IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-2321-WYD

COMMON CAUSE OF COLORADO,
on behalf of itself and its members;
MI FAMILIA VOTA EDUCATION FUND; and
SERVICE EMPLOYEES INTERNATIONAL UNION,
on behalf of itself and its members,

Plaintiffs,

v.

MIKE COFFMAN, in his official capacity as Secretary of State
for the State of Colorado,

Defendant.

SECRETARY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION

Defendant Mike Coffman, the Secretary of State for the State of Colorado (the "Secretary"), by and through undersigned counsel, files this brief opposing Plaintiffs' Motion for Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction.

INTRODUCTION

On October 24, 2008, Plaintiffs Colorado Common Cause (Common Cause), Mi Familia Vota (Mi Familia), and Service Employees International Union (Union), filed this action against Colorado Secretary of State Mike Coffman, seeking both prohibitory and mandatory injunctive relief. Plaintiffs assert that the Secretary has violated the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg, *et seq.* in two ways. Specifically, Plaintiffs allege that (1) the

Secretary has unlawfully removed registered voters from Colorado's official voter registration list within 90 days of a federal primary or general election, in violation of § 1973gg-6(c)(2)(A); and (2) the Secretary has "cancelled" new "registrations" in violation of § 1973gg-6(d) when a notice sent to the applicant by non-forwardable mail is returned as undeliverable within 20 days.

Although Plaintiffs claim the Secretary has engaged in large scale "purges" of the voter registration rolls that are likely to lead to the disenfranchisement of thousands of voters on Election Day, in fact, no eligible Colorado voter will be denied the right to vote.

The challenged cancellations fall into three basic categories:[1]

- **Voter has moved and registered in a different county.** This category includes voters who have moved and re-registered to vote in their new location. The election official in the new location notifies the county clerk in the old location that the voter has registered to vote in the new location. Upon receipt of such communication from the election official, the county clerk cancels the outdated registration record. *See* § 1-2-603, C.R.S. (2008). Notably, under Colorado's new statewide voter registration database (SCORE), where a voter moves from one county to another within Colorado, the old registration will no longer be "canceled" but transferred in the system to the new county. In any event, the voter is obviously still registered to vote – in the proper (new) location – and can cast a regular ballot.

[1] Plaintiffs do not appear to claim that the State improperly cancelled registrations on grounds that the registrant is deceased, §§ 1-2-302(3.5)(a) & 1-2-602, C.R.S. (2008); is a convicted felon, §§ 1-2-302(3.5)(b) & 1-2-606, C.R.S. (2008); or who has requested to be removed from the rolls. § 1-2-601, C.R.S. (2008). All such cancellations are permissible under the NVRA. *See* 42 U.S.C. § 1973gg-6(c)(2)(B).

- **Duplicates.** This category includes voters who have multiple active registration records in the statewide database. The new SCORE system, which consolidated the individual databases of Colorado's 64 counties into a single statewide database, can be used to generate a list of potential duplicate registrations. A county clerk then manually compares the potential duplicates, checking for matches based on last name, first name, middle name or initial, date of birth, driver's license number, and social security number. To avoid erroneous cancellations, all available information is reviewed and considered, including scanned copies of registration documents, which include signatures. To cancel a duplicate registration there must be, at a minimum, a match of the voter's name and date of birth, or name and social security number. § 1-2-604(3), C.R.S. (2008). If the county determines there are duplicate records, the record with the most recent history becomes the surviving record, and the older duplicate records are cancelled. If any uncertainty exists regarding a match, neither record is cancelled. In any event, even where the duplicate records are cancelled, the voter remains registered to vote under the location in the most recent record in the system, and can cast a regular ballot there.
- **Failed 20-day period.** This category includes applicants for voter registration who were never actually registered because the State received information indicating that the address provided by the applicant was invalid – namely, a voter information card sent to the address provided by the applicant was returned by the post office as "undeliverable." In that instance, the record is not "cancelled"; rather, the applicant is simply never actually "registered." § 1-2-509(3). Although that applicant will not appear in the SCORE system as an active registered voter, if the applicant appears in person to vote, he

may still cast a provisional ballot. §§ 1-8.5-101, *et seq.*, C.R.S. (2008); Secretary of State Election Rule 26. If the applicant provides the same address information on the provisional ballot as was provided in the original application, that provisional ballot will be counted and the voter will be deemed properly registered because it will be presumed that the notice was returned due to a postal or other error, (and not because the address was actually invalid as previously indicated by the card returned as "undeliverable").

Although these Colorado laws, rules, and practices have been in place for many years, Plaintiffs waited until only 10 days remained before the November 4, 2008 general election to file their Complaint. Plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction enjoining the State from enforcing Colorado laws and the Secretary's Rules. Plaintiffs further ask this Court to order the Secretary to reactivate all the identified cancelled registrations – including all duplicate registrations and other outdated registrations of persons who are already registered to vote in their new locations, as confirmed by the election officials in those new jurisdictions. By the time of the hearing scheduled in this matter, early voting will have been underway for ten days and nearly 1,000,000 Coloradoans will have already cast votes in the election. To force the State to design and execute a program in the SCORE system to re-activate such records at this critical juncture in the election process threatens the integrity of the SCORE system and therefore presents an unacceptable risk to the entire voting public on the eve of the election. That risk – to all Colorado voters – far outweighs any injury to the Plaintiffs, who are organizations that have not identified a single member actually affected by these cancellations. Plaintiffs cannot show irreparable harm – certainly not to their

organizations, but not to individual voters, either. Voters whose records were canceled because the voter moved or had duplicate records are still registered to vote and can cast a regular ballot in the location where they are currently registered. And any person whose application failed under the 20-day notice provision may still cast a provisional ballot, which will be counted if the address information provided matches the address provided on the original application. In short, no eligible Colorado voter will be denied the right to cast a ballot in this election and have it counted.

For the reasons set forth below, the Plaintiffs' request for a temporary restraining order and preliminary injunction should be denied.

ARGUMENT

Plaintiffs ask this Court to enter a temporary restraining order and preliminary injunction enjoining the Secretary from enforcing Colorado law and the Secretary's Election Rules insofar as these provisions (1) require cancellation of outdated registrations upon receipt of information from another election official that a voter has moved and re-registered in a new jurisdiction, *see* § 1-2-603, C.R.S. (2008); (2) require cancellation of duplicate active registration records within the statewide database, *see* 1-2-604, C.R.S. (2008); and (3) prohibit the registration of a first-time applicant where the initial notice sent to the applicant is returned within 20 days as "undeliverable," indicating that the address provided by the applicant is invalid. Plaintiffs' clams are without merit, as these procedures do not violate the NVRA. This Court should therefore deny the motion for temporary restraining order and preliminary injunction.

I. Standards for issuing a preliminary injunction

Plaintiffs request a preliminary injunction providing both prohibitory and mandatory relief. They request the entry of a prohibitory injunction preventing the Secretary from (a) "removing or cancelling the names of any voters from Colorado's statewide voter registration list pursuant to C.R.S. 1-2-509(3)" and (b) "removing or cancelling the names of any voters from Colorado's statewide voter registration list between now and November 4, 2008 for any reason not provided in 42 U.S.C. § 1973gg-(6) (c) (2) (B)." They also request mandatory injunctive relief requiring reinstatement of names of voters who were (a) "removed or cancelled from the official list of eligible voters since May 13, 2008 for any reason not provided for in 42 U.S.C. § 1973gg-6(c)(2)(B)"; and (b) "removed or cancelled from the official list of eligible voters in violation of 42 U.S.C. § 1973gg-6(d)." Plaintiffs also request an order permitting such voters to vote by regular ballot on Election Day.

As this Court has noted, the Tenth Circuit distinguishes between prohibitory and mandatory injunctions. *Bray v. QFA Royalties, Inc.*, 486 F. Supp. 2d 1237, 1245 (D. Colo. 2007). Although Plaintiffs seek both prohibitory and mandatory injunctive relief, the Court will not distinguish between the "high" and "higher" scrutiny standard. In this case, both types of injunctive relief are subject to the "higher" scrutiny test.

To prevail on a motion for preliminary injunction, Plaintiffs must show that their right to relief is "clear and unequivocal". *Kikumura v. Hurley,* 242 F.3d 950, 955 (10th Cir. 2001). Plaintiffs must establish that (1) they will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs any damage the proposed injunction may cause the Secretary; (3) the injunction would not be adverse to the public interest; and (4) there is

substantial likelihood of success on the merits. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007).

It is the movant's burden to establish that each of the first three factors tips in the movant's favor. *Heideman v. South Salt Lake City*, 348 F.3d at 1182, 1188-89 (10th Cir. 2003). Where the moving party has established that the first three facts "tip *decidedly* in its favor, the 'probability of success requirement' is somewhat relaxed." *Heideman v. South Salt Lake City*, 348 F.3d at 1189. In such cases, the court must employ a "fair ground for litigation standard." *Id.* However, the Tenth Circuit also stated that, in cases in which a party seeks to enjoin governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the court must apply the more rigorous "substantial likelihood of success" requirement regardless of the determination of the first three factors. *Id.* It is undisputed that Plaintiffs seek to enjoin governmental action taken in the public interest pursuant to Colorado's election code. Therefore, the higher standard must apply.

The Tenth Circuit applies a heightened standard to a request for one of three types of preliminary injunctions: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief it could recover at the conclusion of a full trial on the merits. *Summum v. Pleasant Grove City*, 483 F.3d at 1048. A preliminary injunction falling into one of these categories "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* 1048-49 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded, Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 126

S.Ct. 1211, 163 L.Ed. 2d 1017 (2006). Plaintiffs must "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 1049 (quoting *O Centro*, 389 F.3d at 976).

Plaintiffs seek to alter the status quo. The status quo is "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). Thus, the court must look "'to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights.'" *Schrier v. University of Colorado*, 427 F.3d 1253, 1260 (10th Cir. 2005) (quoting *SCFC ILC, Inc.* 936 F.2s at 1100, n. 8). The "reality" is that the Secretary has not altered his interpretation or application of the law to the Plaintiffs' members.

There can be little doubt that the relief requested by the Plaintiffs is mandatory. An injunction is mandatory if the relief "affirmatively require[s] the nonmovant to act in a particular way, and as result...place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *O Centro*, 389 F.3d at 979 (quoting *SCFC ILC, Inc.* 936 F.2d at 1099). The relief requested would require the Secretary to alter its computer programs to reinstate persons whose registrations have been cancelled. Reinstatement is a mandatory action. *Schrier*, 427 F.3d at 1261 (reinstatement of department chairman mandatory because it would affirmatively require the Secretary to act in a certain way.). Moreover, the Court will likely be asked to provide some supervision to ensure that the signatures that Plaintiffs claim were improperly removed were properly reinstated. To the extent that Plaintiffs seek mandatory relief, they carry a heavy burden.

II. Plaintiffs lack standing.

Each of the Plaintiff organizations claim seeks relief for itself. While associations or organizations may have standing to seek judicial relief for themselves, they still must meet the following standing requirements: (1) injury in fact to a legally protected interest which is "concrete and particularized" and "actual or imminent;" (2) the injury must be fairly traceable to the challenged action; and (3) it must be likely that the injury will be redressed by a favorable decision. *Committee to Save Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996). Where an organization is suing on its own behalf, it must demonstrate "more than simply a setback to the organization's abstract social interest...Indeed, [t]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action." *National Taxpayers Union, Inc. v United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

The allegations in the Complaint do not establish standing for any of the Plaintiff organizations. With regard to Plaintiff Common Cause, the Complaint alleges that Common Cause "is committed to ensuring that every American, and Common Cause member, has the right to vote and the opportunity to exercise that right." (Complaint, ¶5.) It devotes some of its resources "to investigate and take measures to counteract the State's unlawful purges." (Complaint, ¶6.).

With regard to Mi Familia Vota Colorado Education Fund, the Complaint asserts that it is a non-partisan civic engagement campaign working with Latino and immigrant families to improve their lives. (Complaint, ¶7.) The Complaint further alleges that the Secretary's actions

create uncertainty about the lawfulness of the registration process and undermine its efforts to register eligible electors and to conduct voter education activities. (Complaint, ¶8).[2]

With regard to Service Employees International Union, the Complaint asserts that the Union has devoted significant time and resources to registering voters in Colorado and that it plans to continue such efforts. (Complaint, ¶ 12.) The Complaint further alleges that the Union has expended resources to investigate and take "measures to counteract the unlawful purges" and that such purges cast "a cloud of uncertainty over its efforts." (Complaint, ¶ 13.)

Similar claims have been rejected by other courts. *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999). There, the association claimed that it had suffered a cognizable injury because (1) it expended resources litigating Louisiana's failure to implement the NVRA; (2) it monitored Louisiana's implementation of the NVRA; and (3) it expended resource either to register voters or to facilitate the registration of voters. *Id.* at 358.

The Fifth Circuit found that each of these assertions was insufficient to establish a concrete and imminent injury to a legally protected interest. It rejected the expenditure of resources argument because any litigant could create an injury by bringing a lawsuit, thereby obliterating any real standard for determining whether an injury has occurred. *Id.* at 358-59.

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[2] It appears that Mi Familia Vota is a trade name for an entity called the Front Range Economic Strategy Center. (Exhibit A.) Article VIII of the Center's Articles of Incorporation states that its business and purpose is (a) to provide and promote research on issues that affect working people, (b) provide and promote the analysis and evaluation of policies affecting working people, (c) provide and promote public education on issues affecting working families, and (d) provide and promote training for working people and families to understand and participate in the policy processes affecting their lives. (Exhibit B.) The articles do not mention voter registration or other activities.

It next rejected the monitoring costs because the association could not show that the costs were incurred as a result of any action taken by Louisiana. In other words, the association monitored Louisiana not because of actions taken by Louisiana but because such monitoring was part of the association's underlying purpose. *Id.* at 359.

Finally, the Fifth Circuit rejected the argument that any harm to the association's future voter registration activities emanated from Louisiana's activities. Mere conclusory allegations about harm are insufficient to establish that voter registration activities will be adversely affected. *Id.* at 36. See also, *Harkless v. Blackwell,* 467 F. Supp.2d 754, 759-60 (N.D. Ohio 2006)(in NVRA challenge, association not harmed because it is likely that association would have carried on activities despite state action.).

The claims by Plaintiffs in this case do not meet the elements required to establish standing. To the extent that they assert expenditures to counter the Secretary's alleged illegal actions, such expenses are not sufficient to show an injury in fact to a legally protected interest. To rule otherwise would mean that the mere filing of an action is sufficient to establish concrete and imminent injury.

Plaintiffs claim that advocacy on the part of their members or constituents to ensure compliance with the law is part and parcel of their purpose. Therefore, they cannot allege any injury or that the injury is fairly traceable to the actions of the State because they would undertake such activity in any event, regardless of the Secretary's actions.

Finally, Plaintiffs' claims about future harms to their ability to register votes do not state a concrete or particularized injury that is actual or imminent. Any alleged harm is nothing more than a setback to their abstract goals.

Both Common Cause and the Union also assert standing due to alleged injury to their members. An association has standing to sue even if it has not been injured so long as (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members to the suit. *Utah Ass'n of Counties v. Bush,* 455 F.3d 1094, 1099 (10th Cir. 2006).

The Sixth Circuit has concluded that assertions similar to those made by Common Cause and the Union likely are insufficient to establish standing. *Northeast Ohio Coalition for the Homeless v. Blackwell, supra.* Although it is not always necessary for an organization to identify in advance members who may be harmed by an election procedure, it is incumbent upon the organization to identify at least one member to whom the harm has already occurred. *Id.* 467 F.3d at 1010 & n. 3. In this instance, neither organization has identified any member who was in fact harmed. Although they have submitted affidavits from certain individuals, none of these individuals alleges that he or she is a member of either organization.

In addition, the assertions about the purposes of the organizations raise concerns about "whether the interests at stake here are not primarily related to election or voters' rights issues." *Id.* Importantly, the Sixth Circuit concluded that the Union (the same Plaintiff - Union here) lacked standing to sue on behalf of its members because it had not shown that its purposes were primarily related to election or voters' rights issues. *Id.*

Plaintiffs in this case have stated interests that go well beyond registration of voters. Thus, Common Cause has as its goal the promotion of "open, honest and accountable government." (Complaint, ¶5). The Union's main function is to represent employees working in

the fields of health care, property services and the public sector. (Complaint, ¶11.) Given the limited role that voter registration activities play, there "are substantial questions about whether the interests at stake here are germane to the organizations' purposes." *Id.*

III. Plaintiffs cannot demonstrate a likelihood of success on the merits

Plaintiffs challenge Colorado's law requiring county clerks to cancel the old registrations of voters who have moved and re-registered in a new location, *see* § 1-2-603, C.R.S., and to cancel duplicate registration records, *see* § 1-2-604, C.R.S. Plaintiffs claim that these practices violate section 8 of the NVRA. 42 U.S.C. § 19733gg-6(c)(2)(A). Plaintiffs also challenge as unlawful Colorado's statute requiring election officials to reject the registration of a first-time applicant, where the initial notice sent to the applicant is returned within 20 days as "undeliverable," indicating that the address provided by the applicant is invalid. *See* § 1-2-509, C.R.S. These claims fail.

A. Overview of NVRA requirements with respect to official voter list maintenance

The National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg *et seq.*, was enacted in 1993 "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). The Act requires states to provide voter registration by three methods, including in person, by mail, and when applying simultaneously for a driver's license. *Id.* § 1973gg-2.

The NVRA also aims to "protect the integrity of the electoral process" and to "ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(3)-(4).

Section 8 of the Act, 42 U.S.C § 1973gg-6, requires each State to implement a general program that "makes a reasonable effort to remove the names of ineligible voters" from the official lists of voters where the voter has died or changed residence. 42 U.S.C. § 1973gg-6(a)(4)(B).

Section 1973gg-6(a)(4) states in relevant part:

> (a) In general
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> In the administration of voter registration for elections for Federal office, each State shall—
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> . . .
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> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of –
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> (A) the death of the registrant; or
>
> (B) a change of residence of the registrant, in accordance with subsections (b), (c), and (d) of this section.

(Emphasis added).

Subsection (b) ("Confirmation of voter registration"), 42 U.S.C. § 1973gg-6(b), requires that any State program or activity implemented to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll must be uniform and nondiscriminatory. Such a program shall not result in the removal of a name of any person from the official list of registered voters by reason of that person's failure to vote, unless the person has failed to respond to a required notice and then has failed to vote in two or more consecutive federal elections.

Subsection (c) ("Voter removal programs"), 42 U.S.C. § 1973gg-6(c), allows (but does not require) a State to establish a program to identify persons whose addresses "may have changed" based on change of address information supplied by the Postal Service. Under such a

program, the election official sends a notice to the registrant by forwardable mail indicating that the person's address appears to have changed and providing the registrant the opportunity to confirm that change to the election official by returning the card. *See* 42 U.S.C. § 1973gg-6(c)(1)(B), -6(d)(2). Subsection (c) further provides:

> (2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.
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> (B) Subparagraph (A) shall not be construed to preclude –
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> > (i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) [removal at the request of the registrant] or (B) [removal by reason of conviction of a crime] or (4)(A) [death of the registrant] of subsection (a) of this section; or
> >
> > (ii) correction of registration records pursuant to this subchapter.

(Emphasis added).

Subsection (d) ("Removal of names from voting rolls"), 42 U.S.C. § 1973gg-6(d), sets out two specific procedures for removal of registrants from the voting rolls because the registrant has changed residence. First, a registrant may be removed from the rolls where the registrant "confirms in writing that he or she has changed residence to a place outside the registrar's jurisdiction." § 1973gg-6(d)(1)(A) (emphasis added). Second, a registrant may be removed from the rolls where: (1) the registrant has failed to respond to a notice informing the registrant of applicable voter registration law sent by forwardable mail containing a postage prepaid and preaddressed return card; and (2) the registrant has not voted in two federal elections following the mailing of the notice. § 1973gg-6(d)(1)(B). Notably, a voting registrar "shall correct an

official list of eligible voters" in accordance with change of residence information obtained in conformance with subsection (d). § 1973gg-6(d)(3).

In addition to the NVRA, the federal Help America Vote Act (HAVA) of 2002 provides that "each State . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, . . . computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State . . . ." 42 U.S.C. § 15483(a)(1)(A). HAVA further requires that "the list maintenance performed . . . shall be conducted in a manner that ensures that . . . only voters who are not registered or who are not eligible to vote are removed from the computerized list. § 42 U.S.C. § 15483(a)(2)(B)(ii).

B. The "conversion" cancellations occurred prior to the counties' migration over to the SCORE system

Plaintiffs claim that that any voter registrations cancelled under the "conversion" code violated the NVRA, § 1973gg-6(c)(2)(A), because these cancellations occurred inside the 90-day window under that provision. However, this claim misunderstands the "conversion" code status. In spring 2008, the separate systems of all 64 counties across Colorado were consolidated into the single statewide database mandated by HAVA. In Colorado, that statewide voter registration system is called "SCORE." During the migration process to SCORE, the counties' own (preexisting) voter registration databases included cancellations, some of which did not include a code number identifying the reason for the cancellation. These cancellations may have occurred years earlier, and may have been for any of a number of reasons, including death, conviction, change of address, withdrawal, etc. For purposes of the SCORE conversion, such cancellations (meaning, already-cancelled records that did not have a specific code reason identified) were

identified in the SCORE system as "conversion" cancellations, a catch-all term assigned to this category. Importantly, however, these cancellations were not "new"; rather, they were previous cancellations (in some cases, perhaps years earlier) that were simply carried over during the conversion to SCORE. The SCORE system merely memorialized cancellations that had already occurred. As such, these cancellations did not take place during the 90-days prior to a primary or general election, and did not violate the NVRA. *See* 42 U.S.C. § 1973gg-6(c)(2)(A).

C. The "moved" cancellations are proper "corrections" of the voter registration rolls based on a notification traceable to the voter that the voter has moved.

The NVRA does not preclude the removal of names of registered voters within the 90-day window where the request is made by the registrant; where the registered voter has been convicted of a crime or has been deemed mentally incapacitated; or where the registered voter has died. *See* 42 U.S.C. § 1973gg-6(c)(2)(B)(i). In addition, the 90-day provision does not preclude "the correction of registration records pursuant to this [Act]." *Id.* § 1973gg-6(c)(2)(B)(ii). Under § 1973gg-6(d)(3), the clerk shall "correct an official list of eligible voters" in accordance with "change of residence information obtained in conformance with this subsection [(d)]." Specifically, where a registered voter "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," the State shall correct the voter list by removing that voter's name from the list of active registered voters. § 1973gg-6(d)(1)(A). In short, where a voter changes address and registers to vote in a new jurisdiction, the NVRA allows the registration in the old jurisdiction to be cancelled, even within the 90-day period.

Under Colorado law, this change of address correction is accomplished under § 1-2-603,

C.R.S. (2008). Where an elector registers to vote in another county within Colorado, the form asks the elector to provide his previous address. In addition, the Colorado form (as do most forms) requires the applicant to affirm that the present address listed on the application is the applicant's sole legal place of residence, and that the applicant claims no other place as his legal residence. *See* § 1-2-205(2), C.R.S. (2008). Based on the applicant's prior residence information, the county clerk in the new county must immediately transmit that information to the county clerk of the prior county of residence. Upon receipt of that information, the clerk in the prior county of residence "shall cancel the elector's registration record" if the record is verified through a match of the name and date of birth or social security number. § 1-2-603(1). In addition, if a county clerk receives notice from the secretary of state or from an election official in another state that the elector has registered to vote in another county within that state, the clerk "shall cancel the elector's registration record" if the record is verified through a match of the name and date of birth or social security number. § 1-2-603(2).

In either instance, the cancellation is triggered by action taken directly by the voter – namely, the voter has affirmatively re-registered to vote in a new location, and, for voters registering in another Colorado county, these voters have affirmatively abandoned any claim to their former residence. By registering in another jurisdiction, that voter has specifically and personally "confirmed in writing" his change of residence, and moreover, has actually registered to vote in that new location, as confirmed by the election official in that jurisdiction. As such, of the outdated registration does not violate the NVRA because it qualifies as a permissible – indeed, mandated – "correction" of the voter registration rolls made at the voter's own request. § 1973gg-6(c)(2)(B)(ii), -(d)(3). Of critical importance, that voter remains registered to vote – in

the proper (new) location. As such, that voter's status as "registered" is unaltered.

Notably, this process of "cancellation" where the voter moves in-state has changed under the SCORE system. In SCORE, when a voter now moves from one county to another county within Colorado, that voter's record in the prior county is no longer "cancelled," but simply transferred to the new county. The voter's multiple records are merged into a single record, which travels with him or her when he or she moves in-state. Secretary of State Rule 2.15 harmonizes this new process with the older pre-SCORE process outlined in § 1-2-603. Rule 2.15 now requires a match of at least the name, date of birth and prior address; or, the name, date of birth and either a driver's license or social security number.

Most importantly, the vote of the person remaining in Colorado will be counted regardless of whether the vote is cast in the new county of residence (in which case the voter casts a regular ballot), or the old residence (in which case the individual casts a provisional ballot and his status as an eligible voter is confirmed during the provisional ballot process). None of these voters is "removed" from the official state voter list. Instead, as the NVRA allows, the record has been corrected at the request of the voter.

D. The "duplicate" cancellations are likewise proper "corrections" of the voter registration rolls by removing duplicate records of a single individual

Plaintiffs likewise claim that the cancellation of "duplicate" records inside the 90-day window before a primary or general election violates the NVRA, § 1973gg-6(c)(2)(A). This claim likewise fails.

Under § 1-2-604, C.R.S. (2008), if the Secretary's master list of registered electors shows that an elector is actually registered in more than once precinct in the State, the Secretary must

notify every applicable county clerk of such multiple registrations, and the county clerks then cancel the duplicate registrations.

In practice, the county generates a report in SCORE of potential duplicate voters. That report includes potential matches based on voter ID, full name, date of birth, residential address, social security number, driver's license number, effective date of the registration, the date of the most recent update to the record, and status of the registrant. Although the computer system generates the potential matches, the final review and decision is conducted manually. To avoid erroneous cancellations, all available information is reviewed and considered, including scanned registration documents. If the county determines that there are duplicate records, the record with the most recent history will be the "surviving" record. The other records are canceled, although they remain in the SCORE system marked as "Canceled- Duplicate." To actually cancel a duplicate registration, there must be, at a minimum, a match of the elector's name and birth date, or name and social security number. If there is any uncertainty about the match, neither record will be canceled.

As with the "moved" records above, the "duplicates" group include voters who have moved and actually re-registered in a new location. That new registration serves as "written confirmation" of the change of address, and the registration itself is confirmed by the SCORE system. Again, these individuals are not "removed" from the voter registration rolls. They remain registered to vote at the proper (most recent) address on file in the system, and can cast a regular ballot at their new location (or a provisional ballot if that person appears to vote in the old location). Only the duplicate records are cancelled, which prevents the

possibility of voter fraud. The process under § 1-2-604, C.R.S. qualifies as a "correction" of the voter registration rolls under § 1973gg-6(d)(1)(A), which plainly "protect[s] the integrity of the electoral process" by protecting against possible voter fraud. *See* 42 U.S.C. § 1973gg(b)(3)-(4).

E. The 20-day notice rule does not violate the NVRA

Plaintiffs claim that thousands of voters had their "registrations" improperly "cancelled" when a notice sent to them by nonforwardable mail was returned within 20 days as undeliverable. This claim fails.

The NVRA prohibits the removal of names of "registrants" based on returned mail until the voter confirms a change of address in writing or, in the event that a notice is sent and the registrant fails to respond to it, until after that registrant fails to vote in two consecutive Federal elections. § 1973gg-6(d). Hence, Plaintiffs' claim hinges on their contention that a person who submits an application for registration and receives a confirmation notice in question is a "registrant." This is simply incorrect.

Although the NVRA does not define "registrant," the Act clearly distinguishes between "applicants" and "registrants." The NVRA does not "register" voters, or provide for who may become a registered voter. Rather, it states that "each State shall ... insure that any eligible applicant is registered to vote in an election . . . ." § 1973gg-6(a)(1) (emphasis added). Subsection 6(a) then goes on to address what should happen after a "valid voter registration form of the applicant is submitted" to the appropriate election official or agency. § 1973gg-6(a)(1)(A)-(D) (emphasis added). The NVRA does not purport to alter or preempt State laws providing for the qualifications of voters. Rather, the registration of voters has been a matter left

to the States; the NVRA was an effort to provide some uniformity in the registration process. In this context, and as a matter of logic, the term "registrant" is properly construed as a person who is properly "registered to vote" under State law. Thus, the provisions of § 1973gg-6(d) apply only to removal of persons actually registered to vote under State law.

Under Colorado law, within 10 business days of receiving an application for voter registration, the county clerk must "notify each applicant of the disposition of the application by nonforwardable mail." § 1-2-509(3), C.R.S. (2008) (emphasis added). If the application is incomplete or inaccurate, the county clerk notifies the applicant of this status, stating the additional information required. § 1-2-509(2), C.R.S. (2008). If that applicant provides the additional information required at any time prior to casting a vote, the applicant shall be deemed registered as of the date of the application. § 1-2-509(3).

If the application is complete and accurate, the county clerk "shall notify the applicant of the registration." § 1-2-509(2) (emphasis added). At the time of this notification, the applicant's status in the SCORE system is reflected as: "Active – 20 day." If, within 20 business days after receiving the application the notification letter is returned to the county clerk as undeliverable, "the applicant shall not be registered." § 1-2-509(3) (emphasis added). "If the notification is not returned within twenty business days as undeliverable, then the applicant shall be deemed registered as of the date of the application. . . ." *Id.* (emphasis added). At that point, the individual's status within the SCORE system becomes simply "Active," and the "20-day" notation is removed.

In other words, during that 20-day window, under state law, the applicant is still legally an "applicant" who is entitled to notice, and not a "registrant," unless and until the State receives

confirmation of the validity of the applicant's address. Such confirmation is presumed where the notification letter is not returned within 20 business days. In addition, as a practical matter, such confirmation can also occur if the applicant appears for early voting or casts a vote by mail in that period.[3] If the county clerk instead receives information indicating that the address provided is invalid – because the notification card is returned as undeliverable – then Colorado law states that "the applicant shall not be registered." § 1-2-309(3). The fact that an applicant temporarily appears in the system as "Active- 20 day" while confirmation is awaited does not change this analysis, because Colorado law is clear that where the notice is returned as undeliverable, such persons never become registered voters.

Amendments made to § 1-2-509 in 1995 confirm the Secretary's interpretation of this provision. Prior to 1995, section 1-2-509(2) stated in relevant part: "If the application is complete and accurate, the applicant shall be deemed registered as of the date of the application, and the county clerk and recorder shall notify the applicant of the registration." However, House Bill 95-1241 specifically deleted the above-underlined language from that provision. 1995 Colo. Gen. Sess. Laws ch. 187, § 22. (Exhibit C.) It is reasonable to infer from that statutory amendment that the legislature intended to clarify that an applicant remains an applicant until the State receives confirmation of the applicant's address.

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[3] For example, if a person registered to vote on the deadline, October 6, 2008, and simultaneously requested a mail ballot, the notification under § 1-2-509 and the mail ballot would be sent at approximately the same time (assuming the application was complete). If the person returns a voted ballot within 20 business days, the county clerk has confirmation that the ballot in fact reached that voter. In that situation, even if the notification card was returned as undeliverable (due to postal error), the voted ballot would override any cancellation and the voter would remain registered.

In sum, Colorado law consistently refers to such individuals as "applicants" throughout the process, which accurately describes individuals' status during the 20-day window in which the State awaits confirmation of that applicant's address. Contrary to Plaintiffs' suggestion, this provision does not operate to "cancel" any registered voter's registration in violation of the NVRA. *See* Pls.' Brief at 20-23. Rather, as a matter of state law, such individuals are "applicants" who are not ever actually "registered." *See ACORN v. Miller*, 912 F. Supp. 976, 986-87 (W.D. Mich. 1995).

Plaintiffs rely on a recent Michigan federal district court case that reached the opposite conclusion. *United States Student Ass'n v. Land*, 2008 WL 4559548 (E.D. Mich. Oct. 13, 2008). That case is currently on appeal and a decision is expected from the Sixth Circuit by Wednesday, October 29, 2008. The analysis in the *Land* case is flawed. There the district court concluded that a person becomes a "registrant" the moment his or her name appears on the official voter registration list. That is simply not the case. Whether an individual is properly registered is a matter of state law; the NVRA does not determine when a voter is deemed "registered" or establish requirements for such registration. Moreover, while it is true that upon submission of an application, an individual is listed in the SCORE system, the fact that the person appears in Colorado's statewide voter registration database does not mean that that individual is a "registrant" for purposes of the NVRA, *i.e.*, an active registered voter. As a practical matter, the SCORE system reflects both active and inactive registered voters, as well as incomplete or otherwise pending applications, and cancelled records. A common sense understanding of the word "registrant" in the NVRA indicates a person who is actually registered to vote under state law, and is not inclusive of persons who are in the process of becoming registered; such persons

are referred to separately under the Act as "applicants." An applicant becomes an active registered voter (and a "registrant" for purposes of the NVRA) only after the registration form is completed accurately and the applicant's address is confirmed. Where the notification sent to the applicant's address on the registration form is returned as undeliverable, the address is never confirmed and the applicant never becomes a "registrant." The Colorado process under § 1-2-509(3) does not violate the NVRA because the individuals involved are not "registrants" under the NVRA.

IV. Plaintiffs have not shown that they or their members will suffer irreparable harm.

In order to prove irreparable harm, Plaintiffs must show that the injury is certain, great, and actual. *Heideman v. South Salt Lake City,* 348 P.3d at 1189. It is not sufficient to show that the harm is serious or substantial. Plaintiffs must show that the injury is so imminent that there is a clear and present need for equitable relief. *Id.*

Plaintiffs' delay in filing the lawsuit belies the claim that they will suffer irreparable injury. *Lucas County Democratic Party v. Blackwell*, 341 F.Supp.2d 861 (N.D. Ohio 2004). In *Lucas,* the Plaintiffs claimed that the Ohio Secretary of State's registration requirement deprived them of the right to vote in the 2004 presidential election. Plaintiffs did not file their lawsuit until eighteen days prior to the election. The court ruled that the delay in filing indicates that the harm is not irreparable. *Id.* at 864.

In this case, each of the Plaintiffs claims that they are actively involved in encouraging eligible electors to participate in the election process and in fact attempt to register voters. As such, it must be presumed that they are familiar with Colorado's registration procedures. Despite

this presumed knowledge of Colorado's law, Plaintiffs waited until Saturday, October 25, 2008, ten days before the Presidential election, to file their Complaint and request for injunctive relief. The Court must conclude that this delay militates against the argument that the harm is irreparable.

The heart of Plaintiffs' argument is that the cancellation or transfer of the names at issue in this case will deprive the voters of their right to vote. (Plaintiffs' Brief in Support of Application for Preliminary Injunction, p. 33). Plaintiffs' argument assumes that persons who may be deemed not registered cannot vote. As noted above in Argument III of this brief, this assumption is incorrect.

Colorado law authorizes provisional ballots. A voter who claims that he or she is properly registered but whose qualifications to vote cannot be immediately established may cast a provisional ballot. Section 1-8.5-101(1), C.R.S. (2008). An elector must be permitted to cast a provisional ballot. Section 1-8.5-101(4), C.R.S. (2008). The election official must attempt to verify that the elector who cast the provisional ballot is eligible to vote. Section 1-8.5-105(1), C.R.S. (2008). If an election official can verify that the elector was indeed registered, then the vote will count.

For example, if a voter moved from one county to another county within the State, and the voter supplied information to show that he should be deemed registered, then the voter's ballot will be counted. Likewise, the ballot of a voter whose notification was returned as undeliverable will be counted if the information provided on the provisional ballot matches the information on the registration application.

V. The public interest will not be served by granting an injunction in this case.

Plaintiffs have the burden of demonstrating that the injunction will not be adverse to the public interest. *Heideman v. South Salt Lake City,* 348 F.3d at 1191. Plaintiffs' argument is based solely on the assumption that the right to vote will be substantially impaired. (Plaintiffs' Brief in Support of Preliminary Injunction, p. 35.)

Contrary to Plaintiffs' argument, courts have consistently concluded that the public interest is harmed by last minute court intervention. In vacating an injunction preventing Arizona from enforcing a voter identification requirement, the United States Supreme Court noted:

> Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

Purcell v. Gonzalez, 549 U.S. 1, 7 (2006).

The Sixth Circuit applied this rationale in staying a temporary restraining order issued to prevent the application of certain absentee ballot voter identification laws. *Northeast Ohio Coalition for the Homeless and Service Employees International Union, Local 1199*, 467 F.3d 399 (6th Cir. 2006). In addressing the public interest argument, the Court noted that, while there is a strong public interest in allowing every registered voter to vote:

> There is also a strong public interest in permitting legitimate statutory process to operate to preclude voting by those who are not entitled to vote. [Citation omitted.] Finally, there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of submission of absentee ballots. [Citation omitted.] As the Supreme Court recently recognized, court orders affecting

> elections can result in voter confusion and cause the very chilling effect that plaintiffs claim they seek to avoid.

Id. at 1012; see also, *Lucas County Democratic Party v. Blackwell,* 341 F.Supp.2d at 864 (denying preliminary injunction request filed eighteen days before the election because injunction would disrupt the orderly administration of elections.)

The entry of an injunction would endanger the orderly administration of Colorado elections. The Colorado Secretary of State's statewide voter registration system is in lockdown through the election. An entry of an injunction which requires an alteration to the statewide voter registration system would require a program update. The program update cannot be implemented until October 31, 2008, at the earliest. The program change would have to be implemented without proper testing. Without proper testing, implementation of a new program has the potential to harm other parts of the statewide voter registration system if the new program is flawed.

Alternatively, the Secretary could send to each of Colorado's 64 counties supplemental lists with the names of persons who fall within each of the categories and who reside in their jurisdiction. This approach has serious flaws. First, it would be difficult to determine the accuracy of the list between the date of the hearing on the request for preliminary injunction and Election Day. Second, it would be impossible to train election judges during the same time frame. As a consequence, there is a strong likelihood that some voters on the lists will not be allowed to vote, thereby raising equal protection concerns.

For these reasons, the Court must conclude that the public interest weighs heavily against granting the preliminary injunction.

VI. The balance of harms weighs against granting the preliminary injunction.

Plaintiffs must show that the threatened injury to them outweighs the injury to the Secretary. *Heideman v. South Salt Lake City*, 348 P.3d at 1190. The State has a strong interest in executing valid laws. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d at 1011. The State would suffer real harm if it allows members of the Plaintiff organizations to cast regular ballots. If the state ultimately prevails in this dispute, it would be impossible to not count the votes. In a close election, therefore, invalid votes may determine the winner, and the State may well be subject to a lawsuit.

Members of Plaintiff organizations, on the other hand, will not be harmed. If members of one of the Plaintiff organizations have been actually cancelled – a fact not alleged in the Complaint – those individuals may still cast a provisional ballot. Upon review of their status, their ballots will be deemed counted if it is determined that they were indeed registered. *Id.*

CONCLUSION

For the foregoing reasons and authorities, the Secretary requests that this Court deny Plaintiffs' request for a temporary restraining order and preliminary injunction. Plaintiffs have not demonstrated a likelihood of success on the merits; moreover, Plaintiffs will not suffer irreparable harm because the provisional ballot process ensures that every eligible Colorado voter will be allowed to vote and have that vote counted. On the other hand, all Colorado could

be placed at risk if the Secretary is forced to design and execute a program in SCORE to re-activate the records at issue at this critical juncture in the election process. The public interest will not be served by granting the relief requested.

Submitted this 28th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2008, I served a true and complete copy of the within **SECRETARY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION** upon all parties by the method indicated below:

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