
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'
BRIEF ON APPEAL**

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Statement in Support of Oral Argument

In light of this Court's grant of expedited review, Defendants do not specifically request oral argument. However, should this Court believe that oral argument will assist the Court in deciding the merits of this appeal, Defendants will not oppose the scheduling of an argument.

Jurisdictional Statement

Plaintiffs' asserted subject matter jurisdiction in the district court pursuant to 28 USC §§ 1331, 1343(3)-(4), and 1367. This Court has jurisdiction over the appeal under 28 USC 1292(a)(1) and Fed R Civ P 3 and 4. Defendants' appeal was timely filed on October 22, 2008, from the district court's order granting the preliminary injunction on October 13, 2008, pursuant to Fed R Civ P 4(a).

Statement of Issues Presented

Constitutional standing is an initial hurdle that all plaintiffs must clear before they may proceed on the merits of their claims. To demonstrate standing, Plaintiffs in this case had to show an actual or imminent injury in fact. Here, Plaintiffs failed to do so because their sole claim of injury was based on the erroneous assumption that some of their members could be disenfranchised under the challenged practices. Because this was and is not so, did the district court err as a matter of law in determining that Plaintiffs had demonstrated an injury in fact, and thus had standing to sue?

To be entitled to the issuance of an injunction, a plaintiff bears the burden of showing that the four requisite factors weigh in favor of granting such extraordinary relief. Here, Plaintiffs did not demonstrate a strong likelihood of success on the merits of their claims as to the two challenged practices, nor did Plaintiffs demonstrate that the other factors weighed in favor of the injunction. Under the particular circumstances of this case, did the district court abuse its discretion in granting the preliminary injunction?

Statement of the Case

On July 8, 2008, Michigan Director of Elections Christopher Thomas received a letter from Mr. Bradley Heard of the Advancement Project, a Washington, D.C. based organization, which asserted that two practices relating to maintaining the State's official voter registration list violated the National Voter Registration Act (NVRA), and purported to give a 20-day notice of intent to sue under 42 USC 1973gg-9(b)(1). Defendants responded to the letter on August 29, 2008, disagreeing that any of the challenged practices violated NVRA.

Weeks later, on September 17, 2008, the United States Student Association Foundation (USSA), the American Civil Liberties Union Fund of Michigan, and the American Civil Liberties Union of Michigan (collectively the ACLU), filed a complaint against Michigan Secretary of State Terri Lynn Land, Director Thomas, and Frances McMullan, the City Clerk for the City of Ypsilanti, Michigan, seeking declaratory and injunctive relief, and asserting, primarily, that these Defendants were violating NVRA, by unlawfully removing registered voters from the qualified voter file (QVF), Michigan's official voter registration list,¹ and by canceling the registrations of newly registered voters. (Record Entry No. 1, Complaint; ROA p. 7). These were the same issues raised by the Advancement Project, although that entity is not a plaintiff here.

¹ See MCL 168.509o, which called for the creation of the QVF.

Plaintiffs requested expedited review of their motion for preliminary injunction, and the district court directed Defendants to respond to Plaintiffs' motion for preliminary injunction by Friday, September 26, 2008, and Plaintiffs filed a reply brief on September 29. A short hearing was held on September 30, 2008, at which the parties presented argument in the matter, but no witnesses were presented.

Some 13 days later, the district court entered its Opinion and Order granting in part, and denying in part, Plaintiffs' motion for preliminary injunction. (Record Entry No. 27, Opinion & Order; ROA p. 538). The court granted the injunction relating to Michigan's practice of rejecting the voter registration applications of persons whose original voter registration cards are returned as undeliverable, finding that it conflicted with § 8 of the NVRA, 42 USC 1973gg-6. The court enjoined Defendants from continuing this practice, and ordered 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.” (Record Entry No. 27, Opinion & Order granting injunction, pp 42-43; ROA pp 578-589).

With respect to the State's practice of canceling the voter registrations of persons who apply for a new driver's license and surrender their Michigan driver

license in another State, the court enjoined the practice but denied Plaintiffs' request that the registrations of such persons be restored to active status in the QVF. (Record Entry No. 27, Opinion & Order granting injunction p 42; ROA p 579).

Defendants moved for a stay pending appeal before the district court, and sought immediate consideration thereof, with respect to those portions of the district court's Opinion and Order relating to undeliverable ID card practice. (Record Entry No. 30, Motion for Stay; ROA p 583). The court denied the motion on October 24, 2008. On the same day, Defendants filed an emergency motion for stay pending appeal and motion to expedite appeal with this Court. (See State Defendants' Emergency Motion for Stay Pending Appeal, 10/24/08).

A panel of this Court, with one judge dissenting, denied Defendants' motion for stay pending appeal, but granted the motion to expedite the appeal on October 29, 2008. (See Opinion & Order denying stay pending appeal, 10/29/08).

Statement of Facts

Plaintiffs challenged two practices of Defendants, which are described separately below.

A. The undeliverable voter ID card practice.

A person is eligible to register to vote in Michigan if the person is a United States citizen; is 18 years of age; is a resident of Michigan for at least 30 days; and

a *resident* of the city, township, or village in which he seeks to be registered.²

Depending upon how a person registers to vote, the person will either hand deliver or mail a completed voter registration 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 clerk for processing.³ After the clerk receives the application, the clerk reviews it to determine whether all of the required elements are stated, and then enters the information into the QVF, unless that action was completed at a Secretary of State branch office. If mandatory information is missing, the clerk makes reasonable efforts to contact the person and obtain the information.⁴

The clerk also undertakes the following 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 part⁵:

² See Const 1963, art 2, § 1; MCL 168.491.

³ MCL 168.509v; MCL 168.509w.

⁴ MCL 168.500b(2).

⁵ MCL 168.499(3) (emphasis added).

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

Thus, under these sections, if the "original" voter identification card is not returned to the clerk's office, its receipt is presumed and an applicant becomes a registered voter in the State of Michigan. However, when the "original" card is returned as undeliverable, that person's registration is rejected, and they will receive notice of the rejection by forwardable mail and an opportunity to cure the rejection. (Record Entry No. 15, Exhibit A, Attachment 3, pp 2-4; ROA pp. 350-352). Notably, voter identification cards are mailed within a single jurisdiction, i.e. city, township or county, meaning that any return occurs within a matter of days after the card was sent since the cards are sent with return service requested.⁶

Sections 499 and 500c are supplemented through instructions issued to local clerks. Under these instructions, if an "original" card is returned as undeliverable to a clerk, but the clerk is provided with forwarding information, then the clerk is instructed to follow the notice and confirmation procedures contained in MCL 168.509aa and elsewhere, which incorporate notice requirements set forth in

⁶ MCL 168.499(3).

subsections 1973gg-6(c)-(d) of NVRA. (Record Entry No. 15, Exhibit A, Attachment 3, pp 2-4; ROA pp. 350-352).

Thus, the only instance in which the return of an “original” voter identification card will result in the rejection of the person’s application is when the original card is returned as undeliverable and with no forwarding information. Under that circumstance, the application is rejected, and the clerk sends out a forwardable, postage prepaid and preaddressed Notice of Rejection and reply card. (Record Entry No 15, Exhibit A, Attachment 2; ROA pp. 348-349). The reply card offers the person a chance to complete the registration by returning the card with correct information, or indicates that the person must re-register or contact the clerk’s office. The person’s status in the QVF will be marked with an identifier indicating rejection based on residence. (Record Entry No. 15, Exhibit A, Attachment 3, pp 2-4; ROA pp.).

If a person whose registration was rejected under this process appears at a polling place on Election Day, that person may vote using a provisional ballot under MCL 168.523a, which will count just like a regular ballot. (Record Entry No. 15, Exhibit A, ¶ 7, Attachment 4; ROA pp. 341, 350-352). The person's status in the QVF as rejected does not prohibit counting the provisional ballot if the person is otherwise qualified to vote.

These statutes help confirm the qualification of local residence.⁷ Under §§ 499 and 500c, the registration of a person whose card is returned as undeliverable is rejected because the qualification of local residence has not been sufficiently satisfied. The mailing out of voter identification cards is a tool election officials use to help 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, the presumption is 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. This process also has the effect of helping deter and protect against fraud in the registration of voters, which the State of Michigan has unfortunately had experience with in recent years. (Record Entry No. 15, Exhibit A, ¶ 13, Attachment 8; ROA pp. 343, 368-388).

These statutes were challenged under NVRA on virtually the same basis by another group of plaintiffs in 1995. The federal district court in that case upheld Michigan's statutes, and Defendants have been enforcing the process under the auspices of that opinion ever since.⁸ Similarly, these statutes, as reenacted, were part of a public act that received preclearance under Section 5 of the Voting Rights

⁷ Const 1963 art 2, § 1; MCL 168.11(1); MCL 168.492.

⁸ See *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).

Act, 42 USC 1973c, by the Department of Justice in 2004. (Record Entry No. 15, Exhibit A, ¶ 5, Attachment 1; ROA pp. 345-347).

From January 1, 2008, to September 25, 2008, 1,438 persons were identified in the QVF as rejected under this process. (Record Entry No. 15, Exhibit A, ¶ 6; ROA pp 340-341).

B. The out-of-state cancellation practice.

After NVRA was enacted, Michigan made a number of amendments to the Michigan Election Law, MCL 168.1 *et seq*, to incorporate the requirements of NVRA. Most of these changes are in 1994 PA 441. One statute that did not change *per se* was MCL 168.500h, which states in part:

The secretary of state, or his or her agent, shall notify local clerks of changes of address. The secretary of state shall notify local clerks of death notices and names of drivers issued a license in another state received by the department of state. Notification to the clerk of a change of address outside of the city or township in which the person is registered or of the issuance of a driver's license in another state shall constitute reliable information that the registered elector has removed from the municipality and the clerk shall proceed in compliance with section 513.

Section 513 was repealed by Public Act 441, and § 500h is now supplemented by MCL 168.509z, MCL 168.509r, and procedures implemented by Defendants. Thus, § 500h is the historic statutory origin for the process of canceling the voter registrations of non-residents.

Accordingly, Michigan does the following. First, the Secretary of State on a regular basis receives information, in a variety of forms, from every State's motor vehicle licensing authority regarding the surrender of Michigan driver licenses in the relevant State.⁹ Then, on a quarterly basis, the Secretary takes this data and electronically compares the surrendered driver license numbers with registered voters' license numbers in the QVF. If there is a match between a surrendered driver license number and a registered voter's driver's license number, that voter's entry in the QVF will be automatically identified as cancelled. The cancellation information is transmitted to the clerk of the jurisdiction where the voter is registered. The local clerk must then send out a "30-Day Notice of Cancellation (Out of State)." (Record Entry No. 15, Exhibit A, ¶¶ 10-11, Attachment 6; ROA pp. 342-343, 362-363).

The notice informs the person that his registration may be canceled as the State has received information that the person no longer resides in Michigan. The notice advises that if this is incorrect, the person should fill out the attached postage paid reply card with the correct information, and return the card within 30

⁹ For example, Michigan law states that a person shall not drive in this State unless licensed by the State of Michigan, and requires that an applicant "surrender" all valid licenses issued by any other State. See MCL 257.301(1)-(2). The Secretary of State must then inform the prior licensing State of the surrender. See MCL 257.301(2). Most, if not all, States have similar provisions – it's known as the "one driver, one record" principal – it is meant to thwart evasion of licensing sanctions imposed for drunk driving, excessive points, etc.

days. The notice advises that "[i]f the reply card is not returned, you will be asked to confirm your address at the polls on Election Day. If the reply card is not returned and you do not vote within 30 days, your voter registration will be canceled." (Record Entry No. 15, Exhibit A, Attachment 6; ROA pp. 362-363). If the reply card is returned indicating the voter is only temporarily outside the State and wishes to remain registered to vote in Michigan, the local clerk must change the QVF voter status to "Active."

Accordingly, persons whose registrations are canceled under this process are provided notice and an opportunity to correct the information and retain their active voter status in Michigan. Also, if a person whose registration has been canceled seeks to vote, that person may vote a regular ballot, including an absent voter ballot, if they assert that they remain a permanent Michigan resident. (Record Entry No. 15, Exhibit A, ¶ 11; ROA p 343).

After NVRA became effective, Defendants queried the Federal Election Commission in 1996, regarding whether this statute and the Defendants' practices were consistent with NVRA. The response was that it was consistent, and in fact permitted, by NVRA. (Record Entry No. 15, Exhibit A, ¶ 8 and Attachment 5; ROA pp. 341-342, 360-361).

Approximately 72,000 registrations are canceled under this process on an annual basis. (Record Entry No. 15, Exhibit A, ¶ 12; ROA p 343).

Summary of Argument

The district court's Opinion and Order contains erroneous factual determinations and misinterpretations of federal and State election law. Many of these errors underlie the court's ultimate conclusions, and thus undermine the validity of the court's order granting injunctive relief. Indeed, the grant of injunctive relief in this case was a clear abuse of discretion, and Defendants are entitled to a reversal of that order.

First, the district 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. The Plaintiff organizations failed to adequately allege that any of their members have or will suffer an injury in fact for purposes of establishing standing. Indeed, Plaintiffs only claim of injury is that some of their members might be disenfranchised under either of the two contested practices. However, neither of these practices result in disenfranchisement since an affected individual can either vote a regular ballot or a provisional ballot that will count on Election Day or after if the person is in fact qualified to vote. Thus, Plaintiffs fail to sufficiently allege an injury in fact, and the district court erred as a matter of law in concluding otherwise.

Second, Plaintiffs failed to demonstrate a substantial likelihood of success on the merits. Regarding the undeliverable ID card practice, the district court's

conclusion that it violates NVRA because it results in the removal of a registered voter from the QVF is inconsistent with the language and intent of NVRA, 42 USC 1973gg-6, and impermissibly encroaches on the State's authority to determine who is a registered voter. Similarly, regarding the driver's license cancellation procedure, the court's determination that it violated NVRA because the State fails to confirm that the change of residence is for voting purposes is inconsistent with the language and intent of § 8 of NVRA. Thus, the district court erred as a matter of law in its interpretation and application of NVRA.

Third, Plaintiffs failed to demonstrate that any of their members would suffer irreparable harm absent an injunction. As with standing, Plaintiffs' claims of irreparable harm were based solely on the erroneous belief that some of their members might be disenfranchised under either of the two practices. Again, none of their members would have, or will if the injunction is reversed, face disenfranchisement since voters affected by either practice may vote. The district court's determination that Plaintiffs had demonstrated irreparable harm is based on the clearly erroneous factual finding that their members faced disenfranchisement. Under these circumstances, this Court can and should reverse the order granting injunctive relief.

Fourth, the balance of harms clearly weighed in favor of Defendants where Defendants have been employing both of these practices for the last decade under

the auspices of another valid district court opinion, and on advice from the federal agency formerly charged with interpreting NVRA. Moreover, the injunction prohibits Defendants from using processes that assist in maintaining an accurate voting roll. An inaccurate list of registered voters subjects Defendants to potential prosecution under federal law, and negatively effects other election processes based on registration numbers.

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.

Argument

I. Constitutional standing is an initial hurdle that all plaintiffs must clear before they may proceed on the merits of their claims. To demonstrate standing, Plaintiffs in this case had to show an actual or imminent injury in fact. Here, Plaintiffs failed to do so because their sole claim of injury was based on the erroneous assumption that some of their members could be disenfranchised under the challenged practices. Because this was and is not so, the district court erred as a matter of law in determining that Plaintiffs had demonstrated an injury in fact, and thus had standing to sue.

A. Standard of Review

This Court reviews the district court's determination of standing de novo because the issue of whether a claimant has constitutional standing is a question of law.¹⁰

B. Discussion

Defendants disagree with the court's conclusion that Plaintiffs' – "just barely" – established standing to sue on behalf of their memberships. (Record Entry No. 27, Opinion & Order, p. 13; ROA p 550). The court overreached and erred as a matter of law 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

¹⁰ *Sandusky County Democratic Party v Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004), citing *United States v. Bridwell's Grocery & Video*, 195 F.3d 819, 821 (6th Cir. 1999).

lawsuit."¹¹ 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."¹²

The district 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 Plaintiffs other allegations, "the facts required for standing follow from these claims *by necessary implication*." (Record Entry No. 27, Opinion & Order, p. 12; ROA p. 549) (emphasis added). Thus, the 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

¹¹ *Northeast Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1010 (6th Cir. 2006), quoting *Friends of the Earth, Inc v Laidlaw Env'tl Svcs (TOC), Inc*, 528 US 167, 181; 120 S Ct 693; 145 L Ed 2d 610 (2000).

¹² *Lujan v Defenders of Wildlife*, 504 US 555, 560-61; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (quotations and citations omitted).

representative standing" (Record Entry No. 27, pp 12-13; ROA pp. 549-550) (emphasis added).

There are several problems with this analysis. Setting aside the fact that the court confused the practices referred to in paragraphs 73 and 88 of the original complaint, those paragraphs stated only this:

73. 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].

* * *

88. 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 disfranchised [sic]. [Record Entry No. 1, Complaint, ¶¶ 73, 88; ROA pp. 21-22].

The district court held Plaintiffs to a reduced burden of proof with respect to standing consistent with assessing a plaintiff's allegations on a motion to dismiss, to wit – that the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." (Record Entry No. 27, Opinion & Order p 8; ROA p 545).

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 stated that they do. (Record Entry No. 27, Opinion & Order p 12; ROA p 549). Plaintiffs simply did not sufficiently allege or establish that any of

their members had been injured by either of these practices, or would imminently suffer an injury as a result of the practices. Moreover, Defendants demonstrated through exhibits and citation to the law that any of Plaintiffs' members affected by these practices would not be disenfranchised. The court clearly stretched the notion of pleading general allegations to support the injury in fact element of standing beyond acceptable boundaries. This was particularly inappropriate here where Plaintiffs were seeking the extraordinary relief of an injunction with respect to current election practices just a few weeks before the election, and where the relief sought went beyond simply maintaining the status quo but requested changes to the State's electronic QVF.

Indeed, this case is similar to *Northeast Ohio Coalition for the Homeless v Blackwell*, in which this Court determined that the organizational plaintiffs had not demonstrated a substantial likelihood of success on the merits because of a weak showing on standing, which was based solely on an unverified complaint with nonspecific allegations of injury¹³:

These allegations fall far short of asserting that any of plaintiffs' members have suffered or will imminently suffer a concrete, actual injury traceable to enforcement of the voter identification requirements. In fact, the complaint contains no reference at all to injury to the plaintiffs' members. While we have noted that an association challenging election procedures need not identify specific voters who will be wronged by election workers because "by their

¹³ *Northeast Ohio Coalition for the Homeless v Blackwell*, 467 F3d 999, 1010 (6th Cir. 2006).

nature, mistakes cannot be specifically identified in advance," there is no reason to apply this reasoning [here].

The same can be said in this case. Plaintiffs' unverified complaint and the two declarations submitted on behalf of the organizations in support of their motion for preliminary injunction, make only a few, generic allegations that some of their members might be "disenfranchised" as a result of the Defendants' practice.

Furthermore, the notion that Plaintiffs do not have to identify any member more specifically because "mistakes" cannot be identified in advance is unpersuasive here because the "mistake" as alleged by Plaintiffs has already occurred. Moreover, it is not the fact that Plaintiffs cannot specifically identify by name any member who will allegedly be injured by this practice that is important, it is the fact that Plaintiffs failed to demonstrate that any member in the past, present, or future, is likely to suffer the injury as alleged by Plaintiffs. Plaintiffs simply failed to demonstrate that any of their members were or are facing a concrete, particularized and imminent injury of wrongful disenfranchisement.

Additionally, the injury in fact to Plaintiffs' members as vaguely alleged by Plaintiffs and determined by the district court, is the threat or increased risk of disenfranchisement as a result of the challenged practices. 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 the court's fears on this front are based on a misunderstanding of the law or facts, or both.

The court apparently understood that with respect to persons affected by the out-of-state cancellation process, those persons face no actual or imminent threat of disenfranchisement because they are allowed to cast a regular ballot if they appear on Election Day to vote. (Record Entry No. 15, Exhibit A, ¶ 11; ROA p. 343). So, the only “injury” Plaintiffs’ members face is misidentification of their status in the QVF, which the member may or may not have knowledge of. Plaintiffs’ Complaint does not allege anywhere how this situation constitutes an injury in fact – the invasion of a legally protected interest.

With respect to the undeliverable cards practice, the court was clearly confused. In its opinion, the court observed 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." (Record Entry No. 27, Opinion & Order, pp. 3, 29; ROA p 540, 556). Individuals affected by this practice, however, may not cast regular ballots. Rather, these persons, if they appear at the polls, will be offered a provisional ballot that may be tabulated on Election Day just like a regular ballot. (Record Entry No. 15, Exhibit A, ¶ 7, Attachment 4; ROA pp. 341, 350-352). Counsel for Defendants specifically explained as much at the hearing. (Transcript, pp 62-64).

The district court, however, discounted the provisional ballot process as any remedy to the alleged disenfranchisement of these individuals because the court

was under the misapprehension that the provisional ballots would not count. (Record Entry No. 27, p 30 n12; ROA pp 568). The court as well as Plaintiffs are apparently under the impression that a person's status in the QVF as rejected prevents that person from having their provisional ballot counted. That is not the case.

MCL 168.523a explains, in detail, the process for casting a provisional ballot. This process is further supplemented by instructions issued by the Bureau of Elections. (See Exhibit C, Instructions for Casting a Provisional Ballot, attached to Defendant's emergency motion for stay pending appeal; Record Entry 15, Exhibit A, ¶ 7, Attachment 4; ROA pp. 357-358).

If a person does not appear on the list of qualified voters for a precinct, they may cast a provisional ballot. First, 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.¹⁴ 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.¹⁵ If the city or township clerk verifies the elector information and the individual presents an

¹⁴ MCL 168.523a(2).

¹⁵ MCL 168.523a(3).

acceptable form of identification that contains a current residence address to establish his or her identity and residence address, "the individual shall be permitted to vote a provisional ballot on election day."¹⁶ 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 provisional 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.¹⁷

The purpose of the provisional ballot process is to provide, as required by Congress, a "fail-safe" voting method in the event that an error prevents the voter from being eligible to cast a regular ballot.¹⁸ During the provisional ballot process, a person reconfirms on Election Day that they are qualified to be a registered voter in the district by signing an affidavit, filling out another registration application,

¹⁶ MCL 168.523a(4).

¹⁷ MCL 168.523a(5)-(7).

¹⁸ See 42 USC §§ 15482, 15483(b)(2)(B).

and showing some identification. If they do all that on Election Day, their provisional ballot is counted, regardless of whether the QVF indicates that their registration was rejected. But, let's say, if a person does not have a piece of identification with them on Election Day that shows a local residence, that person would have to come in within 6 days after the election to verify that missing piece of information. If they do, their provisional ballot counts. If they do not do so, it will not be counted.

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 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.¹⁹

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. 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 or law.

¹⁹ See MCL 168.523a(4) for what is acceptable identification.

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. Indeed, the term "disenfranchisement" is not a magic word that automatically unlocks the courthouse door absent a real threat of injury. Defendants submit that Plaintiffs' "sparse" allegations of injury to their members based on "conclusory" claims in their Complaint that their members will be "disenfranchised" under the State's practices were clearly insufficient to establish an injury in fact that is concrete and particularized, actual or imminent, not conjectural or hypothetical.²⁰ Without sufficiently alleging an injury in fact to their members, Plaintiffs cannot satisfy the elements for organizational standing. Therefore, the district court clearly erred in concluding that Plaintiffs had demonstrated sufficient standing to sue in the context of their request for injunctive relief.

²⁰ *Northeast Ohio Coalition for the Homeless*, 467 F3d at 1010.

II. To be entitled to the issuance of an injunction, a plaintiff bears the burden of showing that the four requisite factors weigh in favor of granting such extraordinary relief. Here, Plaintiffs did not demonstrate a strong likelihood of success on the merits of their claims as to the two challenged practices, nor did Plaintiffs demonstrate that the other factors weighed in favor of the injunction. Under the particular circumstances of this case, the district court abused its discretion in granting the preliminary injunction.

A. Standard of Review

This Court generally reviews a district court's grant of a request for a preliminary injunction for abuse of discretion.²¹ Under this standard, the Court "review[s] the district court's legal conclusions de novo and its factual findings for clear error."²² The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo.²³ However, the district court's ultimate determination regarding whether the four preliminary injunction factors weigh in favor of granting preliminary injunctive relief is reviewed for abuse of discretion.²⁴ "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."²⁵ "A finding is 'clearly erroneous' when, although there is evidence to support it, the

²¹ *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007); *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005).

²² *Jones v City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003).

²³ *Tumblebus*, 399 F.3d at 760.

²⁴ *Tumblebus*, 399 F.3d at 760.

²⁵ *Hamilton's Bogarts*, 501 F.3d at 649 (quoting *Nightclubs, Inc. v City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000)).

reviewing court on the entire evidence is left with the definite and firm conviction that a mistake as been committed."²⁶

B. Standards for issuing a preliminary injunction.

When determining whether to issue a preliminary injunction, a district court must consider four factors²⁷:

(1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

"A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue."²⁸

C. Overview of the relevant provisions of NVRA.

The National Voter Registration Act was enacted, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," "to protect the integrity of the electoral process," as well as "to ensure that accurate and current voter registration rolls are maintained."²⁹ Under § 8 of the NVRA, 42 USC § 1973gg-6(a), a State shall implement a program that

²⁶ *Anderson v Bessemer City*, 470 US 564, 573, 105 S Ct. 1504, 84 L Ed. 2d 518 (1985).

²⁷ *Washington v Reno*, 35 F3d 1093, 1099 (6th Cir 1994) (citing *Keweenaw Bay Indian Community v Michigan*, 11 F3d 1341, 1348 (6th Cir 1993)).

²⁸ *Six Clinics Holding Corp, II v Cafcomp Sys, Inc*, 119 F3d 393, 399 (6th Cir 1997) (citing *In re Dolorean Motor Co*, 755 F2d 1223, 1228 (6th Cir 1985)).

²⁹ 42 USC 1973gg(b)(1), (3), and (4).

makes a reasonable effort to remove from the official State voter registry the names of ineligible voters who have died or changed their residence.

Subsection (b), § 1973gg-6(b), requires that the program implemented to remove voters under subsection (a)(4) be non-discriminatory 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 for failure to vote.³⁰

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 durational or time limitation on when such programs may be used before an election.³¹

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

³⁰ 42 USC 1973gg-6(b).

³¹ 42 USC 1973gg-6(c)(1) (emphasis added).

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. [Emphasis added].

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

(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:

(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.

Lastly, subsection (d)(3), § 1973gg-6(d)(3), requires a registrar to correct the official list to reflect the change of address information that the registrar receives from a voter under subsection (d).³²

In addition to NVRA, the federal Help America Vote Act (HAVA) of 2002 provides that "the State election system shall include provisions to ensure that voter registration records are accurate and are updated regularly, including . . .

³² 42 USC 1973gg-6(d)(3).

safeguards to ensue that eligible voters are not removed in error from the official list of eligible voters."³³ The HAVA provisions essentially parallel or incorporate NVRA, and do not impose additional obligations on the States relevant to the claims alleged in this action.

D. On de novo review, this Court should find that Plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their substantive claims regarding the undeliverable ID card practice, and the out-of-state cancellation practice.

The district court in this case erred as matter of law in concluding that Plaintiffs demonstrated a substantial likelihood of success on the merits of their claims as to the two challenged practices.³⁴

1. Michigan's practice of rejecting the registration of first-time applicants whose original voter registration cards are returned as undeliverable does not violate § 8 of NVRA.

Plaintiffs argue that the rejection of the registration is, in effect, 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 submit that this procedure does not fall within § 8 of NVRA because it is not a “removal program” that results in the “removal” of a “registrant” from the QVF based on a “change of residence.” Specifically, that

³³ 42 USC 15483(a)(4)(B).

³⁴ Defendants observe that this Court is not bound by the majority's decision regarding Defendants' emergency motion for stay pending appeal. See *Wilcox v United States*, 888 F2d 1111, 1113-1114 (6th Cir. 1989).

under these circumstances, the applicant never became a “registrant” as that term is used in NVRA because the registration transaction failed as a result of the original card being returned as undeliverable.

The district 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." (Record Entry No. 27, Opinion & Order, p 18; ROA p. 555). 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)." (Record Entry No. 27, Opinion & Order, p 18; ROA p. 555).³⁵ 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. 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

³⁵ The court speculated in a footnote that this must be so otherwise States might attempt to circumvent NVRA by never placing “registrants” on an official list. (Record Entry No. 27, Opinion & Order, p 18 n6; ROA p. 555). Defendants submit that there is no open-ended authority in the Michigan Election Law, MCL 168.1 *et seq*, that would allow Defendants to determine that applicants will never be placed on the QVF. Rather, election officials are required to timely process registration applications. See MCL 168.499; MCL 168.500b; 168.509w.

this motion, counsel for the defendants represented that the answer to these questions is “yes.” 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 [Record Entry No. 27, Opinion & Order, p 18; ROA p. 556].

Thus, the court concluded, on the basis of a hypothetical, that a person becomes a “registrant” in Michigan the moment his or her name is entered into the QVF regardless of the plain language of MCL 168.499 and 168.500c.³⁶

Aside from the fact that counsel for Defendants did not make some of the statements the court claims counsel did, and in fact was not asked the specific hypothetical question the court found so compelling, the court’s interpretation of NVRA and State law is wrong. (Transcript, pp 60-61,64-66).

The court did not ask counsel about a person who votes and subsequently the card is returned as undeliverable to the clerk. While this scenario is theoretically possible, Defendants are not aware of any such instance occurring, nor have Plaintiffs identified any such instance. Moreover, it is extremely unlikely to occur because the voter ID cards are mailed within a single jurisdiction, i.e. city, township or county, meaning that any return of an undeliverable card generally

³⁶ The court’s later suggestion that this could all be cured if the State created a “pending” identifier in the QVF, which would then render such persons not “registrants” under NVRA seems to contradict the court’s earlier statement that State law cannot define who is a “registrant.” (Record Entry No. 27, Opinion & Order, p 19; ROA p. 556).

occurs within a matter of days since the cards are sent with return service requested.³⁷

Furthermore, a person must file a voter registration application at least 30 days before an election in order to vote in that particular election.³⁸ (Thus, contrary to the court's assertion, no voter who files an original voter registration application is entitled to immediately vote.) It is therefore virtually inconceivable that an original voter identification card would not be returned within that 30-day period. Thus, while perhaps possible, it is extremely unlikely that a person would vote at an election before the ID card was returned as undeliverable. Thus, the court based its conclusion on a hypothetical situation that is virtually unlikely to occur.³⁹

Moreover, regardless of the spectrum of hypothetical possibilities that may exist between a person who, on the initial end, registers and actually receives their original voter ID card, to the person, on the opposite end, who registers and their original ID card is returned as undeliverable, there is no doubt under Michigan law that the person at the opposite end is not a registered voter and never became one.

³⁷ MCL 168.499(3).

³⁸ MCL 168.497(1); MCL 168.500d.

³⁹ Additionally, if a voter registration card were to be returned as undeliverable after an election in which the voter cast a ballot, an entirely different procedure would follow. There, the voter signed an application to vote verifying his local residence when appearing to vote and also had an opportunity to change his address on Election Day if he moved. In that case, the returned card would be treated as the return of a duplicate card, not an original voter ID card under MCL 168.499, 500c and 509aa. Had the court asked Defendants this hypothetical, this would have been their response.

The fact that, as a result of current computer programming and other statutory requirements, the individual is placed into the QVF and identified as an “active” voter for some period of time before the voter ID card is returned, and the registration is rejected, does not change the plain language of the statutes or affect their application. Nor does the fact that persons may vote without ever receiving cards, or under the hypothetical that the card is returned after an election, render the statutes superfluous since their purpose is satisfied under those circumstances.

NVRA does not specifically define "registrant." The court opined that determining who is a "registrant" under NVRA is a question of federal law, but then the court looked directly to the State processes and law, and then ignored the state law in favor of a hypothetical. The court's conclusion here is based on a temporal analysis of Michigan's registration process, or a perceived defect with the law, that is not relevant to determining whether the actual class of individuals in question here – those whose registrations are rejected after their original ID card is returned – are “registrants” entitled to the provisions of subsection 1973gg-6(d)(1)-(2).

NVRA does not "register" voters, or provide for who can become a registered voter, or provide for who can vote. Rather, it provides that "each State

shall . . . insure that any *eligible applicant* is registered to vote in an election . . .

⁴⁰

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.⁴¹ NVRA does not purport to alter or preempt State laws providing for the qualifications of voters or the actual registration of qualified voters.⁴² Indeed, the registration of voters has typically been a matter left to the States.⁴³ Rather, NVRA was simply an attempt by Congress to provide for some uniformity in the method and timing of the registration process.⁴⁴ 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."⁴⁵ The term "registered" means "qualified formally or officially."⁴⁶ Thus, the provisions in subsection 1973gg-6(d) should be interpreted as applying to the removal of a registered voter—a person qualified formally or officially to vote. The only way to determine whether someone is a registered voter is to look to State law—in this case, Michigan law.

⁴⁰ 42 USC 1973gg-6(a)(1) (emphasis added).

⁴¹ 42 USC 1973gg-6(a)(1)(A)-(D) (emphasis added).

⁴² *Gonzalez v Arizona*, 435 F Supp 2d 997, 1003 (DC Ariz, 2006).

⁴³ See *Storer v Brown*, 415 US 724; 94 S Ct 1274; 39 L Ed 2d 714 (1974).

⁴⁴ *Gonzales*, 435 F Supp 2d at 1003.

⁴⁵ See <http://www.merriam-webster.com/dictionary/registant>.

⁴⁶ See <http://www.merriam-webster.com/dictionary/registered>.

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 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. The State complies with that requirement by, as discussed above, sending two forms of notice – the original voter identification card, and the notice of rejection the follows the returned ID card. These persons never become "registrants" for purposes of subsection 1973gg-6(d) because they never become registered voters under Michigan law. The fact that the applicant's name is entered into the QVF at

the time the paper registration application is received and temporarily accorded “active” status for a matter of days before it is changed to "rejected" is immaterial to this analysis because Michigan law is clear that such persons never become registered voters. This interpretation is consistent with the intent of NVRA because its purpose was not to supplant a State’s authority to determine who, how, and when a person becomes a registered voter in a State.⁴⁷

Moreover, as the dissent in the prior panel's decision persuasively argued, this analysis is consistent with this Court's decision in *Bell v Marinko*, where the Court held that NVRA "protects only 'eligible' voters from unauthorized removal."⁴⁸ The Court further observed that "[i]n creating a list of justifications for removal [under NVRA], Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place."⁴⁹ Under this rationale, Michigan's subsequent identification of a person as "rejected" in the QVF, who was not entitled to be registered in the first instance, does not violate NVRA.

Under the court’s holding, the State must follow the subsection 1973gg-6(d)(1)-(2) notice requirements and send a cancellation notice to the same address

⁴⁷ The district court in *Florida State Conference of the NAACP v Browning*, Case No. 07-cv-402 (order granting motion for preliminary injunction) came to a similar conclusion.

⁴⁸ *Bell v Marinko*, 367 F3d 588, 591 (6th Cir. 2004).

⁴⁹ *Bell*, 367 F3d at 591.

the ID card was just returned from, and, assuming no reply card is returned the person's record will sit for up to 4 years in the QVF until 2 even year November elections expire before the person's "registration" can be cancelled. It is inconsistent with NVRA to force the State to carry the names of ineligible voters, as well as potentially fraudulent voter registrations in the QVF for years. Michigan's undeliverable ID card practice addresses these concerns by identifying questionable registrations. Indeed, this is one process that helps the State protect against purely "paper registrants," i.e. fraudulent registrations including valid local addresses but phony names and personal information.⁵⁰

Accordingly, MCL 168.499 and 168.500c do not violate or conflict with § 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 Plaintiffs failed to demonstrate a substantial likelihood of success with respect to this claim.

⁵⁰ The US Supreme Court has specifically observed that States have a recognized interest in protecting against fraud. See *Crawford v Marion County Election Bd*, 553 US ___; 128 S Ct 1610, 1618, 1619-1621; 170 L Ed 2d 574 (“[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).

2. Michigan's practice of canceling a person's voter registration after information regarding that person's application for a driver's license in another State and the contemporaneous surrender of that person's Michigan driver's license is received from another State does not violate § 8 of NVRA.

Subsection (c)(1), § 1973gg-6(c)(1), of NVRA gives States the freedom to implement their own name-removal program, as long as the program complies with any applicable mandatory requirements of NVRA. Subsection (d)(1)(A), § 1973gg-6(d)(1)(A), allows States to remove the name of a voter from the voting rolls if the voter confirms in writing a change of residence to a place outside the current registrar's jurisdiction. Under this section, no other action or notice by the State is required if a voter confirms a change in residence to one located outside the registrar's jurisdiction.

Michigan has retained its specific removal program with respect to a voter who surrenders his or her Michigan driver's license in another State in the process of obtaining a license in that State based on that exception in subsection 1973gg-6(d)(A)(1), which provides⁵¹:

(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—

⁵¹ 42 USC 1973gg-6(d)(1)(emphasis added).

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

Plaintiffs assert that this cancellation process violates NVRA because Michigan does not send that person a notice that complies with § 1973gg-6(d)(2), and then wait the relevant time period before canceling that person's registration on the QVF.

The district court concluded that the cancellation process violated § 8, however, in making that determination the court apparently believed Defendants were relying on § 5 of NVRA, § 1973gg-3, particularly subsections (a)(2) and (d), which state:

(a) In general

* * *

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

* * *

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

The court looked at these two provisions and concluded that because Michigan did not receive confirmation as to whether the person applying for a new license also registered to vote, the cancellation process violated NVRA. (Record Entry No. 27, Opinion & Order, pp 20-21; ROA pp. 557-558).

Defendants, however, do not specifically rely on these provisions as the basis for their argument. Rather, Defendants rely on section 8, § 1973gg-6(d)(1)(A), which simply provides that the name of a voter may be removed from the official role 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.” Defendants purpose in pointing out the motor-voter provisions in § 5 was to emphasize the importance or credibility Congress chose to imbue information or documents received by State officials at motor vehicle licensing agencies under NVRA. Indeed, Defendants agree with Plaintiffs position below that these § 5 provisions pertain to changes made within a single State. Such is not the case, however, with § 1973gg-6(d)(1)(A).

The Supreme Court consistently has counseled that "in any case of statutory construction, [the] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well."⁵² The "cardinal rule" is "that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."⁵³ Only if the statutory

⁵² *Hughes v Aircraft v Jacobson*, 525 US 432, 438; 142 L Ed 2d 881; 119 S Ct 755 (1999). "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" See also, *Hoge v Honda of America Mfg, Inc* 384 F3d 238, 246 (6th Cir 2004).

⁵³ *Conroy v Aniskoff*, 507 US 511, 514; 123 L Ed 2d 229; 113 S Ct 1562 (1993).

provision at issue is ambiguous, courts may look in "good faith" to the legislative history.⁵⁴

Plaintiffs' premise is that Michigan may not remove such a person's name "on the ground that the registrant has changed residence," because the State has not received "confirm[ation] in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered."⁵⁵ Thus, according to Plaintiffs, Michigan can only remove the person by following the provisions of subsection (d)(2), § 1973gg-6(d)(2).

On the contrary, this premise is faulty because in the case of a person surrendering his Michigan license during the application process for a new license in a different State, that person is "*confirm[ing] in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered.*"⁵⁶ Under the plain language of subsection 1973gg-6(d)(1)(A), if a voter confirms a change of residence in writing to a place outside the registrar's jurisdiction, the State is not required to send notice and wait two federal election cycles before canceling that person's registration in the QVF.

This is consistent with other circumstances under which no 1973gg-6(d)(2) notice is required. For example, when a voter moves from one jurisdiction to

⁵⁴ *Wis Pub Intervenor v Mortier*, 501 US 597, 610; 115 L Ed 2d 532; 111 S Ct 2476 (1991).

⁵⁵ 42 USC 1973gg-6(d)(1)(A).

⁵⁶ 42 USC 1973gg-6(d)(1)(A).

another and registers in the new jurisdiction of residence, the voter is cancelled from the former jurisdiction and added to the new one without any notice under subsection (d)(2). Similarly, when a voter changes his or her driver license address in a Secretary of State branch office, showing a move to a different jurisdiction, the voter receives no (d)(2) notice. And when a Michigan election official receives notification from an election official located in another State that a voter has indicated on a voter registration application that he or she was previously registered in Michigan, the voter receives no (d)(2) notice. No notice is required because it is the voter himself who has confirmed in writing a change of address to a new jurisdiction.

Likewise, a voter who makes a written application for a driver license in another State is himself or herself confirming in writing that the person's residence has changed to one outside the original registrar's jurisdiction. Whether it is a network of motor vehicle licensing authorities reporting the information confirmed in writing or a statewide computerized registration system like the QVF reporting this information, the same result would apply – the voter has confirmed in writing a change of residence, and it has been communicated by a government agency to the local election official.

The plain language of § 8 also supports a conclusion that the filling out of an application form for a driver's license in another State, and the surrender of that

person's Michigan license, acts as confirmation in writing that the person has changed residence to a place outside the registrar's jurisdiction in which that person is registered. Since NVRA does not define the terms "confirms," "writing," or "residence," the words should be accorded their common, everyday meanings. The filling out of an application form, and the affixing of that person's signature to the form, generally under penalty of perjury, is a confirmation in writing.

With respect to "residence," the district court and Plaintiffs would read into the language of subsection 1973gg-6(d)(1)(A), an additional element that the State confirm that the change of "residence" is for voting purposes as well. In other words, that a name may be removed only if a person "confirms in writing that the registrant has changed residence [for voting purposes] to a place outside the registrar's jurisdiction in which the registrant is registered."⁵⁷ Subsection (d)(1)(A) does not require this, and clearly if Congress had meant it to be so it could have included language similar to that in section 5, § 1973gg-3(d), quoted above.⁵⁸ Rather, (d)(1)(A) only refers to "changed residence," and "residence" in this context should be accorded an ordinary meaning. Merriam Webster defines "residence," as "a: the act or fact of dwelling in a place for some time b: the act or

⁵⁷ 42 USC 1973gg-6(d)(1)(A).

⁵⁸ See *Lamie v United States Tr.*, 540 US 526, 538; 124 S Ct 1023; 157 L Ed 2d 1024 (2004) (Rejecting petitioner's statutory construction argument that inserted a word absent from the plain language of the statute.)

fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit.”⁵⁹

The application for a new driver’s license qualifies as a confirmation in change of residence because 49 of the 50 States require, in some fashion, that persons applying for a new or permanent driver’s license in the relevant State be a resident of that State. (Record Entry No. 15, Exhibit B, Survey by American Association of Motor Vehicle Administrators; ROA pp. 389-395).⁶⁰ Thus, a reasonable conclusion can be drawn from these facts that a person who applies for a new license in a different State, has sufficiently confirmed a change of residence to the new State. Moreover, States like Michigan are entitled to make reasonable inferences about a voter's residence for registration purposes.⁶¹ Under these

⁵⁹ See <http://www.merriam-webster.com/dictionary/residence>.

⁶⁰ The survey shows that 32 States require “proof of residency” for purposes of obtaining a driver’s license within that State, which ipso facto means the States require the applicant to be a resident. With respect to the 18 States that do not actually require “proof of residency,” those States, excepting Hawaii, still require that an applicant for a driver’s license be a resident of the State. See Alabama (Code of Ala. § 32-6-1 and 2), Arizona (ARS § 28-3153(A)(14), Arkansas (ACA § 27-16-602-603, 606), California (Cal Veh Code §§ 12500, 12502, 12505), Florida (Fla Stat §§ 322.03, 322.031, 322.04), Kansas (KSA §§ 8-235, 8-236), Louisiana (La RS § 32:402, 32:404), Maine (29-A MRS § 1301), Minnesota (Minn Stat § 171.02, 171.03), Nebraska (RRS Neb § 60-484(2)(c)), Nevada (Nev Rev Stat Ann § 483.250(7), New York (NYS CLS Veh & Tr § 250), North Dakota (ND Cent Code § 39-06-02(3)), Ohio (ORC Ann § 4507.02, 4507.04), Oklahoma (47 Okl St § 6-103(8)), Texas (Tex Transp Code § 521.029), Wyoming (Wyo Stat § 31-7-106(a), 107(a)).

⁶¹ See *Bell*, 367 F3d at 590-593.

circumstances, NVRA allows Michigan to cancel that person's registration in the QVF.

The fact that the person is also surrendering his Michigan license at the same time further supports the premise that the execution of an application in a new State confirms a change of that person's residence. This is because a person can only obtain a Michigan license if they are a resident; thus, surrendering that license is indicative of intent to remain in the new State (or of no intention to return to Michigan). Moreover, a driver's license represents an important State-conferred privilege. It goes without saying that for most people of voting age, the possession of a driver's license is necessary for many aspects of daily life. The surrender of that privilege can thus be viewed as indicative of intent not to return to the issuing State.

Although subsection (d)(1)(A) does not require that any notice be sent to persons whose registrations are canceled in this fashion, Michigan requires clerks to send the cancellation notice described previously to those persons whose registrations have been cancelled under this process. Furthermore, persons appearing at polling places on Election Day can assert that the cancellation was in error, and vote a regular ballot. (Record Entry No. 15, Exhibit A, ¶ 11; ROA p 343).

Under this process, the only harm or injury that occurs in the case of an error is that for some period of time, a person's status in the QVF may be misidentified until the error is corrected. But because a person will not be disenfranchised as a result of that error, the misidentification in the QVF is of little consequence to the individual.

Accordingly, Michigan's practice of identifying a person's voter registration as canceled after information regarding the surrender of that person's Michigan driver's license and application for a new license is transmitted to this State does not violate NVRA because the practice is consistent with section 8, and specifically with the plain language of subsection 1973gg-6 (d)(1)(A). This Court should therefore conclude that Plaintiffs' failed to demonstrate a substantial likelihood of success with respect to this claim.

E. The district court abused its discretion when it concluded that Plaintiffs demonstrated that their members would suffer irreparable harm as a result of the undeliverable ID card practice absent an injunction.

Plaintiffs' assertions of irreparable harm were based on the alleged unlawfulness of this practice, and their claim that "many" of their members would be disenfranchised as a result.⁶²

⁶² With respect to the out-of-state cancellation practice, the district court concluded that Plaintiffs had not demonstrated that any of their members would suffer irreparable injury absent an injunction given that Plaintiffs' standing to challenge

The district court recognized the very small number of persons affected by this practice but observed that “any disenfranchisement effected by the undeliverable ID . . . practice[] would indeed constitute irreparable harm.”

(Record No. 27, Opinion & Order, p 28; ROA p. 565). 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 bringing their receipts to the polls even if they have in fact retained them. [Record Entry No. 27, p 29; ROA p 566.]

Similar to its analysis of the injury in fact element of standing, the court again misunderstood the process and Defendants’ arguments. As explained previously, a person whose original ID card is returned as undeliverable may cast a provisional ballot—not a regular ballot. This process is not conditioned on the person presenting his 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 verification before it is

this process was “questionable.” (Record Entry No. 27, Opinion & Order, p 31; ROA p 568).

tabulated at a later date. Both ballots will count if the person provides proof of their identity and local residence.⁶³ The person's status in the QVF as rejected does not prohibit counting their provisional ballot. 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.

The district court's conclusion that at least of a few of Plaintiffs' members faced actual disenfranchisement as a result of this practice was based on the court's factual finding that provisional ballots cast by such persons will not count. This finding was clearly erroneous, and this error infected the court's analysis of Plaintiffs' claims of irreparable harm for purposes of issuing injunctive relief.

The court recognized that Defendants' practice of sending a notice and reply card will reduce the number of persons harmed by the practice, including any of Plaintiffs' members. (Record Entry No. 27, p 30; ROA p 567). But that Defendants' practice of mailing the notice to the same address from which the card was returned is a "poor way" of permitting the person to clarify their address when most people likely will not receive the notice. (Record Entry No. 27, p 30; ROA p 567). Defendants observe that the notice is sent subject to forwarding so if the person has moved and provided forwarding information, there is no reason to

⁶³ See MCL 168.523a.

believe that person will not receive notice. (Record Entry No. 15, Exhibit A, ¶ 6; ROA pp 340-341). The court further noted that even if notice is received, many people will fail to fill out the form, or fill out the form incorrectly. Finally, the court observed that even individuals who return the reply cards will have been wrongfully taken off the rolls until their registrations are reactivated. (Record Entry No. 27, p 30; ROA p 567).

With respect to these last concerns, 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, 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 for or at the least contributes to any harm suffered as an actual result of the rejection. Furthermore, Defendants fail to see what harm a person suffers as a result of being erroneously identified in the QVF, when that fact will not result in a wrongful disenfranchisement.

Finally, the district court noted that neither side had data demonstrating how many of the persons identified as rejected 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." (Record Entry No. 27, Opinion & Order, p 31; ROA p. 568).⁶⁴

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 if a preliminary injunction is not entered." (Record Entry No. 27, Opinion & Order, p 31; ROA p 568). Despite this concern, the court "conclude[d] that although the number of plaintiffs' members likely to be adversely affected by the practice is relatively low, these members face certain irreparable harm." (Record Entry No. 27, Opinion & Order, p 31; ROA p. 568)

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, with respect to at least one of their members. With respect to Plaintiffs' and the court's assumption that errors will occur in the delivery or addressing of mail, Defendants observe that NVRA specifically incorporates and relies upon use of the United States Postal Service. Thus, Congress found the Postal Service sufficiently reliable to build its services into a federal act.

⁶⁴ State Defendants submit that the likelihood of error in the address of an applicant's materials is minimal since the QVF utilizes a statewide street index to confirm addresses. See MCL 168.509p(d).

Accordingly, the State's use of the same service is consistent with NVRA, and Plaintiffs' claims of harm should have been viewed with that fact in mind.

As set forth above, sections 499 and 500c do not violate NVRA. NVRA does not prohibit Defendants from enforcing statutes implementing the qualifications to vote, and ensuring an accurate voter registration list.

Additionally, 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 ultimately end in the wrongful disenfranchisement of any eligible voter.

Plaintiffs clearly have not sufficiently alleged any irreparable harm that would weigh in favor of granting a preliminary injunction as to this practice, and under these circumstances the district court abused its discretion by concluding otherwise.

F. The district court abused its discretion when it concluded that the balance of harm weighed only slightly in favor of Defendants.

The balance of harm clearly and substantially weighs in favor of Defendants in this case. In analyzing this factor, the court acknowledged that the injunction would impose administrative difficulties on Defendants, but concluded that the balance of harm to Defendants weighs only slightly against the entry of a preliminary injunction because the harm was "largely self-imposed." (Record Entry

No. 27, Opinion & Order, p 32; ROA p. 569). The court observed that NVRA was clear enough that "defendants should have been on notice of the potential that they might be found unlawful," and that "plaintiffs explained their objections to these practices to the defendants as early as July, 2007 [sic]." (Record Entry No. 27, Opinion & Order, p 33; ROA p. 570).

With respect to the undeliverable card practice, the court ignored the fact that Defendants have been operating for the last 13 years under *Association of Community Organizations for Reform Now (ACORN) v Miller, et al*, in which that district court held that MCL 168.499 and 500c were not unlawful under NVRA based on similar arguments.⁶⁵ Contrary to the court's belief, the laws are the same today as they were when presented to that court, and there was no reason for Defendants to believe the practice was now somehow unlawful.⁶⁶ Moreover, these statutes were precleared by the Department of Justice in 2004. (Record Entry No. 15, Exhibit A, ¶ 5, Attachment 1; ROA pp. 345-347). Under these circumstances, it was not unreasonable for Defendants to continue this practice.

Similarly, with respect to the out-of-state cancellation practice, Defendants sought informal guidance from the relevant federal officials in 1996, and were

⁶⁵ *ACORN*, 912 F Supp 976.

⁶⁶ The court read MCL 168.509o(2), as rendering the *ACORN* decision irrelevant. However, that statute was part of the Act before that court, and although the substance of it was not effective until 1998, that subsection does not supplant MCL 168.499 or 500c or invalidate any of the court's reasoning in that case. (See Record Entry No. 14, Response to injunction, pp 20-23; ROA pp. 319-321).

informed that the practice was consistent with NVRA. (Record Entry No. 15, Exhibit A, ¶ 8 and Attachment 5; ROA pp. 341-342, 360-361). It was not unreasonable for Defendants to be unpersuaded by the self-interested arguments set forth in the July 2008 letter from the Advancement Project.

Indeed, these facts weigh substantially in favor of Defendants and thus against granting the injunction. This was particularly true before the November 8 election where Plaintiffs were seeking to change established practices days before the election. However, the balance of harm continues to weigh in favor of Defendants. While Defendants have complied with the affirmative aspects of the court's injunction, the fact remains that Defendants continue to be prohibited from enforcing valid laws and practices that help implement the qualifications of voters and protect against fraud in voter registration, as well as maintaining an accurate roll.⁶⁷ Indeed, this Court has observed that a "State's interest in not having its voting processes interfered with . . . is great."⁶⁸ As long as the injunction remains in effect, names will continue to be added to the QVF, or will remain on the QVF, and accorded a status they appear not to be entitled to, whether because they are simply erroneous registrations or fraudulent registrations or are no longer residents of the State.

⁶⁷ *Summit County*, 388 F3d at 551.

⁶⁸ *Summit County*, 388 F3d at 551.

Accurate list maintenance is important, first because it is required both by HAVA and NVRA, and the failure to do so can lead to prosecution by the Department of Justice.⁶⁹ Second, there are other election processes that are affected by an inaccurate list of registered voters. For example, at the county and township level, signature requirements for local petition circulation are based on the number of “active” registered voters in the QVF for the jurisdiction.⁷⁰ Under the injunction, the names of persons who would normally have been identified as “rejected” under the undeliverable card practice and thus removed from “active” status now remain, thus inflating the number of “active” registered voters, and driving up the signature requirements. Similarly, now that the out-of-state cancellation procedure is enjoined, thousands of names that would have been removed from “active” status will remain in the QVF, keeping the number of “active” registered voters invalidly high, and thus affecting signature requirements.⁷¹ Additionally, an inflated number of registered voters effects administration at the local level because precinct size, numbers of voting stations,

⁶⁹ Indeed, the Department of Justice filed suit against Indiana pursuant to Section 8 of the NVRA to enforce the State’s obligations concerning voter registration list maintenance based on claims that Indiana’s rolls were inflated. See *United States v Indiana*, 2006 US Dist LEXIS 45640 (SD Ind, 2006).

⁷⁰ See MCL 45.502; MCL 141.133; MCL 42.6a; MCL 41.34(5); MCL 45.101; MCL 125.1262.

⁷¹ The next update to the QVF based on the out-of-state cancellation procedure would have been conducted on or around December 20, 2008.

and numbers of ballots to be printed, for example, are based on the number of registered voters in the jurisdiction.⁷² Thus, the balance of harms weighed and continue to weigh substantially in favor of Defendants, and the court abused its discretion in deciding otherwise.

G. The district court abused its discretion when it concluded that the public interest weighs in favor of granting the preliminary injunction.

Defendants submit that, on balance, the public interest weighs against granting the preliminary injunction for the same reasons that this Court has recognized in similar cases.⁷³ The public has a strong interest in seeing 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. Moreover, the US Supreme Court has recognized that, court orders, especially conflicting orders, affecting elections can themselves result in voter confusion and cause a chilling effect.⁷⁴

Additionally, the district court agreed that Defendants were "rightly concerned that some, and perhaps many, of the 'rejected' voter registrations were

⁷² See Rule 168.772(2); MCL 168.658; MCL 168.659; Rule 168.774(6); MCL 168.796(a).

⁷³ See *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.

⁷⁴ See *Purcell v Gonzales*, 549 US 1, 7; 127 S Ct 5; 166 L Ed 2d 1 (2006).

fraudulent." (Record No. 27, Opinion & Order, p 34; ROA p. 571). However, the court then inexplicably discounted that concern. The public certainly has an interest in seeing Legislation enforced that helps deter and protect against fraud in the election process. 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."⁷⁵ And in fact Michigan has had first-hand experience in recent years, including 2008, with fraudulent voter registrations. Nothing in NVRA suggests that Congress is no longer concerned with fraud, or that States should not be.

Accordingly, the public interest weighs against granting the injunction as to these practices, and the district court abused its discretion in holding otherwise.

⁷⁵ *Crawford*, 128 S Ct at 1618, 1619-1621; *Purcell*, 549 US at 3-4.

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,

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Dated: November 21, 2008