IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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,

v

TERRI LYNN LAND, Michigan Secretary of State, and CHRISTOPHER M. THOMAS, Michigan Director of Elections, FRANCES MCMULLAN, City Clerk for the City of Ypsilanti, Michigan, in their official capacities,

Defendants.

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Case No. 08-CV-14019
Hon. Stephen J. Murphy, III
Magistrate Hon. Steven R. Whalen

EXPEDITED CONSIDERATION REQUESTED

STATE DEFENDANTS' MOTION FOR STAY PENDING APPEAL AND MOTION FOR IMMEDIATE CONSIDERATION THEREOF

NOW COME State Defendants Secretary of State Terri Lynn Land, and Director of Elections Christopher M. Thomas, by and through their attorneys, and move this Honorable Court pursuant to Rule 62(b)(4) and /or 62(c), and LR 7.1(e), for a stay of this Court's October 13, 2008, Opinion and Order granting in part and denying in part Plaintiffs' motion for preliminary injunction:

1. On October 13, 2008, this Court granted in part, and denied in part, Plaintiffs' motion for preliminary injunction, concluding that Plaintiffs had satisfied the four factors necessary for granting injunctive relief.

2. The Court granted the injunction as to Plaintiffs' claims concerning Michigan's practice of rejecting the registrations of persons whose original voter registration cards are returned as undeliverable, finding that such practice conflicted with the National Voter Registration Act, 42 USC 1973gg.

3. The Court enjoined Defendants from continuing this practice, and ordered the State Defendants to "[r]emove the 'rejected' marking in the QVF from the registrations of all voters whose original voter IDs have been returned as undeliverable since January 1, 2006 until the present, unless rejection was warranted for some other lawful reason." (Opinion & Order, p 42.)

4. The State Defendants request that this Court stay its October 13, 2008, Opinion and Order granting in part and denying in part Plaintiffs' motion for preliminary injunction to the extent that the Court enjoined the State Defendants from continuing its practice of rejecting the registrations of persons whose original voter identification cards are returned as undeliverable, and ordered Defendants to restore these individuals to a status in the qualified voter file (QVF) other than "rejected." The State Defendants can satisfy the four prerequisites for granting a stay pending appeal, because[1]:

5. The Court's conclusion that Plaintiffs have standing to bring their claims, even in the context of a preliminary injunction motion, stretched the law of standing beyond its recognized boundaries.

6. Plaintiffs failed to demonstrate a substantial likelihood of success with respect to their claim that the undeliverable ID card practice violates NVRA, and the Court's conclusion that it does is inconsistent with the plain language of 42 USC 1973gg-6, and impermissibly encroaches on the State's authority to determine who is a registered voter.

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[1] See *Northeast Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1009 (6th Cir. 2006).

7. Plaintiffs failed to demonstrate that any of their members would suffer the alleged irreparable harm of disenfranchisement absent an injunction, particularly where such persons may cast a provisional ballot, and the Court's determination that Plaintiffs had made such a showing appears to be based, in part, on a misunderstanding of the facts.

8. The balance of harms clearly weighed in favor of the State Defendants where Defendants have been employing this practice for the last 13 years under the auspices of another district court opinion affirming its legality, and where changing the procedures this late before an election will disrupt the process.

9. The public interest clearly weighed against the granting of an injunction since the public has a strong interest in seeing valid State laws concerning the voting process enforced, and an interest in the smooth and effective administration of voting laws.

10. Thus, the State Defendants are entitled to a stay pending appeal of this Court's order granting in part, and denying in part, Plaintiffs' motion for preliminary injunction.

11. The State Defendants submit that expedited or immediate consideration of their motion to stay is required because only 11 business days remain before the November 4, 2008, election, and whether this Court grants or denies their motion will make a difference as to what changes in the process of handling these persons will be made, including changes to the QVF, and the training and instruction of local election officials.

12. A quick decision by this Court will also allow the State Defendants to pursue appellate remedies in the United States Court of Appeals for the Sixth Circuit, if necessary.

13. The State Defendants sought the concurrence of opposing counsel as required by LR 7.1(a) and they did not concur.

NOW THEREFORE, for the reasons set forth above and more fully discussed in the accompanying memorandum in support of their motions, State Defendants Secretary of State

Terri Lynn Land and Director of Elections Christopher M. Thomas request that this Honorable Court grant their Motion for Stay Pending Appeal, and grant the Motion for Immediate Consideration, and issue a decision and order as expeditiously as possible.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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,

Case No. 08-CV-14019
Hon. Stephen J. Murphy, III
Magistrate Hon. Steven R. Whalen

Plaintiffs,

v

TERRI LYNN LAND, Michigan Secretary of State, and CHRISTOPHER M. THOMAS, Michigan Director of Elections, FRANCES MCMULLAN, City Clerk for the City of Ypsilanti, Michigan, in their official capacities,

Defendants.

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STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

CONCISE STATEMENT OF ISSUE PRESENTED

I. The State Defendants are entitled to a stay pending appeal because all four factors weigh in favor of granting such relief.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Association of Community Organizations for Reform Now (ACORN) v Miller, et al., 912 F Supp 976 (WD Mich, 1995) 21

Baker v Adams County/Oh Valley School Bd, 310 F3d 927 (6th Cir, 2002) 4

Edelman v Jordan, 415 US 651 (1974) 24

Ex parte Young; 209 US 123 (1908) 24

Ford Motor Co v Department of Treasury, 323 US 459 (1945) 24

Frew v Hawkins, 540 US 431 (2004) 25

Friends of the Earth, Inc v Laidlaw Envtl Sevs (TOC), Inc, 528 US 167; 120 S Ct 693; 145 L Ed 2d 610 (2000) 5

Gonzalez v Arizona, 435 F Supp 2d 997 (DC Ariz, 2006) 16

Lujan v Defenders of Wildlife, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992) 5

Mich Coalition of Radioactive Material Users, Inc v Griepentrog, 945 F2d 150 (6th Cir, 1991) . 4

Northeast Ohio Coalition for the Homeless v Blackwell, 467 F3d 999 (6th Cir, 2006) . 4, 5, 11, 25

Purcell v Gonzalez, 549 US 1; 127 S Ct 5; 166 L Ed 2d 1 (2006) 25, 26

Summit County Democratic Cent & Exec Comm v Blackwell, 388 F3d 547 (6th Cir, 2004) 25

STATEMENT OF FACTS

On September 17, 2008, Plaintiffs United States Student Association Foundation, American Civil Liberties Union Fund of Michigan, and American Civil Liberties Union of Michigan, filed the instant complaint against Secretary of State Terri Lynn Land, Director of Elections Christopher Thomas, and Frances McMullan, the City Clerk for the City of Ypsilanti, seeking declaratory and injunctive relief, and asserting, primarily, that these Defendants are violating the National Voter Registration Act (NVRA), 42 USC 7973gg *et seq.*, by unlawfully removing registered voters from Michigan's official voter registration list, and by canceling the registrations of newly registered voters. Although the statutes and accompanying practices of the State Defendants have been in place for decades, Plaintiffs waited until less than 50 days remained before the November 4, 2008, general election, to file their 9-count complaint. Plaintiffs ask this Court to issue a preliminary injunction enjoining the State Defendants from enforcing their practices and the provisions of the relevant statutes.

The Court directed the Defendants to respond to the motion for preliminary injunction by Friday, September 26, 2008, which the State Defendants did, and further ordered the Plaintiffs to file any reply by Monday, September 29, 2008. The Plaintiffs filed a reply brief late in the evening on September 29. The Court held a hearing in this matter on Tuesday, September 30, 2008, at which all parties appeared and presented argument in the matter. Some 13 days later, on October 13, 2008, the Court entered its Opinion and Order granting in part, and denying in part, Plaintiffs' motion for preliminary injunction.

The State Defendants now move for a stay pending appeal with respect to those portions of the Court's October 13, 2008, Opinion and Order relating to the State's practice of rejecting

the registrations of person's whose original voter identification card is returned as undeliverable in conformity with MCL 168.499 and MCL 168.500c.[2]

[2] The State Defendants disagree with, and will appeal, the Court's conclusion that its practice of canceling the registrations of persons who obtain a driver's license in another state and at the same time surrender their Michigan license, violates NVRA. However, since the Court did not order the State Defendants to take any affirmative action with respect to the registrations of such persons, other than to enjoin the Defendants from continuing its practice, the State Defendants do not seek a stay with respect to that portion of the Court's Opinion and Order.

ARGUMENT

I. The State Defendants are entitled to a stay pending appeal because all four factors weigh in favor of granting such relief.

The Court abused its discretion in granting the injunction in this case, and the State Defendants are entitled to a stay pending appeal. First, the Court's conclusion that Plaintiffs have standing to bring their claims, even in the context of a preliminary injunction motion, stretched the law of standing beyond its recognized boundaries. Second, Plaintiffs failed to demonstrate a substantial likelihood of success with respect to their claim that the undeliverable ID card practice violates NVRA, and the Court's conclusion that it does is inconsistent with the plain language of 42 USC 1973gg-6, and impermissibly encroaches on the State's authority to determine who is a registered voter. Third, Plaintiffs failed to demonstrate that any of their members would suffer the alleged irreparable harm of disenfranchisement absent an injunction, particularly where such persons may cast a provisional ballot, and the Court's determination that Plaintiffs had made such a showing appears to be based, in part, on a misunderstanding of the facts. Fourth, the balance of harms clearly weighed in favor of the State Defendants where Defendants have been employing this practice for the last 13 years under the auspices of another district court opinion affirming its legality, and where changing the procedures this late before an election will disrupt the process. Finally, the public interest clearly weighed against the granting of an injunction since the public has a strong interest in seeing valid State laws concerning the voting process enforced, and an interest in the smooth and effective administration of voting laws.

Thus, the State Defendants request that this Court stay its October 13, 2008, Opinion and Order granting in part and denying in part Plaintiffs' motion for preliminary injunction to the extent that the Court enjoined the State Defendants from continuing its practice of rejecting the

registrations of persons whose original voter identification cards are returned as undeliverable, and ordered Defendants to restore these individuals to a status in the qualified voter file (QVF) other than "rejected." The State Defendants can satisfy the four prerequisites for granting a stay pending appeal. This Court should grant the State Defendants' motion for stay pending appeal.

A. Standards for issuing a stay pending appeal.

When determining whether to issue a stay pending appeal, the Court must consider four factors[3]:

> (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay.

All four factors are not prerequisites but are interconnected considerations that must be balanced together.[4]

B. The Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims.

Plaintiffs are unlikely to succeed on the merits of their claim regarding the undeliverable ID card practice because, contrary to this Court's determination, Plaintiffs have not established standing to sue on behalf of their members, and this Court's conclusion that Michigan's statute(s) requiring election officials to reject the registrations of applicants whose original voter registration card is returned as undeliverable violates section 8 of the NVRA, is inconsistent with its plain language.[5]

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[3] *Northeast Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1009 (6th Cir. 2006); *Mich Coalition of Radioactive Material Users, Inc v Griepentrog*, 945 F2d 150, 153 (6th Cir. 1991); *Baker v Adams County/Oh Valley School Bd*, 310 F3d 927, 928 (6th Cir. 2002) (per curiam).

[4] *Michigan Coalition*, 945 F2d at 153.

[5] 42 USC 1973gg-6.

1. Plaintiffs failed to establish standing to sue on behalf of their memberships.

The State Defendants certainly agree with this Court's conclusion that Plaintiffs failed to establish standing to sue on their own behalf as organizations. (See Opinion & Order, pp 11-12). That said, Defendants disagree with this Court's conclusion that Plaintiffs' – "just barely" – established standing to sue on behalf of their memberships for purposes of requesting a preliminary injunction. This Court overreached in making that determination.

"[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[6] For an association's members to "otherwise have standing to sue in their own right," they must have (1) "suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "the injury has to be fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[7]

The Court concluded that Plaintiffs demonstrated that one or more of their members will suffer an injury in fact based on the allegations set forth in paragraphs 73 and 88 of the original complaint, and the "implications" arising from those allegations. The Court observed that the allegations were "conclusory," but when viewed in light of the Plaintiffs other allegations, "the facts required for standing follow from these claims *by necessary implication*." (Opinion & Order, p 12) (emphasis added). The Court noted:

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[6] *Northeast Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1010 (6th Cir. 2006), quoting *Friends of the Earth, Inc v Laidlaw Envtl Sevs (TOC), Inc*, 528 US 167, 181; 120 S Ct 693; 145 L Ed 2d 610 (2000).
[7] *Lujan v Defenders of Wildlife*, 504 US 555, 560-61; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (quotations and citations omitted).

> With respect to the undeliverable ID card practice, paragraph 73 *can be fairly read* as a claim that some of plaintiffs' members have recently registered to vote, but have not yet received their voter ID cards – so as to be at risk of wrongful disenfranchisement if human error causes them to returned as undeliverable. The paragraph can also be read to claim that other of plaintiffs' members have actually been wrongfully removed from the rolls pursuant to this practice, and will almost certainly be denied the right to vote in the upcoming election. [Opinion & Order, pp 12-13 (emphasis added)].

Thus, this Court concluded that "once the *logical implications* of the sparse language of the complaint are considered, the Court concludes that it satisfies – just barely – the requirement of alleging injury in fact to the plaintiffs' membership, so as to support representative standing . . . ." (Opinion & Order, pp 12-13) (emphasis added).

There are several problems with this analysis. First, paragraph 73 relates to the out-of-state cancellation practice, not the undeliverable ID card practice, so Defendants fail to see how it is relevant to determining standing with respect to the undeliverable ID card practice.

Second, paragraph 73 states only this – "The Purging Procedure 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 [sic]." (Complaint, ¶ 73). Presuming that the Court meant to refer to paragraph 88, that paragraph states, "The Cancellation Procedure 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 disfranchise [sic]." (Complaint, ¶ 88). Defendants recognize the rules of liberal pleading, and that essentially Plaintiffs allegations must be taken as true. Nevertheless, Defendants assert that neither of these paragraphs "can be fairly read" to raise or imply the claims and injuries the Court states that they do. Plaintiffs simply did not sufficiently allege or establish that any of their members had been injured by the undeliverable ID card practice, or would imminently suffer an injury as a result of that practice. The Court clearly stretched the

requirement of pleading some general factual allegations to support the injury in fact element of standing beyond acceptable boundaries.

Third, the injury in fact to Plaintiffs' members as vaguely alleged by Plaintiffs and determined by this Court, is the threat or increased risk of disenfranchisement as a result of the undeliverable ID card practice. In other words, that the member will not be allowed to vote, or the member's vote will not count as a result of this practice. Both Plaintiffs' and this Court's fears on this front appear to be based on a misunderstanding of the law or facts, or both. At page 3 of its Opinion & Order, this Court states that "these voters will not be permitted to cast regular ballots if they appear at the polls on election day in Michigan unless they can produce an original receipt of their voter registrations." Similarly, at page 19 the Court says, "[i]n fact, counsel stressed at the hearing that a potential voter whose ID is returned as undeliverable may nonetheless cast a regular ballot on election day if he or she presents a receipt of registration at the polls." And again at page 29, "the defendants stressed that a voter whose registration has been 'rejected' . . . may nonetheless cast a regular ballot if he or she presents a receipt of registration at the polls."

On the contrary, what the State Defendants "stressed" is that while such persons may not be entitled to cast a regular ballot, they will be allowed to cast a provisional ballot that will be counted if the person is qualified to vote. As the State Defendants pointed out in their response in opposition to the motion for preliminary injunction, a person who shows up at a polling place on Election Day, who has had their registration rejected pursuant to this statutory practice, "will be offered an opportunity to vote using a provisional ballot under MCL 168.523a." (State Defendants' response to preliminary injunction, p 20). Indeed, Director of Elections Christopher Thomas affirmed that election officials will be instructed to offer the opportunity to cast a provisional ballot under these circumstances. (Exhibit A, ¶ 7, Affidavit of Christopher Thomas).

Furthermore, counsel for the State Defendants specifically explained that such persons would be offered a provisional ballot that could be tabulated on Election Day just like a regular ballot. (Hearing Transcript, 9/30/08, pp 62-64).

Section 523a explains, in detail, the process for casting a provisional ballot. This process is further supplemented by instructions issued by the Bureau of Elections, (Exhibit B, Instructions for Casting a Provisional Ballot) including the instructions identified as Attachment 4 to Director Thomas's affidavit. (See Exhibit A, ¶ 7, Attachment 4). Contrary to this Court's and Plaintiffs' apparent understanding (or misunderstanding), a voter does not need his or her voter registration receipt in order to cast a provisional ballot. This was specifically pointed out by Defendants at the hearing in this matter. (Hearing Transcript, 9/30/08, p 72).

If a person can present a voter registration receipt, he or she must execute a new registration, but then that person is permitted to vote a regular ballot.[8] If a person does not have a receipt, the person must execute a sworn statement affirming that the individual submitted a voter registration application before the close of registration and is eligible to vote in the election, and complete a new voter registration application.[9] The election inspector must then contact the city or township clerk to verify whether the individual who signed the sworn statement is listed in the registration records of the jurisdiction or whether there is any information contrary to the content of the sworn statement.[10] If the city or township clerk verifies the elector information and the individual presents an acceptable form of identification that contains a current residence address to establish his or her identity and residence address,

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[8] MCL 168.523a(1)(a). This alternative would not apply to a person whose original registration card was returned as undeliverable because the question of their local residence would not be sufficiently satisfied under that process.
[9] MCL 168.523a(2).
[10] MCL 168.523a(3).

"the individual shall be permitted to vote a provisional ballot on election day."[11] In other words, that person's provisional ballot is tabulated on Election Day just like a regular ballot because Michigan has a unique provisional ballot option that allows a voter to insert his or her ballot into the tabulator just like all other voters casting a regular ballot.

If, however, the election inspector is not able to contact the city or township clerk, the individual is not in the correct precinct, or the individual presents identification in a form other than those statutorily provided for, or presents no identification at all, the individual will be issued a provisional ballot that is not tabulated on election day but is secured for verification within six days after the election.[12]

The Court appeared to discount this entire process in a footnote, stating:

> The defendants also argue, in defense of both the undeliverable ID and the driver's license practice, that because a voter whose name has been removed from the rolls can always cast a provisional ballot, no harm is done by the removal. Plaintiffs respond that under both federal and state law a voter's eligibility for purposes of counting a provisional ballot must be determined by the same standards as is her eligibility to cast a regular ballot. See 42 USC § 15482(a)(4); MCL § 18.183. 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. [Opinion & Order, p 30 n12.]

Regardless of this perplexing statement, the fact is that the only time a person whose registration is rejected pursuant to MCL 168.499 and MCL 168.500c will be disenfranchised is if that person refuses to participate in the provisional ballot process or ultimately fails to provide the necessary information. Thus, if Plaintiffs' hypothetical newly-registered member shows up at the polls, ignorant of the fact that his registration was rejected as a result of his card being returned as undeliverable and not having received the second notice sent by forwardable mail, as

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[11] MCL 168.523a(4).
[12] MCL 168.523a(5)-(7).

long as that person can demonstrate his identity and current residence, he can vote and his vote will count either on Election Day or after verification.

For example, with respect to Plaintiff USSA, if its hypothetical member is a Michigan university or college student, that member is very likely to have an identification card that satisfies Michigan's identification requirement.[13] If the member student is also a permanent resident of Michigan, that member very likely has a Michigan driver's license, which also satisfies the identification requirements.[14] Accordingly, the risk of actual, wrongful, disenfranchisement of any of Plaintiffs' members on the basis of this practice is miniscule since even if such persons cannot cast a regular ballot, they can cast a provisional ballot that will be counted unless the person proves not to be a qualified elector.[15] The Court's statement that such persons "will almost certainly be denied the right to vote in the upcoming election," is just not borne out by the facts.

It is within this factual and legal context then that Plaintiffs' claims of injury in fact on behalf of their memberships should have been assessed. The State Defendants submit that Plaintiffs' "sparse" allegations of injury to their memberships based on "conclusory" claims in their Complaint that their members will be "disenfranchised" under the undeliverable card practice were clearly insufficient to establish an injury in fact that is concrete and particularized,

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[13] Acceptable identification includes, "Michigan operator's or chauffeur's license, department of state issued personal identification card, other government issued photo identification card, or a photo identification card issued by an institution of higher education in this state described in section 6 of article VIII of the state constitution of 1963 or a junior college or community college established under section 7 of article VIII of the state constitution of 1963 that contains a current residence address to establish his or her identity and residence address." MCL 168.523a(4).

[14] MCL 168.523a(4).

[15] Michigan has been providing a form of provisional balloting since the early 1990s, but the procedures set forth in MCL 168.523a were specifically adopted to comply with the provisional ballot requirements of the Help America Vote Act of 2002, 42 USC 15482. These procedures have been utilized in every election since 2004.

actual or imminent, not conjectural or hypothetical.[16] The two declarations submitted with Plaintiff's brief in support of motion for preliminary injunction were similarly lacking. (See Plaintiffs' brief in support of motion for preliminary injunction, Exhibits 1 and 2). Without sufficiently alleging an injury in fact to their members, Plaintiffs cannot satisfy the elements for organizational standing. Therefore, the State Defendants will likely prevail with respect to this issue on appeal.

2. <u>Plaintiffs do not have a strong likelihood of success on the merits of their claim that Michigan's practice of rejecting the registration of applicants whose original voter registration cards are returned to a registrar as undeliverable mail violates NVRA.</u>

Plaintiffs assert that Michigan's statutes and practices requiring election officials to reject the registration of a registrant whose original voter registration card is returned as undeliverable violates section 8 of the NVRA. Specifically, Plaintiffs argue that the statutory and administrative process of rejecting the registrations of persons whose original cards are returned as undeliverable with no forwarding address violates NVRA because it results in the removal of registered voters from the QVF without complying with the requirements of subsections 1973gg-6(a) and (d).

Under section 8 of the NVRA, 42 USC § 1973gg-6, a State "shall" implement a program that removes from the official State voter registry the names of voters who have died or have changed their residence. In pertinent part, § 1973gg-6(a)(4) states[17]:

> (a) In general
>
> In the administration of voter registration for elections for Federal office, each State *shall* --
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> ***
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> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

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[16] *Northeast Ohio Coalition for the Homeless*, 467 F3d at 1010.
[17] 42 USC 1973gg-6(a)(4).

(A) the death of the registrant; or

(B) *a change in the residence of the registrant*, *in accordance with subsections (b), (c), and (d) of this section*; [Emphasis added.]

Subsection (b), § 1973gg-6(b), requires that the program implemented to remove voters under subsection (a)(4) must be a non-discriminatory program and that the program "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote."[18]

Subsection (c), § 1973gg-6(c)(1), sets forth an example of a program for the removal of ineligible voters from the registry, and imposes a time limitation on when such programs may be used before an election.[19]

Subsection (d), § 1973gg-6(d), addresses the removal of names from the official registry:

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); 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.

Subsection (d)(2), § 1973gg-6(d)(2), prescribes detailed requirements of the notice that must be sent to a registrant before the registrant may be removed from the official list:

(2) A notice is . . . a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

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[18] 42 USC 1973gg-6(b).
[19] 42 USC 1973gg-6(c)(1) (emphasis added).

> (A) If the registrant did not change . . . residence, or changed residence, but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote . . . 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, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.
>
> (B) If the registrant has changed residence to a place outside the registrar's jurisdiction . . ., information concerning how the registrant can continue to be eligible to vote.

In Michigan, depending upon what method a person uses to register to vote, the person will either hand deliver or mail a completed application to the appropriate county or local clerk, or the person's application will be forwarded by the agency accepting the application to the appropriate county or local clerk for processing of the application. After the clerk receives the application, he or she will review the application to determine whether all of the required elements have been filled in, and enter the information received into the QVF, unless that was completed at a Secretary of State branch office. If mandatory information is missing, the clerk will make reasonable efforts to contact the person and obtain the information.

The clerk also undertakes the following action pursuant to, MCL 168.500c:

> The clerk of a city or township, *upon receiving an application for registration from an applicant the clerk determines to be qualified as an elector*, shall forward to the applicant a voter identification card as provided in section 499. *A person to whom the voter identification card is sent shall be registered for all elections, including village elections, upon its receipt. A voter identification card returned by the post office as nondeliverable shall be attached to the application by the clerk, and the person shall be deemed not registered under this act.* [Emphasis added.]

Section 499 provides, in relevant part[20]:

> The clerk, immediately after receiving the registration . . . of an elector, shall prepare a voter identification card for the elector. . . . *The clerk shall forward by*

[20] MCL 168.499(3) (emphasis added).

> *first-class mail the voter identification card to the elector at the elector's registration address. . . . If the original voter identification card is returned to the clerk by the post office as nondeliverable, the clerk shall reject the registration and send the individual a notice of rejection*. If a duplicate voter identification card is returned to the clerk by the post office, the clerk shall accept this as information that the elector has moved and the clerk shall proceed in conformity with section 509aa.

Thus, under sections 499 and 500c, if the "original" voter identification card is not returned to the clerk's office, its receipt is presumed and an applicant is a registered voter in the State of Michigan. The voter identification cards are mailed within a single jurisdiction meaning that any return will occur very quickly, in no case more than two weeks after the card was sent. However, when the "original" card is returned as undeliverable, that person's registration will be rejected, and they will receive notice of the rejection by forwardable mail and an opportunity to cure the rejection. (Exhibit A, Attachment 3, December 7, 2007, News You Can Use, Issue 339, pp 2-4). These statutes help effect a confirmation of one of the qualifications to becoming a registered voter in Michigan – local residence.[21] Under these sections, the registration of a person whose original voter identification card is returned as undeliverable is rejected because the qualification of local residence has not been satisfied. The mailing out of voter identification cards is a tool election officials use to confirm the qualification of local residence. When a card comes back as undeliverable to the address the person puts on the application form, and with no forwarding information, it is reasonable to assume that the person does not live there, and thus has not demonstrated that the person is qualified to be registered to vote at that local address.[22]

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[21] Const 1963 art 2, § 1; MCL 168.11(1); MCL 168.492.

[22] The Court seems to suggest at page 17 n5 of its Opinion & Order that Defendants never articulated this point, however, Defendants did so. (See State Defendants response in opposition to preliminary injunction, pp 25-26, 28-30).

This process obviously also has the effect of helping deter and protect against fraud in the registration of voters, which is a recognized State interest.[23]

Plaintiffs argue that the rejection of the registration is a removal of a "registrant" from an official voter list based on a change of address that can only be accomplished using the notice and timing requirements under subsection 1973gg-6(d)(1)-(2). Defendants argue that this procedure – the undeliverable card process – does not fall within section 8 of NVRA because it does not involve the removal of a registered voter from the QVF. Specifically, that under these circumstances, the person never became a registered voter because the registration transaction failed as a result of the original card being returned as undeliverable.

The Court concluded that the resolution of this argument hinged on defining the term "registrant" for purposes of subsection 1973gg-6, and that this was a question of federal law to be determined by examining NVRA and "the potential voter's status in the state registration program in question." (Opinion & Order, p 18). The Court observed that the plain language of NVRA dictated 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.' See 42 USC § 1973gg-6(d)(1)." (Opinion & Order, p 18). The Court continued:

> Thus, 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 it will be returned as undeliverable.[24] In other words, the central question is: if a potential voter's ID card were to be returned as undeliverable only after an election has intervened, would the voter's QVF status have permitted him or her to vote in that election in the meantime? At the hearing on this motion,

[23] See *Crawford*, 128 S Ct at 1618, 1619-1621 ("[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.") See also *Purcell v Gonzales*, 549 US 1, 3-4; 127 S Ct 5; 166 L Ed 2d 1 (2006).

[24] No voter who files an original voter registration application is entitled to immediately vote. Michigan Election Law, similar to nearly ever other State, requires a new voter to submit an application at least 30 days before an election. Consequently, no voter who files an original application is entitled to immediately vote. See MCL 169.497(1); MCL 168.500d.

> counsel for the defendants represented that the answer to these questions is "yes." In fact counsel stressed at the hearing that a potential voter whose ID is returned as undeliverable may nonetheless cast a regular ballot on election day if he or she presents a receipt of registration at the polls.[25] 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 the voter may only have his or her status changed to one that would not permit a valid vote . . . pursuant to the provisions of the statute. [Opinion & Order, pp 18-19.]

The State Defendants submit that there are several flaws in this analysis. NVRA does not specifically define "registrant." The Court concluded that someone becomes a "registrant" the moment his or her name appears on an official voter registration list. But that conclusion only addresses a temporal element. NVRA does not "register" voters, or provide for who can become a registered voter, or who can vote. Rather, it states that "each State shall . . . insure that any *eligible* applicant is registered to vote in an election...."[26] Subsection 1973gg-6(a) then goes on to address what should happen after a "*valid* voter registration form of the applicant is submitted" to the appropriate State official or agency.[27] NVRA does not purport to alter or preempt State laws providing for the qualifications of voters.[28] Indeed, the registration of voters has typically been a matter left to the States. Rather, NVRA was simply an attempt by Congress to provide for some uniformity in the registration process.[29] In this context, it is consistent with NVRA to construe the term "registrant" as someone registered to vote under State law. Indeed, Merriam Webster defines "registrant" as someone "that registers or is registered."[30] The term "registered"

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[25] As noted above, counsel for Defendants did not, in fact, make such statements with respect to casting a regular ballot. (Hearing Transcript, 64-66).
[26] 42 USC 1973gg-6(a)(1) (emphasis added).
[27] 42 USC 1973gg-6(a)(1)(A)-(D) (emphasis added).
[28] *Gonzalez v Arizona*, 435 F Supp 2d 997, 1003 (DC Ariz, 2006).
[29] *Gonzales*, 435 F Supp 2d at 1003.
[30]See http://www.merriam-webster.com/dictionary/registrant.

means "qualified formally or officially."[31] Thus, the provisions in subsection 1973gg-6(d) only apply to the removal of a person registered to vote under State law.

MCL 168.499 and 168.500c are statutes that help effectuate the qualifications to vote, and under these provisions, a person is not registered to vote if his or her original voter identification card is returned as undeliverable. Thus, that person is not a "registrant" for purposes of the list removal provisions set forth in subsection 1973gg-6(a)-(d). This interpretation is further supported by the fact that NVRA initially refers to “applicants” in subsection 1973gg-6(a)(1)(A)-(D), and in (a)(2), which requires the State to "send notice to [the] applicant of the disposition of the application." Thereafter, the statute uses the term "registrants." Thus, NVRA specifically contemplates that some applications to register to vote will be rejected. Notably, the "applicants" who have had their applications rejected, are only entitled to some type of "notice" left to the discretion of the State, and not to the specific notice requirements in subsection 1973gg-6(d)(2). In this case, persons whose registrations are rejected based on the undeliverable card practice are "applicants" who are entitled to "notice" of the "disposition" of their application, and nothing more under NVRA. These persons never become "registrants" for purposes of subsection 1973gg-6(d). The fact that the applicant’s name is entered into the QVF and temporarily accorded “active” status before it is changed to "rejected" does not affect this analysis because the law is clear that such persons never become registered voters.[32]

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[31] See http://www.merriam-webster.com/dictionary/registered.

[32] The Court made much of the fact that it is theoretically possible that a person could appear to vote and indeed vote before his or her voter identification card is returned as undeliverable. Fist, this is highly unlikely because the voter ID cards are mailed within a single jurisdiction, meaning that any return of an undeliverable card should occur within two weeks. Notably, the voter must file the original voter registration application at least 30 days before the election. Consequently, the undeliverable card should be received well in advance of the election. Second, if a voter registration card were to be returned as undeliverable after an election (a scenario never

Accordingly, MCL 168.499 and 168.500c do not violate or conflict with section 8 of NVRA because they do not result in the removal of the name of a registrant from the official list of qualified voters, and therefore the Plaintiffs are not likely to succeed on the merits of this claim.

C. <u>The Plaintiffs will not suffer irreparable harm absent an injunction.</u>

Regarding the rejection of new registrations based on the return of undeliverable cards, Plaintiffs assertions of irreparable harm are based on the statutes' alleged unlawfulness, and the claim "that many of these disenfranchised voters, whose names have been removed from the precinct lists, will be unable to correct the problem in time to vote in the upcoming election." (Plaintiffs' brief in support of motion for preliminary injunction, pp 29-30).

With respect to irreparable harm, the Court found that "any disenfranchisement effected by the undeliverable ID . . . practice[ ] would indeed constitute irreparable harm." (Opinion & Order, p 28). With respect to the undeliverable ID card practice, the Court observed that while this practice potentially affected every eligible voter who registers, only a small fraction of people are actually suffering the harm of being removed from the rolls "and thus deprived of the right to vote." (Opinion & Order, p 29). The Court continued:

> [A]t the hearing held in this matter, the defendants stressed that a voter whose registration has been "rejected" pursuant to the undeliverable ID practice may nonetheless cast a regular ballot if he or she presents a receipt of registration at the polls. This obviously will prevent disenfranchisement, but only for those voters who bring receipts with them to the polls. Presentation of a receipt, however, is not required of other voters, and since many or most Michigan residents removed from the lists pursuant to the undeliverable ID practice will in reality not receive separate notice of removal, they will likely not even know that their registrations have been rejected, and thus will be unaware of the necessity of

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presented before) in which the voter cast a ballot, an entirely different procedure would follow. The voter signed a Ballot Application verifying his or her address when appearing to vote and also had an opportunity to change his or her address on election day if a move had occurred. The returned card would be treated as the return of a duplicate card, not an original voter identification card under MCL 168.499, 500c and 509aa. No rejection would occur.

> bringing their receipts to the polls even if they have in fact retained them. Further, the plaintiffs argue that voters who register by mail do not even receive receipts in the first place, and as a result, the number of disenfranchisements prevented by the possibility of presenting a voter registration receipt is likely to be small. [Opinion & Order, p 29.]

It is clear from this passage that the Court misunderstood the process and the arguments of counsel for Defendants. As explained in detail above, a person whose original ID card is returned as undeliverable will be offered the opportunity to cast a provisional ballot if the person shows up to vote on Election Day. This opportunity is not conditioned on the person presenting his or her voter registration receipt. There are two ways to cast a provisional ballot, one of which results in the provisional ballot being tabulated on Election Day like a regular ballot, the other which requires voter verification before it may be tabulated at a later date. Both of these types of provisional ballot will be counted if the person provides proof of their identity and local residence. (See Exhibit B, Procedures for Issuing a Ballot If Voter's Name Does Not Appeal on Registration List).[33] Moreover, the documents necessary to show identity and residence are likely to be possessed by Plaintiffs' members. Thus, the risk that any of Plaintiffs members will actually be disenfranchised under this process is non-existent, particularly in light of the small number of people negatively affected by this practice in the first place (a little over 1,400 this year).

The Court recognized that Defendants' practice of sending a postage-prepaid, preaddressed Notice of Rejection and reply card to persons affected by this practice will reduce the number of persons harmed by the practice, including any of Plaintiffs' members. (Opinion & Order, p 30). However, the Court then observed that Defendants' practice of mailing the notice to the same address from which the card was returned as undeliverable is a "poor way" permitting the voter to clarify their address, and that most people likely will not receive the

[33] See MCL 168.523a.

notice. (Opinion & Order, p 30). Defendants observe that the notice is sent subject to forwarding so, in fact, if the person has moved and provided forwarding information, there is no reason to believe that person will not receive the notice. The Court further noted that even if such persons do receive the notice, many will likely fail to fill out the form, or fill out the form incorrectly. Finally, the Court observed that even voters who have received and returned the reply cards will have been wrongfully taken off the rolls until their registrations are reactivated. (Opinion & Order, p 30). With respect to these last concerns, the State Defendants submit that if a person refuses to return the reply card even though they received it and thus is on notice of the rejection of their registration, or the person fills out the card incorrectly despite the instructions and the ability to contact the person's local clerk for assistance, such a person is responsible or at the least contributes to any harm suffered as an actual result of the rejection. Furthermore, the State Defendants fail to see what harm a person suffers a result of being erroneously identified in the QVF as rejected, if that status does not ultimately result in the person's disenfranchisement.

Finally, the Court noted that neither side had data demonstrating how many of the 1,000 or so persons identified as rejected under this practice for 2008 were actually wrongfully rejected. "Plaintiffs argue that some simply *must* be wrongful, because human error in addressing and delivering voter IDs is inevitable, and the Court agrees with the plaintiff's analysis." (Opinion & Order, p 31). The Court then, however, noted that it "regards the likely number of these errors to be small enough as to raise serious questions about whether the undeliverable ID practice will actually adversely affect any of plaintiff's membership is a preliminary injunction is not entered." (Opinion & Order, p 31). Despite this concern, the Court "concludes that although the number of plaintiffs' members likely to be adversely affected by the practice is relatively low, these members face certain irreparable harm." (Opinion & Order, p 31).

The State Defendants again observe that Plaintiffs failed to identify even one instance in which such "human error" occurred, and the affected person suffered harm in the form of disenfranchisement, to support their claims that such an error will inevitably occur in the future with respect to at least one of their members. With respect to Plaintiffs' and the Court's belief that errors will occur in the delivery of mail, the State Defendants observe that NVRA specifically incorporates and relies upon use of the United States Postal Service. Thus, Congress apparently found the Postal Service sufficiently reliable to build its services into a federal act. Accordingly, the State's use of the same service to effectuate MCL 168.499 and 168.500c is consistent with NVRA, and Plaintiffs' claims of harm should be viewed with that fact in mind.

As set forth above, sections 499 and 500c do not violate NVRA. NVRA does not prohibit the State Defendants from enforcing statutes implementing the qualifications to vote. Additionally, the State Defendants submit that Plaintiffs must come forward with more than speculative assertions that “many” people will be disenfranchised under these procedures in order to warrant an injunction against procedures that have been in place in Michigan for decades, are consistent with federal and State law, and do not universally end in the disenfranchisement of any eligible voter. Plaintiffs clearly have not sufficiently alleged any irreparable harm that would weigh in favor of granting a preliminary injunction.

D. The balance of harms weighs in favor of granting a stay pending appeal.

The balance of harm weighs in favor of the State Defendants, and thus in favor of granting a stay pending appeal. The State Defendants first note that they are now confronted with two conflicting federal district court opinions as to the lawfulness of MCL 168.499 and 168.500c and the procedures used to implement the undeliverable ID card practice. In *Association of Community Organizations for Reform Now (ACORN) v Miller*, *et al*, Judge Douglas W. Hillman of the United States District Court for the Western District of Michigan,

held that these statutes and this practice were not prohibited or unlawful under NVRA.[34] Nothing has intervened in the interim to change the conditions under which Judge Hillman decided this issue. Thus, for the last 13 years, the State Defendants have continued to enforce these statutes and implement the accompanying procedures pursuant to that opinion. The Court's contrary opinion dramatically alters the status quo, and that by itself warrants the granting of a stay pending appeal of the Court's injunction. Indeed, as the Supreme Court has recognized, court orders, especially "conflicting orders," affecting elections can themselves result in voter confusion and cause a chilling effect.[35]

Second, as demonstrated above, the undeliverable ID card practice does not conflict with or violate NVRA. Thus, absent a stay of the injunction, the State will be irreparably injured in its ability to execute valid laws relating to the qualifications of voters and protecting against fraud.[36] Indeed, the "State's interest in not having its voting processes interfered with . . . is great. It is particularly harmful to such interests to have the rules changed at the last minute."[37] While it is possible for the State Defendants to comply with the Court's injunction orders directed at the undeliverable card practice, it will result in the pulling of time and resources of both State and local officials away from other routine but important preparations for the holding of the election on November 4. The 1,500 or so city, township, and local clerks will have to be instructed with respect to a new process for handling these voters, and while feasible, the State and locals should not be required to do this where Plaintiffs do not have a substantial likelihood of success on the merits of their claim. In fact, the Court's order to reinstate rejected voters back to January 1, 2006 increases the number of records to approximately 5,500. It is very likely that

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[34] *Association of Community Organizations for Reform Now (ACORN) v Miller, et al*., 912 F Supp 976, 980, 986 (WD Mich, 1995), aff'd 129 F3d 833 (6th Cir. 1997).
[35] See *Purcell*, 549 US at 7.
[36] *Summit County*, 388 F3d at 551.
[37] *Summit County*, 388 F3d at 551.

a number of these applicants have since registered at another address. A reactivated record will be seen by the QVF as the most recent record and "move" any existing records for that person to the address on the reactivated record, even though it is an inaccurate address where the person no longer resides. (Exhibit A, ¶ 14).

Third, in analyzing this factor, the Court concluded that the balance of harm to the State Defendants weighed only slightly against the entry of a preliminary injunction with respect to the undeliverable ID card practice because the harm was "largely self-imposed." (Opinion & Order, p 32). The Court observed that the language of NVRA was clear enough that "defendants should have been on notice of the potential that they might be found unlawful," and that the "plaintiffs explained their objections to these practices to the defendants as early as July, 2007." (Opinion & Order, p 33). Thus, according to the Court, defendants had notice and time to consider changing their processes. "If the defendants have failed to undertake such considerations, any hardship faced by the defendants now is squarely attributable as much to the lack of preparation as to the actual changes the plaintiffs are asking for, and should be discounted accordingly." (Opinion & Order, p 33).[38]

Plaintiffs and the Court ignore the fact that, as explained above, the State Defendants had been operating for the last 13 years under Judge Hillman's decision that the undeliverable card practice was lawful. Moreover, as the State Defendants pointed out to the Court, this practice was also brought to the attention of the Department of Justice in the context of seeking preclearance for 2004 PA 92 under Section 5 of the Voting Rights Act, 42 USC 1973c, which contained a reenactment of the statutes. DOJ precleared 2004 PA 92, specifically noting the

[38] Finally, the notice the Court relied upon from Mr. Heard to Mr. Thomas does not rise to the notice required by the NVRA, 42 USC 1973gg-9(b)(1), as no aggrieved person was identified. Mr. Heard is employed by the Advancement Project, a Washington, D.C. based organization, and made no claim to represent any person in Michigan and further specified no person in Michigan aggrieved by the issues he raised.

requirement that voter registrations be rejected under certain circumstances. (Exhibit A, ¶ 5, Attachment 1). Under these circumstances, it certainly was not unreasonable for the State Defendants to continue the practice. Accordingly, the balance of harms tips in favor of the State Defendants and in granting a stay pending appeal of the Court's injunction.

Finally, the Court's injunction includes the directive to '[r]emove the 'rejected' marking in the QVF from the registrations of all voters whose original voter IDs have been returned as undeliverable since January 1, 2006 until the present, unless rejection was warranted for some other lawful reason." (Opinion & Order, p 42.) The practical effect of this part of the injunction is a grant of retroactive relief, which is improper under the Eleventh Amendment.[39] The well-settled rule according to the Supreme Court is that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective* injunctive relief, *Ex parte Young, supra*, and may not include a retroactive award which requires the payment of funds from the state treasury."[40] The nature of the injunctive relief described in subsection (2) of the Court's order is retrospective because it requires affirmative steps designed to return to a status quo that existed on January 1, 2006. A prospective injunction with respect to returned voter identification cards would be limited to subsection (1) of the Court's order, which directs the Michigan Secretary of State and the Michigan Director of Elections to "[i]mmediately discontinue their practice of canceling or rejecting a voter's registration based upon the return of the voter's original voter identification card as undeliverable." (Opinion & Order, p 42.) Subsection (2) ventures beyond the prospective to a retrospective undertaking aimed at recreating a past state of

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[39] The State has yet to file its first responsive pleading, *see* FRCP 7(a), and has only had opportunity to respond on an expedited basis to Plaintiffs' motion for extraordinary preliminary relief. The Court should therefore not doubt the State's full intention to invoke it Eleventh Amendment Immunity in the proper pleading, especially in light of the fact that Plaintiffs filed an amended complaint on October 7, 2008, adding an additional party to the suit.

[40] *Edelman v Jordan*, 415 US 651, 677 (1974) (emphasis added) (citing *Ex parte Young*; 209 US 123 (1908); *Ford Motor Co v Department of Treasury*, 323 US 459 (1945)).

affairs. "Federal courts may not award retrospective relief . . . or its equivalent, if the State invokes its immunity."[41] Subsection (2) oversteps the law's qualitative distinction between preserving the current status quo and seeking to return to a former state of affairs. To correct the situation, the State Defendants respectfully request a stay of proceedings pending appeal.

E. The public interest weighs in favor of granting a stay of the preliminary injunction.

The State Defendants submit that the public interest weighs in favor of granting a stay of the preliminary injunction for the same reasons that the Sixth Circuit has recognized in similar cases[42]:

> There is a strong public interest in allowing every registered voter to vote freely. There is also a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote. Finally, there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election.

And again, as the Supreme Court has recognized, court orders, especially conflicting orders, affecting elections can themselves result in voter confusion and cause a chilling effect.[43]

On balance, the public interest weighs against the granting of the preliminary injunction, and thus in favor of a stay in this case. The public has a strong interest in seeing MCL 168.499 and 168.500c enforced as legitimate statutory processes that help ensure only qualified persons are registered to vote and allowed to vote, as well as an interest in the smooth and effective administration of these laws and other election laws that should not be interfered with at the last minute. Notably, the Court agreed that the State Defendants were "rightly concerned that some, and perhaps many, of the 'rejected' voter registrations were fraudulent." (Opinion & Order, p

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[41] *Frew v Hawkins*, 540 US 431, 437 (2004) (citing *Edelman,* 415 US at 668).
[42] *Summit County Democratic Cent & Exec Comm v Blackwell*, 388 F3d 547, 551 (6th Cir. 2004). See also *Purcell v Gonzalez*, 549 US 1, 7-8; 127 S Ct 5; 166 L Ed 2d 1 (2006); *Northeast Ohio Coalition*, 467 F3d at 1012.
[43] See *Purcell*, 549 US at 7.

34). However, the Court continued, "[w]hatever the merits of that concern may be . . . in the context of the current litigation, the concern has been rejected by Congress when it enacted the terms of the NVRA." (Opinion & Order, p 34). This is an odd reading of NVRA, particularly where two of the identified purposes of NVRA is "to protect the integrity of the electoral process," as well as "to ensure that accurate and current voter registration rolls are maintained."[44] The public certainly has an interest in seeing Legislation enforced that helps deter and protect against voter fraud. The US Supreme Court reconfirmed recently in *Crawford v Marion County Election Board* that protecting against fraud is an important state interest, and that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[45] And in fact Michigan has had first-hand experience in recent years, including 2008, with fraudulent voter registrations. (See Exhibit A, ¶ 13, Attachment 8). Nothing in NVRA suggests that Congress is no longer concerned with fraud. Accordingly, the public interest weighs in favor of granting a stay pending appeal of the Court's injunction as to the undeliverable ID card practice.

[44] 42 USC 1973gg(b)(1), (3), and (4).
[45] *Crawford*, 128 S Ct at 1618, 1619-1621. See also *Purcell v Gonzales*, 549 US 1, 3-4; 127 S Ct 5; 166 L Ed 2d 1 (2006).

CONCLUSION AND RELIEF SOUGHT

The State Defendants request that this Court grant their motion for stay pending appeal of the Court's order granting a preliminary injunction as to the undeliverable ID card practice described in MCL 168.499 and 168.500c. Specifically, a stay is sought as to paragraphs (1), (2), (3) and (5) of the Court's October 13, 2008, Opinion and Order.

Respectfully submitted,

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Dated: October 17, 2008
20083027751A/mot02 stay

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing as well as via U.S. Mail to all non-ECF participants.

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