

**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, MICHIGAN STATE
CONFERENCE OF NAACP BRANCHES, 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.

**PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' MOTION FOR STAY
PENDING APPEAL AND MOTION FOR IMMEDIATE CONSIDERATION THEREOF**

I. INTRODUCTION

The State Defendants are required to fulfill four elements to obtain an order staying the preliminary injunction previously issued by this Court. While reciting the governing elements, they have failed to meet a single one. First, the State Defendants must demonstrate a likelihood of success on appeal (i.e., that this Court's decision will be reversed). In this regard, they primarily repackage arguments from their prior submission, and while expressing disagreement with the Court's Opinion, they do not show that the Court abused its discretion. Second, the State Defendants must next prove that they will suffer irreparable harm absent a stay. This element is not even addressed. Notably, the State Defendants appear to have taken steps (as they must) to comply with the injunction, and if they have sustained irreparable harm in doing so, it is not articulated in their Brief. Third, the State Defendants are required to demonstrate that others will *not* be harmed if a stay is granted. In response, the State Defendants merely regurgitate the same arguments regarding provisional ballots that this Court heard and rejected. Finally, the State Defendants must show that granting a stay is in the public interest. Here again, the State Defendants merely re-assert arguments expressly considered and rejected by this Court.

A stay of the preliminary injunction is absolutely unwarranted, and as such, the request must be denied. Indeed, if this Court were to stay the preliminary injunction pending resolution of an appeal, Plaintiffs will be effectively stripped of the relief that this Court has expressly determined to be necessary under the circumstances. The election is twelve days away.

II. LEGAL STANDARD

To determine whether a preliminary injunction should be stayed, the Court considers the same factors considered in determining whether to issue a preliminary injunction in the first place, although in the context of a stay, the burden of proving each element shifts to the State Defendants as the moving party. *See Summit County v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). These factors are (1) whether the State Defendants have a strong likelihood of success on the merits of an appeal, (2) whether the State Defendants 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. *Id.*; *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). In order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987).

The State Defendants utterly fail to meet this standard and, indeed, do not even attempt to articulate irreparable harm to themselves to support a stay of the preliminary injunction. In fact, although captioned as a motion to stay the preliminary injunction, State Defendants are, in effect, asking this Court to simply reconsider its prior ruling. The Court cannot grant a motion for reconsideration under Rule 7.1(g)(3) of the Local Rules for the Eastern District of Michigan “that merely present[s] the same issues ruled upon by the court, either expressly or by reasonable implication.” Instead, “[t]he movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.” *Id.* The majority of State Defendants’

Motion attempts to re-assert previously rejected arguments, and thus, does not meet the requirements of L.R. 7.1(g)(3) or the elements required to obtain a stay.

Equally important in the context of assessing the State Defendants' Motion is the standard of review that they must address on appeal: any appeal of this Court's decision will be reviewed 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 as been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The State Defendants again will not be able to meet this standard on appeal, and, therefore, their likelihood of success is nowhere near the level necessary to obtain the stay they seek.

III. DISCUSSION

A. The State Defendants Have Not Demonstrated a Strong Likelihood of Success on the Merits of an Appeal

1. The State Defendants Fail to Establish a Strong Likelihood of Success with Respect to Standing

The State Defendants assert that they have a strong likelihood of demonstrating that Plaintiffs do not have standing regarding the undeliverable ID practice. 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. Both arguments are without merit.

a. Identification of Affected Members

The State Defendants argue that Plaintiffs have not identified any specific members who have, to date, been impacted by the undeliverable ID practice. On this basis, they argue that this 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 an actual member of their respective organizations who has been affected. Instead, the threat of such future harm is sufficient to establish standing. *See NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 468 (S.D.N.Y. 2004) (“There is [] no absolute requirement that individual members be identified to confer standing.”). This very issue was fully briefed by both parties and correctly decided by this Court.

As to the mandatory injunction (*i.e.*, that the State Defendants take measures to remove the “rejected” marking of affected individuals), the Court properly found that Plaintiffs have pled the existence of such members among their organizations. (Order at 12.) 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 be possible as the election has not occurred. Even if it were a requirement for Plaintiffs to identify a member whose ID was undeliverable (which it is not), the State Defendants should be estopped from asserting such an argument as they have blocked Plaintiffs' access to such information. Information regarding the identity of Michigan residents removed from the voter rolls as a result of the undeliverable ID practice is exclusively in the control of the Defendant Secretary of State. On April 23, 2008, Counsel for Plaintiffs specifically requested the identity of voters who were "sent a notice of rejection and/or whose QVF status was changed to 'Cancelled,' in accordance with Mich. Comp. Laws § 168.499(3), as a result of the return of such voter's or applicant's original voter registration identification card, at any time from January 1, 2006, through the present." *See Ex. 1*, Bradley Heard Declaration at ¶2, Tab A, April 23, 2008 FOIA and NVRA Public Records Request at Request 6. The State denied the request and *certified* that records matching that description did not exist.¹ *Id.* at ¶2, Tab A, May 15, 2008 Public Records Request Response at Response 6. Notably, this certified response to the FOIA request is directly contrary the assertions in the State Defendants' Brief in which State Defendants identified "a little over 1,400 [cancellations] this year" and approximately 5,500 since January 1, 2006. (State Defendants' Brief at 19, 22) In any event, however, it is clear that the State Defendants, who would have access to information as to who has been "rejected," have specifically declined or refused to

¹ Plaintiffs have since learned that when an original identification card is returned, the QVF status is actually changed to "Reject – Residency," not "Cancelled" as identified in the request. Regardless, the request still called for information as to voters "who were sent a notice of rejection...as a result of the return of such voter's or applicant's original registration identification card...." *Ex. 1* at ¶2, Tab A, April 23, 2008 FOIA and NVRA Public Records Request at Request 6. This description sufficiently meets FOIA's definition of responsive records existing under "another name reasonably known to the public body." Mich. Comp. Laws §15.235(4)(b).

produce it. The State Defendants cannot prevent Plaintiffs from obtaining such information and later point to the absence of Plaintiffs' knowledge of that information to argue that Plaintiffs cannot establish standing.

Moreover, since the Court heard arguments on Plaintiffs' Preliminary Injunction Motion, the Michigan State Conference of NAACP Branches ("Michigan NAACP"), with tens of thousands of members, joined as a Plaintiff in this action. As such, the existence of an affected member among the constituencies of the three Plaintiff organizations has unquestionably been met.

b. Injury in Fact

Equally unconvincing is the State Defendants' argument that they will likely succeed on standing because affected voters would be allowed to cast a provisional ballot and, thus, not suffer an injury in fact. As previously addressed in both Plaintiffs' papers and at argument on the motion, the provisional ballot does not at all remedy the harm: merely completing a provisional ballot is of no consequence if that ballot will not be counted for "rejected" or "cancelled" voters. The Court correctly found that allowing affected voters to cast a provisional ballot merely delays the inevitable disfranchisement of these voters. (Order at 30, n. 12) Specifically, the provisional ballot will only be tabulated if the affected voter is an "eligible" voter. *See Mich. Comp. Laws §168.813* ("Within 6 days after the election, for each provisional ballot that was placed in a provisional ballot return envelope, the city or township clerk shall determine whether the individual voting the provisional ballot was eligible to vote a ballot and whether to tabulate the provisional ballot."). Pursuant to the State Defendants' practice of cancelling registrations upon the return of the original voter identification card, the affected voters necessarily would not appear to be "eligible" voter; therefore, their provisional

ballots would be rejected. In other words, when the clerk consults the QVF and finds that the voter is listed as “cancelled” or “rejected,” the provisional ballot will not be counted.² Accordingly, the Court correctly concluded that injury in fact was established as such persons “will almost certainly be denied the right to vote.” (Order at 14) The State Defendants have failed to establish that they will likely succeed on any appeal of this issue and, thus, a stay of the injunction is not warranted.

In short, the issue of standing was fully examined and decided by this Court. Although the State Defendants may disagree with the outcome, they have not demonstrated that this Court clearly erred, and thus, cannot show a likelihood of success of an appeal on the issue of standing warranting the requested stay.

2. The State Defendants’ Fail to Establish a Strong Likelihood of Success on Appeal with Respect to the Undeliverable ID Practice

The State Defendants also fail to establish a strong likelihood of success on the merits of the underlying action. Far from setting forth any basis that this Court abused its discretion, State Defendants merely regurgitate the same argument that was expressly considered and rejected. On the merits of the claim, the State Defendants operate under the premise that local residency is a qualification for voting, and that the undeliverable ID practice is

² 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. *See, Ex. 2, “Election News,”* Mich. Dept. of State, Issue No. 63 (October 15, 2008). Thus, the State Defendants’ recent directive does nothing to alter the soundness of this 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 the harm to the Plaintiffs or their constituents and members.

confirmation of this qualification. As in the prior briefing, the State Defendants misconstrue the pertinent issue. Plaintiffs do not dispute that local residency is a qualification to vote. The flaw in 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 cancel the registration. As discussed extensively in Plaintiffs' Brief in Support of Preliminary Injunction, 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.³ Instead, the return of a voter ID card provides

³ State Defendants argue that the identification cards are mailed within a single jurisdiction and that any return of the card will occur very quickly. This is a new argument, based on an unverified "fact" that, frankly, does not reflect the realities of the United States Postal Service. The U.S. Postal Service explains on its website that all first class mail that is undeliverable as addressed is processed at one of two mail recovery centers, located in St. Paul, Minnesota and Atlanta, Georgia. See http://www.usps.com/strategicplanning/cs04/chp2_003.html. To say that such cards, in all cases, would be returned in no later than two weeks ignores this reality. It also ignores the common possibility of misdelivered mail. It cannot be assumed that if the card is, for example, delivered to a neighbor, that the neighbor will immediately act on the mistake, return it to the postal carrier for processing in Minnesota or Georgia, all within two weeks. Equally unconvincing is the State Defendants' contention that when the original card is returned as undeliverable, the affected voter will receive a notice of rejection by forwardable mail and an opportunity to cure the rejection. This assumes that the reason the original card was returned was that the voter has moved. It does not take into account human error, such as the possibility that the original card was returned because the clerk input an incorrect address in the first place, rendering the forwarding of later mail impossible.

some evidence *about* a voter's qualifications; it does not create or destroy those qualifications, which are determined by the Michigan constitution.

The State Defendants also assert that the affected voters are not entitled to the NVRA's protections because they are mere "applicants" and not "registrants," and that the NVRA confirmation procedures apply to "registrants" only. In other words, the State Defendants claim that an applicant is not registered to vote and does not become eligible to vote until she receives her original voter identification card. This assertion by the State Defendants belies the undisputed facts and evidence as to how voter registrations are processed in Michigan.

When a 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. *See* Voter Registration Module (January 1, 2003), available at Michigan.gov/documents/sos/Ch_1_VoterReg_200863_7.pdf, attached hereto as Exhibit 3. The clerk then either simultaneously generates an ID card to send to voter or queues the ID card for mailing at a later date. *Id.* at 1-5 – 1-11, 1-19. 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. *See* Exhibit 4. 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. MCL § 168.509o(2). In addition, as the Court rightfully pointed out in its hypothetical at the preliminary injunction hearing, it would be possible for a voter never to

receive a registration card, and for the card never to be returned as undeliverable by the Postal Service (e.g., if it is misdelivered to a neighbor, or stolen out of a mailbox), in which case the voter would remain in an “active” status in the QVF and eligible to vote in any election.

Based upon this undisputed evidence, the Court correctly concluded that a voter registration applicant becomes a “registrant” entitled to the protections of Section 8(a)(3) and (d) of the NVRA at the point when she is entered into the QVF and placed un an “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.⁴ Casting aside all of this evidence, the State Defendants now conveniently now argue in support of their motion to stay, that a voter’s appearance on the QVF as an active voter is merely “temporal” and can be rightfully removed, in accordance with the NVRA, if the original voter identification card (*i.e.*, disposition notice required by the NVRA) is returned as undeliverable. 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 if the NVRA, and the factual findings based on the undisputed evidence that underpin this Court’s decision, and is wholly without merit. Accordingly, State Defendants have come

⁴ As stated in Plaintiffs’ earlier briefs in support of the preliminary injunction, 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. *See Plaintiffs’ Reply Brief at 7.* 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.

nowhere near meeting their burden of establishing substantial likelihood of success on the merits of their appeal and, therefore, are not entitled to a stay pending such appeal.

B. The State Defendants Have Not Demonstrated That They Will Suffer Irreparable Injury Absent a Stay

In evaluating the harm that will occur depending upon whether or not the stay is granted, a court will generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Ohio ex rel. Celebrezze*, 812 F.2d at 290. It is the degree of injury that determines this issue, and only “irreparable” injury will suffice:

the key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of *money, time and energy necessarily expended in the absence of a stay, are not enough*. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958)) (emphasis added). In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. See *Wisconsin Gas Co. v. Federal Energy Regul. Comm'n*, 244 U.S. App. D.C. 349, 758 F.2d 669, 674 (D.C. Cir. 1985). In order to substantiate a claim that irreparable injury is likely to occur, the *movant* must provide some evidence that the harm has occurred in the past and is likely to occur again. *Id.*

The State Defendants fail to point to any single *irreparable harm* they will suffer absent a stay. The State Defendants first assert that *Association of Community Organizations for Reform Now (ACORN) v. Miller, et al*, 912 F. Supp. 976, 980, 986 (W.D. Mich., 1995), was correctly decided and if this Court does not issue a stay of the injunction the “status quo” will be

disrupted. First, the Court expressly considered the *ACORN* decision and correctly rejected its application. Second, contrary to Defendants' assertions, there are no "conflicting orders" affecting this November 2008 election. The *ACORN* case was decided 13 years ago, is now closed, and was based on a voter registration system and scheme that is different than the one used in Michigan today. No injunctive relief ordered by the district court in *ACORN* poses a conflict with this Court's preliminary injunction. Third, the "status quo" is unlawful and, accordingly, must rightfully be disrupted. The State Defendants cannot possibly suffer "irreparable harm" by being required to act lawfully.

The State Defendants next assert that re-enfranchisement of the approximately 5,500 voters impacted by this practice will be administratively difficult, albeit "feasible." (State Defendants' Brief at 22). The Court already considered this argument, balanced it against the harm of disenfranchisement, and expressly rejected it. Further weighing against State Defendants is the fact that any harm is "largely self-imposed." (Order at 32). Moreover, State Defendants *have already complied* with the prospective part of the injunction and instructed all clerks to treat returned original ID cards the same as returned duplicate cards.⁵ *Ex. 5*, Mich. Dept. of State, News You Can Use, Issue 393 (October 13, 2008) ("You must immediately cease marking records 'Reject – ID Card Returned.' Instead, such records must be marked 'Verify – Confirm Address.'"). Moreover, State Defendants *have already identified* the approximately 5,500 individuals who have been marked as "Reject – ID Card Returned" since 2006 – an amount they refer to as "a small number of people who have been affected by this practice." (State Defendants' Brief at 19) Having identified the "small number" of affected voters already, it is

⁵ Having already complied with this portion of the preliminary injunction, the State Defendants likely have no standing to challenge it in the Sixth Circuit in any event.

not unreasonably burdensome for the State Defendants to do what they have already instructed the State's local clerks to do: change the affected records to "Verify – Confirm Address." This hardly presents the administrative headache State Defendants suggest. Furthermore, administrative difficulties and disruption of the status quo do not rise to the level of irreparability. *See Sampson*, 415 U.S. at 90 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

In the section of their Brief addressing the balance of harms – and apparently intending to show that that they will be harmed absent a stay – the State Defendants, for the first time, assert that Eleventh Amendment sovereign immunity applies, arguing that the mandatory injunctive relief is a grant of improper "retroactive" relief. (State Defendants' Brief at p. 24). The State Defendants articulate the legal guidepost as: "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury." *Id. quoting Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (internal citations omitted) (emphasis added). The State Defendants' reliance on this argument is misplaced. First, Plaintiffs are not seeking "payment of funds from the state treasury." *See Amended Complaint at Relief Requested*. Secondly, the injunction at issue is not a form of retroactive relief. Clearly, the injunction requires Defendants to look at information already in the QVF to determine which voters were wrongfully removed from the registration list, but this has no *retroactive* effect. The injunction does not allow wrongfully disfranchised voters to cast a ballot in, for example, the 2004 federal election or any other previous election. Instead, the injunction ensures that their ability to vote -- and have those votes count -- in *elections that are yet to occur* is properly protected. The mere fact that this may require some retrospective research on the part of State

Defendants does not cloak State Defendants with Eleventh Amendment immunity. Moreover, it is unclear how this sovereign immunity argument remotely reflects any “irreparable harm” to the State Defendants, which is what they are required to demonstrate.

C. The State Defendants Have Not Demonstrated That Others Would Not Be Harmed by the Granting of the Stay

The State Defendants fail to demonstrate that others, such as Plaintiffs, would not suffer substantial harm if the preliminary injunction is stayed. The State Defendants rely on the same arguments regarding provisional ballots that this Court already considered and rejected. In essence, the State Defendants argue that there will be no substantial harm to voters if a stay issues 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 just going to be thrown out anyway. And the State Defendants have not offered a single argument or shred of evidence that “rejected” voters’ provisional ballots *will* be counted. Therefore, this Court’s finding of irreparable harm to Plaintiffs still stands. Plaintiffs’ members will suffer the substantial, irreparable harm of disfranchisement if a stay issues. Indeed, with the election a mere twelve days away, any such stay will effectively cause the very real harm that this Court intended to remedy through issuance of the injunction. Balancing the State Defendants’ mere self-imposed administrative difficulties against the right of every eligible citizen to participate in the election in compliance with federal law mandates rejection of the State Defendants’ request for a stay.

D. The State Defendants Have Not Demonstrated That the Public Interest Would be Served by Granting the Stay

Finally, the State Defendants fail to demonstrate that the public interest would be served by issuing a stay of the preliminary injunction. The State Defendants attempt to revive

their arguments that the challenged practice is designed to prevent voter fraud, and imply that such prevention is the most compelling of state interests. The same arguments were previously raised, thoughtfully considered by this Court, and correctly balanced against all other factors weighing in favor of granting the preliminary injunction. Although prevention of voter fraud and preserving electoral integrity are obviously legitimate concerns of any state, these concerns cannot justify state action that is contrary to the requirements of federal statutes such as the NVRA, which are equally concerned with ensuring that the right of all eligible citizens to vote is protected. (Order at 34) There are numerous other protections in place to guard against the type of voter registration fraud to which State Defendants refer. For example, Michigan law imposes a photo identification requirement at the polls for all voters. *See* MCL §168.523. Additionally, the Court's injunction specifically allows State Defendants to establish procedures to confirm the residency information of any voter who is affected by the Order. (Order at 38-39) Indeed, the state already has such procedures in place and, by marking such voters with a "Verify – Residency" status, clerks will be able to confirm each and every voter's continuing eligibility to vote in the November 2008 election. This Court's preliminary injunction order simply ensures that eligible voters adversely affected by Defendants' unlawful returned ID practice will be able to vote on Election Day and have their votes actually count. Far from being contrary to the public interest, the preliminary injunction entered by this Court *protects* that interest. The stay requested by State Defendants will not serve to further the public interest: therefore, it should be denied.

IV. CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny State Defendants' Motion for Stay Pending Appeal and Motion for Immediate Consideration Thereof.

Respectfully submitted,

/s/ Matthew J. Lund

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Dated: October 23, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2008, a copy of the foregoing Plaintiffs' Response to State Defendants' Motion for Stay Pending Appeal and Motion for Immediate Consideration Thereof and this Certificate of Service were filed electronically with the United States District Court, Eastern District of Michigan, and notice will be sent by operation of the Court's electronic filing system to counsel of record.

Respectfully submitted,
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