 2012, at the same time requesting a stay of proceedings.

Resistance to Pet'rs Mot. for Summ. J. or Alternatively Req. for Stay (Dec. 11, 2012). By consent of both parties, the Court ordered proceedings stayed until the conclusion of the permanent rulemaking process. *ACLU v. Schultz*, No. CVCV00931, Order (Iowa Dist. Ct. Jan. 17, 2013).

After the emergency rules were enjoined, Respondent voluntarily rescinded and has not yet pursued further attempts to reintroduce the Voting law Complaint Rule. Accordingly, the only rule that is presently in effect is the Voter Removal Rule, which went into effect via normal rulemaking on or about March 27, 2013.

After the final Voter Removal Rule took effect and pursuant to the agreement of the parties, Petitioner resumed litigation. Second Am. Pet. (Mar. 29, 2013). Respondent filed its third Motion to Dismiss, limiting its request to the Petitioner's claims that the emergency rulemaking process was improper, which Petitioner Resisted. See Resp'ts Mot. to Dismiss Second Am. Pet. for Judicial Review of Agency Action Under Iowa Code § 17A (Apr. 8, 2013); Resistance to Resp'ts Mot. to Dismiss (Apr. 18, 2013). A hearing was held on that motion on June 7, 2013.

In light of very recent developments, Petitioners now move for Judgment on the Merits/Summary Judgment, and in the alternative, for Temporary Injunctive Relief. In recent weeks, Respondent Secretary of State Schultz has entered into a memorandum of agreement (MOA) with the U.S. Citizenship and Immigration Services to access the federal SAVE system to implement Iowa Admin. Code r. 721—28.5, which MOA was executed and became effective August 14, 2013. (Appendix ex. 4, pp. 9-20). Given the urgency that now attends to the protection of Iowa voters who may be erroneously identified as unqualified voters through comparison with the federal SAVE system,

Petitioner now moves for temporary injunctive relief to protect the status quo of parties, and at the same time renews its previously filed Motion for Summary Judgment in the form of a Motion for Review on the Merits as to the purely legal question of the Secretary of State's legal authority to promulgate the Voter Removal Rule.

STANDARD OF DEFERENCE

Petitioners first briefed the standard of deference in their August 10, 2012 Brief in Support of Petition for Judicial Review of Agency Action Under Iowa Code § 17A. For judicial facility, herein is a summary of that argument as pertaining to the claim underlying the alternative motion for review on the merits and motion for temporary injunctive relief, that the Secretary of State lacked authority to promulgate the challenged rule.

Under Iowa Code § 17A.19 (11), in making the determinations required by subsection 10, paragraphs "a" through "n," the Court should not give any deference to the view of an agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11)(b). However, if the court finds that a particular matter has been vested by provision of law in the discretion of the agency, it shall give appropriate deference to the view of the agency with respect to that particular matter. Iowa Code § 17A.19(11)(c). However, the Court should not give any deference to the agency with respect to the underlying question of whether the particular matter has been vested by a provision of law in the agency's discretion. Iowa Code § 17A.19(11)(a).

Petitioner argues that there is no Iowa statute providing express or implied authority to access federal immigration databases to identify and initiate challenge

procedures to remove registered Iowa voters for suspected non-citizenship, and the challenged rule, Iowa Admin. Code r. 721—28.5 [“Voter Removal Rule”], is thus “beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.” Iowa Code § 17A.19(10)(b). In addition and in the alternative, petitioner argues that, even if such an agency action were authorized by statute, that the Voter Registration Commission, not the Secretary of State, would be the proper promulgating agency, and that the rule is therefore “based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(10)(c). Should the Court determine as much, then by virtue of exceeding the authority properly delegated to it, it follows that no deference should be afforded the agency in this matter under Iowa Code § 17A.19(11).

However, should the Court determine that the challenged rule is based upon an interpretation of law clearly vested within the agency’s discretion, it should still grant relief to petitioners because the Voter Removal Rule is “based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency,” Iowa Code § 17A.19 (10)(l), or is “[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion,” Iowa Code § 17A.19 (10)(n).

ARGUMENT

For the following reasons, Petitioners are entitled to summary judgment/review on the merits, finding that the Secretary of State, in adopting the Voter Removal Rule,

exceeded the authority granted to his agency by law. In the alternative, Petitioners move for a temporary stay of the rule to protect voters a final adjudication is pending.

I. PETITIONERS ARE ENTITLED TO SUMMARY JUDGMENT/JUDGMENT ON THE MERITS.

A. Standard of Review

Summary judgment is appropriate when there “is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3); *Estate of Harris v. Papa John’s Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). The party moving for summary judgment has the burden to prove the material facts are undisputed, *Estate of Harris*, 679 N.W.2d at 677. However, a factual issue is *material* only if it might affect the outcome of the suit. *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). A party opposing summary judgment “may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing the existence of a genuine issue for trial.” Iowa R. Civ. P. 1.981(5); *Bitner*, 549 N.W.2d at 299. The moving party has the burden to establish it is entitled to judgment as a matter of law, and the court views the facts in a light most favorable to the nonmoving party. *Clinkscales v. Nelson Securities, Inc.*, 697 N.W.2d 836, 841 (Iowa 2005); *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998).

B. The Claim that the Secretary of State Exceeded his Statutory Authority in Promulgating the Rules is Purely Legal, and There Are No Material Facts Thereto in Dispute.

The Court has very recently acknowledged the appropriateness of summary judgment—properly denominated a Ruling on the Merits—in actions for judicial review

of agency rulemaking in *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826, 839 (Iowa 2013)(“Because the issues decided are legal in nature, we will review the district court’s summary judgment as though it were a ruling on the merits in a judicial review action.”). *See also City of Sioux City v. GME, Ltd.*, 584 N.W.2d 322, 324-25 (Iowa 1998)(“Despite this general disapproval of summary judgment motions on judicial review of contested case proceedings, we have allowed such a motion to be considered as a motion for review on the merits when the facts of the case were not in dispute.”).

Summary judgment is appropriate when there “is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3). The Petitioner’s second claim—that the Secretary of State exceeded his statutory authority in promulgating the Voter Removal Rule—is a sufficient basis on which to resolve the case. Here, there are no facts in dispute in the pleadings relevant to this purely legal claim of statutory interpretation. Because the merits of this claim entitle the Petitioners to judgment as a matter of law, and no material facts regarding this claim are in dispute, summary judgment is appropriate.

C. Petitioners are entitled to a judgment as a matter of law.

As a matter of law, Petitioners are entitled to relief. The Secretary lacks the requisite statutory authority to promulgate the Voter Removal. First, unlike other forms of maintenance of the voter registration rolls that have been specifically authorized, maintenance by cross-reference to numerous federal immigration databases is not authorized by an Iowa statute. Second, the Voter Registration Commission, not the

Secretary of State alone, is vested with the authority to promulgate procedures through rulemaking for the maintenance of Iowa's voter registration list.

D. Coordination of Iowa's Voter Registration File with Federal Databases is Not Authorized by Statute.

In promulgating the Voter Removal Rule, the Secretary cited his authority as state commissioner of elections under Iowa Code § 47.1 (2013). The Secretary is the State commissioner of elections and is charged with supervising the county commissioners. Iowa Code § 47.1(1) (2013). 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) (2013). 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) (2013). The Secretary is also the state registrar of voters, charged with preparing, preserving, and maintaining voter registration records. Iowa Code § 47 (2013).

The Voter Removal Rule usurps the Iowa legislature's authority, which has specifically created the exclusive means of verifying voters and maintaining voter registration lists. Iowa Code §§ 48A.28 (systematic confirmation program); 48A.30 (cancellation of voter registration). Voter registration information may be verified at the front end in the following manner as prescribed by statute:

Upon receipt of an application for voter registration, the commissioner of registration shall compare the Iowa driver's license number, the Iowa nonoperator's identification card number, or the last four numerals of the social

security number provided by the registrant with the records of the state department of transportation. To be verified, the voter registration record shall contain the same name, date of birth, and Iowa driver's license number or Iowa nonoperator's identification card number or whole or partial social security number as the records of the state department of transportation. If the information cannot be verified, the application shall be recorded and the status of the voter's record shall be designated as pending status. The commissioner of registration shall notify the applicant that the applicant is required to present identification described in section 48A.8, subsection 2, before voting for the first time in the county. If the information can be verified, a record shall be made of the verification and the status of the voter's record shall be designated as active status.

Iowa Code § 48A.25A (2013). On the back end, state law is equally specific about when voter registration records may be updated or removed. Voter registration records on the state registered voter list may be updated or removed on the following grounds:

1. The voter registration of a registered voter shall be canceled if any of the following occurs:
 - a.* The registered voter dies. For the purposes of this subsection, the commissioner may accept as evidence of death a notice from the state registrar of vital statistics forwarded by the state registrar of voters, a written statement from a member of the registered voter's household, an obituary in a newspaper, a written statement from an election official, or a notice from the county recorder of the county where the registered voter died.
 - b.* The registered voter registers to vote in another jurisdiction, and the commissioner receives notice of the registration from the registration official in the other jurisdiction.
 - c.* The registered voter requests the cancellation in writing. For the purposes of this subsection, a confirmation by the registered voter that the registered voter is no longer a resident of the county constitutes a request for cancellation.
 - d.* The clerk of the district court, or the United States attorney, or the state registrar sends notice of the registered voter's conviction of a felony as defined in section 701.7, or conviction of an offense classified as a felony under federal law. The clerk of the district court shall send notice of a felony conviction to the state registrar of voters. The registrar shall determine in which county the felon is registered to vote, if any, and shall notify the county commissioner of registration for that county of the felony conviction.
 - e.* The clerk of the district court or the state registrar sends notice that the registered voter has been declared a person who is incompetent to vote under state law.

f. The registered voter's registration record has been inactive pursuant to section 48A.29 for two successive general elections.

2. When a registration is canceled pursuant to subsection 1, paragraph "d", "e", or "f", the commissioner shall send a notice of the cancellation to the registered voter.

Iowa Code § 48A.30 (2013). The Rule, in conflict with Iowa Code §48A.30, seeks to evade the careful delineation of this law by posing a choice to registered voters who are identified incorrectly as noncitizens, to either remove themselves from the registered voters list, or to face a challenge whereby the person must provide citizenship documentation they may or may not have, and which Iowa law makes no provision for demanding and/or criminal investigation for registration fraud. *See* Voter Removal Rule, Admin. Code r. 721—28.5. (Appendix ex. 1, pp. 1-2).

In 2006, the Iowa legislature centralized its voter registration file on a statewide, rather than county by county basis, and in so doing, outlined the authorities granted to the Secretary of State, as state registrar of voters, to prepare, preserve, and maintain voter registration records:

On or before January 1, 2006, the state registrar of voters shall ***implement in a uniform and nondiscriminatory manner***, a single, uniform, official, centralized, interactive computerized statewide voter registration file defined, maintained and administered at the state level that contains the name and registration information of every legally registered voter in the state and assigns a unique identifier to each legally registered voter in the state. The state voter registration system shall be coordinated with other agency databases ***within the state***, including, but not limited to, state department of transportation driver's license records, judicial records of convicted felons and persons declared to be incompetent to vote, and Iowa department of public health records of deceased persons.

Iowa Code § 47.7(2)(a) (2013) (emphasis added). The Voter Removal Rule is not authorized by or conflicts with this statute in two important ways. First, the Voter Removal Rule aims to obtain matches with our voter registration list by comparison with

federal databases beyond the scope and control of the state: “Matches between lists of foreign nationals obtained by the Secretary of State from a federal or state agency and the voter registration list shall be based on a combination of the registrant’s name, driver’s license number, date of birth or last four digits of the registrant’s social security number.” Voter Removal Rule 721—28.5(1)-(2) (Appendix Ex. 1, p. 1). Then “After producing a list of probable matches,” the Secretary of state will attempt to check citizenship status through access “to the Systematic Alien Verification Entitlement (SAVE) program, administered by the United States Department of Homeland Security or to an equivalent database administered by the United States Department of Homeland Security.” Voter Removal Rule 721—28.5(1)-(2) (Appendix Ex. 1, p. 1).

Second, the Voter Removal Rule fails to meet the requirement of being “uniform and nondiscriminatory” as required by Iowa Code § 47.1. By definition, the rule only identifies registered voters who have recently obtained U.S. Citizenship who had first acquired their driver’s licenses from the Iowa DOT as lawful permanent residents.¹ Thus, only this subgroup is subjected to the multi-agency, state-federal matching system and, if identified, to the daunting requirement of proving their U.S. Citizenship to the satisfaction of the Secretary of State. Therefore, the burden is not applied uniformly to all voters. The SAVE system was never designed for voter verification.² It is not a

¹ See Statement of Katherine Culliton-Gonzalez, Voter Protection Program Director, Advancement Project, Testimony before the Virginia House of Delegates, Privileges and Elections Committee, Elections Subcommittee, Hearing on Senate Bill 1077 (Feb. 12, 2013), (Appendix Ex. 5 pp. 21-23).

² See American Immigration Council’s Immigration Policy Center, The Systematic Alien Verification for Entitlements (SAVE) Program, *available at* <http://www.americanimmigrationcouncil.org/justfacts/systematic-alien-verification-entitlements-save-program-fact-sheet>. Included in Addenda. [hereinafter “SAVE

comprehensive list of all immigrants or all U.S. Citizens, and it is not “real time.”³ SAVE is a complex federal program that accesses data through at least 14 separate federal agencies.⁴ The USCIS website shows that SAVE verification is a multistep process.⁵ While the initial electronic verification occurs in seconds, any necessary paper-based verification process takes up to 20 working days—once an agency already has documents at the ready to produce to verify a person’s status.⁶ Each of the layers of verification cost the state an additional fee and imposes burdens on the voter. Like any large aggregation of personal data that has been transcribed and manually entered at multiple times for multiple purposes, it is not free of errors and inconsistencies in either primary or secondary indicators.⁷ Primary indicators include information such as alien numbers,

Factsheet”] (Appendix Ex. 6 pp. 24-26); American Immigration Council’s Immigration Policy Center, Using the (SAVE) Program for Voter Eligibility Verification (August 2012), *available at* <http://www.americanimmigrationcouncil.org/justfacts/using-systematic-alien-verification-entitlements-save-program-voter-eligibility-verification>. [hereinafter “SAVE for Voter Verification Factsheet”]. (Appendix Ex. 7 pp. 27-30);

³ *Id.* See also United States Citizenship and Immigration Services, SAVE Verification Process (last updated 10/01/2012), *available at* www.uscis.gov (HOME>SAVE>Getting Started>SAVE Verification Process). (Appendix Ex. 8 pp. 31-32);

⁴ *Id.*

⁵ SAVE Verification Process, *supra* note 3.

⁶ *Id.*

⁷ *Id.* SAVE for Voter Verification Factsheet, *supra* note 2. Legislation to authorize access to SAVE to verify voters failed in Colorado. Colorado State Rep. Salazar stated “the evidence has borne out” that there is not a large number of noncitizens voting, citing comments by the Colorado Secretary of State that the SAVE system is “riddled with errors.” See Statement of Katherine Culliton-Gonzalez, Voter Protection Program Director, Advancement Project, Testimony before the Virginia House of Delegates, Privileges and Elections Committee, Elections Subcommittee, Hearing on Senate Bill 1077 (Feb. 12, 2013), (Appendix Ex. 5 pp. 21-23).

citizen certificate numbers, and I-94 numbers, while secondary indicators include biographical information, names, birth dates, and social security numbers. The USCIS website provides: “If the SAVE Program does not verify an applicant’s status on the Initial Verification, it does not necessarily imply that the applicant is not authorized to be in the United States. It may be the result of processing error or indicate the need for additional or corrected documentation.”⁸ When errors occur, an in-person visit to a USCIS office with documentation should be arranged.⁹ Replacing documentation takes weeks to months, and costs hundreds of dollars.¹⁰ For example, replacing a lost or stolen certificate of naturalization costs \$345 and may take 6 months to a year.¹¹ The United States Citizenship and Immigration Services – the agency within the federal Department of Homeland Security that administers the SAVE system – has advised against using SAVE to maintain voter registration lists.¹²

⁸ SAVE Verification Process, *supra* note 3.

⁹ See U.S. Citizenship and Immigration Services, Fact Sheet, (Appendix Ex. 9 pp. 33-34).

¹⁰ See Department of Homeland Security, Instructions for Form N-565, Application for Replacement Naturalization/Citizenship Document, (Appendix Ex. 10 pp. 35-37); Affidavit of Della Arriaga in Support of Resistance to Motion to Dismiss. (Appendix Ex. 11 pp. 38-40).

¹¹ *Id.*

¹² See Appendix Ex. 12. The email from a representative of USCIS for SAVE to Jim Gibbons with the Secretary of State’s office: “I advised that the use of the SAVE program for verifying the citizenship status of voters has significant limitations. SAVE cannot verify individuals who acquired US citizenship by birth in the United States because USCIS only has comprehensive records on naturalized, and, to the extent they have acquired Certificates of Citizenship, derived U.S. citizens.”) See also SAVE for Voter Verification Factsheet, *supra* note 2.

By contrast to the Voter Removal Rule, the other administrative rules governing the Secretary of State (Iowa Administrative Code Chapter 28, Voter Registration Rule (I-Voters) Management) that provide for maintenance of the voter registration file are clearly authorized by § 47.7(2)(a). The Voter Registration Commission, through regulations, has already created a detailed regulatory scheme for ensuring that only eligible applicants—meaning, among other qualifications, that they must be U.S. Citizens—have their voter registration approved. *See* Iowa Admin. Code r. 821 (2013). As Petitioner has stated in the pleadings, the administrative rules also delineate several instances in which the Secretary is granted authority to compare Iowa’s voter registration list to other specified lists to ensure that ineligible voters do not remain registered, e.g., comparing Iowa’s list with lists of other states to prevent duplicate voting, Iowa Admin. Code r. 721—28.3; comparing the list with a list of convicted felons, Iowa Admin. Code r. 721—28.4.

These provisions show that the legislature is well aware of how to give the Secretary authority to remove ineligible voters from the list, and that, until the promulgation of the Voter Removal Rule, the VRC and Secretary of State had only regulated voting in a manner consistent with statutory authorization. Had the legislature intended the Secretary to have the broad power he grants himself through promulgation of these rules, it knew how to give it to him. 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 misuse in order to prevent the Secretary from exceeding his authority.

**E. The Voter Registration Commission is the Proper Agency to
Promulgate Rules Governing Voter Registration Issues.**

Iowa 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 create and adopt new rules to the Voter Registration Commission (“VRC”). Iowa Code § 47.8(1) (2011) (the VRC 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, and to promote interagency cooperation and planning.”).

As the state commissioner of elections, the Secretary serves as chairperson for the VRC. Iowa Code § 47.8(1)(c) (2013). The VRC consists of four members: the state commissioner of elections, 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 (2013). 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) (2013). 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 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. . . .” Iowa Code § 47.8 (2013).

A recent example of the VRC exercising the authority to make rules pertaining to maintenance of the voter registration rolls through voter removal is Admin. Code r. 821—7.1 (2013), first noticed in the December 26, 2012 Administrative Rules Bulletin by the VRC as ARC 529C. (Appendix Ex. 13). The rule provides for modification to the voter registration list based on mailing address of voters, with specifically outlined means of notice to the voter, pursuant to Iowa Code §48A. Iowa Admin. Code r. 821—7.1 (2013).

Quite simply, the VRC adopts the policies and rules governing registration, and the Secretary (in his capacity as registrar) carries out those goals by enforcing 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 (2013). Because the VRC has not authorized the Secretary’s actions in this case, he has no authority to act by fiat alone.

Thus, rules pertaining to the removal of registered voters from the voter registration list must be established by the VRC, not the Secretary of State acting unilaterally. There has been no policy determination or other action by the VRC authorizing the Voter Removal Rule’s promulgation, nor is there any Iowa law in place providing for such action by the VRC. Therefore, the Secretary exceeded his statutory authority, and the rule should be struck down.

II. TEMPORARY INJUNCTIVE RELIEF IS APPROPRIATE TO PRESERVE THE STATUS QUO OF PARTIES WHILE THE CASE IS ONGOING.

A. Standard of review

As provided in this Court's prior order issuing a temporary injunction on the Petitioners' claim that emergency rulemaking was improper:

A temporary injunction is a preventative remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Lewis Inv., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005) (citing *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985)). "The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case." *Id.* (citation omitted). A district court's ruling on a motion for stay under section 17A.19(5) is reviewed for an abuse of discretion. *Snap-On Tools Corp. v. Schadendorf*, 757 N.W.2d 339, 342 (Iowa 2008). The burden is on the movant to establish a temporary injunction is appropriate. *O.N. Equity Sales Co. v. Pals*, 509 F. Supp. 2d 761, 767 (N.D. Iowa 2007). However, it is also "often said the pleader will be accorded the advantage of every reasonable intendment, even to implications, regardless of technical objections or informalities." *Bd. of Ed. Of Kimballton Indep. Sch. Dist. v. Bd. of Ed. Of Audubon County*, 260 Iowa 840, 151 N.W.2d 465, 567 (1967). In considering a request for temporary injunction, the Court should "consider the circumstances confronting the parties and balance the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001)(citation omitted).

ACLU v. Schultz, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012).

When considering an application for a stay of final administrative action, the court should consider the balance of four factors laid out in the Iowa Administrative Procedures Act: (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 our various pleadings and below, the balance of these four factors strongly supports a stay of administrative action in this case.

B. Petitioners are likely to be successful in their claim that the Secretary of State exceeded his lawful authority.

As fully argued in this brief in support of Petitioner's Motion for Review on the Merits, *supra* section I, Petitioners have demonstrated a likelihood of success on their claim that the Voter Removal Rule is not authorized by any law. The Secretary lacks the requisite statutory authority to promulgate the Voter Removal. First, unlike other forms of maintenance of the voter registration rolls that have been specifically authorized, maintenance by cross-reference to numerous federal immigration databases is not authorized by an Iowa statute. Second, the Voter Registration Commission, not the Secretary of State alone, is vested with the authority to promulgate procedures through rulemaking for the maintenance of Iowa's voter registration list.

C. Petitioners will suffer an irreparable injury if a stay is denied.

Prior to the November 2012 General Election, this court granted a temporary injunction to protect the parties. Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Sept. 13, 2012). The Court found that Petitioners had shown a potential that they and their members would suffer irreparable harm either through misidentification or chilling of qualified voters if the Secretary proceeded according to the Voter Removal Rule, citing affidavits that are now part of the record showing fear of erroneous identification, reputational harm, and wrongful criminal investigation. *Id.*

The prior temporary injunction protected the parties during the November 2012 General Election and until the final Voter Removal Rule became effective in March 2013; thereafter, and the absence of the Secretary's access to the SAVE system, temporarily reduced the potential harm of the Voter Removal Rule. *ACLU v. Schultz*, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012) at 8-9. However, the recent announcement that the Secretary has been granted access to the SAVE system by USCIS, (Appendix Ex. 14), as well as upcoming local elections, have once again created urgency to move to protect Iowa voters from the rule. (Appendix Exhibit 15).

D. Other parties will not be harmed by a stay.

Respondent will not be harmed by a temporary stay to protect voters while a final adjudication of the rule's legality is pending. In ruling on the Respondent's prior claims that failure to implement the Voter Removal Rule would harm the agency, this Court found that staying enforcement of the rule would not be likely to remove transparency or compromise voters' faith in the voter registration system, or undermine confidence in the agency's ability to conduct free and fair elections. *ACLU v. Schultz*, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012) at 10. Quite the contrary, the court found the harms all fell on Petitioners and Iowa voters:

With regard to the Voter Purge Rule, the Court believes it places a fairly heavy burden on any allegedly ineligible voter who receives notice under this rule to show that they are in fact a qualified voter. Such a burden has the potential to fall more heavily on any newly admitted citizens who may not fully understand how to prove their citizenship, and/or on lower income individuals who may not have the time or resources required to refute such claims. Petitioners have already

identified inaccuracies on the DOT list of individuals who obtained a driver's license while not a citizen and subsequently became citizens and registered to vote....In the alternative they may be forced to show additional proof of citizenship at the polling place; an activity which could easily be seen as having a chilling effect on Iowa residents who are qualified electors.

ACLU v. Schultz, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012) at 10.

E. The Secretary did not rely on the public interest in promulgating these rules.

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 (2013) ("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 (2013) (providing for election-day and same-day registration). The Secretary, for two legislative sessions, in 2012 and 2013, could have sought legislation authorizing the Voter Removal Rule, or even regulatory backing from the Voter Registration Commission. Instead, the Secretary waited until July 20, 2012 before enacting the rules via emergency rulemaking, and failed to produce legislation authorizing the rule, even after the Court's grant of a temporary injunction, in the 2013 session. As found in this Court's prior order, the public interest weighs in favor of protecting voters who are likely to be swept up by the Voter Removal Rule, rather than speedy implementation of the Rule prior to a final adjudication of its legality. *See ACLU v. Schultz*, No. CVCV00931, Ruling and Order on Petitioner's Motion for Temporary Injunctive Relief (Iowa Dist. Ct. Sept. 13, 2012) at 11.

CONCLUSION

Because the Secretary clearly did not possess the authority to unilaterally act on behalf of the legislature and Voting Rights Commission to vest himself with the authority to promulgate the challenged rules, and no material facts as to this claim are in dispute, Petitioners respectfully ask for summary judgment as a matter of law. In the alternative, Petitioners move for a temporary stay to protect Iowa voters while the legality of the rule is being adjudicated.

WHEREFORE, the Petitioners, ACLU of Iowa and LULAC of Iowa, respectfully request a judgment on the merits in this case striking the Voter Removal Rule, and in the alternative, a temporary stay of the rule.




Respectfully submitted,

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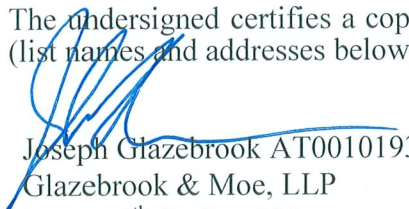
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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this application was served on the following parties (list names and addresses below) on the 26th day of August, 2013 by electronic service.


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