
No. 08-2352

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES STUDENT ASSOCIATION FOUNDATION, as an organization and representative of its members, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, as an organization and representative of its members, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, as an organization and representative of its members,

Plaintiffs-Appellees,

and

MICHIGAN STATE CONFERENCE OF NAACP BRANCHES, as an organization and representative of its members,

Plaintiff,

v.

TERRI LYNN LAND, Michigan Secretary of State, and CHRISTOPHER M. THOMAS, Michigan Director of Elections, in their official capacities,

Defendants-Appellants,

and

FRANCES McMULLAN, City Clerk for the City of Ypsilanti, Michigan, in her official capacity,

Defendant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division

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JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(3)-(4) and 1367. This Court has jurisdiction, under 28 U.S.C. § 1292(a)(1) and Fed. R. App. P. 3 and 4, over the interlocutory appeal of the district court's partial grant of a preliminary injunction in Plaintiffs' favor, concerning the State of Michigan's practice of immediately cancelling the registrations of voters whose original voter registration cards were returned as undeliverable by the post office.

Because the district ultimately court did not grant preliminary injunctive relief in Plaintiffs' favor concerning the State's practice of immediately cancelling the registrations of voters who apply for driver's licenses in other states, and in the absence of any appeal *by Plaintiffs* concerning the district court's partial denial of injunctive relief with respect thereto, Plaintiffs assert that this Court has no jurisdiction to entertain an interlocutory appeal of any legal or factual determinations made by the district court concernig the illegality of that practice.

STATEMENT REGARDING ORAL ARGUMENT

The issue of whether the district court abused its discretion in granting partial preliminary injunctive relief in Plaintiffs' favor with respect to the Defendants' practice of immediately cancelling the registrations of voters whose original voter registration cards were returned as undeliverable by the post office was previously briefed, considered, and decided by this Court in a published opinion, in connection with Defendants' emergency motion for a stay of the district court's preliminary injunction order pending appeal. See *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373 (6th Cir. 2008) (holding that the district court did not abuse its discretion in granting preliminary injunctive relief; denying motion to stay injunction pending appeal). Accordingly, Plaintiffs do not believe that oral argument will assist the Court in deciding the merits of the appeal. Plaintiffs therefore do not request oral argument.

STATEMENT OF ISSUE PRESENTED ON APPEAL

Whether the district court abused its discretion in granting partial preliminary injunctive relief in Plaintiffs' favor with respect to the Defendants' practice of immediately cancelling the registrations of voters whose original voter registration cards were returned as undeliverable by the post office.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

On September 17, 2008, Plaintiffs filed a lawsuit and motion for a preliminary injunction in the District Court for the Eastern District of Michigan, seeking an order prohibiting the State Defendants from engaging in actions that violate both federal and state laws protecting the rights of Michigan residents to vote. (R.1, ROA, 7-31) Plaintiffs submitted – and the District Court agreed – that, absent an injunction, qualified Michigan voters would be disfranchised and unable to vote in the November 2008 general election and future elections.

Plaintiffs’ lawsuit addresses two practices related to the improper removal of registrants from Michigan’s Qualified Voter File. The first practice (the “undeliverable ID card practice”) involves the removal from Michigan’s Qualified Voter File of newly-registered voters whose original voter identification cards are returned as undeliverable. Prior to the issuance of the District Court’s injunction, rather than affording such registrants the opportunity to confirm their residency and correct any errors – as required by the plain language of the National Voter Registration Act of 1993 – the State Defendants would summarily remove these voters from the rolls.

The second practice (the “out-of-state driver’s license practice”) involves the purging of Michigan voters upon an unverified assumption that such voters have changed their residencies to jurisdictions outside of the state of

Michigan. In Michigan, unlike many other jurisdictions, the Secretary of State administers both driver's licenses and voter registrations. When an individual applies for or receives a driver's license in a different state, the Secretary of State is notified by the cooperating state's motor vehicle licensing bureau. Upon receipt of this information, the Michigan Defendants immediately cancel the voter's registration and remove the voter's name from his precinct voting list, without providing any pre-cancellation notice or waiting period to the voter. The State Defendants make no effort to determine whether the affected voter actually intends to change his residency for voting purposes, or has applied for an out-of-state driver's license for some other reason. Instead, the State Defendants presume that the voter intends to change his voting residence and to cancel his Michigan voter registration. The State Defendants' practice is directly contrary to both federal and state laws, which provide safeguards to voters and prohibit the immediate cancellation of voter registrations under these circumstances.¹

On October 13, 2008, the district court granted a preliminary injunction in Plaintiffs' favor on the undeliverable ID card practice but declined to

¹ The District Court, while finding that the out-of-state license cancellation practice clearly violates the NVRA, did not preliminarily enjoin the practice based on standing considerations. (R. 27 at 42, ROA, 579.)

preliminarily enjoin the out-of-state driver's license practice.² (R. 27, ROA, 538-580.) Defendants applied to the district court for a stay of the preliminary injunction order pending appeal, and the district court denied the stay. Defendants then sought a stay in this Court, which was likewise denied. *See U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373 (6th Cir. 2008). This Court did, however, grant Defendants' request for an expedited review and briefing schedule, in light of the State's contention that it needed a ruling concerning the preliminary injunction prior to the next election in February 2009.

² Although the district court did not enjoin the out-of-state driver's license practice, given its concerns regarding Plaintiffs' standing as to that claim, as well as its concerns about the relative balance of harms, it did nevertheless determine that the out-of-state driver's license practice violated the NVRA. *See* R. 27, ROA 551 ("The Court's analysis of the standing issue should not be construed to mitigate what seems to be the clear unlawfulness of what the Secretary is doing with regard to out of state driver's license applications.")

STATEMENT OF FACTS

A. Voter Qualifications and Registration Procedures in Michigan

To be eligible to register to vote in Michigan, a person must be a United States citizen and, by the time of the next election following registration, must be at least 18 years of age; a resident of Michigan for at least 30 days; and a resident of the city, township, or village in which he seeks to be registered. MCL § 168.491.

Michigan has maintained a statewide voter registration database, known as the Qualified Voter File (the “QVF”), since the 1998 election cycle. The QVF links local election officials throughout the state to a fully automated, interactive statewide voter registration database. (Ex. 3 to R. 3, ROA, 91-93.) The QVF was established and is maintained by the Michigan Secretary of State. MCL 168.5090. Data entry procedures for the QVF are described in the Voter Registration Module (January 1, 2003). (Ex. 4 to R. 3, ROA, 94-145.)

Upon receipt of a voter’s registration form, the clerk enters the voter’s information into the QVF and either prints or queues the voter identification card to be sent to the voter. (*Id.* at 1-5 – 1-11, 1-19, ROA, 94-145.) At that point, the voter is registered and is marked as “active” in the QVF, regardless of whether the voter ID card has been received by the voter or even sent out. The voter ID card is simply the “disposition notice” required by Section 8(a)(2) of the National Voter

Registration Act of 1993 (the “NVRA”), signaling that the voter has successfully registered.³ 42 U.S.C. § 1973gg-6(a)(2). *See also U.S. Student Ass’n Foundation*, 546 F.3d at 384 (“[T]he original voter ID card that is sent out by the state of Michigan is the notice of disposition of the application to register to vote required by 42 U.S.C. § 1973gg-6(a)(2).”)

Indeed, once the voter’s name is entered into the QVF, the voter may check his registration status online at the Michigan Department of State’s Voter Information Center. (Ex. 6 to R. 3, ROA 154.) As long as the voter’s information is in the QVF, even if the voter identification card is still waiting in a queue to be printed, the voter is directed to a webpage that states: “Yes, You Are Registered!” (*Id.*) A person who appears to vote at an election and whose name appears in the QVF is likewise considered a registered voter under the Michigan Election Law. MCL § 168.509o(2).

Section 8 of the NVRA prohibits election officials from removing any registered voter from the rolls except at the request of the registrant, the death of the registrant, or pursuant to the confirmation of registration procedures set forth in subsections (b), (c), and (d) of Section 8. 42 U.S.C. § 1973gg-6(a)(3) and (4).

³ A voter does not need to present a voter ID card in order to vote. (Ex. 5 to R. 3, ROA, 147-152.)

B. The Immediate Cancellation of Voters' Registration Upon Return of Undeliverable Voter Identification Cards

Michigan's Election Law requires city and township clerks to issue a voter identification card to any applicant that the clerk determines to be qualified to vote, based on the applicant's completed voter registration application. MCL §§ 168.499(3), 168.500c. After the voter's identification card is generated, it is forwarded to the voter by first-class mail. MCL § 168.499(3). However, the Michigan statute also provides that if the elector's original voter identification card – the notice of disposition under Section 8 of the NVRA – is returned as undeliverable, “the clerk shall reject the registration and send the individual a notice of rejection,” MCL § 168.499(3); that the returned original ID card is to be attached to the voter's completed registration application, MCL § 168.500c; and that “the person shall be deemed not registered,” MCL § 168.500c (the “Cancellation Procedure” or “Undeliverable ID Card Practice”). Thus, under this statutory provision, the voter who has completed an application, whose name has been added to the QVF, and who has been told by the Secretary of State: “Yes, You Are Registered!” is removed from the voting rolls. (Ex. 4 to R. 3 at 1-36, ROA 94-145.)

This Cancellation Procedure conflicts with the express provisions of Section 8(a)(3) of the NVRA, which prohibit the immediate removal of registered voters from the rolls under such circumstances. The Cancellation Procedure also

serves to disfranchise qualified Michigan voters whose original cards are returned as undeliverable merely due to postal error, clerical error, inadvertent routing within a multi-unit dwelling, and even simple misspelling or transposition of numbers in an address.

By contrast, if a voter's duplicate voter identification card⁴ is returned as undeliverable, Michigan law instructs the local clerks to "accept this as information that the elector has moved and . . . proceed in conformity with section 509aa," which is Michigan's counterpart to Section 8(d) of the NVRA. MCL 168.499(3). If the confirmation of registration notice sent out pursuant to MCL § 168.509aa is likewise returned as undeliverable, the clerk is instructed to mark the voter's registration record as "challenged," which triggers an obligation on the poll worker to inquire further into the voter's qualifications when he or she appears to vote, but still provides the voter the opportunity to cast a regular ballot. *Id.*

⁴ A duplicate voter identification card might be issued, for example, when a voter loses or misplaces his original identification card, or when a voter's polling place or precinct information changes. For all practical purposes, there is no difference between an original and a duplicate voter identification card.

C. Defendants' Immediate Purging of Voters Who Are Presumed to Have Changed Residence Based Solely on Obtaining a Driver License in Another State⁵

When the State Defendants receive notice from a cooperating state motor vehicle licensing bureau that an individual has surrendered his Michigan driver's license and applied for a driver's license in another state, they immediately cancel that individual's voter registration and remove the voter's name from the precinct list (the "Purging Procedure" or "Out-of-State Driver's License Practice"). (Ex. 4 to R. 3 at 1-33, ROA, 94-145; *see also* Ex. 7 to R. 3, ROA, 156.) Defendants further instruct the local city or township clerk to issue a "30-Day Notice of Cancellation (Out of State)" ("30-Day Notice") to the affected voters. (Ex. 4 to R. 3 at 1-33, ROA 94-145.) The 30-Day Notice specifically informs the affected individuals that their registration will be canceled in 30 days unless they return the postage-paid return card attached to the 30-Day Notice. (*Id.*; *see also* Ex. 8 to R. 3, ROA 158-159.) The 30-Day Notice does not inform affected voters that their names have *already been removed* from the precinct voter rolls and that they are *already* unable to vote. To return to "Active" status, a voter must affirmatively notify the state within 30 days that he wishes to remain registered to

⁵ Plaintiffs include this section regarding the out-of-state driver's license practice only for purposes of providing a complete response to the issues raised in Defendants' main brief. However, as indicated previously, Plaintiffs do not believe that this Court has interlocutory appellate jurisdiction to consider any findings or rulings made by the district court concerning this practice, inasmuch as the district court declined to enter a preliminary injunction in Plaintiffs' favor with regard to it and Plaintiffs elected not to file an interlocutory appeal of the partial denial of preliminary injunctive relief in that regard.

vote in Michigan. (Ex. 4 to R. 3 at 1-33, ROA 94-145.) This practice automatically denies the affected voters of the protection of the NVRA, 42 U.S.C. §1973gg-6(d), which prohibits final removal of voters from the registration roll in this circumstance until after the *second* general election for federal office following the required notice to the voter.

Plaintiffs' members, for various reasons, may procure a driver's license in a state other than Michigan while intending to maintain their Michigan residency for purposes of voting. Students who spend eight or nine months per year at an out-of-state college, or citizens who spend several months per year in a warmer climate often elect to obtain an out-of-state driver's license while maintaining their Michigan residency. Indeed, in many states such individuals are required to obtain such driver's licenses.⁶ These voters are being improperly and illegally disfranchised through the Purging Practice. According to the State Defendants' estimates, they cancel the registrations of approximately 72,000 voters per year through this procedure. (Ex. A to R. 15 at ¶ 12, ROA 339-388.)

⁶ See, e.g., Ohio Bureau of Motor Vehicles, How to Obtain an Ohio Driver License, Vehicle Registration, License Plates & Ohio Title, available at http://www.bmv.ohio.gov/misc/new_resident.htm (stating Ohio requirement that persons who have, among other things, signed a lease or taken a job in Ohio must obtain an Ohio driver's license "as soon as possible"); Wisconsin Department of Transportation, Drivers & Vehicles: Non-Residents, available at <http://www.dot.wisconsin.gov/drivers/drivers/apply/nonreside/index.htm> (Wisconsin license must be obtained within 60 days).

SUMMARY OF ARGUMENT

The district court's preliminary injunction order is reviewed by this Court for abuse of discretion. *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). The district court's legal conclusions in assessing the Plaintiffs' Motion for Preliminary Injunction are reviewed *de novo* and its factual findings for clear error. *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003). However, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. *Id.*

This standard of review is "highly deferential" to the district court's decision. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Hamilton's Bogarts*, 501 F.3d at 649. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). While expressing their general disagreement with the district court's opinion and order, Defendants fail to show that the district court abused its discretion in any way.

Also relevant, for purposes of this appeal, are the findings that this Court made a few months ago in its published opinion in connection with its ruling on Defendants' emergency request of a stay of the district court's injunction pending appeal. In that opinion, this Court stated:

In considering defendants' motion for a stay of the district court's preliminary injunction, we are deciding whether the defendants are likely to be able to show that the district court abused its discretion in granting the preliminary injunction... **We conclude that the defendants have not shown that it is likely that the district court abused its discretion in granting the preliminary injunction,** and we must therefore deny defendants' motion to stay the preliminary injunction.

United States Student Ass'n v. Land, 08-2352, Doc. 00611903984, (Oct. 30, 2008) (emphasis added).

In other words, *this Court has already opined, in a published opinion, on the very question presented for review in this interlocutory appeal* – i.e., whether the district court abused its discretion in granting the preliminary injunction. A subsequent panel of this Court is not permitted to revisit or alter the legal rulings of a prior panel in a published opinion. *See Darrah v. City of Oak Park, 255 F.3d 301, 309-10 (6th Cir. 2001)* (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”) (internal citations omitted); *Brentwood Academy v. Tennessee*

Secondary, 442 F.3d 410, 421-22 (6th Cir. 2006) (“Our agreement or disagreement with the 2001 panel decision is not at issue here. We have no authority to overturn a prior published decision of this court and, moreover, that decision is the law of the case.”); *see also* 6th Cir. R. 206(c) (stating that published panel opinions are binding on all subsequent panels). Accordingly, as previously determined by this Court, the district court’s preliminary injunction order must be affirmed.

ARGUMENT

A. The State Defendants Fail to Establish That the District Court Erred in its Determination that Plaintiffs Have Standing

The State Defendants assert that the district court erred in its determination that Plaintiffs have standing regarding the challenged practices. Specifically, they set forth two arguments: (1) that Plaintiffs have failed to identify any members who have been affected by the practice, and (2) that Plaintiffs fail to demonstrate an injury in fact because affected voters would be able to complete a provisional ballot. The State Defendants already made both of these arguments in support of their Emergency Motion for Stay Pending Appeal. This Court considered these arguments and expressly rejected them. *U.S. Student Ass'n Foundation*, 546 F.3d at 381 (“Defendants have not shown that the plaintiffs lack standing. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004).”.)

As did the prior panel, this Court must again reject these arguments as meritless. Moreover, an examination of the State Defendants’ argument reveals that the district court reached the correct decision regarding standing and confirms this Court’s earlier ruling.

1. Identification of Affected Members

The State Defendants argue that Plaintiffs have not identified any specific members who have, to date, been impacted by the challenged practices. On this basis, they argue that the district court erred in finding that Plaintiffs have met their standing requirements. As an initial matter, with regard to the prospective injunctive relief (*i.e.*, the prohibitory injunction), Plaintiffs are not required to identify a specific member of their respective organizations who has been affected. Instead, the threat of such future harm to Plaintiffs' members is sufficient to establish standing. As this Court explained in another voting rights case:

Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to human error by an election worker who mistakenly believes the voter is at the wrong polling place. ***It is inevitable, however, that there will be such mistakes.*** The issues Appellees raise are not speculative or remote; they are real and imminent.

Sandusky County, 387 F.3d at 574. On that basis, this Court determined that the plaintiffs had standing. *Id.* Here, similarly, the district court properly determined that Plaintiffs have standing.

As to the mandatory injunction (*i.e.*, that the State Defendants take measures to remove the “rejected” marking of affected individuals), the district court properly found that Plaintiffs have pled the existence of such members among their organizations. (R. 27 at 12, ROA 546.) Plaintiffs need not identify a specifically affected member who has been denied the right to vote by this practice, and, indeed, to find such a person would not have been possible as the election had not yet occurred at the time the district court issued the preliminary injunction. The sheer numbers of those purged removes any doubt that the district court did not abuse its discretion in finding that plaintiffs had adequately demonstrated standing.

2. Injury in Fact

Equally unconvincing is the State Defendants’ argument that the district court’s decision on standing should be overturned because (1) Plaintiffs have not alleged injury in fact, and (2) affected voters would be allowed to cast a provisional ballot and, thus, not suffer an injury in fact.

(a) Plaintiffs Have Adequately Pled Injury in Fact

The State Defendants rely on *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), to show that Plaintiffs have failed to allege standing. That reliance is entirely misplaced, however. In *Northeast Ohio Coalition*, this Court found that plaintiffs had not established

standing because they had failed to assert that any of their members had suffered or would suffer “a concrete, actual injury traceable to” defendants’ actions. *Id.* at 1010. Here, in stark contrast, Plaintiffs have explicitly alleged that the State Defendants’ challenged procedures “deprives Plaintiffs’ members of the NVRA Safeguards prior to removing their names from the voting rolls and presents the real and immediate threat that such members will be disfranchised.” (R. 1 at ¶¶ 73, 88, ROA 20, 22.) This is plainly the assertion of a concrete, actual injury – deprivation of safeguards provided under federal law and disfranchisement – that Plaintiffs’ members are likely to suffer because of the State Defendants’ actions.⁷ *Northeast Ohio Coalition* is simply inapposite here. The district court, taking Plaintiffs’ allegations as true, correctly held that Plaintiffs had demonstrated standing.

⁷ Plaintiffs did not, in their Complaint, break down into component steps the manner in which the State Defendants’ challenged practices would disfranchise Plaintiffs’ members (*e.g.*, with respect to the Cancellation Procedure, by separately alleging that their members had registered to vote; that some members’ original ID cards were or will be returned as undeliverable; and that those members intend to go to the polls on Election Day to try to vote). However, given the Plaintiffs’ exhaustive description in their Complaint of just how the State Defendants’ cancellation procedure works, those underlying steps are *necessarily implied* in the statement that the State Defendants’ challenged procedures “deprive Plaintiffs’ members of the NVRA Safeguards prior to removing their names from the voting rolls and presents the real and immediate threat that such members will be disfranchised.” The district court recognized this in finding that the Plaintiffs had adequately pled standing.

(b) Provisional Ballots Do Not Prevent Injury in Fact

The State Defendants next contend that Plaintiffs' members cannot possibly suffer injury in fact, because they will be able to cast a provisional ballot on Election Day, and that the district court "discounted the provisional ballot process as any remedy to the alleged disenfranchisement of these individuals because the court was under the misapprehension that the provisional ballots would not count." (Appellants' Brief at 21.) As an initial matter, the district court did, in fact, consider and correctly understand the facts and law relating to provisional ballots. In its Order Denying Defendants' Motion for Stay Pending Appeal, the district court addressed the issue at some length:

To the extent that the defendants suggest that the Court was not cognizant of their provisional-balloting argument when it granted the preliminary injunction motion, they have misread the Court's order. There was never any confusion on the part of the Court that persons appearing at the polls are entitled to provisional ballots regardless of whether they present a receipt of registration. The order addresses the issue of provisional ballots in footnote 12, recognizing that a voter can "always" cast a provisional ballot. October 13 Order, docket no. 27, at 30 n.12. The Court regarded the provisional ballot option as unhelpful to the defendants' case not because provisional ballots are unavailable to voters affected by the undeliverable ID practice, but because it appears that if a voter's registration is marked "rejected" pursuant to the practice, then even if he or she casts a provisional ballot, the ballot will not be counted. *Id.*

The defendants argue otherwise, citing to M.C.L. 168.523a. The statutory provision relied upon by the defendants, however, confirms rather than disproves the Court's understanding. . . . Under subsection (4), “[i]f the city or township clerk verifies the elector information and finds no information contrary to the information provided by the individual in the sworn statement,” then on presenting one of the several enumerated forms of identification the voter may cast a provisional ballot. . . . Under subsection (5), if the local clerk is unavailable when the voter is at the polls, or if the voter is unable to produce a form of subsection (4) identification, the voter's provisional ballot will be counted only if it can be “verifi[ed] after the election” by means that are unspecified, but presumably identical to the verification by the local clerk contemplated by subsection (4).

. . . . [O]f course, if a voter's registration is marked “rejected” in the QVF because his or her voter ID card was returned as undeliverable, the clerk will not be able to verify the address and indeed may regard this marking as contrary information on the issue of residency. *As a result, even if the potential voter were able to cast a provisional ballot, it would ultimately not be counted.*⁸

⁸ In the context of deciding Defendants' Motion for a Stay Pending Appeal, the district court only addressed the Cancellation Procedure. In this appeal, the State Defendants are challenging the district court's holding with respect to both the Purging Procedure and the Cancellation Procedure. The district court specifically held that provisional ballots equally do not provide a remedy for those affected by the Purging Procedure. (R. 27 at 30, n.12, ROA 567 (“Thus, even if a voter who does not appear on the rolls is permitted to cast a provisional ballot, this only delays the inevitable disenfranchisement.”)).

(R. 38 at 3-4, Doc. 00611610740 (emphasis added)).⁹ The district court accepted, as a factual matter, that the foregoing accurately describes the disposition of “rejected” voters’ ballots. While the district court’s ultimate determination of standing is a legal question that is reviewed by this Court *de novo*, the district court’s underlying factual findings – such as the likely disposition of “rejected” voters’ provisional ballots – are reviewed under the clearly erroneous standard. *Jones*, 341 F.3d at 476. The State Defendants clearly cannot meet this standard.

Merely completing a provisional ballot is of no consequence if that ballot will not be counted for “rejected” or “cancelled” voters. The district court correctly found that, as a factual matter, it appears that voters who are marked “rejected” or “cancelled” in the QVF because their ID cards were returned or because they registered for an out-of-state drivers license would be allowed to cast futile provisional ballots that would not be counted. *Cf. Reynolds v. Sims*, 377

⁹ Although the State Defendants have recently (subsequent to the filing of this lawsuit) instructed all clerks to allow anyone who does not appear on the QVF list to *submit* a provisional ballot, their directive importantly does not instruct the clerks to *count* the ballot, irrespective of the voter’s “cancelled” or “rejected” status in the QVF, if the voter was cancelled or rejected merely as a result of the undeliverable ID card practice or the driver’s license practice and is otherwise eligible to vote. (Ex. 2 to R. 36.) Thus, the State Defendants’ recent directive does nothing to alter the soundness of district court’s finding that allowing a voter who would be considered ineligible by the State to cast a provisional ballot (absent the injunction) is a useless exercise and does not remedy or prevent the harm to the Plaintiffs or their constituents and members.

U.S. 533, 554 (1964) (“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted. . . .”) (citations omitted).

The State Defendants’ insistence that “rejected” or “cancelled” voters’ provisional ballots *will* be counted is utterly inconsistent with the facts, the governing state law and the State Defendants’ own position. For example, the State Defendants argue on the one hand that a person whose original ID card is returned as undeliverable is not registered or even qualified to vote – and yet argue on the other hand that this unregistered, unqualified person’s provisional ballot will still be counted. The State Defendants’ position is insupportable. Michigan state law requires that a provisional ballot be verified by the clerk before it can be counted. M.C.L. 168.523a(3), (5)-(7). The district court determined, as a factual matter, that the clerk would have to refer to the QVF to verify the voter’s right to have his provisional ballot count, would necessarily see that the voter had been marked “rejected,” and would then throw out the ballot. (R. 27 at 30 n.12, ROA, 567.) The district court’s determination of these facts is not clearly erroneous; indeed, it is far more plausible than the scenario proposed – without a shred of support – by the State Defendants.

Accordingly, the district court correctly concluded that injury in fact was established as such persons “will almost certainly be denied the right to vote.”

(R. 27 at 14, ROA, 551.) The State Defendants have failed to establish that the district court erred in finding standing exists in this matter.

B. The District Court Did Not Abuse its Discretion in Issuing the Preliminary Injunction

In exercising its discretion to enter a preliminary injunction order under Fed. R. Civ. P. 65, a court must consider four factors:

- (1) whether the Plaintiff has a reasonable likelihood of success on the merits;
- (2) whether the Plaintiff likely will suffer irreparable harm if the alleged misconduct continues;
- (3) the balance of hardships on the parties; and
- (4) the impact of the injunction on the public interest.

Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997); *see also Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).

“It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements.” *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992). The district court, in a carefully-reasoned 43-page opinion, addressed each of the four factors at length and found that, on balance, they weighed in favor of granting a preliminary injunction. (R. 27, ROA,

538-580.) As discussed below, it is clear that the district court did not abuse its discretion in doing so.

1. The District Court did not Err in Determining that Plaintiffs Have a Strong Likelihood of Success on the Merits of Their Claim Regarding the Cancellation Procedure Affecting Newly Registered Voters

As an initial matter, this Court has already considered whether the Plaintiffs would likely succeed on their claim that the challenged practice violates the NVRA: “We hold that Michigan’s undeliverable-voter-ID-card practice likely violates the clear language of the NVRA. . . .” *U.S. Student Ass’n Foundation*, 546 F.3d at 381. This Court need go no further in deciding (again) that the district court did not abuse its discretion in making its determination that Plaintiffs will likely succeed on the merits of their claim that the challenged practice violates the NVRA. *See Darrah*, 255 F.3d at 309-10; *Brentwood Academy*, 442 F.3d at 421-22; *see also* 6th Cir. R. 206(c).

Even if this Court were to re-examine the issue, it would conclude that it correctly decided the matter the first time, as the State Defendants fail to establish that the district court abused its discretion in granting in part Plaintiffs’ motion for preliminary injunction with respect to the Cancellation Procedure claim. This Court summed up the question before the district court as “essentially boil[ing] down to a disagreement over the meaning of the word ‘registrant,’ as it appears in the NVRA.” *U.S. Student Ass’n Foundation*, 546 F.3d at 382. This is

the determinative question because, as this Court held, “if a person is a ‘registrant,’ a state may not remove his or her name from an official registration list on the grounds that his or her residence has changed unless the specified criteria of 42 U.S.C. § 1973gg(d) are met.” *Id.*

Addressing the problem of who is a “registrant,” the district court held that

making the question of who is a “registrant” a matter of state law would frustrate the NVRA’s purpose of regulating state conduct of elections, by essentially permitting states to decide when they will be bound by the Act’s requirements. If Michigan can label potential voters who have not received their IDs as not “registered” under the NVRA, nothing is to stop it from attaching that same label to any other group of people, and thus from circumventing the procedures mandated by the NVRA whenever it sees fit. ***Instead, the Court concludes that whether a potential voter is a “registrant” entitled to the NVRA’s protections is clearly a question of federal law,*** to be answered by a careful consideration of the substance of the potential voter’s status in the state registration program in question.

Indeed, the *plain language* of the NVRA virtually dictates that a person be regarded a “registrant” within the meaning of that statute at the moment his or her name appears on “the official list of eligible voters.”

(R. 27 at 18, ROA, 555 (emphasis added)). This Court agreed, holding that, “[b]ecause state law cannot control the definition of ‘registrant,’ we resolve the meaning of ‘registrant’ under the NVRA as a matter of federal law.” *U.S. Student Ass’n Foundation*, 546 F.3d at 383.

In their Appeal, the State Defendants do not challenge the district court's conclusion, or this Court's affirmance, that determining who is a "registrant" within the meaning of the NVRA is a question of federal law. Instead, somewhat inexplicably, they argue that the district court's conclusion that the NVRA dictates that "a person be regarded a 'registrant' within the meaning of that statute at the moment his or her name appears on 'the official list of eligible voters'" is incorrect because it is "based on a temporal analysis of Michigan's registration process, or a perceived defect with the law." (Appellants' Brief at 34.)

On the contrary: the district court's analysis – as explicitly stated in the court's opinion – is based on the plain language of the federal statute. The State Defendants offer no plausible argument why the district court should have looked at Michigan law, rather than the plain language of the statute, to discern the meaning of the NVRA. In any event, it is clear that the district court did not abuse its discretion in this regard.

The district court then *did* look to Michigan's registration process in order to determine, as a factual matter, when a person's name appears on "the official list of eligible voters." For the district court, "the lawfulness of the undeliverable ID practice ultimately hinges on whether Michigan lists a potential voter as permitted to vote on the QVF as soon as it processes his or her registration application, without waiting to determine whether [the original ID card] will be

returned as undeliverable.” (R. 27 at 18, ROA, 555.) In other words, irrespective of what the district court termed “dueling statutes . . . on the issue of when a potential voter becomes registered to vote as a matter of Michigan law,” (R. 27 at 17, ROA, 554), the question under *federal law* is *when* Michigan lists potential voters in the QVF as permitted to vote. The State Defendants utterly fail to challenge this as the relevant question under federal law. Instead, they continue to argue that a voter does not become registered under Michigan law if his original ID card is returned as undeliverable.¹⁰

¹⁰ Even if, contrary to the district court’s and this Court’s earlier determination, this were the relevant question, the State Defendants still miss the mark. The State Defendants operate under the premise that local residency is a qualification for voting, and that the undeliverable ID practice is confirmation of this qualification. However, the State Defendants misconstrue the pertinent issue. Plaintiffs do not dispute that local residency is a qualification to vote. The flaw in the State Defendants’ argument, however, is that they conflate the residency requirement with the receipt of the original identification card. Receipt of the original voter identification card does not create the qualification (local residency); whether the individual is or is not a local resident is not dependent on whether he receives his ID card in the mail. Return of the ID card may create a *question* as to whether the voter currently resides at the address, but in that case the NVRA’s residency confirmation procedure must be followed. Instead of following this procedure, the State Defendants simply assume that the affected voter is not a local resident and unlawfully cancel the registration.

When an individual applies to vote, he certifies under penalty of perjury that he is a local resident. The mere fact that he may not actually receive the original voter identification card, by human error, clerical error or otherwise, does not mean that he is not a local resident; it merely means that he did not receive a piece of mail. The return of a voter ID card provides some evidence *about* a voter’s qualifications; it does not create or destroy those qualifications, which are determined by the Michigan state constitution.

The evidence clearly shows that Michigan lists a voter in the QVF as permitted to vote as soon as it processes his or her registration application, without waiting to determine whether the original ID card will be returned as undeliverable. When a properly-completed voter registration application is received, the clerk adds the voter to the QVF, assigns him to the appropriate precinct and voting districts, and places him in an “**active**” status. (Ex. 4 to R. 3, ROA, 94-145.) The clerk then either simultaneously generates an ID card to send to the voter or queues the ID card for printing and mailing at a later date. (*Id.* at 1-5 – 1-11, 1-19, ROA, 94-145.) Once the voter has been entered into the QVF in this manner, he is eligible to vote in all elections. Indeed, *prior to ever receiving a voter identification card*, if the voter were to enter his identifying information into the Secretary of State’s online web portal at www.michigan.gov/vote, he would be told “**Yes, You Are Registered!**” and would be provided his correct precinct and polling place information. (Ex. 6 to R. 3, ROA 154.)

If that voter were to then go to the polls and vote (assuming his ID card had not been returned to the clerk in the interim and that the clerk had not acted to change his registration status to “rejected”), he would appear on the precinct register and be able to cast a regular ballot in the election – even if his original ID card were *subsequently* returned as undeliverable. MCL § 168.509o(2). As the district court found, “the central question is: if a potential

voter's ID card were to be returned only *after* an election has intervened, would the voter's QVF status have permitted him to vote in the meantime? At the hearing on this motion, counsel for the defendants represented that the answer to these questions is 'yes.'" (R. 27 at 19, ROA 556).

Based upon this undisputed evidence, the district court correctly concluded, as a factual matter, that a person's name appears on "the official list of eligible voters" at the point when she is entered into the QVF and placed on "active" status, and not at some indefinite point in the future, when the applicant receives the disposition notice required by Section 8(a)(2) of the NVRA.¹¹ There is nothing clearly erroneous about this conclusion. The district court then correctly applied the plain language of the NVRA to the facts to find that voters who are entered into the QVF and placed on "active" status are "registrants" within the meaning of the NVRA and are entitled to the protections of Section 8(a)(3) and (d) of the NVRA. (R. 27 at 19, ROA, 556 ("Since the Court accepts these facts as true, the Court also concludes that a potential voter in Michigan is a 'registrant' under the NVRA the moment the state processes his or her registration, and that

¹¹ The voter identification card issued by the local clerks is clearly the disposition notice contemplated by Section 8(a)(2) of the NVRA, signifying successful voter registration. Otherwise, State Defendants would be violating their duty to issue disposition notices to the vast majority of applicants in the state who are successfully entered into the QVF. *See U.S. Student Ass'n Foundation*, 546 F.3d at 384.

the voter may only have his or her status changed to one that would not permit a valid vote (regardless of whether Michigan calls the change ‘rejection,’ ‘cancellation,’ or anything else) pursuant to the provisions of the statute.”). This Court agreed:

Because Michigan has chosen to treat individuals as ‘active,’ as individuals permitted to cast ballots upon entry of their applications into the QVF, defendants cannot then withdraw this ‘active’ voter status without complying with the NVRA. Once the state takes the step of identifying individuals as active voters, those individuals clearly become ‘registrants’ protected by the NVRA.

U.S. Student Ass’n Foundation, 546 F.3d at 384.

Casting aside all of the evidence, the State Defendants conveniently now argue that a voter is only “temporarily” an active voter in the QVF and therefore can be removed without complying with the NVRA if the original voter identification card is returned as undeliverable. (Appellants’ Brief at 36-37.) This is precisely the argument that the district court held would eviscerate the NVRA. If states can “temporarily” register some voters and then later (perhaps even after the voters have actually cast ballots) “deem” those voters not to be registered, then states can essentially sidestep the federal law altogether. It is incomprehensible to suggest that a person can be placed on the list as an active voter but that, somehow, the person is not a “registrant.” Even more confusing is how the State Defendants can then change the voter’s status from “active” to “rejected” upon receipt of a

returned original identification card, while claiming that such action is not the removal of a registered voter from the list of eligible voters. The State Defendants' tortured argument in this regard ignores common sense, a plain-language reading of the NVRA, and the factual findings based on the undisputed evidence that underpin the district court's decision, and is wholly without merit.

2. The State Defendants Fail to Demonstrate that the District Court Abused its Discretion in Determining Plaintiffs Established a Strong Likelihood of Success on the Merits of Their Purging Procedure Claim

As an initial matter, Plaintiffs point out that the State Defendants are appealing an issue on which they prevailed before the district court. (R. 27, ROA, 538-580.) Although the district court stated that the Purging Practice plainly violated the NVRA, it declined to enjoin the practice, citing questions about standing with respect to this issue. (R. 27 at 27, 32, ROA, 564, 574.) The district court's view that the Purging Practice violates the NVRA is correct, but –correct or not – it is not appealable by the State Defendants. *See, e.g. Bunting v. Mellon*, 514 U.S. 1019, 1023 (2004) (explaining that it is the settled practice to refuse “to entertain an appeal by a party on an issue as to which he prevailed”). This Court, like the Supreme Court, sits to “review[] judgments, not statements in opinions.” *Id.* (citation omitted). Plaintiffs, however, discuss the Purging Practice herein for the sake of completeness.

The State Defendants fail to establish that the district court erred in determining that Plaintiffs established a strong likelihood of success on the merits of their claim that the Purging Procedure violates the NVRA. Section 5 of the NVRA provides that

Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved *unless the registrant states on the form that the change of address is not for voter registration purposes.*

42 U.S.C. § 1973gg-3(d).

The district court found that “there can be little doubt that the out of state driver's license practice is violative of the NVRA. Even if out of state driver's license applications qualify as ‘change of address forms’ under subsection (d), that very subsection still clearly requires states to ascertain whether the applicant has designated the application as *not* a change of address for voter registration purposes.” (R. 27 at 22, ROA, 559.) In other words, the NVRA clearly contemplates that an individual may have one residence for driver's license purposes and another residence for voter registration purposes. (*Id.* at 23, ROA, 560 (“Thus, even the state recognizes that voters can be eligible both to vote in Michigan and to apply for a driver's license in another state, and that the residence requirements for the two are not always identical.”).) As such, the State

Defendants may not summarily remove such voters from the rolls but instead must afford them the protections granted by the NVRA.¹²

The State Defendants, nonetheless, argue that when a person surrenders his driver's license during the application process for a new license in another state, that person is “*confirm[ing] in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the*

¹² The NVRA expressly prohibits the removal of a name from the voting rolls unless the procedure is followed:

(d) Removal of names from voting rolls.

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B) (i) has failed to respond to a notice described in paragraph (2) [requesting voter confirm change of address]; and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

42 USC §1973gg-6(d).

registrant is registered.” (Appellants’ Brief at 42 (quoting 42 U.S.C. 1973gg-6(d)(1)(A)) (emphasis in original).)¹³

This is a fundamentally flawed assumption, and betrays the core problem for which Plaintiffs are seeking redress. The application for a driver's license or state identification card in another state may be driven by any number of factors, none of which has any bearing on a voter's residence for voting purposes. A Michigan student going to school in Ohio nine months out of the year may find it more convenient to have an Ohio license and an Ohio car registration. A Michigan senior citizen who spends her winters in Florida may prefer to hold a Florida license for insurance reasons. A member of the armed services stationed outside of Michigan may have no choice, when her license expires, but to apply for a new license in another state. The only facts the State Defendants know in this

¹³ The State Defendants’ assertion that they can rely on Section 8 of the NVRA to summarily remove registrants from the voter rolls is unavailing. The only way to harmonize this section with Section 5 is to read the word “residence” as meaning “residence for voting purposes.” Thus, a voter may be removed from the rolls only if he confirms in writing that he has changed residence *for voting purposes* to a place outside the registrar’s jurisdiction. As the district court noted, the State Defendants simply have no idea whether the voters they are purging from the rolls have confirmed such a change of residence. “Currently, the Secretary is cancelling voter registrations based on out of state driver’s license applications, without even having before her the key piece of information necessary to determine whether the NVRA permits such removals; that is, *whether the application has designated the change of address as not for voting purposes.*” (R. 27 at 37, ROA, 574 (emphasis added).)

circumstance – the only “confirmation” of any kind – is that these Michigan residents have surrendered their driver’s licenses. The State Defendants have no indication whatsoever of whether or not the voters registered to vote in the new state or specifically declined such registration in favor of remaining a Michigan resident for voting purposes.

Indeed, the State Defendants’ argument that surrendering a Michigan driver’s license and obtaining a driver’s license in another state “ipso facto” means that the voter no longer resides in Michigan, and is therefore ineligible to vote here, is belied by its own current procedures: under the current protocol, out-of-state driver’s license is acceptable photo identification for voting in Michigan. (Ex. 1 to R. 21, ROA, 427-433.) Certainly, then, a Michigan resident must be able to apply for and obtain an out-of-state driver’s license and still be a validly registered Michigan voter. While a Michigan registered voter’s recent acquisition of an out-of-state driver’s license may well prompt Defendants to inquire into whether the voter intends to remain registered in Michigan, it does not give the official license to immediately cancel the voter’s Michigan registration. To the contrary, it is the duty of the State Defendants to afford Plaintiffs the protections to which they are entitled, which, in this case, means that notice is given, and the voter remains on the rolls and allowed to vote upon confirmation of his address. 42 U.S.C 1973gg-6(d); MCL 168.509aa(3)(c)(3). The district court clearly did not

err in determining that Plaintiffs had established a strong likelihood of success on this claim.

3. The State Defendants Have Not Demonstrated That The District Court Erred in Determining that Plaintiffs' Members Would Suffer Irreparable Injury Absent a Preliminary Injunction

The district court correctly concluded that Plaintiffs will be immediately and irreparably harmed if the requested injunctive relief is not provided.¹⁴ The right to vote is a fundamental right of our society. “Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. ... It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *see also United States v. Classic*, 313 U.S. 299, 315 (1941) (observing that “obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted”); *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Mixon v. State of Ohio*, 193 F.3d 389, 403 (6th Cir. 1999) (recognizing that “implicit in our constitutional system, a right to participate in state elections on an equal basis with other qualified voters”). The

¹⁴ The district court only found irreparable harm with respect to the Cancellation Procedure and specifically found that, due to questions regarding
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violation of a citizen's right to vote is the quintessential injury justifying an injunction. *See, e.g., Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000) (“[B]y finding an abridgement to the voters’ constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made.”).

The Cancellation Procedure abridges voters’ constitutional right to vote. Absent an injunction, many of these disfranchised voters, whose names had been removed from the precinct lists, would have been unable to correct the problem in time to vote in the recent election on November 4, 2008. The denial of the right to vote to newly-registered voters whose ID cards are returned as undeliverable could have caused irreparable harm to those individuals and to the Plaintiff organizations that represent them. The district court correctly found that “any disenfranchisement effected by the undeliverable ID or driver’s liscence practices would indeed constitute irreparable harm.” (R. 27 at 28, ROA, 565). This Court affirmed that finding: “As discussed above, the preliminary injunction is necessary to protect the individual voters of Michigan affected by the undeliverable-voter-ID-card practice.” *U.S. Student Ass’n Foundation*, 546 F.3d at 387-88.

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standing, irreparable harm was not established with respect to the Purging Procedure. (R. 27 at 32, ROA, 569).

State Defendants do not challenge the district court's finding that "any disenfranchisement effected by the undeliverable ID . . . practice[] would indeed constitute irreparable harm." (R. 27 at 28, ROA, 565.) Instead, the State Defendants argue that there will be no such disenfranchisement will occur in the absence of an injunction because anyone can cast a provisional ballot on Election Day. This is the same argument that the State Defendants made in attacking Plaintiffs' standing, and it is just as wrong in this context. A provisional ballot is no panacea when it is overwhelmingly likely that it will not be counted.

The State Defendants allege – contrary to all the facts, the governing state law and their own arguments – that "rejected" voters' provisional ballots will be counted "regardless of whether the QVF indicates that their registration was rejected." (Appellants' Brief at 24.) First, this flies in the face of the State Defendants' insistence that voters whose original ID cards are returned as undeliverable "never become registered voters." (*Id.* at 37.) The State Defendants cannot have it both ways – they cannot insist that such persons are not and never became registered voters, while expecting this Court to believe that they will nonetheless count the provisional ballots of such unregistered voters.

Furthermore, the provisional ballot process requires that the election inspector contact the city or township clerk to verify whether the individual who signed the sworn statement as part of the process is listed in the registration records

of the jurisdiction or whether there is any information contrary to the content of the sworn statement. M.C.L. 168.523a(3). If the clerk cannot be reached, the voter's information must be verified within six days after the election. M.C.L. 168.523a(5)-(7). The State Defendants seem to think that this process somehow will result in "rejected" voters' provisional ballots being counted. This mystifying view, however, ignores reality.

Whether the clerk is reached on Election Day or attempts to verify the voter's information within the six days after Election Day, as soon as she looks at the QVF she will see that the voter's registration was "rejected." As the district court pointed out, "of course, if a voter's registration is marked 'rejected' in the QVF because his or her voter ID card was returned as undeliverable, the clerk will not be able to verify the address and indeed may regard this marking as contrary information on the issue of residency. As a result, even if the potential voter were able to cast a provisional ballot, it would ultimately not be counted." (R. 38 at 4.) The State Defendants have not offered any argument or evidence showing that the district court's determination of these facts was clearly erroneous.

Indeed, as this Court previously held, the State Defendants' argument that the provisional ballots provide a fail-safe "ignores Michigan law, which allows for some provisional ballots to go uncounted. In fact, in the 2006 elections, only 19.1% of all provisional ballots cast in Michigan were counted." *U.S. Student*

Ass'n Foundation, 546 F.3d at 388. Thus, Plaintiffs' members are highly likely to suffer the substantial, irreparable harm of disfranchisement absent the injunction. State Defendants cannot demonstrate that the district court erred in making this decision.

C. The State Defendants Have Not Demonstrated That Balance of the Harms Weighs in Favor of a Preliminary Injunction

The State Defendants fail to demonstrate that the district court abused its discretion in determining that the balance of harms weighed in favor of a preliminary injunction. In contrast to the irreparable harm Plaintiffs' members would have suffered absent an injunction as discussed above, the State Defendants fail to point to any substantial harm they will suffer. On the contrary, they previously admitted "that it is both 'possible' and 'feasible' for them to comply with the preliminary injunction." *U.S. Student Ass'n Foundation*, 546 F.3d at 386.

Moreover, the State Defendants *have already complied* with the preliminary injunction. They have instructed all clerks to treat returned original ID cards in the same manner that returned duplicate cards are treated. (Ex. 8 to R. 36 ("You must immediately cease marking records 'Reject – ID Card Returned.' Instead, such records must be marked 'Verify – Confirm Address.'"¹⁵).

¹⁵ Unlike voters whose registrations are marked "rejected," voters whose registrations are marked "Verify – Confirm Address" *do* appear on precinct lists. (continued...)

Additionally, State Defendants were able to quickly identify the 5,500 individuals in the QVF who had been marked as “Reject – ID Card Returned” and changed each to “Verify – Confirm Address” in time for the November 4, 2008 election. The fact that the State Defendants have already complied with the injunction, with little apparent difficulty, underscores that the district court clearly reached the correct decision in balancing the harms.

The State Defendants further argue, bizarrely, that they may be subject to prosecution by the Department of Justice for violating the NVRA if they are forced to obey the district court’s injunction. (Appellants’ Brief at 55.) As an initial matter, the district court’s injunction brings the State Defendants’ practices into *compliance* with the NVRA. Moreover, it defies logic to suggest that the State Defendants would be subject to federal prosecution for complying with a validly issued federal court injunction. The State Defendants’ argument – essentially grasping at straws – should be given no credence.

The district court, and this Court, correctly concluded that balancing the State Defendants’ mere administrative difficulties against the right of every

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Moreover, they are able to vote a regular ballot, not merely a provisional one, once they verify their address.

eligible citizen to participate in the election in compliance with federal law clearly weighs in favor of issuing an injunction.

D. The State Defendants Have Not Demonstrated That the District Court Abused its Discretion in Determining That the Public Interest Would be Served by Issuing an Injunction.

Finally, the State Defendants fail to demonstrate that the district court abused its discretion in determining the public interest would be served by the preliminary injunction. The State Defendants argue that the challenged practice is designed to prevent voter fraud, and imply that such prevention is the most compelling of public interests. (Appellants' Brief at 56-57.) This Court, by contrast, has found that while preventing fraud is certainly an important state interest, there is also "a strong public interest in allowing every registered voter to vote freely." *Summit County Democratic Cent. and Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).¹⁶ And as the district court noted, "the public has an interest in the enforcement of federal statutes." (R. 27 at 34, ROA, 571.) The district court's preliminary injunction order thus correctly and carefully balanced all of the

¹⁶ The court in *Summit County*, which was actually decided on Election Day 2004 itself, ultimately found that the weight of public interest "militate[d] against changing the rules in the hours immediately preceding the election." *Id.* Here, by contrast, the State Defendants had days, not hours, to comply with district court's injunction before Election Day 2008, and at this time apparently have already complied with it. Thus, it has been amply demonstrated that the district court's

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important interests at stake. The State Defendants have not demonstrated (and cannot demonstrate) any abuse of discretion by the district court in so doing.

Furthermore, contrary to the State Defendants' implications, the preliminary injunction issued by the district court does not raise the spectre of voter fraud.¹⁷ The district court expressly recognized that "the state certainly has an interest in preventing non-residents from voting within its borders" and tailored its order accordingly. (R. 27 at 38, ROA, 575.) The district court's injunction specifically allows the State Defendants to establish procedures to confirm the residency information of any voter who is affected by the order. (*Id.* at 38-39, ROA, 575-576.) Indeed, the state already has such procedures in place and, by marking such voters with a "Verify – Confirm Address" status, clerks will be able and in fact required to confirm each and every voter's continuing eligibility to vote in an election. This will prevent ineligible voters from casting a ballot, while

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injunction did not and will not disrupt the "smooth and effective administration of the voting laws." *Id.*

¹⁷ The district court's injunction does not prevent fraudulent registrations from being weeded out; it simply requires that such purges be done in compliance with federal law within the framework of the safeguards provided by the NVRA. As this Court stated, "[t]he NVRA strikes a balance between removing fraudulent registrations while ensuring that legitimate voters are able to vote, and Michigan cannot remove names from its rolls in a manner that fails to respect this balance that Congress has drawn." *U.S. Student Ass'n Foundation*, 546 F.3d at 388.

ensuring that eligible voters adversely affected by the State Defendants' unlawful returned ID practice will be able to vote *and* have their votes actually counted.

Far from being contrary to the public interest, the preliminary injunction entered by the district court *protects* that interest. Indeed, this Court took that fact into consideration in denying the State Defendants' motion to stay the injunction: "Because the risk of actual voter fraud is miniscule when compared with the concrete risk that Michigan's policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of denying the stay of the preliminary injunction." *U.S. Student Ass'n Foundation*, 546 F.3d at 388. Clearly, there was no abuse of discretion by the district court in this regard.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the State Defendants' appeal be denied.

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT FOR
PLAINTIFFS-APPELLEES' BRIEF**

In accordance with F.R.A.P. 32(a)(7), which limits the allowable length of a response brief to 14,000 words, counsel for Plaintiffs-Appellees hereby certifies that the response brief submitted on behalf of Plaintiffs-Appellees on December 19, 2008 is within the word limit and that the total of the countable words contained in the brief from pages 1 to 42 is 10,133.

Dated: December 19, 2008

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