IOWA SUPREME COURT

No. 14-0585

AMERICAN CIVIL LIBERTIES UNION and LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA,

Petitioners-Appellees,

vs.

IOWA SECRETARY OF STATE MATT SCHULTZ,

Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE MARY PAT GUNDERSON, JUDGE (MOTION TO DISMISS) and SCOTT D. ROSENBERG, JUDGE (MOTION FOR RECONSIDERATION)

RESPONDENT-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Erred in Waiving Standing Under the Great Public Importance Doctrine in a 17A Petition Where Standing is Statutorily Required.

AUTHORITIES

Iowa Code chapter 17A

Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999)

Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)

Alons v. Iowa Dist. Ct., 698 N.W.2d 858 (Iowa 2005)

Iowa Code section 17A.19(1)

Iowa Code section 17A.19(10)

Polk County v. Iowa State Appeal Bd., 330 N.W.2d 267 (Iowa 1983)

Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439 (Iowa 1983)

City of Des Moines v. Pub. Employment Relations Bd., 275 N.W.2d 753 (Iowa 1978)

Medco Behavioral Care Corp. v. Dep't of Human Servs., 553 N.W.2d 556 (Iowa 1996)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992)

Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364 (1991)

II. Whether the District Court Erred in Bifurcating and Disposing the Petition for Judicial Review on a Motion Unavailable in a 17A Proceeding.

AUTHORITIES

Iowa Code chapter 17A

Callender v. Skiles, 591 N.W.2d 184 (Iowa 1999)

Iowa Medical Society v. Iowa Board of Nursing, 831 N.W.2d 839 (Iowa 2013)

City of Sioux City v. GME, Ltd., 584 N.W.2d 322 (Iowa 1998)

Black v. Univ. of Iowa, 362 N.W.2d 459 (Iowa 1985)

Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 449 (Iowa 1983)

Young Plumbing & Heating Co. v. Iowa Natural Res. Council, 276 N.W.2d 377 (Iowa 1979)

III. Whether the District Court Erred in Concluding that the Secretary of State's Rulemaking Authority is Entirely Subsumed by the Voter Registration Commission.

AUTHORITIES

Iowa Code § 17A.19(10)(b)

Iowa Code § 17A.19(10)(c)

City of Sioux City v. GME, Ltd., 584 N.W.2d 322 (Iowa 1998)

Overton v. State, 493 N.W.2d 857 (Iowa 1992)

Iowa Code § 17A.19(8)(a)

Iowa Code § 47.1(1)

Iowa Code § 47.7

Iowa Code § 47.1(3)

Iowa Code § 47.1

Iowa Code § 47.8

Iowa Code § 47.8(1)(a)

Iowa Code § 47.8(1)(b)

Iowa Code § 47.8(2)

Iowa Code § 47.8(1)

Coleman v. Iowa Dist. Ct., 446 N.W.2d 806 (Iowa 1989)

1976 Iowa Acts ch. 1075, § 22

Iowa Admin. Code chapter 721—23

Iowa Admin. Code chapter 721—28

Iowa Admin. Code rule 821—1.2

Iowa Code § 48A.19(3)

Iowa Code § 48A.18(4)

Iowa Admin. Code rule 721—28.3

Iowa Admin. Code rule 721—28.4

Iowa Admin. Code rule 721—28.5

Iowa Admin. Code rule 721—21.3

Iowa Admin. Code rule 721—21.7

Iowa Admin. Code rule 721—21.8

Iowa Admin. Code rule 721—21.302

Iowa Code § 48A.25A

Iowa Code § 48A.30

Iowa Code §§ 48A.14–16

Iowa Code § 47.7(2)(a)

Iowa Code § 48A.14

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(*c*), this case should be retained by the Iowa Supreme Court. Resolution of this case involves two issues of first impression. The first is the proper procedure for a rulemaking challenge, a question left unaddressed by this Court in *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826 (Iowa 2013). The second is the Secretary of State's rulemaking authority over voter registration, especially the maintenance of voter registration rolls, in light of the Voter Registration Commission.

STATEMENT OF THE CASE

The Secretary of State appeals the district court's issuance of a permanent injunction of an administrative rule related to the maintenance of Iowa's voter registration rolls. The district court's decision was not limited to the narrow issue before it and drastically limits the Secretary's ability to fulfill his statutory duty as the State Registrar of Voters to maintain the accuracy of state registration records.

FACTUAL AND PROCEDURAL HISTORY

In March 2012, the Iowa Department of Transportation (DOT) provided Secretary of State Matt Schultz access to its database of foreign nationals who have an Iowa driver's license. (Schultz Affidavit ¶ 3; App. 75). The Secretary instructed staff to compare the DOT database with Iowa voter registration records. (Schultz Affidavit ¶ 4; App. 75). The comparison revealed that over three thousand[1]

[1] Petitioners assert the Secretary cannot rely upon these numbers as the "numbers do not account for subsequent intervening adjustments in status to full citizenship." (Petitioners' Response to Respondent's Brief on Judicial Review at 11–12). The Secretary indisputably agrees, which is precisely why the Secretary sought to compare the DOT list with the SAVE database—to remove those individuals who had subsequently attained citizenship. (Reisetter Affidavit ¶ 10; App. 160).

foreign nationals appeared to be registered to vote in the State of Iowa. (Schultz Affidavit ¶ 5; App. 75). The Secretary further instructed staff to determine how many of these foreign nationals actually voted in the 2010 general election. (Schultz Affidavit ¶ 6; App. 76). Staff determined that over twelve hundred foreign nationals appeared to have voted in the 2010 general election. (Schultz Affidavit ¶ 7; App. 76). The Secretary inferred from this information that Iowa faced a potential voter fraud problem. (Schultz Affidavit ¶ 8; App. 76).

In order to determine whether Iowa's internal data was accurate and if any foreign national identified in the DOT database had subsequently attained citizenship, the Secretary requested access to the federal Systematic Alien Verification for Entitlements (SAVE) database. (Schultz Affidavit ¶ 8; App. 76). SAVE "is a web-based service that helps federal, state and local benefit-issuing agencies, institutions, and licensing bureaus determine the immigration status of benefits to applicants so only those entitled to benefits receive them."[2] SAVE is maintained by the U.S. Citizenship and Immigration

[2] U.S. Citizenship and Immigration Service, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1721c2ec0c7c8110VgnVCM100000

Service (USCIS). After informal inquiries, the Secretary made a formal application for access to the SAVE database with the federal Department of Homeland Security (DHS). (Schultz Affidavit ¶ 9; App. 76).

On April 25, 2012, the Secretary was informed that USCIS wanted to ensure that verifying citizenship status of current and future voters using the SAVE program does not conflict with the Voting Rights Act. (Schultz Affidavit ¶ 10; App. 76). USCIS sought guidance with the federal Department of Justice, Voting Rights Section. (Schultz Affidavit ¶ 10; App. 76). DHS additionally requested guidance on the Secretary's intended use of the SAVE database. (Schultz Affidavit ¶ 11; App. 76). On May 22, Sarah Reisetter, Iowa Director of Elections, outlined Iowa's proposed procedure for implementing SAVE access. DHS consulted with the federal Office of Chief Counsel regarding Iowa's intended use. (Schultz Affidavit ¶ 12; App. 76).

After repeated inquires as to the status of Iowa's formal request for SAVE access, DHS informed Director Reisetter that Iowa was approved for access on July 17. (Schultz Affidavit ¶¶ 13, 14; App. 76–

4718190aRCRD&vgnextchannel=1721c2ec0c7c8110VgnVCM1000004718190aRCRD (last accessed August 15, 2012).

77). On July 20, the Secretary promulgated two administrative rules through emergency rulemaking procedures implementing Iowa's access to SAVE as outlined to DHS in May. (Schultz Affidavit ¶ 15; App. 77). The first of those rules, the Voter Complaint Rule was codified at Iowa Administrative Code rule 721—21.100. The second, the Noncitizen Registered Voter Identification Rule was codified at Iowa Administrative Code rule 721—28.5.

The Petitioners filed a Petition for Judicial Review challenging the legality of the two rules on August 8, 2012. That Petition was later amended twice. The Secretary sought to have the Petition dismissed as the Petitioners lacked standing. The district court denied the motion, waiving the required standing under the great public importance doctrine. (Dist. Ct. Order Sept. 11, 2012; App. 183–90). The district court then granted temporary relief over the Secretary's objection and stayed the implementation of the emergency rules. (Dist. Ct. Order Sept. 13, 2012; App. 191–203).

ACLU and LULAC thereafter served discovery upon the Secretary and attempted to depose a number of individuals. The Secretary resisted. (Motion for a Protective Order & Expedited Hearing; App. 204–208) A hearing on the Petitioners' Motion to

Compel was held November 30, 2012. At the conclusion of the hearing, the Petitioners served a Motion for Summary Judgment. (Motion for Summary Judgment; App. 212–214). Neither the Motion to Compel nor the Motion for Summary Judgment was ever ruled upon. Instead the district court stayed the petition pending finalization of the normal rulemaking process. (Dist. Ct. Order Jan. 17, 2013; App. 218–220).

On March 27, 2013, the single permanent rule went into effect. In the rulemaking process the emergency Voter Complaint Rule, Iowa Administrative Code rule 721—21.100, was wholly rescinded. It was not replaced by a permanent rule. The Noncitizen Registered Voter Identification Rule, Iowa Administrative Code rule 721—28.5, was substantially amended following notice and comment period. (Pet'rs. App. Ex. 3; App. 250–52). The final and permanent version of the rule provides:

> **Noncitizen registered voter identification and removal process.**
>
> **28.5(1)**
>
> *Matching of foreign national files and the voter registration list.*
>
> 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 a

registrant's name, driver's license number, date of birth or last four digits of the registrant's social security number. The match may be completed as often as the secretary of state deems necessary, but not more than once a quarter.

28.5(2)

Confirming matches between the foreign national file and the voter registration list.

After producing a list of probable matches based on the criteria listed in subrule 28.5(1), the secretary of state shall determine whether the registrant has obtained citizenship status subsequent to the date on which the record in the file obtained from the other federal or state agency was generated. This determination shall be made by obtaining 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.

Following verification that a registrant is not a United States citizen, the secretary of state shall send the registrant a letter and a response form by certified mail that the registrant may use to respond to the information received by the secretary of state. The letter shall inform the registrant of the source of the information received by the secretary of state (e.g., driver's license files from the Iowa department of transportation), provide the registrant with information regarding how to correct the information obtained by the secretary of state, and provide the registrant with information regarding how to voluntarily remove the registrant's name from the voter registration list if the registrant is not a United States citizen. A postage-paid return envelope shall be included with the letter and response form. The response form shall include spaces for the registrant to indicate that the information received by the secretary of state is either correct or incorrect and a space for the registrant to indicate that the registrant needs more time to provide a

response. In the event a registrant indicates that the registrant needs more time to provide a response, the secretary of state shall not proceed under subrule 28.5(3) for a minimum of 60 days from the date the letter was originally mailed.

28.5(3)

Registered voter notification.

Upon receipt of information indicating that a noncitizen is registered to vote, the secretary of state shall take the following steps.

a.

Subsequent notice.

If the registrant does not respond to the initial letter from the secretary of state sent pursuant to subrule 28.5(2) within 30 days from the date the letter was originally mailed, the secretary of state shall send the registrant a subsequent notice informing the registrant of the source of the information received by the secretary of state (e.g., driver's license files from the Iowa department of transportation). The subsequent notice shall also provide the registrant with information regarding how to correct the information obtained by the secretary of state, provide the registrant with information regarding how to voluntarily remove the registrant's name from the voter registration list if the registrant is not a United States citizen, and list the penalty for being registered to vote while knowing oneself not qualified. A postage-paid return envelope shall be included with the notice and response form. The response form shall include spaces for the registrant to indicate that the information received by the secretary of state is either correct or incorrect and a space for the registrant to indicate that the registrant needs more time to provide a response. In the event a registrant indicates that the registrant needs more time to provide a response, the secretary of state shall not

proceed under paragraph 28.5(3)*"b"* for a minimum of 60 days from the date the notice was originally mailed.

b.

County auditor notification.

(1)

If a registrant receives a notice from the secretary of state pursuant to paragraph 28.5(3)*"a"* and fails to respond to the notice within 30 days from the date the notice was originally mailed, the secretary of state shall notify the county auditor that the secretary of state has received information indicating that the registrant may not be a citizen of the United States and may be illegally registered to vote. The county auditor shall notify the precinct election officials working at the polling places on election day that the secretary of state has indicated that a registrant appearing on the election register for an election may not be a United States citizen and shall be challenged by the precinct election officials if that registrant attempts to vote.

(2)

The county auditor shall notify the secretary of state when any registrant who is the subject of one of these notices voluntarily requests cancellation of the registrant's record.

c.

Noncitizen registrant with active absentee ballot request.

If a county auditor receives notice pursuant to this rule from the secretary of state for a registrant who has an active absentee ballot request on the registrant's record, the county auditor shall attach the notice from the secretary of state regarding the registrant to the voter's absentee ballot affidavit envelope if the absentee ballot is returned to the auditor's office. The county auditor shall instruct the precinct election officials to challenge the

voter's absentee ballot as provided in Iowa Code section 53.31.

d.

Noncitizen registrant with voting history on voter record.

If a county auditor receives notice pursuant to this rule from the secretary of state for a registrant who has a previous voting history on the voter's record, the county auditor shall immediately print a copy of the voter's voting history, make copies of any signed election registers or absentee ballot affidavit envelopes that are still in the custody of the county auditor and make a copy of the notice received by the county auditor pursuant to this rule. The foregoing list of documents shall be forwarded to the secretary of state within 30 days of receipt of the notice.

28.5(4)

Removing confirmed matches from the voter registration list.

A registered voter shall only be removed from the voter registration list following the voter's request for removal or the completion of the legal process set forth in Iowa Code sections 48A.14 through 48A.16.

This rule is intended to implement Iowa Code chapters 39A, 48A, 49 and 53.

Iowa Admin. Code r. 721—28.5.

Petitioners filed a Second Amended Petition for Judicial Review challenging both the emergency rules and the permanent rule on March 29, 2013. (Second Amended Petition for Judicial Review; App. 221–32). The Secretary thereafter sought to limit the judicial review

to only the permanent rule. The Secretary's partial motion to dismiss was denied on September 21, 2013. (Dist. Ct. Order Sept. 21, 2013; App. 369–74). In the interim, Petitioners filed a Motion for Review on the Merits, asking the district court to bifurcate the second, purely legal issue raised in their Second Amended Petition—that the Secretary exceeded his statutory authority in promulgating the rules. The district court denied that request, but granted a temporary injunction staying the implementation of the permanent rule. (Dist. Ct. Order Nov. 12, 2013; App. 375–82).

At about the same time, Petitioners served new requests for discovery, which the Secretary again resisted. A hearing on the discovery dispute was held at the same time as Petitioners request to reconsider their Motion for Review on the Merits. (Order Setting Hearing, Jan. 3, 2014; App. 400–01). The district court chose to ignore the discovery issue, agreed to reconsider the Petitioners' Motion for Review on the Merits, and set a briefing schedule. (Dist. Ct. Order Jan. 17, 2014; App. 402–03).

On March 5, 2014, the district court issued a ruling on Petitioners' Motion for Reconsideration of Motion for Review on the Merits. (Ruling on Motion for Reconsideration of Review on the

Merits; App. 417–25). The Secretary filed a timely Notice of Appeal. (Notice of Appeal; App. 426).

ARGUMENT

I. The District Court Erred in Waiving Standing Under the Great Public Importance Doctrine in a 17A Petition Where Standing is Statutorily Required.

A. Error Preservation & Standard of Review.

Respondent preserved error. The Secretary filed a pre-Answer Motion to Dismiss on August 16, 2012. (Brief in Support of Respondent's Motion to Dismiss; App. 66–74). In said brief, the Secretary cited the statutory standing requirements for judicial review proceedings. (Brief in Support of Respondent's Motion to Dismiss at 4; App. 69). The district court denied the Motion to Dismiss following hearing. (Ruling and Order on Respondent's Motion to Dismiss; App. 183–90).

Whether a petitioner has statutory standing to pursue a judicial review action is a question of statutory interpretation. As a result, this Court's review is for corrections of errors at law. *Callender v. Skiles*, 591 N.W.2d 182, 184 (Iowa 1999).

B. Argument. On September 11, 2012, the district court denied the Secretary of State's Motion to Dismiss. (Ruling and Order on Respondent's Motion to Dismiss; App. 183–90). The sole issue in the ruling concerns the Secretary's allegation that Petitioners lacked

standing to pursue their Petition for Judicial Review. Uniquely, the district court did *not* determine that the Petitioners had standing to pursue their claims. Instead, the district court found "this is precisely the type of situation the exception to the standing rule was intended to address and which requires the Court to intervene in the affairs of another branch of government." (Ruling and Order on Respondent's Motion to Dismiss at 5–6; App. 187–88). In other words, the district court waived standing under the great public importance doctrine.

Not only was this the first instance where the great public importance doctrine was applied in Iowa and not merely recognized, it was applied to a judicial review proceeding where the doctrine is wholly inapplicable. *See Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008); *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858 (Iowa 2005). Unlike an original action where standing is prudential, in a judicial review proceeding under Iowa Code chapter 17A standing is jurisdictional. Under Iowa Code section 17A.19(1), a petition for judicial review can only be brought by a person or party "who is aggrieved or adversely affected by any final agency action." Likewise agency action can be reversed under section 17A.19(10) if the court "determines that substantial rights of the *person* seeking judicial review have been

prejudiced. . . .” (emphasis added). *See Polk County v. Iowa State Appeal Bd.*, 330 N.W.2d 267, 272 (Iowa 1983) (discussing the standing requirement for judicial review proceedings and equating 17A’s statutory standing requirement to the traditional notions of legal interest and injury); *Iowa Bankers Ass’n v. Iowa Credit Union Dep’t*, 335 N.W.2d 439, 443–44 (Iowa 1983) (rejecting liberal interpretation of statutory standing requirement under 17A concluding that “the legislature intended to make a judicial remedy available to any person or party who can demonstrate the requisite injury”); *City of Des Moines v. Pub. Employment Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1978) (adopting two-part test for standing in administrative proceedings). The district court, therefore, had no authority to waive the standing requirement in this instance.

Neither the ACLU nor LULAC have the necessary standing to pursue this action as neither party is aggrieved or adversely affected by the challenged administrative rules. In order to have standing, under the Iowa Administrative Procedure Act, the petitioner must “(1) have a specific, personal, and legal interest in the litigation; and (2) the specific interest must be adversely affected by the agency action in question.” *Medco Behavioral Care Corp. v. Dep’t of Human*

Servs., 553 N.W.2d 556, 562 (Iowa 1996). Petitioners' claims for organizational and third-party standing fail under this two-pronged test.

The United States Supreme Court explored the issue of "organizational standing" in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992). The Court noted that when the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Lujan*, 504 U.S. at 562, 112 S. Ct. at 2137. The Court held that to have standing an organization must show "that one or more of [its] members would be 'directly' affected apart from their 'special interest' in the subject." *Id.* at 563, 112 S. Ct. at 2138.

This case is on all fours with *Lujan*. The challenged administrative rules concern voting. Neither the ACLU nor LULAC possess the right to vote. The rules, therefore, regulate someone *other* than the Petitioners. The ACLU overlooks this issue by claiming it has a special interest in voting rights. To that end, it introduced its Iowa Voter Empowerment and Education materials and a 2005 Amicus Brief. Likewise, LULAC introduced an affidavit by Joe Henry and its bylaws both attesting to a special interest in

voting and Latino outreach.[3] Neither organization, however, can avoid the indisputable fact that they are not subject to the rules' regulation and as such cannot be adversely affected by their promulgation. Any "injury" to the ACLU and LULAC is wholly abstract and akin to the general societal interest in constitutional governance. *See Iowa Bankers Ass'n*, 335 N.W.2d at 444 (noting that petitioner "must show some interest distinguishable from that of the general public, and injury to that interest has been or will be sustained"). Petitioners simply cannot meet the second prong of the *Medco* test. The real question is whether either or both organizations can assert the interests of its members.

The Petitioners have not identified any of its members that have been directly affected by the promulgation of the challenged rules.[4] Instead Petitioners have merely alleged that some unidentified

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[3] Throughout the pendency of this judicial review, Petitioners have assumed that a "disproportionately high number of Latinos" will be affected by the challenged rules. (Brief in Support of Petitioner's Resistance to Respondent's Motion to Dismiss at 14). This is pure speculation and the record is wholly devoid of any factual basis to support this proposition.

[4] Because the emergency rules were stayed no individual has been regulated under either the emergency or permanent rules. The Secretary's Office has not issued any letters and no individual has been removed from the voter registration rolls.

members *may be* affected by the *future* enforcement of the administrative rules. (Henry Affidavit; App. 93–94). This is simply not enough to be "adversely affected" and to confer standing, especially at this late stage in the litigation. *See Lujan*, 504 U.S. at 561, 112 S. Ct. at 2137 (noting the differences between the requisite standing required at the final stage of litigation).

Petitioners submitted three affidavits from new citizens in support of their Resistance to the Motion to Dismiss. (Petitioner's Exhibit List for Briefs in Support of Resistance to Motion to Dismiss and for Temporary Injunctive Relief at 3–11; App. 95–104). Notably none of these affidavits state that these citizens reasonably fear that their right to vote will be adversely affected by the challenged rules. More importantly, none of these citizens claim to be members of either the ACLU or LULAC. The record is wholly devoid of any evidence that *any* member of the ACLU or LULAC is regulated by the challenged rules or reasonably fears regulation. Under this record, there is simply no basis to allow the ACLU or LULAC to assert the interests of unknown individuals.

Petitioners' assertion of third-party standing is equally as meritless. "Third-party standing normally requires a litigant to

establish the parties not before the court, who have a direct stake in the litigation, are either unlikely or unable to assert their rights." *Godfrey*, 752 N.W.2d at 424; *see also Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 1370 (1991). Once again the record is wholly devoid of any evidence showing that third-parties are incapable or unlikely to assert their rights. For instance, the affidavits submitted by Petitioners from "New Citizens" do not suggest an inability or unwillingness to assert their interests. Since the challenged rules have never been acted upon, it is pure speculation that a regulated party would not challenge the rules—either in the hearing process contemplated by the rules themselves—or in a separate proceeding.

Even assuming Petitioners could make this showing, standing to bring an action on behalf of a third party nevertheless requires the litigant to have suffered an injury in fact. *Id.* As noted previously, neither the ACLU nor LULAC have suffered or will suffer an injury in fact.

II. The District Court Erred in Bifurcating and Disposing the Petition for Judicial Review on a Motion Unavailable in a 17A Proceeding.

A. Error Preservation & Standard of Review. The Secretary preserved error by filing a Resistance to Motion for Review

on the Merits. (Resistance to Motion for Review on the Merits; App. 360–68). Although this is a unique question, resolution of this issue involves issues of statutory interpretation. Review is thus for correction of errors at law. *Callender*, 591 N.W.2d at 184.

B. Argument. As noted earlier, this judicial review was disposed of on a Motion to Reconsider Motion for Review on the Merits. While Iowa law recognizes liberal motion pleading, a Motion for Review on the Merits has never been recognized in a judicial review proceeding either under the Iowa Administrative Procedure Act or under case law. Petitioners incorrectly base their unique motion on a misreading of this Court's decision in *Iowa Medical Society*. In *Iowa Medical Society*, the district court reversed final agency action promulgating rules on a motion for summary judgment. *Iowa Med. Soc.*, 831 N.W.2d at 839. As a result, this Court reviewed "the district court's summary judgment as though it were a ruling on the merits in a judicial review action." *Id.* This language was not recognition by the Court of a new motion or novel procedural action to resolve judicial review proceedings. Instead, this language is recognition that summary judgment is not available in a judicial review action, so the Court would review the district court's

judgment as if it were a decision on the petition for judicial review. *See also City of Sioux City v. GME, Ltd.*, 584 N.W.2d 322, 324 (Iowa 1998).

Evidenced by this case's peculiar procedural history and the prior issue, this case got off on the wrong procedural footing right from the start. The Petitioners and the district court treated the petition as if it were an original proceeding. At one point, the court even issued an order for a trial scheduling conference. (Order for Trial Scheduling Conference; App. 209–11). A petition for judicial, like the one at issue, is an appellate proceeding. As a result, different rules and procedures "apply to the hearing and disposition of judicial review proceedings as distinguished from original actions." *Black v. Univ. of Iowa*, 362 N.W.2d 459, 463 (Iowa 1985).

Under Petitioners' theory, the issue is purely one of semantics—summary judgment is impermissible but a motion for review on the merits is permissible. Whatever name one attaches to the motion is immaterial as neither motion is an available motion in a judicial review action. The question is not the proper name for the motion. The question is whether bifurcation or summary disposition of one count of a multi-count judicial review petition is permitted. Under

this Court's precedent, it is not. Petitions for judicial review often include pure questions of law, questions of application of law to facts, substantial evidence reviews, and any combination thereof. The Iowa Administrative Procedure Act "provides a comprehensive, integrated procedure for review of [agency] action." *Iowa Bankers Ass'n*, 335 N.W.2d at 449. It is not intended to be adjudicated on a piecemeal basis.[5]

In both *Iowa Medical Society* and *City* of *Sioux City*, the issues raised by the petitioners were purely legal questions. *Iowa Med. Soc.*, 831 N.W.2d at 839; *City of Sioux City*, 584 N.W.2d at 324. Notably the petitioners in those cases did not raise issues of law *and* issues of fact. Here, the Petitioners raised three issues. (Second Amended Petition for Judicial Review; App. 221–32). Petitioners' challenge to

[5] Not only is summary judgment a procedure not typically permissible in appellate proceedings, its application to a multi-count petition for judicial review is illogical. Summary judgment is permitted in original proceedings because it promotes judicial efficiency and forgoes the need to conduct an unnecessary trial. There is no efficiency to be gained here. Assuming the Secretary prevails on this appeal, the case will have to be remanded to the district court for adjudication on the two remaining counts, one of which relates to both the emergency and permanent rules. This remand will entail additional briefing and additional oral argument because the other issues were never briefed. Of course, an appellant court is free to decide a case on a single, dispositive issue where the entire case was briefed and presented. This is not what occurred here.

the Secretary's emergency promulgation as the constitutional law claim involve questions of the application of law to fact. This "mixed" petition was simply not contemplated in either *Iowa Medical Society* or *City of Sioux City*. In this type of judicial review proceeding summary judgment is inapplicable and inconsistent with the district court's appellate capacity and the purposes of 17A judicial review. *Iowa Bankers Ass'n*, 335 N.W.2d at 448–49 (finding motion for adjudication of law points in a rulemaking challenge inapplicable as it would "short-circuit" judicial review); *Young Plumbing & Heating Co. v. Iowa Natural Res. Council*, 276 N.W.2d 377, 381 (Iowa 1979) (finding summary judgment inapplicable to judicial review of a contested case proceeding).

III. The District Court Erred in Concluding that the Secretary of State's Rulemaking Authority is Entirely Subsumed by the Voter Registration Commission.

A. Error Preservation & Standard of Review. The Secretary preserved error by raising this issue it his Brief on Judicial Review. (Respondent's Brief on Judicial Review; App. 404–16). The district court ruled on this issue in its Ruling on Motion for Reconsideration of Review on the Merits. (Ruling on Motion for Reconsideration of Review on the Merits; App. 417–25).

Petitioners argue that the Secretary's rulemaking should be reversed under Iowa Code section 17A.19(10)(*b*) and (*c*). A reviewing court "shall reverse, modify, or grant other appropriate relief" from final agency action that is "[b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law," or "[b]ased 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)(*b*); (*c*).

" 'An Agency rule is presumed valid and the party challenging the rule has the burden to demonstrate that a "rational agency" could not conclude the rule was within its delegated authority.' " *City of Sioux City v. GME, Ltd.*, 584 N.W.2d 322, 324–35 (Iowa 1998) (quoting *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992)); *see also* Iowa Code § 17A.19(8)(*a*) ("The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.").

B. Argument. Petitioners assert the rules exceeded the Secretary's statutory authority because (1) cross-referencing voter registration records with federal databases is not specifically authorized by statute and (2) the Secretary's promulgation of the

contested rules conflicts with the role of the Voter Registration Commission (VRC). Implicit in their argument and in the district court's decision is an assertion that the Secretary's rulemaking authority over voter registration and voter registration maintainance has been *wholly subsumed* by the VRC. Because that underlying assumption pervades review of both issues, it will be addressed first.

By statute, the Secretary of State serves as the State Commissioner of Elections. Iowa Code § 47.1(1). One of the State Commissioner of Elections' duties is to "prescribe uniform election practices and procedures." *Id.* By statute, the Secretary further serves as the State Registrar of Voters. *Id.* § 47.7. The chief duty of the State Registrar of Voters is the "preparation, preservation, and maintenance of voter registration records." *Id.* Finally, the Secretary is designated as the chief election official responsible for complying with the National Voter Registration Act. *Id.* § 47.1(3).

In order to fulfill his statutory duties, the Secretary has rulemaking authority. Iowa Code §§ 47.1; 47.7. These statutory duties include maintenance of the voter registration records. *Id.* The VRC was created and is governed by Iowa Code section 47.8. The VRC is comprised of the Secretary, as State Commissioner of

Elections, the state chairpersons of the two major political parties, and a county commissioner of registration. *Id.* § 47.8(1)(*a*). The VRC meets quarterly and is required to be politically balanced. *Id.* § 47.8(1)(b). The Commission's chief responsibility is to "prescribe the forms required for voter registration by rule promulgated pursuant to chapter 17A." *Id.* § 47.8(2).

The VRC is further authorized "to make and review policy, adopt rules, and establish *procedures* to be followed by the registrar in discharging the duties of that office. . .". Iowa Code § 47.8(1) (emphasis added). This is no dispute that the VRC has authority to promulgate rules regarding voter registration. The issue is whether that authority is *exclusive*.

To find, as the district court did, that the VRC's rulemaking authority over voter registration is exclusive would be to nullify the Secretary's statutory obligations under section 47.7—especially in regard to his statutory duty to maintain voter registration rolls. VRC's authorizing section fails to even reference section 47.7, let alone refer to maintenance. There is simply no evidence that the legislature intended to abrogate the Secretary's rulemaking authority or duties regarding voter registration maintenance. When statutes do

not directly conflict—as is the case here—"they should be read together and, if possible, harmonized". *Coleman v. Iowa Dist. Ct.*, 446 N.W.2d 806, 807 (Iowa 1989). As a result, the most logical interpretation is that *both* the Secretary and the VRC have authority to promulgate rules regarding voter registration.[6]

The Commission was created in 1976. 1976 Iowa Acts ch. 1075, § 22. Since that time, numerous Secretaries of State have promulgated rules related to voter registration—especially in regard to the maintenance of the rolls. For instance, the Secretary has administrative rules related to voter registration in state agencies. Iowa Admin. Code chapter 721—23 (adopted in 1988 and amended by Secretaries in 1990, 1995, and 2008).[7] Likewise, the Secretary has rules related to the maintenance of the Voter Registration File (I-Voters). Iowa Admin. Code chapter 721—28 (adopted in 2006,

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[6] The Commission itself recognizes this dual role. Iowa Administrative Code rule 821—1.2 states, "The state registrar is responsible for the regulation of the preservation, preparation and maintenance of voter registration records. This regulation activity is in accordance with the policies of the voter registration commission."

[7] These rules are prime example of the dual role. Under Iowa Code section 48A.19(3), the Secretary has the duty to proscribe rules for voter registration at state agencies, while under section 48A.18(4), the VRC has the duty to adopt rules for registration at the DOT.

amended in 2012 and 2013). These rules include a process for the deletion of duplicate voter registrations. Iowa Admin. Code r. 721—28.3. It also includes rules for the cancellation and restoration of voter registration due to felony conviction. Iowa Admin. Code r. 721—28.4.

If the Petitioners are correct, far more rules than simply rule 721—28.5 would presumptively be invalid. And future Secretaries of State would be left without an ability to fulfill his/her statutory obligation to maintain Iowa's voting registration records. *See* Iowa Admin. Code r. 721—21.3 (defining "current and valid" identification for election day registration adopted in 2009); r. 721—21.7 (setting forth procedure for poll workers when processing election day registrations and adopted in 2009); r. 721—21.8 (requiring follow-up notice to voters after election day registration and adopted in 2009); r. 721—21.302 (related to in-person voting after close of registration and adopted in 2009).

Because the Secretary possesses rulemaking authority over voter registration maintenance, the only way in which Petitioners can be successful is to demonstrate that the Secretary's exercise of his statutory authority conflicts with another provision of the Iowa Code.

See Iowa Code § 17A.19(10)(*b*) (noting that the district court will reverse final agency action where the action is "[b]eyond the authority delegated to the agency by any provision of law *or* in violation of any provision of law") (emphasis added).

Petitioners' first argument is that rule 28.5 exceeds the Secretary's statutory authority because Iowa law prescribes the exclusive means by which voter registration records may be removed or cancelled. In support, Petitioners point to Iowa Code section 48A.25A, whereby voter registration information is initially confirmed and section 48A.30, whereby a voter registration is cancelled if the voter dies, registers to vote in another jurisdiction, requests cancellation, has been convicted of a felony, has been declared incompetent, or has been inactive for two successive general elections. Since Iowa Code section 48A.30 does not explicitly include a provision for voters determined to be foreign nationals, Petitioners insist that the Secretary has exceeded his authority in promulgating rule 28.5. That argument, however, is based upon two faulty premises.

First, Iowa Code section 48A.30 is not the exclusive means to remove or cancel a voter's registration. An additional process for

removing a voter is outlined in Iowa Code sections 48A.14 through .16. Moreover, the comparison of Iowa's voter registration records with the SAVE database under rule 28.5 does not and cannot result in the removal or cancelation of a voter's registration. The process for removing or canceling a voter's registration in section 48A.14 to .16 is in no way altered or even affected by the promulgation of rule 28.5.

The Petitioners' reference to rule 28.5 as the Voter Removal Rule is thus misleading and disingenuous. What rule 28.5 actually provides is a *process* by which lists of foreign nationals obtained by state and federal agencies are compared to the SAVE database. If registered voters are suspected of being ineligible to vote following this comparison, the voter and the relevant county auditor are notified. In other words, it describes a process by which information is obtained and funneled into the statutory removal processes described above.

There is no authority under the rule to remove a voter or cancel a voter's registration. This is fundamentally *not* a rule about voter removal, it is a rule about the *maintenance* of Iowa's voter

registration rolls.[8] The process provided in rule 28.5 sits on top of the process provided under section 48A.14 to .16. The rule, therefore, is not in conflict with either section 48A.14 to .16 or section 48A.30. The statutory processes in section 48A.14 to .16 and 48A.30 continue to be the only mechanism for removing or canceling a voter registration in Iowa.[9]

Secondly, contrary to the Petitioners' assertion, rule 28.5 is not the only instance whereby the Secretary is authorized to compare voter registration records to other databases. The Secretary has authority under Iowa Administrative Code rule 721—28.3 to compare voter registration records with lists of other states to prevent duplication. Under rule 721—28.4, the Secretary has authority to compare records with lists of convicted felons. Interestingly, the comparison authorized in these later two rules actually results in the removal or cancellation of a voter's registration. That authority is

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[8] No one disputes that foreign national are not legally authorized to register to vote in Iowa or to cast a vote. Rule 28.5, therefore, does not establish new voter policy. It is not akin to Voter Identification Laws or proposals to change the hours of polling stations operations. It is simply a rule designed to enforce *existing* state law.

[9] If Petitioners and the district court are correct, there is no mechanism under Iowa law to remove a foreign national from voter registration rolls.

derived from Iowa Code section 48A.30. The comparison of records with the SAVE database, under the challenged rule, does not result in the direct or automatic removal of voters. Matches obtained under rule 28.5 have *more due process* than their counterparts. *See* Iowa Code § 48A.14–16. The purpose of comparing these databases, whether of felons, other state registration lists, or foreign nationals is one in the same—to *maintain* Iowa's voter registration rolls.

The Petitioners are attempting to create a tension between two different removal processes proscribed by the legislature in sections 48A.14 and 48A.30 to invalidate the rule. These processes, however, were not created by the Secretary—they were established by the legislature. Both are legitimate for their respective purposes and both are unaffected by the Secretary's promulgation of the permanent version of rule 721—28.5.

Petitioners' reliance on Iowa Code section 47.7(2)(*a*) does not change this result. Section 47.7(2)(*a*) created a statewide, uniform voter registration file, known as I-Voter. The statute specifically allows the Secretary to compare the State's voter file with other databases within the State. The statute is silent with regard to federal databases. Rule 28.5 is not in conflict with this statute.

Under rule 28.5, the voter registration file is compared to lists or databases of foreign nationals maintained by other state and federal agencies, including the Department of Transportation which is specifically referenced in section 47.7(2)(*a*). Furthermore, there is nothing particular or discriminatory about this process. It is the same as comparing the voting list with lists of felons. Both felons and foreign nationals are not authorized voters. The voting list is uniformly compared to a category of ineligible voters. It would be discriminatory if the comparison was between the voter list and felons under the age of thirty or between the voter list and female foreign nationals. Nothing in rule 28.5 authorizes that type of comparison.

Any registered voter can challenge the eligibility of any registration under Iowa Code section 48A.14—including the Secretary and other election officials. Because the Secretary is not attempting to circumvent the statutory voter removal process in section 48A.14 to .16 and rule 28.5 does not remove or cancel any voter's registration, one questions whether the promulgation of rule 28.5 was even necessary. If the Secretary did not need authority under the

rules to compare voting records, how can the promulgation of the rule be beyond his statutory authority?

The Petitioners' second argument—the Secretary's promulgation conflicts with the role of the VRC—must also fail. As noted above, the argument is based on a faulty assumption. Moreover, Petitioners have not pointed to a specific statute or administrative rule that the challenged rule violates. Likewise, the Petitioners have not pointed to a particular VRC policy that the rule obfuscates. The question presented here, thus is whether in the *absence* of any action by the VRC is the Secretary prohibited from acting? Stated another way, has the VRC preempted the entire field of voter registration, including the Secretary's statutory obligation to maintain registration rolls. The answer is simply no.[10]

CONCLUSION

The Secretary of State respectfully prays that this Court reverse the district court's decision and reaffirm his statutory and constitutional authority to promulgate rules regarding the maintenance of voter registration records.

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[10] A fundamentally difference question may exist where the Secretary and the VRC promulgate rules which are in conflict with each other. That, however, is not the question presented here. Resolution of that question should be left for another day.

REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because this brief 6,484 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Georgia font.

/s/ Meghan Gavin Date: October 20, 2014

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