UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendants.
______________________________________/

Case No.

Hon.

REQUEST FOR EXPEDITED CONSIDERATION

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

ISSUES PRESENTED

1. Does Defendants' practice of purging Michigan voters upon information that the affected voter has applied for and/or received an out-of-state driver's license violate Michigan election law and/or the National Voter Registration Act of 1993?

   Plaintiffs state "Yes"

2. Does Defendants' practice of removing from Michigan's Qualified Voter File newly-registered voters whose original voter identification cards are returned by the post office as undeliverable violate the National Voter Registration Act of 1993, the Civil Rights Act and/or the First and Fourteenth Amendment of the United States Constitution?

   Plaintiffs state "Yes"

3. Are Plaintiffs entitled to injunctive relief where they have a reasonable likelihood of success on the merits; they will likely suffer irreparable harm if Defendants' activities continue; the balance of the hardships weigh in Plaintiffs' favor; and the impact of the injunction is on the public interest?

   Plaintiffs state "Yes"

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I. INTRODUCTION

Through this Motion, Plaintiffs United States Student Association Foundation ("USSA"), American Civil Liberties Union Fund of Michigan ("ACLU Fund") and American Civil Liberties of Michigan ("ACLU") (together, "Plaintiffs") seek an injunctive order prohibiting the Michigan Secretary of State, Michigan Director of Elections, and City Clerk for the City of Ypsilanti, Michigan (together, "Defendants") from engaging in actions that violate both federal and state laws protecting the rights of Michigan residents to vote. Absent the requested injunction, qualified Michigan voters will be disfranchised and unable to vote in the November 4, 2008 election. Intervention by this Court is necessary to preserve for Michigan residents their fundamental rights, as citizens of Michigan and the United States, to vote in the November election.

This lawsuit addresses two practices related to the improper removal of voters from Michigan's Qualified Voter File. Through such practices, thousands of voters have been, and will continue to be, improperly disfranchised in Michigan.

The first practice involves the purging of Michigan voters upon an unverified assumption that they have moved out of the state of Michigan. In Michigan, unlike many other jurisdictions, the Secretary of State administers both driver's licenses and voter registration. When an individual applies for or receives a driver's license in a different state, the Secretary is notified by the cooperating state motor vehicle licensing bureau that the individual has surrendered her Michigan driver's license and applied for a license in another state. Upon receipt of this information, Defendants immediately cancel the voter's registration and remove the voter's name from the precinct voting list. There are several reasons why many Michigan residents apply for out-of-state driver's licenses while maintaining their Michigan residency. Defendants' practice of removing residents from the Michigan voting rolls upon information that

the resident has applied for an out-of-state driver's license is contrary to both federal and state law, both of which provide safeguards to voters and expressly prohibit the immediate cancellation of voter registrations.

The second practice relates to the removal from Michigan's Qualified Voter File of newly-registered voters whose original voter identification cards are returned as undeliverable. Rather than affording such voters the opportunity to confirm their residency and correct any errors – as required by federal law – Defendants summarily remove the voters from the rolls. The practice, albeit consistent with Michigan's Election Law, violates the National Voter Registration Act of 1993, the Civil Rights Act and the First and Fourteenth Amendments of the United States Constitution.

Absent a preliminary injunction, Defendants will continue to engage in these unlawful practices and will cause severe and irreparable harm to Plaintiffs and their constituencies.

II. FACTS

A. Plaintiffs

1. United States Student Association Foundation

The United States Student Association Foundation ("USSA") was founded in 1947 and is the country's oldest and largest national student-led organization. See Exhibit 1, Declaration of Carmen Berkley, ¶ 2 (attached hereto as Exhibit 1). USSA develops current and future leaders and amplifies the student voice at the local, state, and national levels through grassroots mobilization efforts. USSA is dedicated to training, organizing, and developing a base of student leaders who are utilizing those skills to engage in expanding access to higher education and advancing the broader movement for social justice. A cornerstone of USSA's activities is "helping students make their voice heard at the ballot box," including through non-

partisan voter registration drives. In that regard, USSA's national electoral project focuses on building strong peer-to-peer student electoral coalitions and maximizing voter turnout among young adult voters, particularly on college campuses in Michigan. See Exhibit 1, Berkley Decl. at ¶ 3. USSA employs a statewide field organizer in Michigan whose duties include organizing voter registration and get-out-the-vote ("GOTV") activities at Michigan colleges and universities including the following schools located in the Eastern District of Michigan: Eastern Michigan, University of Michigan -- Ann Arbor, Oakland University, Saginaw Valley State University, University of Michigan at Dearborn and Western Michigan University.

2. The American Civil Liberties Union Plaintiffs

Plaintiffs ACLU Fund of Michigan ("ACLU Fund") and ACLU of Michigan (ACLU) are nonprofit organizations that engage in public education and lobbying about civil rights and civil liberties in the state of Michigan. See Exhibit 2, Declaration of Kary L. Moss, ¶¶ 2,3. The ACLU of Michigan has approximately 15,000 members with approximately 6,000 members located within the Eastern District of Michigan, most of whom are registered voters. Id. at ¶ 3. Members of the ACLU of Michigan support its mission which is to protect and defend civil liberties. Id. As such, members are civic activists with a strong interest in voting, efficient and fair elections, and equal access to the ballot. Id. The ACLU Fund is extensively involved in a variety of voter empowerment initiatives throughout Michigan, including voter education, collection and analysis of voting irregularities, advocacy for positive election reform, and – when necessary – litigation to ensure the protection of voters' rights under the law. Id. at ¶5. The ACLU of Michigan is likewise dedicated to equal protection of the laws, including issues of racial justice and equality. Id. The ACLU Fund and the ACLU of Michigan are both headquartered at 2966 Woodward Avenue, Detroit, MI 48201. Id. at ¶ 4.

B. Voter Qualifications and Registration Procedures in Michigan

To be eligible to register to vote in Michigan, a person must be a United States citizen and, by the time of the next election following registration, must be at least 18 years of age; a resident of Michigan for at least 30 days; and a resident of the city, township, or village in which he seeks to be registered. MCL § 168.491. Under Michigan's Election Law and the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg et seq. ("NVRA"), a qualified Michigan citizen may to register to vote in a number of ways. She may register in person before the clerk of the county, city, township, or village where she resides; or at a Secretary of State branch office, a public assistance agency, an armed forces recruitment center, or a number of other designated state, federal, and nongovernmental agencies. 42 U.S.C. §§ 1973gg-2, 1973gg-3, 1973gg-5; MCL §§ 168.492, 168.499, 168.500a, 168.509u. The NVRA and Michigan law also allow voters to register by mail. 42 U.S.C. § 1973gg-4; MCL § 168.509t, 168.509u.

Regardless of which method of registration a person chooses, Section 8 of the NVRA requires Michigan's election officials to "insure that any eligible applicant is registered to vote in an election" whenever a valid voter registration form is received or postmarked on or prior to 30 days before the date of the federal election.[1] 42 U.S.C. § 1973gg-6(a)(1). Section 8 also requires Michigan's election officials "to send notice to the applicant of the disposition of the application," 42 U.S.C. § 1973gg-6(a)(2), and prohibits election officials from removing any registered voter from the rolls except at the request of the registrant, the death of the registrant,

[1] In addition, Michigan law states that an application received through the mail with a missing or illegible postmark is considered timely received if it arrives within seven days of the close of registration. MCL § 168.509x(c).

or pursuant to the confirmation of registration procedures set forth in subsections (b), (c), and (d) of Section 8. 42 U.S.C. § 1973gg-6(a)(3) and (4).[2]

Section 303(a) of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15483(a), mandated that all states develop and maintain a single, uniform computerized voter registration database for administration of all federal elections by January 1, 2006. Michigan has maintained a statewide voter registration database, known as the Qualified Voter File (the "QVF"), since the 1998 election cycle. The QVF links local election officials throughout the state to a fully automated, interactive statewide voter registration database. See The Michigan Qualified Voter File: A Brief Introduction, available at *http://www.michigan.gov/sos/0,1607,7-127-1633_11976_12001-27157--,00.html*, attached hereto as Exhibit 3. The QVF was established by and is maintained by the Michigan Secretary of State. MCL 168.5090. Data entry procedures for the QVF are described in the Voter Registration Module (January 1, 2003), available at *michigan.gov/documents/sos/Ch_1_VoterReg_200863_7.pdf*, attached hereto as Exhibit 4. Upon receipt of the voter's registration form, the clerk enters the voter's information into the QVF and either prints or queues the voter identification card to be sent to the voter. Id. at 1-5 – 1-11, 1-19. At that point, the voter is considered registered, regardless of whether the voter ID card has been received by the voter or even sent out. The voter ID card is simply the "disposition notice" required by Section 8(a)(2) of the NVRA, signaling that the voter has successfully registered.[3] 42 U.S.C. § 1973gg-6(a)(2). Indeed, once the voter's name is entered into the QVF, the voter may check his registration status online at the Michigan Department of

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[2] The NVRA also allows voters to be removed from the rolls, as provided by state law, by reason of criminal conviction or mental incapacity; however, Michigan Election Law does not provide for removal of voters from the rolls on either of those bases.

[3] A voter does not need to present a voter ID card in order to vote. Voter Information Center Frequently Asked Questions, Exhibit 5.

State's Voter Information Center. See Exhibit 6. As long as the voter's information is in the QVF, even if the voter identification card is still waiting in a queue to be printed, the voter is directed to a webpage that states: "Yes, You Are Registered!" Id. A person who appears to vote at an election and whose name appears in the QVF is likewise considered a registered voter under the Michigan Election Law. MCL § 168.509o(2).

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

Michigan's Election Law requires city and township clerks to issue a voter identification card to any applicant that the clerk determines to be qualified to vote, based on the applicant's completed voter registration application. MCL §§ 168.499(3), 168.500c. After the voter's identification card is generated, it is forwarded to the voter by first-class mail. MCL § 168.499(3). However, the Michigan statute also provides that if the elector's *original* voter identification card is returned as undeliverable, "the clerk shall reject the registration and send the individual a notice of rejection," MCL § 168.499(3); that the returned original ID card is to be attached to the voter's completed registration application, MCL § 168.500c; and that "the person shall be deemed not registered," MCL § 168.500c (the "Cancellation Procedure"). Thus, under this statutory provision, the voter who has completed an application, whose name has been added to the QVF, and who has been told by the Secretary of State: "Yes, You Are Registered!" is deemed not registered and removed from the voting rolls. Voter Registration Module, Exhibit 4 at 1-36. This Cancellation Procedure, which relates only to original voter identification cards, conflicts with the express provisions of Section 8(a)(3) of the NVRA, which prohibit the immediate removal of registered voters from the rolls under such circumstances. The Cancellation Procedure also serves to disfranchise qualified Michigan voters whose original cards are returned as undeliverable merely due to postal error, clerical error, inadvertent routing

within a multi-unit dwelling, and even simple misspelling or transposition of numbers in an address.

By contrast, if a voter's *duplicate* voter identification card is returned as undeliverable, Michigan law instructs the local clerks to "accept this as information that the elector has moved and . . . proceed in conformity with section 509aa," which is Michigan's counterpart to Section 8(d) of the NVRA. MCL 168.499(3).[4] If the confirmation of registration notice sent out pursuant to MCL § 509aa is likewise returned as undeliverable, the clerk is instructed to mark the voter's registration record as "challenged," which triggers an obligation on the poll worker to inquire further into the voter's qualifications when he or she appears to vote, but still provides the voter the opportunity to cast a ballot. Id.

D. Defendants' Immediate Purging of Voters Who Are Presumed to Have Changed Residence

Michigan's Election Law contains several sections addressing protocol related to registered voters who change residence. See e.g., MCL §§168.507, 507a, 509, 509aa. Defendants' Voter Registration Module instructs that, whenever a clerk receives "reliable information" that a registered voter has moved to another jurisdiction, the voter's status is changed to "Verify," and a precinct list code is added to alert poll workers to verify the voter's residence in the jurisdiction before issuing a ballot. Voter Registration Module, Exhibit 4 at 1-25. The clerk also generates and sends out a Confirmation Notice of Cancellation ("Notice") to the voter. Id. If the Notice is returned as undeliverable, the voter's status is changed to "Challenge - Residency." Id. The voter's status will be changed to "Cancel" on the QVF only if

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

the voter confirms that he has moved out of the jurisdiction or there has been no response from the voter after the second November General Election held in even numbered years after the Notice was sent. Id. This procedure is consistent with both federal and state law. See MCL §168.509aa; see also 42 U.S.C. §1973gg-6.[5]

While mandated by the above-referenced statutes, however, this procedure is not followed under circumstances where Defendants receive notice from a cooperating state motor vehicle licensing bureau that an individual has surrendered his or her Michigan driver's license and applied for a driver's license in another state.[6] Upon receipt of such information, the voter's registration is immediately cancelled and the voter's name is removed from the precinct list (the "Purging Procedure"). Voter Registration Module, Exhibit 4 at 1-33; see also Exhibit 7, Mich. Dept. of State, News You Can Use, Issue 255 (October 11, 2006). Defendants further instruct the local city or township clerk to issue a "30-Day Notice of Cancellation (Out of State)" ("30-Day Notice") to the affected voters. Voter Registration Module, Exhibit 4 at 1-33. The 30-Day Notice specifically informs the affected individuals that their registration will be canceled in 30 days unless they return the postage-paid return card attached to the 30-Day Notice. Id.; see also Exhibit 8, 30-Day Notice of Cancellation (Out of State). The 30-Day Notice does not inform affected voters that their names have *already been removed* from the precinct voter rolls and that, unless their status is returned to "Active," they are *already* unable to vote. To return to "Active"

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[5] The NVRA provides that a voter may not be removed from a voter lists unless (1) he requests removal; (2) state law requires removal by reason of criminal conviction or mental incapacity; (3) he has confirmed in writing that he has moved outside of the jurisdiction maintaining the specific list or he both has failed to respond to the NVRA cancellation notice and (b) has not voted or appeared to vote in the two federal general elections following the date of that notice. 42 U.S.C. §1973gg.

[6] Michigan's Department of State administers both driver's license and voter registration records.

status, a voter must affirmatively notify the state within 30 days that he or she wishes to remain registered to vote in Michigan. Voter Registration Module, Exhibit 4 at 1-33.

Plaintiffs' members, for various reasons, may procure a driver's license in a state other than Michigan while intending to maintain their Michigan residency for purposes of voting. Students who spend eight or nine months per year at an out-of-state college, or citizens who spend several months per year in a warmer climate often elect to obtain an out-of-state driver's license while maintaining their Michigan residency. Indeed, in many states such individuals are required to obtain such driver's licenses.[7] As discussed below, these voters are being improperly and illegally disfranchised through Defendants' practice of immediately cancelling their voter registrations (the "Immediate Purging Practice"). According to Defendants' estimates, they cancel the registration of over 280,000 voters per year through this procedure. See Ex. A to the May 31, 2007 FOIA Response Ltr from R. Anastor to A. Beverley entitled "Qualified Voter File (QVF) System Activity and Processes."

E. Defendants' Position and Stated Intent to Maintain the Present Procedure

The next general election will be held on November 4, 2008, and presents the opportunity for Plaintiffs' members to select individuals for federal, state and local offices. By correspondence dated July 8, 2008, co-counsel for Plaintiffs notified Defendants that its Cancellation and Purging Procedures violated federal law, and urged Defendants to discontinue such practices and to take remedial action to re-enfranchise affected voters. Exhibit 9, Letter

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

dated July 8, 2008 at pgs. 4-5, 6. Defendants responded by letter dated August 29, 2008. Exhibit 10.

As to the Purging Procedure, Defendants affirmed that voter registrations are indeed cancelled in this manner, and that the onus lies with the voter to "correct the record," stating that the change of address for purposes of a driver license constitutes a change of address for voter registration under federal law. Id. at 2. As to the Cancellation Procedure for newly-registered voters, Defendants maintained that the individuals whose registrations are cancelled upon return of the original voter ID cards had "never become registered voters," and, thus are not subject to cancellation. Id. Defendants neither agreed to alter their practices nor to reactivate the registrations of the affected voters. As discussed below, absent the requested injunctive relief, qualified voters who have been illegally disfranchised will be turned away when seeking to exercise their fundamental right to vote on November 4, 2008.

III. STANDING

Standing is "the threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498, 95, S. Ct. 2197, 45 L. Ed. 2d 343 (1975). An organization may have standing in its own right, as well as "associational" standing derived from the standing of its members. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 181 (2000). Here, Plaintiffs have both individual and associational standing to bring its claims.

An organization has standing to seek injunctive relief on its own behalf if: (1) it will suffer an imminent injury in fact that is "concrete and particularized"; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-561. In the context of voting rights cases, as the Sixth Circuit recently explained, an

organization need not identify the specific individual voters who will suffer harm in order to establish standing:

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

Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004); see also Village of Elk Grove v. Evans, 997 F.2d 328, 329 (7th Cir. 1993) ("[E]ven a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the hypothetical – provided of course that the relief sought would, if granted, reduce the probability."). An organization may also establish an imminent and concrete injury in fact by proving that a challenged practice will frustrate its mission. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); See also, Hughes v. Peslina, 96 Fed. Appx. 272,274 (6th Cir. 2004).

Plaintiffs clearly meet these requirements. First, civic engagement, including the registration of voters, is critical to Plaintiffs' organizational mission of empowering the communities that they serve. As discussed in greater detail below, Defendants' activities disfranchise these communities and thus frustrate Plaintiffs' mission. Second, the causal connection is beyond dispute. Qualified voters whom Plaintiffs serve would be able to vote but for Defendants' actions; this disruption is the causal act frustrating Plaintiffs' missions. Finally, a favorable decision in this case would redress Plaintiffs' injuries by reinstating the voters who were wrongfully removed from the voting rolls and preventing further disfranchisement. Thus, Plaintiffs have clearly established standing to proceed in its own right.

Moreover, Plaintiffs have associational standing in this matter. "[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, 528 U.S. at 181. Plaintiffs need not have the "oracular vision," Elend v. Basham, 471 F.3d 1199, 1207 (11th Cir. 2006), to demonstrate the particular member to be injured in the 2008 election in order to demonstrate standing, as long as the threat of future harm is real and immediate. See NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 468 (S.D.N.Y. 2004) ("There is [] no absolute requirement that individual members be identified in order to confer organizational standing."). As discussed below, it is clear that Plaintiffs' members are threatened with real and immediate harm by the burdens placed on registration; it is clear that Defendants' actions would be the cause of such harm; and it is clear that the requested injunction would redress the injury. Plaintiffs therefore have associational standing in this matter as well.

IV. ARGUMENT

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

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

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

"It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." In re Eagler-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1992). Thus, "the degree of likelihood of success that need be shown . . . will vary inversely with the degree of injury the plaintiff will suffer absent an injunction." Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982) (internal citation omitted).

As demonstrated below, each of the factors weighs in favor of the Plaintiffs and, accordingly, the Court should grant Plaintiffs' request to impose a preliminary injunction against Defendants.

A. Plaintiffs Have a Strong Likelihood of Success on the Merits of Their Claims

1. Claims Arising from the Purging Procedure

a. Defendants' Immediate Purging Practice Violates 42 U.S.C. §1983, Section 8(d) of the NVRA and M.C.L. § 168.509aa

Plaintiffs bring this claim under 42 U.S.C. § 1983 as well as the National Voter's Registration Act ("NVRA") and Michigan's Election Law. To establish a claim under 42 U.S.C. § 1983, two elements must be satisfied: (1) there was a deprivation of a right secured by the Constitution or the laws of United States and (2) that deprivation was caused by a person acting under the color of state law. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 205 (1990). As discussed below, Defendants, acting for the Department of State in their official capacities, have violated Section 8(d) of the NVRA as well as § 168.509aa of Michigan's Election Law through its immediate Purging Practice.[8]

[8] The NVRA creates a privately enforceable cause of action when notice of the violation is timely provided. *See* 42 U.S.C. §1973gg-9 (allowing aggrieved party to bring a civil action if the violation is not corrected within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for (continued...)

Under the Michigan statute, whenever election officials receive "reliable information" that a voter has moved from the city or township where the voter is registered, they are required to send notice to the voter setting forth specific protections – protections allowing the voter to clarify whether he, in fact, has moved. Specifically, the clerk must provide:

> (a) A notice that the clerk has received information indicating that the voter has moved his her residency to another city or township.
>
> (b) A postage prepaid and preaddressed return card on which the voter may verify or correct the address information.
>
> (c) A notice containing all of the following information:
>
> (i) If the address information is incorrect and the voter has not moved to another city or township and wishes to remain registered to vote, the voter should complete and return the card to the clerk with a postmark of 30 days or more before the day of the next election. If the card is not completed and returned with a postmark of 30 days or more before the date of the next election, the voter may be required to affirm his or her current address before being permitted to vote. Further if the voter does not vote in an election within the period beginning on the date of the notice and ending on the first business day immediately following the second November general election that is held after the date on the notice, the registration of the voter will be cancelled and his or her name will be removed from the registration record of that city or township.
>
> ***

MCL §168.509aa(3)(c)(3). While the Michigan statute does not define "reliable information," it does not carve out any specific type of information from its scope, and it clearly does not allow for immediate cancellation of the voter's registration. Id.; see also NVRA, 42 U.S.C. § 1973gg-

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(continued...)

Federal office). On July 8, 2008, proper notice was provided to Defendants. Exhibit 9. No notice is required under Michigan's Election Law.

6 (prohibiting removal of voter from voting rolls absent written confirmation from voter, or the passage of two general election cycles).[9]

Defendants, in treating the driver license information as conclusive of residency, certainly give every appearance of treating such information as "reliable information" that a voter has moved. That notwithstanding, Defendants employ a policy that immediately cancels the voter's registration – an act that terminates the individual's right to vote in Michigan – rather than providing the protections mandated by MCL § 168.509aa and Section 8(d) of the NVRA. Voter Registration Module, Exhibit 4 at 1-33. Under the Federal statute, absent confirmation in writing by the voter of a change of residency, Defendants must wait the span of two federal general election cycles before cancelling the voter's registration and removing him from the rolls 42 U.S.C. § 1973gg-6(d)(1)(B). Under the Michigan statute, the voter retains her right to vote, but "may be required to affirm his or her current address before being permitted to vote." MCL

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

> (d) Removal of names from voting rolls.
>
> (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--
> (A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
> (B) (i) has failed to respond to a notice described in paragraph (2) [requesting voter confirm change of address]; and
> (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

42 USC §1973gg-6(d).

§ 168.509aa(3)(c)(i).[10] These protections afforded to Michigan voters by these statutes clearly leave no room for Defendants to ***cancel*** the voter's registration while "providing [the voter] an opportunity to correct the record." Thomas Letter, Exhibit 9 at 2.

Defendants may argue that its procedure in this regard complies with Section 5(d) of the NVRA, which states, "[a]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes." 42 U.S.C. § 1973gg-3(d) (emphasis added). As a result, to be compliant with this section the change of address form must allow the voter to specify that the change of address is not for voting registration purposes. 42 U.S.C. §1973gg-3(d). As the legislative history of the Section explains:

> The requirements of residency pertaining to driver's licenses may vary from those pertaining to voting; therefore, this provision will permit a person to indicate that a change of address notification to the motor vehicle agency is not intended to effect a change in the address for voting purposes and should not be forwarded to the voting registrar.

See H.R. Rep. 103-9, H.R. Rep. No. 9, 103RD Cong., 1993 U.S.C.C.A.N. 105 (Feb. 2, 1993) (relevant portions attached hereto at Exhibit 11).

Defendants implement the 30-day cancellation procedure upon notice that an individual has surrendered her Michigan driver's license and not based on a change of address

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[10] If the voter does not appear to vote, Defendants may cancel the registration and remove the voter from the rolls, but not until "the first business day immediately following the second November general election that is held after the date on the notice." Id. See also M.C.L. §168.509aa(4) (providing that, if notice is returned as undeliverable, the clerk shall identify the voter as "challenged" and allow the challenged voter to cast a regular ballot upon indication that the voter resides at the registered address).

form compliant with the NVRA. Section 5(d) of the NVRA deals with change of address forms only. Here, Defendants are not relying on a change of address form. By the clear language of the statute, this provision does not apply to the facts of this matter.[11] Moreover, Defendants proceed to remove individuals from the precinct lists and cancel registrations without critical information required by this provision of the NVRA, namely, whether the voter specified that the new address is for voting purposes as well as driving purposes.

The harm posed by Defendants' practice is real, and, if not stopped, will prevent Plaintiffs' members from voting in the November 4, 2008 election. A tangible example of those at risk are students attending out of state colleges. A college student may be required to apply for a driver's license in the state where she attends school, while maintaining residency in her home district of Michigan. As discussed above, in many states, if an individual is present in the state for a certain period of time, or takes certain actions, such as signing a lease or taking a job, she is ***required*** to register her vehicle and obtain a driver's license in that state, even if her permanent residence is in Michigan. See p. 10, *supra*. On November 4, 2008, such a student will appear to vote in Michigan and will be turned away because her name does not appear on the precinct list, rather than having the opportunity to affirm her residency in the precinct and cast a regular ballot as provided by Michigan's election law. See, M.C.L. §168.509aa(3)(c)(i). Defendants' policy and practice runs squarely afoul of both Section 8(d) the NVRA and the Michigan's Election law.[12] Plaintiffs will succeed on the merits of their claims.

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[11] It is equally apparent that this section only deals with intrastate drivers license forms and was not intended to apply in this circumstance. Specifically, only someone already licensed to drive in one state can subsequently change his address as to that license.

[12] Indeed, this procedure also runs afoul of 42 U.S.C. §1973aa-1(e) which provides that any individual who changes his residency within thirty days of a Presidential election may be allowed to vote in the state of his previous residency if he has not satisfied the registration requirements of his residential state prior to the (continued...)

2. Claims Arising from the Cancellation Procedure

a. The Cancellation Procedure Violates Section 8(d) of the NVRA

Section 8(a)(1) of the NVRA imposes an obligation upon states to register qualified voters immediately upon receipt of their properly completed voter registration forms. 42 U.S.C. § 1973gg-6(a)(1). Section 8(a)(2), in turn, obliges states to send voters a disposition notice concerning their registration. 42 U.S.C. § 1973gg-6(a)(2). Finally, Section 8(a)(3) prohibits states from removing voters from the rolls, except for reasons specified in the statute.

Section 8(d) of the NVRA provides explicit protections to registered voters, setting forth the specific circumstances under which a name may be removed from the voter rolls by reason of suspected change of residence. Pursuant to section 8(d), a state is expressly prohibited from removing a voter's name until the voter confirms his or her change of address in writing or, in the event that a notice is sent and the voter fails to respond to it, until after the period of two general election cycles has expired. 42 U.S.C. § 1973gg-6(d).

Once a registrant's name appears on the official list of eligible voters, Section 8(d) provides the only method by which such name may be removed on the ground that the registrant has changed residences. MCL §§ 168.499(3) and 168.500c, which provide for the immediate removal of newly registered voters from the voting rolls, violate and are preempted by Section 8(d) of the NVRA, 42 U.S.C. § 1973gg-6(d).[13]

(continued...)

election date. As a result, even those individuals who do intend to change residency are improperly disfranchised if they return to Michigan to vote only to discover they are no longer on the precinct voting list.

[13] See Charles H. Wesley Educ. Fdn., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005) (finding that the NVRA overrides all state laws which are inconsistent with its specific mandates); Project Vote, 455 F. Supp. 2d at 704 (same); cf. Wilson v. U.S., 1996 WL 297051, at *1 (N.D. Cal. May 31, 1996) (finding that provisions of the California elections code pertaining to the mailing of a nonforwardable voter notification card and the cancellation

(continued...)

Under Michigan's system of voter registration, a registrant's name appears on the official list of eligible voters, and the registrant is able to vote, once his or her name is entered into the QVF. See MCL § 168.509o(2) ("Notwithstanding any other provision of the 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.").[14]

As a matter of policy and practice in Michigan, this voter registration occurs *before* a voter ID card is issued – and thus before it can be returned as undeliverable – since the QVF system itself generates the ID card in question. Id. at 1-19; see also Voter Information Center Frequently Asked Questions, Exhibit 5 (explaining that voters "must register at least 30 days before the election. This gives the clerk time to process the forms and send you a Voter Identification Card."). Indeed, once a voter's information is entered into the QVF, the voter can check his or her registration status online at the Secretary of State's Web Voter Information Center, available at *https://services2.sos.state.mi.us/mivote/votersearch.aspx*. The voter enters

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(continued...)

of registration upon receipt of information from the postal authorities were inconsistent with and preempted by the NVRA).

[14] In ACORN v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995), the court relied on MCL § 168.500c to hold that a voter was not "registered" under Michigan law until he or she receives a voter identification card. However, this case was decided in 1995, well before § 168.509o(2) became effective. MCL § 168.509o(2), which expressly supersedes any law to the contrary, provides that a voter is "considered a registered voter" when his name is entered into the QVF and he appears to vote in an election – *not* when he receives a voter ID card. Thus, Plaintiff respectfully submits that the portion of the decision in ACORN that holds that registration does not occur until a voter ID card is received (which is not binding on this court in any event) has been legislatively overruled. In addition, irrespective of the intervening legislative change, the district court's nonbinding opinion in *ACORN v. Miller,* which relied principally on Michigan's determination of when a voter was "deemed" registered, did not give proper weight to the preemptive nature of the NVRA's mandate that states "insure that any eligible applicant is registered to vote in an election" when the properly completed form is timely received by the election official. *Cf.* 42 U.S.C. § 1973gg-6(a)(1). Thus, while the NVRA does require that a disposition notice to be sent to the voter, *cf.* 42 U.S.C. § 1973gg-6(a)(2), it does not allow a local registration authority to delay or deny voter registration to an individual based on that individual's receipt or non-receipt of that notice. Neither does Michigan's own law condition voter eligibility and qualification on receipt of a piece of first-class mail. *Cf.* MCL § 168.492.

his or her name, month and year of birth, and zip code. As long as the voter's information is in the QVF, even if the original voter ID card has not yet been mailed out, the voter will be directed to a webpage that states unequivocally: "Yes, You Are Registered!" Id. The webpage does not tell the voter that he or she is subject to later being "deemed not registered" if the original voter ID card goes astray. Id.

If an original voter ID card is returned as undeliverable, the voter remains in the QVF, but her status code is changed from "Active" to "Rejected" and her name is removed from the precinct list. Id. at 1-36. By the time the ID card is issued, mailed out, returned to the registrar and the QVF is updated, the "rejected" voter who is "deemed not registered" under MCL § 168.500c may well have voted already. Conversely, where an ID card is returned and a voter's registration status changed to "Rejected" shortly before an election, the voter – particularly a voter who has already been assured by the Secretary of State that "Yes, You Are Registered!" – is unlikely to become aware of that fact in time to remedy it, and thereby will lose the opportunity to vote.

It is clear that, under MCL § 168.509o(2), a voter is "registered" when his or her information is entered into the QVF and he or she subsequently appears to vote. Nothing in Section 168.509o(2) permits a voter in the QVF to be removed from the precinct list and denied the right to vote if the voter's original ID card is returned as undeliverable. As such, the procedures mandated by MCL §§ 168.499(3) and 168.500c constitute a "removal of names from voting rolls" and must comport with Section 8(d) of the NVRA. See 42 U.S.C. § 1973gg-6(d). The immediate removal of a registered voter from the voting rolls, as currently practiced by Defendants pursuant to their Voter Registration Module, directly conflicts with section 8(d) and deprives voters of the protections afforded by the NVRA.

b. The Cancellation Procedure Violates 42 U.S.C. § 1983 and Section 1971(a)(2)(A) of the Civil Rights Act

The Civil Rights Act provides in relevant part that:

> (2) No person acting under color of law shall –
>
> (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure difference from the standards, practices or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote. . . .

42 U.S.C. § 1971(a)(2)(A). The requirements of MCL §§ 168.499(3) and 168.500c violate the Civil Rights Act by applying different standards to equally-qualified voters – i.e., qualified newly-registered voters versus qualified previously-registered voters, and, as such, violate these Federal statutes.

The Michigan Constitution states:

> Every citizen of the United States who has attained the age of 21 years,[15] who has resided in this state six months, and who meets the requirements of local residence required by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.

Mich. Const. 1963, Art. 2, § 1. In other words, the Michigan Constitution provides that it alone sets forth the floor on qualifications for being an elector in Michigan: "except as otherwise provided in this constitution," no more stringent qualifications may be placed on electors. Id. Notably, the Michigan Constitution says nothing about registration as a "qualification" to be a voter; it certainly says nothing about the successful receipt of a voter ID card as a "qualification." Stated simply, possession of a voter ID card is not a qualification for being an

elector. Cf. Voter Information Center Frequently Asked Questions, Exhibit 5 ("You do not need to present a voter registration card in order to vote."). It is clear, then, that MCL §§ 168.499(3) and 168.500c govern the state's ability to regulate elections and *not* an individual's qualification to be an elector.

In practice, however, pursuant to MCL §§ 499(3) and 500(c) two individuals who are equally qualified to be electors under the Michigan Constitution, and whose voter ID cards are returned as undeliverable, are treated differently, simply because one is a first-time registrant and the other had previously registered. The latter will be afforded the chance on Election Day to confirm his or her residency, correct any clerical errors and cast a ballot. The former *equally qualified* individual will simply be disfranchised. This arbitrary difference in treatment is directly contrary to the Civil Rights Act.

Plaintiffs acknowledge McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000), in which the Sixth Circuit held that 42 U.S.C. § 1971(a) was *directly* enforceable only by the attorney general. However, the court did not consider whether private litigants have the ability to sue under 42 U.S.C. § 1983 to remedy a violation of their rights under 42 U.S.C. § 1971(a). Indeed, as pointed out by the Eleventh Circuit in Schwier v. Cox, 340 F.3d 1284, 1294-97 (11th Cir. 2003), private litigants have been enforcing § 1971 through suits authorized by 42 U.S.C. § 1983 since the latter was enacted in 1871. Moreover, "Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. . . . Once a plaintiff demonstrates

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[15] Under the United States Constitution, the voting age requirement has been changed to 18 years. U.S. Const., Am. XXVI.

that a statute confers an individual right, the right is presumptively enforceable by § 1983." Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002). Thus, Plaintiffs may vindicate their rights under § 1971(a) through § 1983.

c. The Cancellation Procedure Violates the "Materiality Provision" of the Civil Rights Act

The Civil Rights Act prohibits the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material to determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. § 1971(a)(2)(B). This section of the law, "often referred to as 'the materiality provision,' was designed to eliminate practices that could encumber an individual's ability to *register* to vote." Friedman v. Snipes, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004) (citation omitted). Congress adopted the materiality provision specifically "to deal with the problem of registering as a deterrent to voting." Condon v. Reno, 913 F. Supp. 946, 949-50 (D.S.C. 1995).

MCL §§ 168.499(3) and 168.500c violate the Civil Rights Act by denying the right of individuals to vote in an election because of errors that are not material to the individuals' qualifications as voters under Michigan law. In the course of processing hundreds or even thousands of voter registrations, it is virtually certain that clerical or other errors will occur that result in ID cards being returned as undeliverable. The Brennan Center for Justice, a non-partisan public policy and law institute, notes that "[s]imple typos may . . . infect voter records, changing a name or an identifying number or an address in a way that interferes with attempts to validate the voter's information against some other source." Justin Levit, The Truth About Voter Fraud at 7, Brennan Center for Justice (2007), available at *truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf*, attached hereto as Exhibit 12.

Clerical errors appear to be particularly prevalent in Detroit:

> election records are "plagued with mistakes and inconsistencies." . . . An analysis of voting by *The Detroit News* found, "Clerical errors so pervasive that it is difficult to determine in many instances who actually voted. Incorrect addresses . . . expired residencies; typographical errors in names and addresses; and garbled spellings are regularly recorded and kept on the city's active voter list."

In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 476-77 (Mich. 2007) (Cavanaugh, J., dissenting). Few would dispute that such errors almost certainly result in some original voter ID cards being returned as undeliverable, through no fault of the voter and without regard to the voter's qualifications.

Moreover, as anyone who has mistakenly received his neighbor's mail would attest, the United States Postal Service – while highly efficient – is not beyond the grasp of human error. Nor is the return of a voter ID card necessarily an indication that the voter does not live at the registered address. The Brennan Center for Justice notes a number of circumstances in which mail to properly qualified voters may be returned as undeliverable:

> A voter may be away from home for work, like a Louisiana Congresswoman challenged because she received her mail in Washington; or for military service, like an Ohio servicewoman challenged because she received her mail where she was stationed, in North Carolina; or for an extended vacation, like an Oregon woman rendered inactive because she was out of the country for a few months. A voter may live with others but be unlisted on the mailbox. Or, like Ohio resident Raven Shaffer, he may receive mail at a post office box or other mail service, and not at his registered residence. Moreover, some mail is simply not delivered, through no fault of the voter: in the 1990 census, for example, *The New York Times* reported that "[a]lthough at least 4.8 million [census] forms were found to be undeliverable by the Postal Service, 1.8 million of those were later delivered by hand." And recent reports found that government records used by Chicago postal workers to deliver mail contained more than 84,000 errors.

The Truth About Voter Fraud, Exhibit 12, at 10.

Minor errors or omissions – by the voter in filling out the registration forms, by the city or township clerk in entering the information into the QVF, or by the Postal Service in delivering the voter ID card – may result in the non-delivery of the voter ID card, and thus act as a bar to registration. Given the numerous innocuous reasons why a voter ID card may be returned as undeliverable, the successful receipt of a voter ID card is in no way material to whether an individual is qualified under Michigan law to vote. Indeed, MCL §§ 168.499(3) and 168.500c and Defendants' practice of cancelling newly registered voters upon return of the original voter ID card effectively upends the materiality provision of the Civil Rights Act, allowing non-material errors outside a qualified voter's control to determine his or her ability to remain on the voting rolls. Thus, Defendant's practice clearly violates the Civil Rights Act.

d. The Cancellation of Newly Registered Voters Whose Original Voter ID Cards are Returned as Undeliverable Violates the First and Fourteenth Amendments of the U.S. Constitution

The First and Fourteenth Amendments to the U.S. Constitution protect the right to vote as a fundamental right. See, e.g., Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (citation omitted). The right to vote extends to all phases of the voting process, including registration. See United States v. McLeod, 385 F.2d 734, 740 (5th Cir. 1967) ("The right to vote encompasses the right to register."); Condon, 913 F. Supp. at 949 ("[R]egistration, rather than being simply a mechanism to facilitate orderly elections, [may be] in fact a significant barrier to voting."); Bishop v. Lomenzo, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies.").

Laws that deny the franchise to qualified voters must be narrowly tailored to advance a compelling state interest. See Dunn v. Blumstein, 405 U.S. 330, 337 (1972). Even in

Burdick, in which the Supreme Court applied a "flexible test" to the analysis of voting restrictions, the Court nonetheless made it clear that courts still must apply strict scrutiny when the challenged practices impose severe burdens on voting rights. Burdick, 504 U.S. at 434. For voters whose original ID cards are returned as undeliverable, MCL §§ 168.499(3) and 168.500c impose the most severe of burdens: the complete denial of the right to vote. This burden severely impairs not only the fundamental voting rights of Plaintiffs' members, but also Plaintiffs own rights of expression and association under the First and Fourteenth Amendments. When Plaintiffs' constituents are disfranchised, it loses the concomitant strength in advocating in the political arena for its policy priorities. Cf. Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

Because the burden is so severe, the restrictions on voters must be narrowly tailored to a compelling state interest. The assessment of any election regulation requires a balancing of the interest of voters against the "precise interests put forward by the State" and an evaluation of "the extent to which those interests make it *necessary* to burden the plaintiffs' rights." Burdick, 504 U.S. at 434 (emphasis added); see also Crawford v. Marion Cty. Election Bd., 128 S.Ct. 1610 (2008) (reaffirming standard in Burdick). Regulations that are not sufficiently justified by the interest advanced to support them will be struck down. See New Alliance Party v. Hand, 933 F.2d 1568, 1576 (11th Cir. 1991) ("Although the Court finds that the burden imposed . . . is not insurmountable, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed."); McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) ("A regulation which imposes only moderate burdens could well fail the

[Supreme Court's] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.").

Here, the state has an interest in maintaining an orderly and accurate registry, and in preventing voter fraud. However, this interest is insufficient to justify barring qualified, newly-registered voters from the voting rolls. Even if the state's interest were compelling, the restrictions under MCL §§ 168.499(3) and 168.500c are not narrowly tailored to that interest, as demonstrated by the fact that the statute provides a different, and far less severe, means of achieving the state's interest under MCL § 168.509aa when a duplicate ID card is returned as undeliverable. Under that section of the statute, the voter must take steps to confirm his or her residency – thereby ensuring the integrity of the voting rolls – *but remains, and continues to remain, entitled to vote.* Unlike MCL §§ 168.499(3) and 168.500c, which severely burden voters without sufficient justification, MCL § 168.509aa is narrowly tailored to the state's interest and should apply whether the returned ID card is an original or a duplicate.

MCL §§ 168.499(3) and 168.500c also violate Plaintiffs' rights under the Equal Protection Clause. See Bullock v. Carter, 405 U.S. 134, 141 (1972) (in regulating elections, states' "power must be exercised in a manner consistent with the Equal Protection Clause"). Even when state regulation does not facially differentiate voters based on suspect categories, it will not withstand Equal Protection scrutiny if it unreasonably disfranchises a segment of the electorate without sufficient justification, since "[s]tates may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." Carrington v. Rash, 380 U.S. 89, 96 (1965); see also O'Brien v. Skinner, 414 U.S. 524, 530-31 (1974) (holding that "wholly arbitrary" statutes allowing detainees held outside home counties to vote while disfranchising detainees held within home counties "deny appellants the equal protection

of the laws guaranteed by the Fourteenth Amendment"); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

MCL §§ 168.499(3) and 168.500c arbitrarily and unreasonably cause different classes of equally qualified voters whose ID cards are returned to be disparately treated. Those qualified voters with undeliverable duplicate ID cards afforded the opportunity to confirm their residency and to vote, whereas those qualified voters with undeliverable original ID cards have no chance to confirm their residency and are summarily disfranchised. As noted above, no legitimate state interest justifies this disparate treatment, which is not "consistent with [the state's] obligation to avoid arbitrary and disparate treatment of the members of its electorate." Bush v. Gore, 531 U.S. 98, 105 (2000).

Accordingly, Plaintiffs have shown a strong likelihood of success on their constitutional claims.

B. Absent An Injunction the Plaintiffs Will Suffer Irreparable Harm.

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

(recognizing that "implicit in our constitutional system, a right to participate in state elections on an equal basis with other qualified voters"). The violation of a citizen's right to vote is the quintessential injury justifying an injunction. See, e.g., Touchston v. McDermott, 234 F.3d 1133, 1158-59 (11th Cir. 2000) ("[B]y finding an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made.")

As discussed above, the Purging Procedure initiated by Defendants with respect to individuals who have surrendered their Michigan driver's licenses abridges voters' constitutional right to vote. Moreover, the procedure does not conform to state and federal law. State and federal law provide a number of safeguards to ensure that, even where there is "reliable" information that an individual has moved, such individual is afforded the opportunity to demonstrate that he continues to reside in the jurisdiction and to vote on Election Day. Absent an injunction, many voters who are disfranchised by the Purging Procedure and whose names have been removed from the precinct lists will be unable to correct the problem in time to vote in the upcoming election on November 4, 2008. Defendants' refusal to implement these safeguards with respect to individuals who become licensed to drive in another state thus will cause irreparable harm to those individuals and to the plaintiff organizations that represent them.

The Cancellation Procedure followed with respect to newly-registered voters also abridges voters' constitutional right to vote. Although the Cancellation Procedure is in accordance with Michigan state law, that law violates and is preempted by the NVRA, the Civil Rights Act and the U.S. Constitution. Michigan law protects the right to vote of *some* voters whose ID cards are returned as undeliverable, while arbitrarily disfranchising other, equally qualified voters. Absent an injunction, many of these disfranchised voters, whose names have been removed from the precinct lists, will be unable to correct the problem in time to vote in the

upcoming election on November 4, 2008. The denial of the right to vote to newly-registered voters whose ID cards are returned as undeliverable will cause irreparable harm to those individuals and to the plaintiff organizations that represent them.

C. The Balance of Hardships Favors Issuance of an Injunction

The third factor in determining whether to issue a preliminary injunction also weighs in favor of Plaintiffs. This factor considers the "balance of hardships" between the parties. Blue Cross, 110 F.3d at 322. As discussed, the harm to Plaintiffs is substantial. If the requested relief is not granted, a number of otherwise qualified voters will be disfranchised. On the other hand, equitable relief will not impose any significant costs on the State. Defendants already have a computerized system in place that can easily track the affected voters, and is already set up to provide the types of notice and follow the procedures sought by Plaintiffs. See Voter Registration Module, Exhibit 4. To the extent that there may be some *de minimis* cost to the State to instruct registrars to stop using the Cancellation and Purging Procedures, that cost is far outweighed by the profound and irremediable hardship that the lack of an injunction will work on the eligible citizens of Michigan.

D. The Public Interest Mandates a Grant of Injunctive Relief

The public interest weighs strongly in favor of letting every qualified resident of Michigan register and cast a vote. See Charles H. Wesley, 408 F.3d at 1355. Protecting an individual's right to vote is "without question in the public interest," as is "removing the undue burdens on that right imposed by" the state. Id.; see also Bush, 531 U.S. at 109 (stating that the public interest is always served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted); Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005).

E. A Bond Is Not Required Under Fed. R. Civ. P. 65(c)

Because Defendants will not suffer material monetary loss due to the entry of preliminary injunctive relief, a bond is not required under Fed. R. Civ. P. 65(c).

V. REQUESTED RELIEF

For the foregoing reasons, Plaintiffs respectfully requests that the Court grant its Motion for a Preliminary Injunction and enter a preliminary injunction ordering Defendants:

> (1) to discontinue their practice of sending out 30-Day cancellation notices and immediately removing voters from precinct voting lists upon receipt of notice that such voters have surrendered their Michigan driver's licenses and/or applied for driver's licenses in another state;
>
> (2) to follow the confirmation of registration procedures set forth in Section 8(d) of the NVRA and MCL § 168.509aa upon receipt of notification that a Michigan voter has surrendered his or her driver's license and/or applied for a driver's license in another state;
>
> (3) to restore to "Active" status in the QVF all voters whose registrations (a) were cancelled pursuant to the 30-Day notice cancellation procedure between January 1, 2006 and the present and (b) have not been reactivated by other means, unless (x) Defendants have received a specific written request from an affected voter authorizing the cancellation of a particular registration, or (y) the affected voter is presently no longer qualified to vote under Michigan law by reason other than a change of address;
>
> (4) to discontinue the practice of immediately cancelling or rejecting a voter's registration based upon the return of the original voter identification card as undeliverable;
>
> (5) to treat the return of original voter identification cards in the same manner as the return of a duplicated identification cards;
>
> (6) to restore to "Active" status in the QVF all voters whose registrations (a) were cancelled or rejected pursuant to MCL § 168.500c between January 1, 2006 and the present and (b) have not been reactivated by other means, unless (x) Defendants have received a specific written request from an affected voter authorizing the cancellation of a particular registration, or (y) the affected voter is presently no longer qualified to vote under Michigan law by reason other than a change of address; and
>
> (7) to maintain, preserve, and not destroy until after December 31, 2009, any and all records relating to Defendants' quarterly purge programs that have, since January 1, 2006, resulted in the cancellation of the registration of voters who have applied for out-of-state driver's licenses, the sending of 30-day cancellation notices,

and/or the cancellation or rejection of voters' registrations based upon the return of original voter identification cards;

Plaintiffs further request that this Court declare the rights of the parties, including a declaration that MCL §§ 168.499(3) and 168.500c are preempted by Section 8(d) of the NVRA, 42 U.S.C. § 1973gg-6(d); a declaration that the Purging Procedure violates Section 8(d) of the NVRA, 42 U.S.C. § 1973gg-6(d) and M.C.L. § 168.509aa; and grant such other and further relief as this Court deems appropriate.

Respectfully submitted,

/s/ Matthew J. Lund___________

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Dated: September 17, 2008

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