SUPREME COURT NO. 14-0585
POLK COUNTY CASE NO. CV 009311

IN THE SUPREME COURT OF IOWA

AMERICAN CIVIL LIBERTIES UNION OF IOWA
AND
LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA,
PETITIONERS-APPELLEES

v.

IOWA SECRETARY OF STATE MATT SCHULTZ,
RESPONDENT-APPELLANT.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE MARY PAT GUNDERSON
HONORABLE SCOTT D. ROSENBERG

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ROUTING STATEMENT

Petitioners-Appellees respectfully ask the Court to retain this case because it presents fundamental and urgent issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(2014).

STATEMENT OF THE CASE

The Appellant-Respondent, Iowa Secretary of State Matt Schultz ("Secretary") seeks review of the district court's ruling in favor of the Appellees-Petitioners, the American Civil Liberties Union of Iowa Foundation ("ACLU of Iowa") and League of United Latin American Citizens of Iowa ("LULAC of Iowa") (collectively "Petitioners") that permanently enjoined Iowa Admin. Code r. 721—28.5, entitled the "Noncitizen registered voter identification and removal process" ("Voter Identification and Removal Rule"). The district court's holding was limited to the narrow question of whether the Secretary exceeded the authority vested in his office by statute in promulgating the Voter Identification and Removal Rule. (App. 424.) ("[T]he Court finds that the Respondent lacked the statutory authority to promulgate Rule 721—28.5 as it conflicts with Iowa Code 48A.30, and a rational agency could not conclude the rule was within its delegated authority.")

RELEVANT FACTS AND PROCEDURAL BACKGROUND

Shortly before the 2012 General Election, Petitioners filed an Amended Petition for Judicial Review challenging the Secretary's emergency promulgation of two administrative rules impacting voting. The first regulation, Iowa Admin. Code r. 721—21.00 ("Voting Law Complaint Rule"), created an alternative procedure that would allow for unsworn challenges to voters in direct contravention of Iowa Code § 48A.14. (App. 56-58.) The second regulation, Iowa Admin. Code r. 721—28.5 ("Voter Identification and Removal Rule"), allowed the Secretary to trigger automatic challenge and removal proceedings to registered Iowa voters on the grounds of alleged non-U.S. citizenship, based on the Secretary's comparison of Iowa's voter registration rolls with unspecified state and federal "lists of foreign nationals." (App. 247-49.)

Both rules were adopted and immediately made effective through emergency rulemaking on July 20, 2012. (App. 20.) Shortly after on August 8, 2012, the Secretary used the "double barreling" procedure to commence the slower, normal rulemaking process pursuant to Iowa Code § 17A.4(1). ARC 0271C, ARC 0272C, Iowa Admin. Bull., vol. XXXV at 226, 235 (Aug. 8, 2012).

Petitioners made three claims to enjoin the emergency rules: (1) that the use of emergency rulemaking powers was improper under Iowa Code §17A.4(3), §17A.5(b), and §47.1; (2) that the Secretary exceeded his statutory authority in adopting the rules in question and that they were in violation of Iowa law; and (3) that the rules were vague and posed a substantial risk of erroneously depriving qualified voters of their fundamental right to vote. (App. 29, 43-44.) In addition to his Resistance, the Secretary filed a Motion to Dismiss alleging the Petitioners lacked standing to challenge the emergency rules. (App. 67-73.)

On September 11, 2012, following briefing and a hearing, the district court denied the Secretary's motion. (App. 188.) On September 13, 2012, it temporarily enjoined both emergency regulations, finding that the Petitioners had demonstrated a sufficient likelihood of harm of disenfranchising eligible registered voters if the regulations were to take effect. (App. 201-02.) In addition, the district court found that the numbers cited by the Secretary of likely non-citizen voters at most represented individuals who at one point obtained their driver's licenses as lawful residents, and then, at some later point

in time, registered to vote, as well as other inaccuracies as to citizen status.[1] (App. 199.)

On December 12, 2012, the Secretary published notice of the proposed voluntary rescission of the Voter Complaint Rule, proposed minor changes to the Voter Identification and Removal Rule, and set a public hearing on the Rule for January 3, 2013. ARC 0528C, Iowa Admin. Bull., vol. XXXV at 1010 (Dec. 12, 2012). Petitioners, joined by numerous other civil rights and voting rights organizations, faith organizations, and members of the public, made written and oral comments in opposition to the proposed regulation. (App. 326-31.) Testimony included statements made by new U.S. Citizens and

[1] Despite its acknowledgment that the numbers do not account for subsequent intervening adjustments to full citizenship in its brief, the Secretary's recitation of the facts persist in the imprecise statement that "over twelve hundred foreign nationals appeared to have voted in the 2010 election." Br. of Resp't-

> Affidavits provided by the Petitioner show the DOT list contains inaccuracies by showing the affiants were not U.S. citizens when they obtained their driver's license, but subsequently became a citizen and then registered to vote.

(App. 199.)

Transportation records are not an accurate determinant of a person's immigration status, which is fluid until the acquisition of citizenship. Iowa law provides that lawful permanent residents (the immigration status of those whose next step in the naturalization process is full U.S. Citizenship) need only renew their driver's licenses every five years. Iowa Code § 321.196(1)(2014). Other foreign nationals—who have temporary lawful presence—need only renew their driver's licenses every two years. *Id.*

members of LULAC of Iowa regarding harms to voting and voter registration efforts caused by the rule, as well as the unreliability and ineffectiveness of the federal Systemic Alien Verification for Entitlements ("SAVE") system to verify citizenship for voting. (*Id.*)

SAVE is a complex federal program that accesses data through at least 14 separate federal agencies. (App. 265-78.) SAVE was developed for state agencies that provide benefits, such as food assistance and Medicaid, to certain lawfully present foreign nationals to verify the validity of immigration documents contemporaneously submitted by the applicants. (*Id.*) The SAVE system was not designed for voter verification, is not a comprehensive list of all persons, immigrants or citizens, and their immigration statuses, and is not "real time."[2] (*Id.*) The U.S. Citizenship and Immigration Services ("USCIS"), the agency within the federal Department of Homeland Security that administers SAVE Program—has advised the Secretary and other states of the "significant limitations" of using SAVE to maintain voter registration lists. (App. 288.)

[2] For example, in its Fact Sheet, USCIS provides, "[T]here are a number of reasons why the SAVE program may not be able to verify your citizenship, e.g., the SAVE Program can only verify naturalized or derived citizens, to the extent that a derived citizen received an official determination on citizenship by USCIS. The inability of the SAVE Program to verify your citizenship does not necessarily mean you are not a citizen of the United States and are ineligible to vote." (App. 263-64.)

Shortly after the publication of the Bulletin and public hearing, and by agreement of the parties, the district court ordered a stay until the conclusion of the permanent rulemaking process, leaving the temporary injunction in place. (App. 218-19.)

The permanent rule took effect on March 27, 2013. Iowa Admin. Code r. 721—28.5 (2014). In its final adopted form, the rule provides for the cross-matching the personal information contained in Iowa's rolls of registered voters with Iowa transportation records and the federal SAVE system. *Id.* When SAVE does not immediately verify the U.S. citizenship of individuals whose transportation records indicate non-U.S. citizenship, the rules provide for two successive mailed notices to voters. Iowa Admin. Code r. 721—28.5 (1)-(2) (2014). Voters have a total of sixty days to respond from the date of the first mailing. *Id.* Voters' options are to prove their citizenship to the Secretary, voluntarily rescind their voter registration, or ask for more time. Iowa Admin. Code r. 721—28.5(2)-(3) (2014). If the voter fails to respond to the second notice within thirty days, mandatory challenge proceedings are triggered. Iowa Admin. Code r. 721—28.5(3)(*b*)-(*c*) (2014). Local precinct election officials are informed that they are required to challenge voters who vote at the polls or by absentee ballot. *Id.* Auditors are required to provide names and voting histories of any voters who do voluntarily cancel their voter registration, Iowa Admin.

Code r. 721—28.5(3)(*d)* (2013). Affidavits submitted by the Secretary show that thereafter "the case will be referred to local law enforcement for further investigation, including verification of citizenship status and possible prosecution if warranted," (App. 89-90.) Notably, responding to indicate a voter needs more time has the identical effect of not responding at all: even if additional time is requested, the rule provides that adverse action may begin after 60 days from the date of the first mailing. Iowa Admin. Code r. 721—28.5(3)(*d)* (2013). ("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.").

On March 29, 2013, Petitioners again filed a petition for judicial review, this time challenging the legality of the *permanent* rule. (App. 221-22, 228.) In addition, they re-asserted their claims against both *emergency* rules. (*Id.*) The Secretary filed a motion to dismiss claims against the emergency rules as moot, but did not challenge the Petitioners' standing to seek review of the permanent rule at issue in this appeal. (App. 233-34.)

On August 14, 2013, the Secretary entered into a memorandum of agreement with USCIS to access SAVE pursuant to the rule. (App. 253-64.) Petitioners requested that the court temporarily enjoin the Secretary from

running Iowa voters who have been cross-matched with state transportation records through SAVE, and at the same time, and in the alternative, asked the court to dispose of the case by ruling on the merits of the purely legal question of the Secretary's statutory authority. (App. 236-39, 241-42, 332-55, 357-58.)

On November 12, 2013, the Court issued a temporary injunction to prevent the Secretary from implementing the Voter Identification and Removal Rule. (App. 378-81.) At the same time, the court declined to rule on Petitioners' Motion for Review on the Merits. (App. 377-78.) Shortly thereafter, Petitioners filed a motion to reconsider. (App. 383-86.) After a hearing on the issue and subsequent briefing by the parties, the court granted the motion, permanently enjoining the rule. (App. 417-24.)

ARGUMENT

I. STANDING

The Secretary's contention that Petitioners lack standing is untimely because the issue was not preserved for appeal. However, had the issue been preserved, the district court correctly found that Petitioners had demonstrated that standing could be waived under the great public importance exception in order to protect the rights of voters. Finally, even if this Court finds that the

exception to standing does not apply to this case, any error by the district court is harmless, because Petitioners have standing.

A. Standard of Review

The Court reviews decisions on standing for correction of errors at law. *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008).

B. The Secretary Did Not Preserve Alleged Error Regarding Standing

The issue of standing "must be raised from the outset in order to preserve error." *Richards v. Iowa Dept. of Revenue,* 414 N.W.2d 344, 349 (Iowa 1987) (agency could not challenge petitioner's standing on appeal where it had not raised the issue at the district court). Even when the issue of standing has been raised in a previous proceeding, it still must be raised again in the current proceeding to preserve the issue. *Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 347 N.W.2d 423, 427 (Iowa 1984). If a party fails to raise the issue of standing in a timely manner, it waives its right to contest standing later. *Cole v. City of Osceola,* 179 N.W.2d 524, 527 (Iowa 1970).

The Secretary cites his motion to dismiss the Petitioners' challenge to the emergency rules, filed on August 16, 2012, in support of the contention that alleged error was preserved on Petitioners' challenge to the permanent rule now at issue on appeal. Br. of Resp't-Appellant at 17. However, the August 16, 2012 motion challenged Petitioners' standing to challenge the *emergency* rules; the

Voter Identification and Removal Rule at issue in this case did not exist at that time and was not a part of the litigation. Both the Secretary's motion to dismiss and the district court's order denying its motion, finding that the great public interest exception applied in this case, were closely tied to the emergency rulemaking process, not at issue in the current Voter Identification and Removal Rule on appeal. (App. 63.)("The American Civil Liberties Union (ACLU) and the League of United Latin American Citizens of Iowa (LULAC) filed petition for Judicial Review challenging the legality of two rules promulgated by the Secretary under emergency rulemaking procedures."); (App. 187.) ("They specifically allege the manner in which Secretary Schultz promulgated the challenged voting rules, in secret and on an emergency basis, amounted to surprise to legislators, county auditors, and all Iowans alike.")

When, seven months later, Petitioners filed their Second Amended Petition for Judicial Review challenging the permanent Rule, they re-pleaded their standing. (App. 222, 224.) The Secretary filed a motion to dismiss, arguing the claims against the emergency rules were moot. (App. 233-34.) However, the Secretary chose not to raise any objection to Petitioners' standing to challenge the Voter Identification and Removal Rule now on appeal. (*Id.*)

To the contrary, the Secretary and Petitioners agreed in writing to the terms of the stay of litigation ordered on January 17, 2013 regarding the

emergency rule. Specifically, the Secretary and Petitioners agreed that Petitioners would:

> be allowed to amend their complaint to add to their existing claims a challenge to the normal rulemaking procedure currently underway and/or the rule(s) resulting therefrom, should petitioners choose to challenge them at that time . . . . so as to allow litigation over the rules to be consolidated without prejudicing the rights of any party.

(App. 215-16.) This agreement was incorporated by the district court in its Order granting a temporary stay of proceedings on January 17, 2013. (App. 218-19.)

Because the Secretary did not raise the issue of Petitioners' standing to challenge the Voter Identification and Removal Rule in earlier proceedings, this Court should not address the issue for the first time on appeal. However, should the Court address the state's argument regarding standing, it should uphold the district court's court finding that this case merited application of the great public importance exception to standing.

C. The District Court Correctly Applied the Great Public Interest Exception to this Case

When a petitioner "seek[s] to resolve certain questions of great public importance and interest in our system of government," and "constitutional protections are most needed," a court in Iowa has jurisdiction to grant an exception to the limitations on standing. *Godfrey*, 752 N.W.2d at 426-27.

In Iowa, the right to vote is constitutionally assured to all Iowa residents who are adult U.S. Citizens, have not been convicted of an infamous crime, or adjudicated incompetent. Iowa Const. art. II, §§ 1, 5 (as amended by the 1970 and 2008 Amendments); U.S. Const. amends. IXX, XXVI. The right to vote is and has long been considered of "great public importance and interest" to a functioning democracy. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *Devine v. Wonderlich,* 268 N.W.2d 620, 623 (Iowa 1978)("[T]he right to vote is a fundamental political right. . . essential to representative government."); *Coggeshall v. City of Des Moines*, 117 N.W. 309, 312 (Iowa 1908) ("The right of suffrage is a political right of the highest dignity, abiding at the fountain of governmental power. . .").

The emergency voting rules subject to the state's objection to standing is exactly the kind of rare case warranting the great public importance exception because it concerned improper agency action, taken without public notice or input, that limited the exercise of Iowans' fundamental right to vote. There is no better example of agency action that is "inconsistent with the democratic process." (App. 187.) The district court found that this case illustrated the very example provided by this Court in *Godfrey*:

> Petitioners contend this manner of rulemaking seriously undermined the democratic process and poses a substantial risk of infringing upon the fundamental constitutional right to vote of

> qualified voters. Therefore, the very example given in *Godfrey* of when waiving standing to allow the court to examine acts of another branch of government would be appropriate is present in this case.

(*Id.*) Thus, the district court's application of the great public importance exception to standing was well rooted in the case law and the particular case before it.

The state asserts that standing is jurisdictional rather than prudential in any judicial review proceeding under Iowa Code § 17A.19, although it cites no authority. Br. of Resp't-Appellant at 18-19. It argues the requirements of standing would be more rigorous in an action for judicial review of agency action than an original action, and the great public importance exception to standing could never support a challenge to unlawful agency action.

Quite the opposite, the IAPA was intended to promote and protect the rights of litigants, rather than limit them. Administrative procedure acts, in Iowa and elsewhere, have at their origin a legislative desire to increase accessibility and accountability of agencies to citizens—and to limit agency power over individual citizens, not expand or insulate it from review. Arthur E. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, and the Rulemaking Process*, 60 Iowa L. Rev. 731, 735-36 (1974-75) [hereinafter Bonfield, *IAPA*]. *See also* Arthur E. Bonfield, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 Iowa L.

Rev. 845, 845 (1989-90) ("[APAs] are also intended to ensure that agencies act lawfully, wisely, and in a politically responsible manner, and that the process by which agencies deal with members of the public is fair and acceptable to the community at large.")

The IAPA provides as much in its statement of purpose. Iowa Code § 17A.1 (2014); Bonfield, *IAPA*, at 755. The purpose of the IAPA is to "simplify the process of judicial review . . . . as well as increase its ease and availability." Iowa Code § 17A.1 (3) (2014); Bonfield, *IAPA* at 758. The IAPA is intended to streamline access to the district court, not limit its ability to provide relief to the parties. Iowa Code § 17A.19(10) (2014) ("The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced…")

Nor could the Iowa legislature, in enacting the IAPA, deprive the Iowa judiciary of its jurisdiction to protect fundamental rights had that been its intent. In Iowa, a "court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it." Iowa Const. art. V, § 6; *Tigges v. City of Ames,* 356 N.W.2d 503, 512 (Iowa 1984)(internal citations omitted). "The fundamental law of the state has fixed the jurisdiction of the district courts, and it is not within the power of

the legislature to change or modify it." *Hutton v. Drebilbis,* 2 Greene 593, 594-95 (Iowa 1850) ("We do not understand by this article that the legislature have the right to limit or restrict the jurisdiction thus conferred upon the district court by the constitution, but merely to define and regulate the manner in which that jurisdiction shall be employed.").

Indeed, this Court has already addressed this issue in the analogous context of a mootness challenge, and found that the IAPA does not transform the court's self-imposed rules of restraint into jurisdictional bars. In *City of Des Moines v. Public Employment Relations Bd.*, the Court rejected the state's proposition that the IAPA altered the jurisdiction of the court to exercise discretion in maters of great public importance by waiving the bar to moot claims:

> 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 v. Pub. Employment Relations Bd., 275 N.W.2d 753, 759 (Iowa 1979). Thus, the requirement that actions be brought under the §17A.19 of the

IAPA does not limit the court's jurisdiction to decide matters of great public importance by waiving self-imposed rules of restraint.

There is a strong public interest in preventing a statutorily unauthorized regulation that would subject a subset of voters—new U.S. Citizens—to unreliable and burdensome verification, documentation, and challenge procedures. The court therefore properly exercised its authority to waive prudential principles of standing under the great public interest exception in this rare case.

D. Petitioners Possess Standing Under the IAPA on their Own and on Behalf of their Memberships

Since the district court found that the great public importance exception to standing applied in this case, it never ruled on whether Petitioners had standing under an alternative theory. (App. 188.) ("Because the Court has concluded this exception to the standing requirements has been met it need not determine whether standing would be appropriate under any of the other grounds asserted or addressed by the parties.") However, had the district court erred in applying the exception, the error would be harmless, because Petitioners have standing.

Under the IAPA, any "person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter" to

determine whether her or his "substantial rights . . . have been prejudiced." Iowa Code § 17A.19 (2014); *Medco Behavioral Care v. State Dep't of Human Servs.*, 553 N.W.2d 556, 562 (Iowa 1996); *Iowans for WOI-TV, Inc. v. Iowa State Bd. of Regents*, 508 N.W.2d 679, 684-85 (Iowa 1993). The Court has formulated a two-prong test for standing: (1) the petitioner must have a specific, personal, or legal interest in the litigation; and (2) the interest must be adversely affected by the agency action in question. *Godfrey*, 752 N.W.2d at 419-20; *City of Des Moines*, 275 N.W.2d at 759.

i. Petitioners have a specific interest in the litigation

The first prong of standing requires that the petitioner have a specific personal or legal interest in the outcome of the case—"as distinguished from a general interest." *Godfrey*, 752 N.W.2d at 419. *See also Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013) (While supplier did not establish that its exclusion had caused it to lose profits, it alleged an injury different from one to the population in general, i.e., that a discriminatory classification prevented supplier from competing on an equal footing.) The allowance for asserting a specific personal (as opposed to legal) interest, "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 . . .").

For example, in *Hurd v. Odgard*, 297 N.W.2d 355 (Iowa 1980), lawyers who used the county courthouse had standing to compel the county to repair it, despite their lack of monetary or traditional damages, by virtue of their status as users of the building. *See also Elview Construction Co. v. North Scott Cmty. Sch. Dist.*, 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); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983) (petitioner met the first prong of standing to challenge share-draft rule by virtue of being a competitor business in providing the financial services contemplated by the rule). The U.S. Supreme Court has also recognized that a "petitioner has standing to assert the corresponding rights of its members." *NAACP v. Button,* 371 U.S. 415, 428 (1963) (NAACP had standing to challenge the constitutionality of statutes that limited the free speech rights of both the organization and its members.). The Supreme Court has found that even organizations that have no members, yet nonetheless represent the interests of a group adversely harmed by government action, have standing to challenge the harmful regulations. *See Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (commission without members that represented the interests of a group of individuals possessed standing to challenge a statute regulating the behavior of those individuals).

LULAC of Iowa and the ACLU of Iowa, both on their own behalf and on behalf of their members, have a specific personal interest in this action. 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 and their members' interests in freedom from racial discrimination in voting, are greater and more personal than the general interest.

The League of United Latin American Citizens ("LULAC"), founded 83 years ago, is the largest national Latino and Hispanic civil rights and advocacy group in the United States. LULAC of Iowa is the statewide affiliate of LULAC. LULAC of Iowa has more than 400 members and is active through 7 councils across the state. Its members include people who have only recently acquired U.S. Citizenship. LULAC promotes active participation of all eligible Latino Citizens in the democratic process by registering to vote and voting, and encourages all legislative, judicial, and educational efforts to promote voter participation and advocacy. As part of its efforts to protect and promote the voting rights of Latino U.S. citizens in Iowa, LULAC of Iowa purchased the registered voter list from the Secretary, and engaged in a statewide voter identification and registration drive of tens of thousands of Latino U.S. citizens in Iowa prior to the 2012 General Election. It continues those efforts related to

the 2014 General Election. LULAC aims to ensure that voters' rights are safeguarded on Election Day by preventing potential voting rights violations.

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 and countless additional supporters who are nonmembers. The mission of the ACLU of Iowa and its members is to preserve and protect fundamental constitutional rights, including the right to vote and protection against laws and regulations with racially discriminatory effects. The ACLU of Iowa has extensively lobbied the executive and legislative branches to protect the rights of eligible voters in Iowa, and has a significant interest in protecting the voting rights of its members and all Iowans.

Because 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 that is different from the general public, the first prong of the standing requirement is met.

ii. Petitioners' interests injured-in-fact by the Voter Identification and Removal Rule

Petitioners meet the second prong of standing under the IAPA, because their interests were adversely affected by the Voter Identification and Removal

Rule they are challenging, and those injuries were redressed by the favorable outcome of their actions for judicial review. Prior to the November 2012 General Election, within days of deciding the standing issue regarding the emergency rules, the district court granted a temporary injunction to protect the parties. (App. 191-202.) Petitioners introduced into evidence affidavits showing harm to voter registration efforts, fear of erroneous identification, reputational harm, high cost of acquiring and producing citizenship documents upon request, and wrongful criminal investigation. (*Id.*) The district court found that Petitioners had shown a likelihood that they and their members would suffer irreparable harm either through misidentification, or chilling of qualified voters if the Secretary proceeded according to the Rules. (*Id.*)

> 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."

(App. 200.)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), does not govern this case, both because standing is prudential rather than jurisdictional in Iowa courts[3], and more pointedly, because both LULAC of Iowa and the ACLU of Iowa, as well as their members have an interest apart from the general public and injury-in-fact from the Voter Identification and Removal Rule. The standing that Petitioners assert is personal, not merely organizational, as the Secretary has stated. Br. of Resp't-Appellant at 20.

Ample precedent guides adjudication of the injury prong of standing. A petitioner's interest must be adversely affected, and he 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.") While a plaintiff need not allege a violation of a private right or that it suffered damages, he must demonstrate some injury different from the population at large. *Id.* at 420. So long as the injury is specific to the complaining party, it is sufficient to confer standing. *Id.* at 419; *Hurd v. Odgard*, 297 N.W.2d 355 (Iowa 1980); *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573 (Iowa 1990).

The Secretary contends that it is inadequate to assert future injury. Br. of Resp't-Appellant at 21-22. To the contrary, while an injury may not be

[3] Discussed at length in Part I.C, at 11-16.

"abstract," it may be prospective. *Godfrey*, 752 N.W.2d at 421. "Only 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.*, 335 N.W.2d at 445. The implication of the state's position is untenable: no party could ever enjoin governmental action that would wrongly deprive voters of their fundamental rights until *after* their vote was blocked or their registration cancelled.

Further, when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit—much less exercise a fundamental right, the "injury in fact" is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. Iowa Const. art. 1, § 6.; *Horsfield Materials,* 834 N.W.2d 444. That principle is even more pronounced with regard to the unequal treatment in a citizen's exercise of a fundamental right on the basis of national origin.

The rule necessarily targets a high number of Latinos, including LULAC of Iowa's members, because it targets those who, at the time they applied for driver's licenses, were lawfully present immigrants, and subsequently (in the case of some of Petitioners' members, after becoming naturalized citizens), registered to vote. Forty-two percent of Iowa's foreign-born population is from Latin America. LULAC of Iowa, By the Numbers & Iowa Map, *available at* http://www.lulaciowa.org/about-us/iowa-map/ (last visited Sept. 5, 2014).

Nearly forty percent of all Latinos in Iowa are foreign-born. *Id.* Many of them, like all members of LULAC of Iowa, are now U.S. Citizens. (App. 91-126, 157-58.)

While the Secretary imprecisely alleges twelve hundred people whose transportation records indicate non-citizenship voted in 2010, in that year alone USCIS records indicate over eighteen hundred people in Iowa became naturalized U.S. Citizens; twenty-nine hundred naturalized the year before in 2009; and over thirty-five hundred naturalized in 2008. U.S. Dept. of Homeland Security, 2010 Yearbook of Immigration Statistics (Table 22), *available at* http://www.dhs.gov/yearbook-immigration-statistics-2010-0 (last visited Sept. 5, 2014). Iowa DOT records are valid for 5 years for lawful permanent residents. Iowa Code § 321.196(1)(2014). Thus, many of the records the Secretary cites are outdated and inaccurate, because many license holders who naturalize their status will not return to the update their still-valid license, as the Petitioners' affidavits of new U.S. Citizens demonstrate. (App. 91-126, 151-58.)

In this case, LULAC of Iowa meets the injury prong of the standing test. LULAC of Iowa demonstrated to the district court that its substantial voter registration efforts had been harmed by the voting regulations. (App. 93-94.) LULAC of Iowa's members were in some cases fearful of wrongful criminal prosecution on account of the Rules. (App. 93-94, 151-58.) In addition,

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 then (3) registered to vote. (App. 93-104, 151-52, 157-58.) The Iowa Department of Transportation list used as the basis of the SAVE matching is therefore likely to erroneously identify these LULAC members as non-citizens who are disqualified from voting. Thus, LULAC of Iowa and its members had *already* suffered injury at the time it obtained an injunction prior to the 2012 election, and are likely to suffer substantial further injury were the invalidated Rule to take effect.

The ACLU of Iowa's mission includes eliminating voter suppression, facilitating open government and democracy, and challenging laws with racially discriminatory effects. If upheld, the Rule would confer broad authority to a subordinate member of the executive branch to promulgate rules without statutory basis, despite their effects on the fundamental rights of Iowans or their disparate impact on racial or ethnic minorities. This injury, both personal to the organization and its ability to accomplish its mission, and borne individually by its members, occurred before the injunction took effect, and would have been further exacerbated without the injunction.

II. DISPOSITION OF THIS CASE ON THE LEGAL MERITS WAS APPROPRIATE

A. Standard of Review

The standard of review is for correction of errors of law. *Iowa Bankers Ass'n,* 335 N.W.2d at 442. The Court endeavors to "apply the standards of section 17A.19(8) to the agency action, to determine whether our conclusions comport with those of the district court. . . . except that the district court [is] entitled to consider such additional evidence as it deemed appropriate, in addition to that received by the agency." *Id.*

B. Error Preservation

It is unclear whether the Secretary preserved the alleged error. Although the Secretary resisted the Petitioners' motion for judicial review on the merits, the resistance acknowledged that "[n]evertheless, the Secretary would agree to expediting the submission of this judicial review if the Petitioners' now agree that this case involves purely legal questions—making discovery and the Petitioners' prior request for a delay unnecessary." (App. 362.) Notably, the nature of the Petitioners' argument is that the issue of the Secretary's authority is purely legal. As Petitioner recited at a hearing on the motion, success on that claim would "avoid the complicated constitutional issues that are involved in the third claim" and "cut out the third claim . . . have the Court rule just on the

legal issues on the second claim, which don't involve factual disputes, and avoid the whole discovery situation altogether." (App. 393-94.)

C. The District Court Properly Disposed of the Underlying Controversy on the Legal Merits

Disposition of this case on the legal merits was appropriate because there were no relevant facts in dispute regarding the Secretary's authority. Submission of the case for review on the legal merits therefore promoted judicial efficiency by obviating the need for discovery and the presentation of additional evidence on the Petitioners' final claim, and comported with the longstanding principle of constitutional avoidance. A ruling on the legal merits was not prohibited by any provision of the IAPA or precedent.

The district court was asked to decide "whether [the Secretary] exceeded his statutory authority by promulgating emergency and permanent rules affecting the voter registration list." (App. 419.) The district court properly determined that "[a]s this issue is a purely legal question, summary judgment is appropriate." (*Id.*) (citing *Iowa Med. Soc.*, 831 N.W.2d at 839 *and City of Sioux City*, 584 N.W.2d at 324–25).

In *Iowa Medical Society,* this Court acknowledged that it is sometimes appropriate to resolve claims on judicial review of agency action on the legal merits, which resolves the litigation in a manner that is distinct from but functionally akin to a summary judgment motion in a civil action. *Iowa Med.*

Soc., 831 N.W.2d at 839 ("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,* 584 N.W.2d at 324-25 ("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.").

The district court's decision to dispose of the case on the legal question of the Secretary's statutory authority also avoided adjudication of Petitioners' constitutional claims. In this case, adequate relief and resolution could be, and was, obtained through adjudication of Petitioners' non-constitutional claims. As Petitioners' conceded, their success on the question of the Secretary's legal authority to promulgate the Rule obviated the need for adjudication of the question of the unconstitutional nature of the Rule. (App. 383-85.)

While the Court maintains its discretion to decide important constitutional questions, it normally avoids determining constitutional questions in cases that may be resolved on other grounds. *See, e.g., Simmons v. State Public Defender*, 791 N.W.2d 69, 73-74 (Iowa 2010)(administrative rule capping attorney fees was in violation of Iowa Code § 13B.4 (4)(a)).

Finally, the nature of this case is distinguishable from both *Iowa Bankers Ass'n*, 355 N.W.2d at 448-49, and *Young Plumbing & Heating Co. v. Iowa Natural*

Res. Council, 276 N.W.2d 377, 381 (Iowa 1971), which the Secretary cites. In *Young Plumbing & Heating Co.,* the underlying agency action on judicial review was a contested case, unlike the Petitioners' challenge. *Young*, 276 N.W.2d at 381. The Court's holding in *Young* is predicated on the idea that a court in a judicial review action is limited to the evidence in the agency record unless application is made to hear additional evidence. *Id.* Similarly, in *Iowa Bankers Ass'n*, the Court's reasoning is tied to the idea that a "motion for summary judgment requires determination of the existence of disputed fact issues, whereas judicial review of agency action normally is based on the record made before the agency." *Iowa Bankers Ass'n*, 335 N.W.2d 439, 448 (Iowa 1983). The Court is careful to note that "[a]gency rule-making is not a contested case under the IAPA. The district court was free to hear and consider such additional evidence as it deemed appropriate." *Id.* The Court determined that:

> "[A] summary judgment motion entails determination whether there are issues of material fact, and application of law to the undisputed fact…The IAPA thus provides a comprehensive, integrated procedure for review of action, which a [summary judgment] motion *frequently* would short circuit. Such a motion is therefore inapplicable and inconsistent."

Id. at 448-49 (emphasis added). However, in this case, disposition of the purely legal question of the Secretary's statutory authority in favor of Petitioners resolved all claims, rather than short-circuited them. Leaving the decision of the

district court intact obviates entirely the need to further litigate the Secretary's invalidated Voter Identification and Removal Rule.

By contrast, had the district court declined to exercise constitutional avoidance by disposing of the case on its legal merits, it would have been necessary for the court to hear and consider additional evidence relevant to the question of the infringement of the right to vote. That process would have required time and expense, and placed the now invalidated rule squarely in the public's awareness shortly before the upcoming 2014 election, where media coverage of the controversy would undoubtedly scare and confuse some voters. Rather than deciding the Petitioners' constitutional claim that the Voter Identification and Removal Rule would violate the fundamental voting rights of qualified Iowans, the district court made the issue moot by resolving the statutory authority question.

The support for the district court's decision in the *Iowa Medical Society* and *City of Sioux City v. GME* cases, as well as its significant distinction from *Young* and *Iowa Bankers Ass'n*, allowed for resolution of the case on its legal merits. By submitting this case for review on the merits, the district court avoided deciding complicated constitutional questions and saved the court system and the parties the delay and cost of further, unnecessary litigation. Thus, the district court's disposition of this case on the legal merits was appropriate and should not be disturbed on appeal.

III. THE SECRETARY LACKS STATUTORY AUTHORITY TO PROMULGATE THE VOTER IDENTIFICATION AND REMOVAL RULE

A. Standard of Review

"Our review of rulings on a petition for judicial review is for correction of errors at law. We apply the standards of review found in Iowa Code section 17A.19 (10) to the agency action to determine whether our conclusions are the same as those made by the district court." *Litterer v. Judge*, 644 N.W.2d 357, 360-61 (Iowa 2002) (internal citations omitted). A court "shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced" because the agency action is "[b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law" or is "[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) (2014); *Iowa Bankers Ass'n*, 335 N.W.2d at 442.

B. Error Preservation

The Respondent preserved the alleged error. (App. 410-15.)

C. The District Court Correctly Determined that the Secretary Lacked the Statutory Authority to Promulgate the Voter Identification and Removal Rule.

Petitioners make two arguments that the Secretary lacked authority to promulgate the Voter Identification and Removal Rule: (1) The Rule is '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); (2) In addition and *in the alternative*, even if such an agency action were authorized by statute, 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) (2014); (App. 339.).

i. Standard of deference

Under Iowa Code § 17A.19 (11), 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) (2014). 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) (2014). 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) (2014).

The promulgation of the Voter Identification and Removal Rule contravenes Iowa's broadly accessible and progressive voter registration laws and policies. These important goals expressly guide judicial construction of laws governing voter registration. Iowa Code § 48A.1 (2014) ("It is the intent of the general assembly to facilitate the registration of eligible registrants of this state through the widespread availability of voter registration services. This chapter and other statues relating to voter registration are to be liberally construed toward this end."); *see also* Iowa Code §§ 48A.5, 48A.5A (2014) (voter in Iowa does not need to be an Iowa domiciliary to register to vote, but need only consider Iowa his or her home, including students from other states); *and* Iowa Code § 48A.7A (2014) (providing for same day/Election day registration).

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. Thus the Rule is "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).

Alternatively, under Petitioners' argument that even if such an agency action were authorized by statute, the proper promulgating agency is the Voter

Registration Commission, not the Secretary, no deference should be afforded under Iowa Code § 17A.19(11), because the rule is "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).

However, should the Court determine that the challenged rule is based upon an interpretation of law clearly vested within the agency's discretion, the Rule is "based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation," Iowa Code § 17A.19 (10)(l), and is "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion," Iowa Code § 17A.19 (10)(n) (2014).

"[T]he right to vote is a fundamental political right. It is essential to representative government." *Devine v. Wonderlich,* 268 N.W.2d 620, 623 (Iowa 1978) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17-18, 84 S.Ct. 526, 535 (1964)). "Regulatory measures abridging the right to vote 'must be carefully and meticulously scrutinized.'" *Chiodo v. Sect. 43.24 Panel*, 846 N.W.2d 845, 856 (Iowa 2014) (citing *Devine*, 268 N.W.2d at 623; and *Reynolds v. Sims*, 377 U.S. 533, 561-562, (1964)). "Statutory regulation of voting and election procedure is permissible so long as the statutes are calculated to facilitate and secure, rather than subvert or impede, the right to vote." *Devine*, 268 N.W.2d at 623.

ii. The Voter Identification and Removal Rule is beyond the authority delegated to the Secretary and conflicts with existing law.

The Secretary's assertion of nearly limitless executive action in lieu of an express and specific contravening statute is directly contradicted by longstanding, constitutionally derived statutory and case law, particularly in the context of statutes and regulations impacting voting in our state. In sum, the Secretary asserts that he possessed the required legislative authority to promulgate the Rule because there is no statute explicitly prohibiting the cross-referencing of Iowa's voter registration list with the federal SAVE database, nor prohibiting him from subsequently threatening voters with challenge proceedings and deletion from the voting rolls, absent only the voter's ability to produce documents proving citizenship to the Secretary's satisfaction.

The court may nullify 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." Iowa Code § 17A.19(10). In addition to limiting agency actions to those that are within the authority delegated to them by the legislature, Iowa Code § 17A.19(10) expressly prohibits an agency from adopting rules that are contravened by statute. *See, e.g., Barker v. Iowa Dep't of Transp., Motor Vehicle Dep't*, 431 N.W.2d 348, 350 (Iowa 1988) (holding the Iowa Department of Transportation lacked authority to promulgate rule establishing a "margin of

error" for breath alcohol concentration test, when statute failed to designate one or authorize Department to make this designation); *S & M Fin. Co. Fort Dodge v. Iowa State Tax Comm'n*, 162 N.W.2d 505, 510 (Iowa 1968) ("The commission itself is powerless to adopt rules inconsistent with, or in conflict with, the law to be administered.").

When reviewing an agency's exercise of authority, courts ask whether the legislature either expressly or impliedly authorized the action in question. *See e.g., Zomer v. W. River Farms, Inc.,* 666 N.W.2d 130, 132 (Iowa 2003)("In determining whether the commissioner has the power to reform a workers' compensation insurance policy under the circumstances presented by this case, we start with the general proposition that as an administrative agency, the commissioner 'has no inherent power and has only such authority as is conferred by statute or is necessarily inferred from the power expressly granted'.")(citing *Schmidt v. Iowa State Bd. of Dental Exam'rs,* 423 N.W.2d 19, 21 (Iowa 1988); *accord Sioux City Cmty. Sch. Dist. v. Iowa State Bd. of Pub. Instruction,* 402 N.W.2d 739, 741 (Iowa 1987)). In *Zomer*, the court noted that the 1998 IAPA amendments—which remain in place—"confirm the principle that an agency has no inherent authority." *Id.* at 132 n.1 (citing Iowa Code 17A.23 (2001) *and generally* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State*

Government 73 (1998) (stating amendment to section 17A.23 "clearly and firmly restates current law.")).

On March 27, 2013, the date that the permanent Rule went into effect, the IAPA provided:

> An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency.

Iowa Code 17A.23(3)(Iowa 2013).[4] This fundamental limitation on executive branch agency is constitutionally derived:

> The powers of the Government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Iowa Const. art. III, § 1. Thus, the bald assertion of the Secretary's virtually unrestrained authority to regulate voting and voter registration in the absence of a specific and express statute contradicts longstanding Iowa law. The Secretary's argument that he only lacks authority to promulgate rules that directly contradict statutes and Voter Registration Commission regulations also

[4] An amendment to the IAPA which took effect July 1, 2013, *inter alia*, left the above intact, and added the following sentence: "Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly." *See* 2013 Acts, ch. 114, §5; Iowa Code 17A.23 (2014).

leads to absurdity: it would require that the legislature and Voter Registration Commission anticipate and codify every potential misuse in order to prevent the Secretary from exceeding his authority. Accordingly, in the absence of a statute authorizing the rule expressly or conferring express powers from which such authority is necessarily inferred, the Voter Identification and Removal Rule is not authorized by law and should remain permanently enjoined.

The Secretary's promulgation of the Voter Identification and Removal Rule contravened existing law in significant ways. Specific statutes that it conflicts with (discussed in turn below) include:

- Iowa Code § 48A.28 (systematic confirmation program);
- Iowa Code § 48A.25A (verification of voter registration information on the front end);
- Iowa Code § 48A.30 (cancellation of voter registration and establishing bases for updating or removal of voter registration on the back end);
- Iowa Code § 47.7 (centralized voter registration file must be maintained in uniform and nondiscriminatory manner, allowing coordination with agency databases within the state);
- Iowa Code § 47.8 (creation of Voter Registration Commission).

In promulgating the Voter Identification and Removal Rule, the Secretary cited his authority as state commissioner of elections under Iowa Code § 47.1 (2014). The Secretary is the state commissioner of elections and is charged with supervising the county commissioners. Iowa Code § 47.1(1) (2014). 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." *Id.* Likewise, the Secretary is the chief state election official responsible for ensuring that Iowa complies with the National Voter Registration Act of 1993. Iowa Code § 47.1(3) (2014). The Secretary is also the state registrar of voters, charged with preparing, preserving, and maintaining voter registration records. Iowa Code § 47.7 (2014).

The Voter Identification and Removal Rule usurps Iowa laws governing voter registration, which specifically delineate 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—when a voter registers—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 (2014). On the back end—once a voter is registered—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.29for 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 (2014).

The Voter Identification and Removal 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 procedure whereby the voter must provide citizenship documentation they may not have, and failing that, possible criminal investigation for registration fraud. Iowa Admin. Code r. 721—28.5 (2014).

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 limited authorities granted to the Secretary, 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)(2014) (emphasis added).

The Voter Identification and Removal Rule is not authorized by and conflicts with this statute in two important ways. First, the Rule aims to obtain matches with the voter registration list by comparison with federal databases beyond the scope, jurisdiction, 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." Iowa Admin. Code r. 721—28.5(1)-(2) (2014). Then "After producing a list of probable matches," the secretary 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." Iowa Admin. Code r. 721—28.5 (2014). Unlike the delineated databases with which the Secretary is

authorized to verify voters according to statute, the state of Iowa has no means to insure the reliability or integrity of the federal SAVE system for voter verification purposes, much less any unspecified future D.H.S. "equivalent database." Rather, those systems are entirely outside the control of the state.

Perhaps most importantly, the Rule fails to meet the requirement of being "uniform and nondiscriminatory" as required by Iowa Code § 47.1 (2014). By definition, the regulation only identifies registered voters who have recently obtained U.S. Citizenship but whose driver's license record, normally updated every five years, still indicates non-Citizen status as a lawfully present immigrant. Iowa Code § 321.196(1)(2014). Only this subgroup of qualified Iowa voters, new U.S. Citizens, 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. The burden is not applied uniformly to all voters.

The SAVE system was not developed for the purpose of voter verification. (App. 265-74.) There is no listing or database of all U.S. citizens or all foreign nationals. (*Id.*) The SAVE system does not access or comprise such data, nor is it a real-time or comprehensive database of the immigration and citizenship status of all voters. (*Id.*) The way the SAVE system is intended to work is to provide a way for government agencies to compare information provided by applicants for certain public benefits with information stored

through at least 14 separate federal agencies. (App. 275-76.) The system was designed for the check to occur contemporaneously with the applicant's submission of those documents to the agency. (App. 265-67, 275-76.)

The USCIS website shows that SAVE verification is a multistep process. (App. 275-76.) While the initial electronic verification occurs in seconds, any necessary paper-based verification process takes up to twenty working days, *after* an agency has documents from the applicant produced to verify her status. (*Id.*) Each of the layers of verification imposes an additional set of burdens on the voter. Like any large aggregation of personal data that has been transcribed and manually entered at multiple times across at over a dozen separate databases for multiple purposes, SAVE contains errors and inconsistences in alien numbers, citizen certificate numbers, I-94 numbers, names, birth dates, and social security numbers.[5] (App. 271-76.) When errors occur, an in-person visit to a USCIS office with documentation is required. (App. 277-78.) Replacing documentation takes weeks to months, and costs hundreds of dollars. (App. 279-84.) For example, replacing a lost or stolen certificate of naturalization costs $345 and may take 6 months to a year. (*Id.*)

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[5] 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." (App. 265-67.)

The USCIS—the agency within the federal Department of Homeland Security that administers the SAVE system—has advised against using SAVE to maintain voter registration lists. (App. 285-94.) 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." (App. 275-78.) The email from a representative of USCIS for SAVE to the Secretary's staff, submitted into evidence by the Secretary, reads:

> 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.

(App. 285-94.)

Finally, in contrast to the Voter Identification and Removal Rule, *all* of the other administrative rules governing the Secretary that provide for maintenance of the voter registration file, found in Chapter 28, are clearly and expressly authorized by § 47.7(2)(a). 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 (2014); comparing the list with a list of convicted felons, Iowa Admin. Code r. 721—28.4 (2014).

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 Identification and Removal Rule, the Voter Registration Commission and Secretary had only regulated voting in a manner consistent with their statutory authorization. Had the legislature intended the Secretary to have the power he grants himself through promulgation of this regulation, it knew how to give it to him.

In this case, however, there is no such authorizing statute. To the contrary, the Secretary promulgated a regulation that conflicts with multiple Iowa statutes in significant ways. Accordingly, the district court's grant of declaratory and injunctive relief should be affirmed.

iii. The Voter Registration Commission is the proper agency to promulgate statutorily authorized rules governing voter registration issues.

No agency has been authorized by Iowa law to regulate new U.S. Citizen voters in the manner the Voter Identification and Removal Rule does. However, *arguendo*, were such a statute found that could infer such authorization to any agency, that agency is not the Secretary. Rather, the agency empowered to regulate voter registration records by verifying voter information

in accord with Iowa law is the non-partisan Voter Registration Commission ("VRC"), which in turn is vested with statutory authority to direct the voter registration related activities of the Secretary.

Iowa Code does not give the Secretary authority to mandate widespread challenges to target a particular class of voters for the purpose of removing them from the voter registration records, nor does it grant him the ability to create rules to do so. *See* Iowa Code § 47 (2014). Instead, the legislature expressly granted the power to create and adopt new rules to regulate voter registration to the VRC. Iowa Code § 47.8(1) (2014) (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."); Iowa Admin. Code r. 821—1.2 (2014). 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 (2014).

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 (2014). 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.* As the state commissioner of elections, the Secretary serves as chairperson for the VRC and *one-fourth* of its voting membership. Iowa Code § 47.8(1)(c) (2013).

The Iowa Legislature clearly limited the ways in which the Secretary is authorized to maintain the voter registration lists: namely, as the State Registrar of Voters, and the Secretary's role as the State Commissioner of Elections. Iowa Code §§ 47.1, 47.7. When the Secretary is acting in his role as State Commissioner of Elections, he has limited authority to unilaterally adopt rules to (1) carry out Iowa Code § 47.1, (2) address emergency powers in relation to natural disasters, and (3) implement a limited grievance procedure for violations of the federal Help America Vote Act. Iowa Code §47.1(1), (4)-(5) (2014). Iowa Code § 47.1 is concerned with the supervision of the county commissioners of elections and the administration of the election process itself—not the maintenance of voter rolls.

The maintenance of voter rolls, pursuant to the policies and direction of the VRC, is a function carried out by the Secretary in his role as Registrar of Voters. Iowa Code § 47.7 (2014) ("The state commissioner of elections is designated the state registrar of voters, and shall regulate the preparation,

preservation, and maintenance of voter registration records.") In the context of his role as Registrar, the Secretary is limited to adopting "procedures for *access* to the state voter registration file, security requirements, and *access protocols* for adding, changing, or deleting information from the state voter registration file." Iowa Code § 47.7(2)(d) (2014)(emphasis added). Rules for discharging the duties of the office of Registrar must be implemented by the nonpartisan VRC. Iowa Code § 47.8(1) ("[The VRC] shall meet at least quarterly to make and review policy, *adopt rules*, and establish procedures *to be followed by the registrar in discharging the duties of that office*...") (emphasis added).

This authority is not speculative, and the VRC actively exercises its role in creating procedures to regulate voter registration. A recent example of the VRC exercising the authority to make rules pertaining to maintenance of the voter registration rolls through voter removal is Iowa Admin. Code r. 821—7.1 (2014), first noticed in the December 26, 2012 Administrative Rules Bulletin by the VRC as ARC 0539C. (App. 320-22.) The rule provides for modification to the voter registration list based on the 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 (2014). Similarly, the VRC recently re-designed Iowa's voter registration form to resolve voter confusion under Iowa Code §47 and §48A. *See* ARC 1361C, Iowa Admin. Bull., vol. XXXVI at 1853 (Mar. 5, 2014); Iowa Admin. Code r. 821—2.16 (47, 48A) (2014). By contrast, there has

not been any determination to regulate Iowa's voter registration records through access to the SAVE system by the VRC, nor authorization by the VRC for the Secretary to administer such a regulation.

The Secretary argues for an interpretation of the Iowa Code that would allow him to act unilaterally and independently of the VRC in adopting rules to selectively challenge and remove registered voters from the rolls. Under the Secretary's interpretation, the provisions of Iowa Code § 47.8 giving rulemaking authority to the VRC would be redundant, and the VRC itself would be rendered superfluous. The Iowa Legislature need not have bothered to create mechanisms for maintaining the voter roles when the Secretary is free to use any mechanism he desires, so long as it is not, to the express detail, prohibited by statute. Thus, the General Assembly would not have any need to create the VRC at all, nor to have directed it to promulgate rules for the Secretary to follow.

Moreover, the Secretary has acted not in the absence of regulations by the VRC, as the Secretary asserts, but in spite of them. The VRC, through regulations, has *already* created a detailed regulatory scheme for ensuring that only eligible applicants have their voter registration approved. *Specifically, see* Iowa Admin. Code r. 821—2.15 (48A) (Verification of voter registration information)*;* Iowa Admin. Code r. 821—2.16 (47, 48A) (Form of official Iowa voter registration application, requiring voters to swear that they are U.S.

Citizens); Iowa Admin. Code r. 821—6.1 (47) (Statewide voter registration system requirements); Iowa Admin. Code r. 821—7 (48A) (Voter Registration Mailing Address Maintenance); *and* Iowa Admin. Code r. 821—9 (48A) (National Change of Address Program, notably directing the Secretary as state registrar to organize the program in Iowa and outlining his duties in so doing).

Rules pertaining to the removal of registered voters from the voter registration list must be both authorized by statute and established by the VRC, not by the Secretary of State acting unilaterally. There was no policy determination or other action by the VRC authorizing the Voter Identification and Removal Rule's promulgation, nor is there any Iowa law in place providing for such action. Therefore, the Secretary exceeded his statutory authority, and the district court's decision to strike the regulation was clearly necessary.

iv. Rules may not "sit on top" of Iowa statutes they conflict with, nor may they regulate "on top" of authority delegated to other agencies by statute.

The Secretary states that the Voter Identification and Removal Rule cannot be in conflict with Iowa Code § 48A.14-16 or § 48A.30 because the Rule itself does not include the language "to remove a voter or cancel a voter's registration," and that the regulation merely "sits on top" of the removal process created by the legislature. In asserting this, The Secretary attempts to create a catch-all exception that allows him to promulgate any rule he can

imagine, so long at that rule itself does not explicitly contain the language of removal, but merely triggers the existing removal process codified in Iowa Code § 48A.14-16. The rule the district court properly enjoined—which would subject a particular subset of Iowa voters to a flawed and incomplete federal database never intended for such purpose, and then put the onus on the identified Iowa voter to prove her citizenship to the satisfaction of the Secretary or else face challenge and removal procedures—is a gross overstep.

The Secretary continues this line of reasoning by noting that, since other rules do give him authority to compare voter registration records to *other*, specific databases *enumerated in the Code*, he must have the authority to compare those records to the SAVE database as well. In support of this contention, the Secretary cites Iowa Admin. Code rr. 721—28.3 and R. 721—28.4. Yet these other database comparisons are expressly authorized by statute. No such statute exists to allow the Secretary to compare the voter registration records to the SAVE database system. On the contrary, the Legislature expressly found that comparison to the lists contemplated in those two rules (lists of individuals registered to vote in other states and a list of convicted felons) were appropriate. No such legislative finding exists regarding the SAVE database. Given the widely understood limitations and inaccuracies in the SAVE system, it does not seem likely the Secretary could have obtained passage of such legislation. The Secretary skirted the state legislative process in which the

relative merits of the SAVE database—including consideration of its necessity, accuracy, efficiency—could be determined by the General Assembly.

The district court, in giving the appropriate level of deference under the IAPA, struck the Voter Identification and Removal Rule. The regulation starkly conflicts with numerous Iowa statutes, and is outside of the sphere that the Secretary is authorized to regulate in the absence of action by the VRC. In so doing, the district court protected the reliability and predictability of Iowa's registration regulations, and accountability of Iowa's elections officials to voters to abide by the limits of their authority.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to affirm the district court below. Specifically, the Petitioners request that the Court affirm the district court's grant of declaratory relief finding that the promulgation of the Voter Identification and Removal Rule was beyond the authority delegated to the Secretary by any provision of law and in violation of Iowa law. The Petitioners also ask that this Court affirm the district court's grant of permanent injunctive relief preventing the Secretary from taking any action pursuant to the invalid rule. Finally, the Petitioners request that this Court affirm the district court's grant of temporary injunctive relief on November 12, 2013 to protect voters should this Court remand this case to the

district court for further proceedings, as any change on remand before the election would be hugely disruptive, cause voter confusion and likely disfranchise eligible voters.

REQUEST FOR ORAL ARGUMENT

The Petitioners-Appellees respectfully request the opportunity to present oral arguments to the Court in this matter.

Respectfully,

/s/ Rita Bettis

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