
No. 08-2352

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

and

MICHIGAN STATE CONFERENCE OF NAACP BRANCHES,

Plaintiff,

v

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

Defendants-Appellants,

and

FRANCES MCMULLAN, City Clerk of the City of Ypsilanti, Michigan

Defendants.

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

**APPELLANTS MICHIGAN SECRETARY OF STATE TERRI LYNN
LAND AND DIRECTOR OF ELECTIONS CHRISTOPHER M. THOMAS'
REPLY BRIEF**

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INTRODUCTION

Defendants have administered the two election practices at issue here for well over a decade, and have done so under the auspices of a prior federal district court opinion and approval by other federal agencies.¹ At no time during these years have Defendants been apprised by either local election officials or voters themselves of any significant problems or complaints with these practices.

Specifically, there has never been any indication that thousands of voters are being wrongfully disenfranchised under either of these practices as Plaintiffs speculate. Indeed, the Plaintiff organizations did not produce even one person, let alone a member, or identify even one instance in which a person was either wrongfully disenfranchised or suffered some other unspecified injury as a result of either practice. Instead, Plaintiffs simply speculate that such is bound to occur, and the district court agreed.

Defendants affirmed that no voter should be wrongfully disenfranchised as a result of these practices since voters affected by either may vote and have their vote counted. The question for this Court to decide is whether, on this record, which is bereft of any credible evidence that Plaintiffs' members faced any

¹ Indeed, Director Thomas has held his appointed position since 1981, (R. 15, Exhibit A, ¶ 2, ROA p. 339), and has served both democratic and republican Secretaries of State in the ensuing 28 years.

imminent, actual, and irreparable injury, the district court abused its discretion in granting a preliminary injunction.

For the reasons set forth fully in their principal brief and incorporated here, Defendants again submit that the answer to that question is "yes." Nothing in Plaintiffs' brief should persuade this Court otherwise, and Defendants offer only the following brief responses to statements or arguments made within Plaintiffs' principal brief.

A. Plaintiffs' allegation that their members would suffer an injury in fact lacked both support and credibility and therefore was insufficient to establish standing in this case.

Plaintiffs again argue that they do not need to specifically identify a member who will be harmed by each of the practices at issue here. They further assert that their allegation in the Complaint, which Plaintiffs state the district court was bound to accept as true, that the challenged procedures "deprive[] Plaintiffs' members of the NVRA Safeguards prior to removing their names from the voting rolls and presents the real and immediate threat that such members will be disfranchised [sic]," sufficiently plead an injury in fact. (Defendants' Brief, pp 15-16, quoting R. 1, Complaint, ¶¶ 73, 88, ROA pp 20, 22). Plaintiffs miscomprehend Defendants' arguments on this issue.

It is not the fact that Plaintiffs were unable to specifically identify and name at least two members (one for each practice), who would allegedly be injured by

these procedures that causes their claim for standing to fail. Although on this front it has come to Defendants attention that Plaintiff United States Student Association Foundation is apparently not an organization made up of individual members.² If this is so, this Plaintiff likely cannot establish the elements for organizational standing since it has no individual members who have or will be denied the "NVRA [National Voter Registration Act] safeguards" or face the threat of disenfranchisement at the voting booth.³ But leaving that aside, Defendants' point is that while the district court, and presumably this Court on de novo review, may generally accept a plaintiff's pleading as true at this stage of the litigation, where a defendant has offered facts or evidence that seriously undermines the credibility of that plaintiff's allegations, that too must be taken into consideration by the court and duly weighed against the plaintiffs' allegations.

Here, as Plaintiffs acknowledge, their only allegation of injury in fact is that the two practices have or will deprive their members of rights owed them under

² According to the United States Student Association's (USSA) website, Plaintiff United States Student Association Foundation (USSAF) is USSA's tax-exempt sister organization. See www.usstudents.org/donate-to-ussa (last accessed January 8, 2009). USSAF provides educational and training opportunities to student leaders. See www.usstudents.org/who-we-are/ussa-membership-benefits (last accessed January 8, 2009). USSA's membership consists of a coalition of student governments and student associations from campuses around the Nation. See www.usstudents.org/who-we-are/membership (last accessed January 8, 2009).

³ The same would be true of Plaintiff American Civil Liberties Union Fund of Michigan, which also does not appear to be made up of individual members unlike its sister organization Plaintiff American Civil Liberties Union of Michigan. (R. 1, Complaint, ¶ 3, ROA p. 9).

NVRA, and/or will result in the members' disenfranchisement. Plaintiffs offered nothing to support this allegation.⁴

In response to Plaintiffs' bare allegation, Defendants offered the following. First, regarding the threat of disenfranchisement, Defendant Director Thomas affirmed in his affidavit that – with respect to the driver's license cancellation practice – a voter who appears on Election Day to vote whose registration was canceled under this practice may cast a regular ballot. (R. 15, Exhibit A, ¶ 11, ROA p 343).⁵ The local election official makes an administrative correction to that person's QVF listing, and there is no additional burden on the voter. (R. 15, Exhibit A, ¶ 11, ROA p 343). Plaintiffs provided no evidence or facts to contravene this affirmation. Thus, the only credible evidence presented was that individuals affected by the driver's license cancellation procedure did not face any threat of disenfranchisement.

Turning to the undeliverable ID card practice, Director Thomas affirmed that while the State had never formally addressed how local officials should proceed if an individual whose registration was rejected appeared to vote, Director Thomas

⁴ The two declarations submitted on behalf of the organizations in support of their motion for preliminary injunction, make only the same generic allegations that some of their members might be "disenfranchised" as a result of the Defendants' practice. (R. 3, Declarations of Berkley and Moss, ROA pp. 81-89).

⁵ Contrary to the district court's statements in its Order granting the injunction, Defendants never asserted that these persons were required to vote a provisional ballot. The longstanding practice has been to allow these persons to cast regular ballots.

stated that he would instruct officials to allow such persons to cast provisional ballots. (R. 15, Exhibit A, ¶7, Attachment 4, ROA pp. 341, 350-352). The provisional ballot process was the subject of much dispute in all of the subsequent pleadings in this case, and was thoroughly explained in Defendants' principal brief. (See Defendants' brief, pp 20-24). Plaintiffs' insistence that Defendants do not comprehend the laws they enforce or the procedures they have drafted and implement, is unbelievable. Furthermore, Plaintiffs assertions that the provisional ballots that would have been or will be offered to persons affected by the ID card practice who appear to vote will not be counted, suggests an element of bad faith on the part of Defendants that is wholly unfounded and offensive. The district court's conclusion that such would be the case was based on either clearly erroneous factual determinations, or errors of law, or both.

Defendants' proposed pre-injunction instruction to local election officials that persons affected by the ID card practice would be eligible to receive provisional ballots would have remedied any threat of wrongful disenfranchisement, and nullified Plaintiffs' claim of injury with respect to this practice. Thus, as with the driver's license practice, the only credible evidence presented was that individuals affected by the undeliverable ID card procedure did not face any threat of disenfranchisement.

With respect to Plaintiffs' other alleged injury in fact – the deprivation of rights under NVRA – Defendants demonstrated in addressing the substantial likelihood of success of the issues that neither practice violated NVRA, or more specifically, that none of Plaintiffs' alleged members were entitled to the notice and timing provisions set forth in 42 USC 1973gg-6(d)(1)-(2). Thus, Plaintiffs' members could not suffer the deprivation of a protected right or interest for purposes of establishing an injury in fact with respect to either practice. Under these circumstances the district court clearly erred by finding that Plaintiffs had demonstrated standing on behalf of their purported memberships.

B. Contrary to Plaintiffs' assertion, the district court's interpretation of the term "registrant" as it appears in section 8 of the National Voter Registration Act is inconsistent with the plain language and intent of the Act.

Defendants agree that interpreting what meaning should be accorded the term "registrant" as it is used in section 8 of NVRA is a question of federal law. What Defendants disagree with is Plaintiffs' contention that the court's interpretation comports, in any sense, with the plain language and meaning of the Act.

With respect to the undeliverable ID card practice, Plaintiffs contention is that Defendants cannot change an individual's status in the QVF from "active" to "rejected" after the voter ID card is returned as undeliverable because Defendants

are effectively removing that person from the active roll based on a change of residence in violation of NVRA.

42 USC 1973gg-6 states in relevant part:

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.

NVRA does not define who is a "registrant," and notably neither did the district court. Rather, the district court defined *when*, in its opinion, someone becomes a "registrant" for purposes of section 8. The court concluded that the plain language "virtually dictates that a person be regarded a 'registrant' . . . at the moment his or her name appears on 'the official list of eligible voters.'" (R. 27, Order, p 18, ROA p 555).

Defendants submit that without actually ascribing some meaning to the word "registrant," as Defendants do in their brief at pages 34-36, the court's analysis is fatally flawed. Indeed, the gravamen of Defendants' argument is that because

NVRA does not regulate who may become a registered voter, the only way to give the term "registrant," which term must logically be equated with the term "registered voter," any real meaning is to look at who qualifies as a registered voter within the context of the case at hand. Here, it means looking at who is a registered voter under Michigan's law and registration process. The law is clear that when an individual's original voter ID card is returned as undeliverable, that person never becomes officially registered – the registration is ultimately rejected.⁶

Again, as discussed in Defendants' principal brief, this entire process – from receipt of the application to the return receipt of an undeliverable ID card – should take only a few days, perhaps a week, to accomplish. (Defendants' brief, pp 7, 32-33). It is virtually inconceivable that someone could vote in an election before this process is complete since any election would be at least 30 days out from the applicant's registration. Defendants submit that an applicant whose registration is

⁶ The district court's and Plaintiffs' argument that the requirements of MCL 168.499 and 168.500c were somehow nullified when the provision in MCL 168.509o(2), which states, "[n]otwithstanding any other provision of law to the contrary, beginning January 1, 1998, a person who appears to vote in an election and whose name appears in the qualified voter file for that city, township, village, or school district is considered a registered voter of that city, township, village, or school district under this act," became effective is simply wrong. Under their reasoning, any person whose name appears in the QVF would be a registered voter, when in fact the QVF contains the names of thousands and thousands of individuals who are not, in fact, registered voters, whether because they are deceased, have moved out of state, or for some other reason have had their status changed. This is because names are not purged from the QVF, they are simply accorded different identifiers in the database.

rejected under these circumstances cannot be considered a "registrant" owed the specific removal procedures set forth in section 8. Indeed, nothing in NVRA suggests that States should be made to treat as registered voters, persons who are not entitled to that designation.

The district court's analysis is further flawed because the court's conclusion that NVRA dictates that someone becomes a registrant the moment their name appears on the list of eligible voters is unsupported by the plain language of the statute. There is no language in section 8 that suggests any such immediacy element. Notably, the registration provisions in 42 USC 1973gg-6(a)(1) do not contain any requirement that a State immediately process or register a voter upon receipt of the application. Rather, that section simply requires that a State "insure" that an eligible applicant is registered as long as the valid registration form is received or postmarked no later than 30 days before an election. There simply is no language in section 8 that supports the court's interpretation, and the imposition of an express time element as to when a person becomes a "registrant." This error is further compounded by the fact that the court relief on a perceived answer to a hypothetical question that was never asked, and other misunderstanding as to who the process functions.

Thus, the court's conclusion that because Michigan enters a person's name into the QVF and temporarily accords them an "active" status before the status is

changed to "rejected", that person becomes a "registrant" under NVRA, is legally flawed and should be rejected by this Court.

C. The driver's license cancellation procedure does not violate section 8 of NVRA where the notice provisions set forth in that section are in applicable.

Defendants submit that the driver's license cancellation procedure is consistent with NVRA because 42 USC 1973gg-6(d)(1)(a) plainly provides that Defendants may remove the name of a voter from the official list if the voter "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered." Under those circumstances the notice and timing provisions set forth in 42 USC 1973gg-6(d)(2) are inapplicable.

Defendants maintain that when a person applies for a driver's license in another State and surrenders their Michigan license at the same time, they are confirming in writing a change of residence to a location outside the former registrar's jurisdiction. The district court concluded that that this violated NVRA because Defendants do not receive confirmation regarding whether the change in residence is for voting purposes. (R. 27, Order, p 22, ROA p. 559).

In their principal brief, Defendants observed that subsection 1973gg-6(d)(1)(a) does not contain a requirement that the change in residence be for voting purposes, unlike section 5 of the NVRA, 42 USC 1973gg-3(d), which specifically

contains such language, and thus that requirement should not be read into section 8. (Defendants' brief, pp 40-41). Plaintiffs, in a footnote, argue that this Court should indeed read that language into section 8 in order to "harmonize" sections 5 and 8. (Plaintiffs' brief, p 32 n13.)

This Court should reject that argument. There is no need to "harmonize" these two sections by reading language into section 8 because construing them as written does not present any internal inconsistency between these two sections and does not contravene the intent of NVRA. Indeed, Plaintiffs position below was that section 5, § 1973gg-3(d), applied to changes made within a State. (See R. 27, Order, p 21, ROA p. 558). Subsection 1973gg-6(d)(1)(a) does not contain the same limiting language and was obviously intended to apply in a broader or wider sense. In other words, to changes in residence outside the jurisdiction of the State. It is not inconsistent with the purpose of NVRA (which is to ensure the registration of eligible applicants, and protect the integrity of the process by requiring accurate lists), to allow States to take less precaution with respect to individuals who have changed residence to a new State. Plaintiffs' argument is thus unpersuasive.

On page 33 of Plaintiffs' brief, they assert the State Defendants' "argument that surrendering a Michigan driver's license and obtaining a driver's license in another State 'ipso facto' means that the voter no longer resides in Michigan, and is therefore ineligible to voter here is belied by its own current procedures; under the

current protocol, out-of-state driver's license is acceptable photo identification for voting in Michigan." Defendants note that while an out-of-State driver's license is acceptable picture identification for purposes of MCL 168.523, which requires matching a name with a face, such a license is not acceptable for demonstrating local residence. This protocol does not undermine Defendants' argument

D. Plaintiffs failed to demonstrate that any of their alleged members faced imminent disenfranchisement as a result of the undeliverable ID card practice.

The district court held that "any disenfranchisement effected by the undeliverable ID card practice or driver's license practice would indeed constitute irreparable harm." (R. 27, Order, p 28, ROA p. 565). While Defendants do not necessarily disagree that disenfranchisement may present an irreparable harm, Defendants submit that for the same reasons discussed above in subsection A, Plaintiffs failed to set forth any credible evidence that any of their members faced disenfranchisement as a result of the undeliverable ID card practice, and thus failed to show irreparable harm.

E. Defendants maintain that the balance of harms and the interest of the public weigh against the issuance of the injunction.

In light of the fact that Plaintiffs failed to demonstrate standing, a substantial likelihood of success on the merits, and no credible threat of irreparable harm, the remaining factors weighed in favor of Defendants and against the issuance of an injunction.

Plaintiffs, however, suggest that because Defendants have complied with the court's injunction the balance of harm factor does not weigh in Defendants favor, and never did. Plaintiffs are wrong. The district court has erroneously enjoined two legitimate election practices that the State uses to either help ensure that only eligible, qualified individuals are added as registered voters to the QVF, or to help ensure that only eligible, qualified individuals remain on the QVF. As noted in Defendants principal brief, Defendants are legally obligated under both NVRA and the Help America Vote Act of 2002, to make reasonable efforts to remove ineligible voters from the QVF. (Defendants' brief, pp. 27-29, 54-55). Failure to do so can, and has resulted in the prosecution of other States, by the Department of Justice. The injunction prevents Defendants from using these practices to assist in maintenance of the QVF. Thus, the continuing injunction does cause harm to Defendants.

With respect to the public interest factor, Plaintiffs assert that the injunction "does not raise the spectre of voter fraud," and that Defendants can employ other procedures to check for fraud. (Plaintiffs' brief, p 41). Defendants again observe that Plaintiffs provided no evidence to support their allegation that the undeliverable ID card practice threatened to disenfranchise any of their members. However, Defendants provided evidence through Director Thomas that the threat of fraudulent voter registrations is very real. (R. 15. Exhibit A, ¶ 13, ROA p 343).

The undeliverable ID card practice provided a very simple way to monitor or protect against fraudulent paper registrants. Fraudulent paper registrants clutter the QVF and inflate the number of registered voters, which does harm the public interest because, as explained in Defendants' brief, p 55, certain election practices are connected to the number of registered voters. Under Plaintiffs arguments, Defendants would have to send additional notice to such fraudulent registrants, and then keep the registrations on the QVF through two federal election cycles. The public interest is not served under those circumstances.

Indeed, the entry of the injunction in favor of Plaintiffs on the bare record in this case was clearly an abuse of discretion. Plaintiffs presented nothing to support their speculative fears that thousands of members stood to be disenfranchised under these practices. This Court should reverse the district court.

F. The issues raised regarding the driver's license cancellation practice are properly before this Court.

Plaintiffs assert that this Court lacks jurisdiction over the questions raised regarding the driver's license cancellation practice because the district court did not specifically enjoin this practice.

Defendants acknowledge that the district court stated that it was not entering a preliminary injunction against the driver's license practice. (R. 27, Order, p 41, ROA p 578). However, earlier in the court's Order, the court determined that "there can be little doubt that the out of state driver's license practice is violative of

NVRA." (R. 27, Order, p 22, ROA p 559). The court then stated that Plaintiffs' were likely to succeed on the merits of their legal claims as to this issue. (R. 27, Order, p 22, ROA p 561).

Later, the court determined that Plaintiffs have only demonstrated "questionable" standing to challenge this issue but that the "Court's analysis of the standing issue should not be construed to mitigate what seems to be the clear unlawfulness of what the Secretary is doing with regard to out of state driver's license applications." (R. 27, Order, p 27, ROA p 564). The court then determined that Plaintiffs' "overall likelihood of success on the merits in the view of the Court is questionable." (R. 27, Order, p 27, ROA p 564). On page 37, however, the court again states that Defendants' driver's license practice is "unlawful," but then agrees that it would not be in the public interest to require Defendants to restore the names of potentially ineligible voters to the QVF, and thus the court found "that this factor weighs rather strongly against the mandatory relief requested by plaintiffs." (R. 27, Order, p 37, ROA p 574).

The court continued with respect to the driver's license practice:

A prohibitory injunction would involve some hardship to the defendants, and mandatory injunction would involve considerably greater hardship, but both sets of hardships would be largely self-imposed. Finally, a prohibitory injunction would be in the public interest, but mandatorily enjoining the defendants on this issue would not.

Weighing these factors, a preliminary injunction against the driver's license practice is not appropriate on this record.

Nevertheless, it bears repeating that this practice does appear to be in violation of the NVRA. Should the plaintiffs be able to shore up their standing on this case, it is the Court's hope that both sides will cooperate in developing a method by which any voters who have wrongfully had their registrations cancelled can be restored to the rolls, without resorting to a mass reactivation. [R. 27, Order, p 40, ROA p 577].

In its conclusion, the district court ordered Defendants to preserve records relating to voter registrations that have been canceled under the driver's license practice since January 1, 2006, and further ordered Defendants to "*[g]ive no order, direction, or encouragement that any other government official or any other person engage in activity hereby prohibited to them.*" (R. 27, Order, p 42, ROA p 579) (emphasis added).

After reading all of this, it was clear to Defendants that the court did not enter a mandatory injunction with respect to the driver's license practice. But given the court's repeated statements that the practice is unlawful, and suggestion that Defendants look to modifying the practice, the actual or practical effect of the court's words was to prohibit or enjoin the practice. Indeed, since the court's order, Defendants have refrained from engaging in this practice.

Defendants submit that because the practical effect of the district court's order was to enjoin the driver's license practice, this issue is properly before the Court. This Court has held in the context of an interlocutory appeal under 28 USC 1292(a)(1) that "the actual effect of an order, rather than the district court's

characterization of it, shall be considered on appeal."⁷ Moreover, this de facto injunction effects a serious consequence upon Defendants by unnecessarily interfering with Defendants right and/or obligation to maintain an accurate and up-to-date registered voter file.⁸

In any event, even if this Court disagrees that the effect of the district court's order was to enjoin the driver's license practice, this Court has also held that on reviewing an order granting injunctive relief under section 1292(a)(1), the Court's review is "plenary and the court has the jurisdictional power to reach and decide other aspects of the order which would not be independently reviewable."⁹ Thus, this Court has discretion to review the district court's determinations as to Plaintiffs' standing and their substantial likelihood of success on the merits regarding the driver's license practice. Defendants submit that this Court should review these issues since the analysis to be applied is the same, the issues are interrelated, and all the necessary information is before the Court.

⁷ *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1395 (6th Cir. 1991), citing *American Motors Corp. v. FTC*, 601 F.2d 1329, 1331-32 (6th Cir.), cert. denied, 444 U.S. 941; 100 S. Ct. 294; 62 L. Ed. 2d 307 (1979).

⁸ See *Bayshore*, 934 F.2d. at 1395 (Observing that for orders that have the "practical effect" of granting an injunction, the additional requirement that the order cause a "serious, perhaps, irreparable consequence" applies.)

⁹ See *Freeman v. Helldoerfer*, 2000 U.S. App. LEXIS 1388 (6th Cir. Ohio Jan. 28, 2000), citing *Alexander v. Aero Lodge No. 735, Int'l Ass'n*, 565 F.2d 1364, 1370 (6th Cir. 1977); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997).

G. The panel's opinion denying Defendants' motion for stay pending appeal is not binding on the subsequent panel deciding the merits of Defendants appeal of the preliminary injunction.

Plaintiffs assert throughout their principal brief that the panel opinion denying Defendants' motion for stay pending appeal is binding on this subsequent panel, which will decide the merits of Defendants' appeal of the order granting the preliminary injunction. Plaintiffs cite 6th Cir. R. 206(c), and several cases to support their contention.

Defendants agree that the prior panel's published decision is binding on subsequent panel's of this Court deciding other cases, to the extent it has any relevance outside of its own set of unique facts. That panel's decision on the preliminary question of whether Defendants were entitled to a stay pending appeal, however, is not binding on this panel.¹⁰ If that was the case no party would ever seek a stay pending appeal, or similarly no appeal could be advanced after a motion panel decision negative to an appellant seeking a stay. Accordingly, Plaintiffs' suggestion that this panel is bound by the motion panel's decision is without merit.

¹⁰ See e.g., *Wilcox v. United States*, 888 F.2d 1111, 1113-1114 (6th Cir. 1989).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court reverse, in its entirety, the October 13, 2008, Opinion & Order of the district court granting Plaintiff's request for a preliminary injunction in this case.

Respectfully submitted,

MICHAEL A. COX
Attorney General

s/Heather S. Meingast

Heather S. Meingast
Denise C. Barton (P41535)
Assistant Attorneys General
Attorneys for Defendants Land & Thomas
PO Box 30736
Lansing, Michigan 48909
517.373.6434
Email: meingasth@michigan.gov
P55439

Dated: January 9, 2009

**CERTIFICATION OF WORD COUNT FOR
DEFENDANTS-APPELLANT'S BRIEF**

In accordance with FRAP 32(a)(7), which limits the allowable length of a reply brief to 7,000 words, counsel for Defendants-Appellants hereby certifies that the reply brief submitted on behalf of Defendants-Appellants on January 9, 2008, is within the word limit and the entire countable words contained in the brief from is 4,662.

Respectfully submitted,

MICHAEL A. COX
Attorney General

s/Heather S. Meingast

Heather S. Meingast
Denise C. Barton (P41535)
Assistant Attorneys General
Attorneys for Defendants Land & Thomas
PO Box 30736
Lansing, Michigan 48909
517.373.6434
Email: meingasth@michigan.gov
P55439

Dated: January 9, 2009

CERTIFICATE OF SERVICE

I certify that on January 9, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

MICHAEL A. COX
Attorney General

s/Heather S. Meingast

Heather S. Meingast
Denise C. Barton (P41535)
Assistant Attorneys General
Attorneys for Defendants Land & Thomas
PO Box 30736
Lansing, Michigan 48909
517.373.6434
Email: meingasth@michigan.gov
P55439