

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-02321-JLK-KMT

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.

BERNIE BUESCHER, in his official capacity as Secretary of State
for the State of Colorado,

Defendant.

**SECRETARY’S REPLY IN FURTHER SUPPORT OF HIS
MOTION TO DISMISS AMENDED COMPLAINT**

Defendant Bernie Buescher, the Colorado Secretary of State (the “Secretary”), by and through undersigned counsel, submits this reply in further support of his motion to dismiss Plaintiffs’ Amended Complaint.

INTRODUCTION

Plaintiffs Colorado Common Cause (Common Cause), Mi Familia Vota (Mi Familia), and Service Employees International Union (SEIU), filed this action to prevent the alleged *disenfranchisement* of “thousands” of voters, including members of Plaintiffs’ organizations and citizens whom Plaintiffs registered to vote. *See* Compl. ¶ 1 (“Plaintiffs bring this action to prevent the disenfranchisement of their members and citizens they registered to vote”); Am. Compl. ¶ 1 (“This is an action to rectify the improper disenfranchisement of eligible Colorado

voters to [sic] and prevent the disenfranchisement of thousands more such voters, including Plaintiffs' members and citizens registered by Plaintiffs"); *see also* Compl. ¶¶ 6, 9, 13; Pls.' Br. in Support of Mtn. for Temporary Restraining Order and Preliminary Injunction, at 1.

To be *disenfranchised*, of course, is to be deprived of the right to vote. Indeed, Plaintiffs assert in their Complaint that the challenged cancellations of voter registration records "disenfranchise eligible voters" by "*depriving them of the right to cast a ballot that will count.*" Am. Compl. ¶ 1 (emphasis added).

Plaintiffs had access to the List of all registrations cancelled for any reason between May 14, 2008 and November 4, 2008 for months before filing their Amended Complaint. Yet, as argued in the Secretary's motion to dismiss,¹ the Amended Complaint identifies not one single member or individual whom Plaintiffs registered to vote – not one – who was actually *disenfranchised* as the result of an alleged unlawful cancellation. Moreover, to the extent Plaintiffs assert injury-in-fact to their *organizations*, the Amended Complaint fails to allege any such injury stemming from actual disenfranchisement.

The point, of course, is that to allege that a record was simply *cancelled*, without more, is

¹ Plaintiffs object to the Secretary's overview of events that have transpired in this litigation, as set forth in the "Introduction" section of his motion to dismiss. Pls.' Resp. at 4 n.3, 20. The Secretary's motion, however, is based on the deficiency of the allegations in the Amended Complaint, not the events described in the Introduction. That background is offered to give the Court some context for what has occurred in this litigation since the parties appeared before the Court shortly before the November 2008 election. Although he has moved to dismiss the Amended Complaint, the Secretary has not sought to stay discovery in this case but instead has given Plaintiffs access to voluminous records and documents, provided multiple hands-on informal discovery sessions demonstrating the SCORE system, and shared many of the Secretary's policies and procedures with Plaintiffs in informal discovery, in addition to producing tens of thousands of documents in response to Plaintiffs' formal discovery requests. The point is simply that the Secretary has given Plaintiffs more than adequate opportunity over the last several months to investigate and substantiate their claims of alleged disenfranchisement. Despite this, the Amended Complaint fails to allege a single concrete instance of disenfranchisement.

insufficient to state a violation of the NVRA or HAVA. The state is *required* to cancel records of persons who, for various reasons, are no longer eligible to vote in a given jurisdiction. Certainly, that a record was merely cancelled does not, without more, state any violation of law. The fact that a voter's registration record has been cancelled does not – as Plaintiffs improperly assume – mean that the voter is thereby (automatically and inevitably) prevented from casting a regular ballot. Moreover, while Plaintiffs repeatedly refer to the cancellation of records as voter “purges”, this choice of language mischaracterizes Colorado's list maintenance processes, improperly suggesting that records are deleted from SCORE. This is untrue; as the Secretary's witnesses testified at the preliminary injunction hearing, even a cancelled record remains in the SCORE system – records are never “removed” from the database. Tr. Hrg. 10-29-08, at 40:15-22, 46:9-12, 93:12-94:15.

Despite months of informal discovery, several exchanges of information and documentation, and all of the records produced pursuant to the special procedures followed under the Stipulation, Plaintiffs' Amended Complaint (and even the supplemental declarations attached to their response to the motion to dismiss) fail to put forth a single, non-conclusory factual allegation that the Secretary's actions have caused the actual unlawful disenfranchisement of even one member of their organizations or a person whom Plaintiffs registered to vote.

Plaintiffs assert that hundreds of voters likely would not have had their votes counted in the 2008 election but for the “relief Plaintiffs obtained” at the preliminary injunction proceedings. It is true that, under the special procedures under the Stipulation, some votes were counted that otherwise might not have been, but this fact stems directly from the heightened

standard applied in the stipulation. Plaintiffs correctly note that those votes counted “only under standards and procedures” set forth in the Stipulation. Pls.’ Resp. at 2, 25. However, those standards and procedures were negotiated by the parties strictly for purposes of getting through the 2008 election, given that Plaintiffs filed this suit only days before the election, precluding any meaningful resolution of their claims on the merits before Election Day. As expressly set forth in the Stipulation, those procedures, and certainly the heightened standard applied, do not reflect any concession by the Secretary that any of these cancellations was unlawful. Thus, the fact that additional votes were counted under the standard set forth in that Stipulation does not establish that any violations of law occurred, nor does it prove that, but for Plaintiffs’ efforts, those voters would have been unlawfully disenfranchised.

In their response to the motion to dismiss, Plaintiffs continue to assert that the number of voters who were deprived of their votes is far higher, “likely in the thousands or tens of thousands.” Pls.’ Resp. at 2. Not only is this pure conjecture, but this entirely implausible assertion is belied by the results of the 2008 election.

Plaintiffs claimed at the preliminary injunction proceedings that the 46,000 (allegedly unlawful) cancellations made prior to the 2008 election could disenfranchise “thousands of qualified Colorado voters.” *See* Compl. ¶¶ 6, 9, 13; Pls.’ Br. in Support of Mtn. for Temporary Restraining Order and Preliminary Injunction, at 1. If this assertion were plausible, surely evidence of such disenfranchisement would have revealed itself in that election. Indeed, that was precisely the purpose served by the processes under Stipulation – to enable those cancelled registrations to be closely monitored. Plaintiffs were provided with documentation throughout this process (including the numbers of provisional ballots cast by persons on the List, broken

down by county). As described in the Introduction to the motion to dismiss, only a few hundred persons on the List even voted a provisional ballot subject to the review processes under the Stipulation. Of the 8,470 persons on the List who actually voted in the election, 7,633 (or 90%) ended up voting a regular ballot from an active registration record in SCORE. Of those provisional ballots cast, the vast majority were counted. Of the only 45 provisional ballots statewide that were ultimately rejected following the Secretary's review, Plaintiffs agreed with 42 of those rejections. In short, at the end of this entire process, only three ballots were disputed, in an election in which over 2.3 million votes were cast for President in Colorado.

While the specifics of that process are not before the Court on this motion, the point is simply that, given the results of the (very closely monitored) 2008 election, Plaintiffs were fully aware when they filed their Amended Complaint that Colorado's list maintenance procedures did not result in widespread disenfranchisement as they had claimed at the preliminary injunction proceedings. Their continued assertions to the contrary – that the number of voters disenfranchised in the 2008 election alone is “likely in the thousands or tens of thousands” – is entirely unfounded. Pls.' Resp. at 2.

As argued below, Plaintiffs lack standing to bring the claims asserted here. Even assuming Plaintiffs have sufficiently alleged injury in fact to establish standing, the Amended Complaint fails to state a claim for relief, and therefore should be dismissed. None of the challenged practices violates the NVRA.

ARGUMENT

Standard of Review

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: a facial attack or a factual attack. When reviewing a facial attack, the court accepts the allegations of the complaint as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a factual attack on a complaint supported by affidavits and other documents, a district court may *not* presume the truthfulness of the complaint's factual allegations. It makes its own factual findings and need not convert the motion to one brought pursuant to Rule 56. *Id.* at 1003.

The standard for reviewing a motion to dismiss under Rule 12(b)(6) was recently clarified by the U.S. Supreme Court in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009). A complaint does not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* at 1949 (quoting *Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

I. The Amended Complaint should be dismissed under Rule 12(b)(1) because Plaintiffs lack standing to bring the claims asserted.

Plaintiffs correctly note that the Secretary’s motion to dismiss was based on the legal sufficiency of the allegations in the Amended Complaint. Pls.’ Resp. at 4 n.3. Rather than defend the legal sufficiency of those allegations, Plaintiffs instead attach a series of declarations to their response brief that present a host of entirely new allegations that do not appear in the Amended Complaint. Moreover, the information contained in these declarations was available to

the Plaintiffs in April when the Amended Complaint was filed.

By injecting such new assertions, Plaintiffs have, at a minimum, converted the Secretary's motion from a facial attack on the legal sufficiency of the allegations in the Amended Complaint into a factual dispute regarding the court's jurisdiction. As such, the Court may not presume the truthfulness of the factual allegations. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). To the extent the Court exercises its discretion to consider the additional declarations offered by Plaintiffs, it must also consider the attached declaration submitted by the Secretary, which directly refutes Plaintiffs' new allegations concerning the purported disenfranchisement of individual members and persons whom Plaintiffs registered to vote.

Attachment 7 (Rudy Decl.).

The plaintiff, as the party asserting jurisdiction, bears the burden of showing that he has standing for each type of relief sought. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009); *Utah Ass'n. of Counties v. Bush*, 455 F.3d 1094, 1100 (10th Cir. 2006). To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical. *See Earth Island Inst.*, 129 S. Ct. at 1149.

A. Plaintiffs lack associational standing to bring claims on behalf of their members or persons whom they registered to vote.

An association has standing to bring suit on behalf of its members when (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 in the lawsuit. *See Hunt v. Wash. State Apple*

Adver. Comm'n, 432 U.S. 333, 343 (1977); *Utah Ass'n. of Counties*, 455 F.3d at 1099.

As noted in the Secretary's motion to dismiss, to meet the first prong of this test, a plaintiff-organization must make specific allegations establishing that "at least one identified member" has suffered the requisite harm. *Earth Island Inst.*, 129 S. Ct. at 1151.

Here, Plaintiffs Common Cause and SEIU purport to bring claims on behalf of individual members of those organizations. SEIU and Mi Familia purport to bring claims on behalf of voters whom those organizations registered. However, the Amended Complaint, even with the supplemental declarations, fails to allege sufficient facts showing that Plaintiffs have associational standing to bring the claims asserted here.

Plaintiff Mi Familia's declarations are particularly deficient, in that they offer no more than the entirely speculative "possibility that some eligible voters who were registered by Mi Familia Vota" will be disenfranchised. Dick Decl. at Ex. C (Lopez Decl. ¶ 8). Notably, the Lopez Supplemental Declaration (dated July 13, 2009) fails even to allege that any person whom Mi Familia registered to vote was unlawfully cancelled, let alone disenfranchised. Supp. Lopez Decl. This is not surprising, as Mi Familia admits it does not maintain records of everyone whom it registered to vote. Ulibarri Decl. ¶ 2. Given this recent admission, it is unclear on what possible basis Mi Familia asserted in the Amended Complaint that "on information and belief, some eligible voters who were registered by Mi Familia staff or volunteers will be or have already been purged unlawfully from the rolls." Am. Compl. ¶ 11. It is likewise unclear how Plaintiff Mi Familia intends to substantiate this claim if the organization admittedly does not

know whom it has registered to vote.²

In the new declarations attached to the response to the motion to dismiss, Plaintiff SEIU presents a list of members and persons whom SEIU registered to vote whom SEIU claims were unlawfully cancelled.³ Allen Decl. at Ex. A (Webb Decl. ¶ 7), Ex. B. Similarly, Plaintiff Common Cause offers a supplemental declaration identifying the names of 11 Common Cause members whose voter registration records were allegedly unlawfully cancelled. Flanagan Supp. Decl. ¶ 52. Common Cause proffers these new allegations for the first time in response to the motion to dismiss, although it acknowledges having had access to the lists of cancelled registrations since November 13, 2008. Flanagan Supp. Decl. ¶ 48.

What is particularly noteworthy about these supplemental declarations is that both SEIU and Common Cause stop curiously short of claiming that any of these persons was actually *disenfranchised* as a result of a cancelled registration record. These declarations contain not one assertion that any person on these lists was actually deprived of the right to cast a ballot that

² Plaintiffs suggest that this information is kept by the Secretary and must be obtained through the discovery process. Resp. at 13 n.7. Plaintiffs further suggest that “once Defendant provides this information, Mi Familia Vota will be able to carry out the detailed matching necessary to identify the specific voters it registered who were purged from the voting rolls.” *Id.* However, Plaintiffs have not sought this specific information in discovery (*i.e.*, records of persons whom Mi Familia registered to vote). Even if they had requested it, the Secretary maintains no log or master list of persons whom a particular VRD registered to vote. Voter registration drives simply turn in stacks of individual registration forms to the counties. While the scanned image of an individual registration form will usually contain the VRD number, without a list maintained by the VRD itself, any search for particular registration forms turned in by a VRD would require individual review of literally every scanned voter registration form in SCORE. In short, it would be virtually impossible to identify specific persons whom Mi Familia registered to vote. The Secretary is certainly under no obligation to undertake such an effort in order to substantiate Mi Familia’s conclusory allegations in the Amended Complaint.

³ This list was provided to the Secretary on December 3, 2008, and was based on a comparison against the lists the Secretary had previously provided to Plaintiffs of all registrations cancelled between May 14, 2008 and November 4, 2008, as well as all applications that failed the 20-day provision beginning August 2007.

counted, let alone as a result of an allegedly unlawful cancellation. The absence of such allegations is telling. These Plaintiffs presumably have contact information for their own members. Common Cause states it has actually spoken with at least six of these individuals. *See* Flanagan Supp. Decl. ¶ 52. Plaintiffs have had months to investigate whether any of these 37 individuals was disenfranchised or otherwise experienced problems voting in the 2008 election. Yet even the supplemental declarations contain no such allegations.

To the extent the Court considers Plaintiffs' supplemental declarations for purposes of determining Plaintiffs' standing (and therefore the court's jurisdiction) under Rule 12(b)(1), the Secretary replies that, in fact, none of the persons identified either the SEIU or Common Cause lists was disenfranchised. As set forth the attached declaration, the Secretary has reviewed the voter history for the persons identified in the lists supplied by SEIU and Common Cause and determined that, with one exception,⁴ every person on those lists who attempted to vote in the November 2008 election was able to cast a *regular* ballot from an active registration record in SCORE. The majority of these persons were issued mail-in ballots from their active registration records; others voted in person either during early voting or on Election Day, and cast regular ballots – again, from active registration records. **Attachment 7** (Rudy Decl.)

In their response to the Secretary's motion to dismiss, Plaintiffs now suggest that actual disenfranchisement is not the alleged harm at stake in this litigation, but the mere cancellation of voter registration records, without more. The NVRA, however, does not outlaw the cancellation of voter registration records. To the contrary, the NVRA and HAVA *require* states to maintain

accurate voter registration lists by removing the names of ineligible voters from the official voter registration lists. Allegations that the State has simply cancelled certain voter registrations in SCORE, without more, do not state any violation of law. Under Plaintiffs' new articulation of the alleged injury, *any* list maintenance would be subject to litigation, regardless of whether the cancellation of any voter record impacted the voter's ability to cast a ballot.⁵

Put differently, Plaintiffs appear to suggest that the mere cancellation of a voter registration record constitutes disenfranchisement. This is simply not true. In the most obvious example, the cancellation of a voter's *duplicate* registration record does not disenfranchise a voter because the voter necessarily *remains registered* to vote; only the voter's duplicate record is cancelled. Therefore, that voter can still cast a ballot that will count. (Indeed, as shown in Attachment 7, this is precisely what happened for a number of the individuals identified by SEIU and Common Cause in the supplemental declarations.) Similarly, the cancellation of the registration of a convicted felon or of a deceased person does not constitute illegal disenfranchisement because such persons are either ineligible or otherwise unable to vote.

Alternatively, Plaintiffs attempt to characterize the right to cast a provisional ballot as an

⁴ The exception involved an individual who voted a provisional ballot because he had been previously issued a mail ballot that had not been returned. Thus, he voted a provisional ballot for reasons entirely unrelated to the cancelled record.

⁵ For example, Plaintiffs acknowledge that the Amended Complaint now raises allegations regarding cancellations outside the 90-day window (the original claim in this litigation), and admit they have no data to support these allegations of purportedly illegal list maintenance activity. Pls.' Resp. at 9 ("The Amended Complaint asserts claims related to the purges conducted outside the period covered by the Purge lists as well as those carried out within it, *but Plaintiffs do not yet have data regarding these purges.*") (emphasis added). Plaintiffs should not be permitted to "unlock the doors of discovery . . . armed with nothing more than conclusions." *Ashcroft*, 129 S. Ct. at 1950.

“injury.” Pls.’ Resp. at 23-24.⁶ This argument turns the HAVA mandate of fail-safe voting on its head. Provisional ballot voting ensures that a voter whose eligibility is in doubt (for whatever reason) will *not* be turned away at the polls but will be able to cast a ballot without having to first resolve the question of eligibility. The ability to cast a provisional ballot is thus a *remedy*, not a “burden.” Both the U.S. Supreme Court and the Tenth Circuit have made this clear.

In *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), the Supreme Court noted that “the right to cast a provisional ballot provides an adequate remedy” for problems with producing proper photo identification at the polls. *See id.* at 1620; *see also id.* at 1621 (noting that certain inconveniences, such as having to make a trip to another agency or gathering required documents “do not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting”); *id.* (likewise noting that the severity of the burden of obtaining proper photo identification “is, or course mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.”).

Similarly, the Tenth Circuit has characterized the provisional ballot voting process as a remedy, not an “injury.” *See American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008). There, the Court noted that to cast a provisional ballot, a voter was required to sign an affidavit and make an additional trip to the clerk’s office within ten days following the election to present valid photo ID. The Court concluded, “Perhaps presenting an

⁶ Plaintiffs contend that voting a provisional ballot is a “burden” because it “takes time and effort,” and requires filling out a form. Pls.’ Resp. at 23-24; Flanagan Supp. Decl.¶ 25.

inconvenience to certain voters, *these alternatives would still allow such a vote to be counted and therefore do not amount to a substantial burden on the right to vote.*” *Id.* at 1324 (emphasis added).

In short, a voter who has a registration record cancelled is not disenfranchised unless the cancellation of that record prevents that eligible voter from casting a ballot that is counted. Plaintiffs’ Amended Complaint, even with the supplemental declarations, fails to allege that the cancellation of records at issue here has resulted in any actual disenfranchisement.

B. Plaintiffs lack standing to sue on their own behalf as organizations.

To establish standing to seek judicial relief on their own behalf as organizations, the Plaintiffs must still meet the constitutional standing requirements applied to individuals: (1) injury in fact to a legally protected interest which is “concrete and particularized” and “actual or imminent;” (2) fairly traceable to the challenged action; and (3) redressable by a favorable decision. *See National Taxpayers Union, Inc. v United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). Where an organization sues on its own behalf, it must allege such a “personal stake” in the outcome of the controversy as to warrant the invocation of federal court jurisdiction. *Id.* Each of the Plaintiffs here must demonstrate that the organization has suffered injury in fact, including concrete and demonstrable injury to the organization’s activities, with a consequent drain on the organization’s resources. *See id.*

As argued in the motion to dismiss, the allegations in the Amended Complaint do not establish standing for any of the Plaintiff organizations. Sec’y Br. at 14-16. Again, rather than defend the legal sufficiency of the allegations in the Amended Complaint, Plaintiffs have instead

attached several declarations with a host of new allegations of purported injury to the organizations. Mi Familia, for example, alleges that “Mi Familia Vota staff members spoke with several persons who were concerned about the voter purges and had questions about what to do in order to ensure that their votes would count.” Lopez Supp. Decl. ¶ 4. Common Cause and SEIU likewise state that their staff responded to phone calls from their members. Flanagan Supp. Decl. ¶ 15, 21-22; Webb Supp. Decl. ¶ 5. As set forth in the declarations, however, these calls were not prompted by any individuals having discovered that their registrations had actually been cancelled, but rather, by the media attention caused by the October 9th New York Times article. Flanagan Supp. Decl. ¶ 14; Webb Supp. Decl. ¶ 5. The declarations do not allege, for example, that any of these callers was discovered to have had a cancelled registration.

Common Cause alleges various other forms of purported harm to its organizational interests; namely, that its director was required to devote time during Just Vote Colorado meetings and Lawyer’s Committee Election Task Force meetings to convey information about “Colorado’s illegal purge activities” and the voter merge project (Flanagan Supp. Decl. ¶¶ 18, 33; that the director testified before the Election Reform Commission (*id.* ¶ 9); and that she tracked House Bill 09-1018 and the rulemaking process for Rules 2.18 and 2.20 (*id.* ¶¶ 27-32, 37-38). Such activities however, were among the ordinary duties of the director of Common Cause, as the declaration itself confirms. *See, e.g., id.* ¶ 9 (“As director of Common Cause, I was required to testify before the Election Reform Commission on several occasions.”); *id.* ¶ 13 (“I was responsible for running and supervising Just Vote Colorado and the Voter Protection Hotline as part of my duties as director of Common Cause.”); *id.* ¶ 33 (“As part of my duties as

director of Common Cause, I am an active member of the Colorado Lawyer's Committee Election Task Force.”).

More importantly, even taking the allegations in the supplemental declarations as true, none of the additional alleged burdens on the organizations is connected in any way to actual disenfranchisement of voters. Given the legal claims in this case (alleged violations of the NVRA and HAVA), the real “injury-in-fact to a legally cognizable interest” at stake here is actual disenfranchisement – the deprivation of the right to vote – a right notably held by individuals, not organizations. Absent concrete allegations of actual disenfranchisement, these organizations’ efforts and interests have not been injured in fact.

In sum, as set forth in the motion to dismiss and herein, Plaintiffs have failed entirely to allege standing based on the actual disenfranchisement of even one member their organizations or any person whom they registered to vote. Plaintiffs likewise fail to allege any injury to their organizations that stems from actual disenfranchisement caused by the Secretary’s actions. Rather, Plaintiffs are left simply with allegations that their organizations responded to phone inquiries following the publication of the New York Times article, and that the director of Common Cause attended certain meetings and tracked legislation – activities that were part of her regular director duties regardless of this litigation. Should the Court conclude that such assertions adequately state injury in fact sufficient to establish the standing of these organizations on their own behalf, and permit this case to go forward, as discussed below, Plaintiffs’ Amended Complaint nevertheless fails to state a claim for relief.

II. Plaintiffs' complaint fails to state a claim for relief because Colorado's list maintenance procedures do not violate the NVRA or HAVA.

Even assuming Plaintiffs have alleged sufficient injury in fact to establish standing to survive a motion to dismiss under Rule 12(b)(1), the Amended Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim for relief. Colorado's list maintenance procedures do not violate the National Voter Registration Act (NVRA) or the Help America Vote Act (HAVA).

Plaintiffs focus exclusively on those provisions of the NVRA and HAVA that serve to safeguard the exercise of the right to vote, and discount or simply ignore corresponding provisions that require states to take efforts to protect against voter fraud. Congress struck a careful balance between these objectives in the NVRA and HAVA in order to "protect the integrity of the electoral process." 42 U.S.C. § 1973gg(b)(3). Plaintiffs' reading of these statutes strikes no such balance; under their interpretation the State is virtually never permitted to cancel a voter registration record – rendering those equally important mandates virtually meaningless.

A. Colorado's procedures for removing duplicate registrations do not violate the NVRA or HAVA.

Plaintiffs insist that the NVRA prohibits the removal of *duplicate* registrations without following the specific NVRA procedures that govern removal of registrants who have "*changed residence*." Pls.' Resp. at 48-52. This argument misreads the NVRA and disregards directly relevant commentary appearing both in the legislative history of the Act as well as the *FEC Guide to Implementing the NVRA* ("FEC Guide"). See Sec'y Br. at 20 n.6 and Attachment 1.⁷

⁷ The legislative history referenced in the Secretary's motion to dismiss and in this reply is contained in an appendix to the FEC Guide that Plaintiffs introduced during the preliminary injunction proceedings.

The express purposes of the NVRA, as stated by Congress, include “protect[ing] the integrity of the electoral process” and “ensur[ing] that accurate and current voter registration rolls are maintained.” 42 U.S.C. § 1973gg(b)(3)-(4). Section 1973gg-6(a)(3) allows states to remove of the name of a registrant from the official list “at the request of the registrant”; for mental incapacity; or upon criminal conviction. § 1973gg-6(a)(3)(A)-(B). Section 1973gg-6(a)(4) also *requires* States to conduct a general program that “that makes a reasonable effort” to remove ineligible voters by reason of death (§ 1973gg-6(a)(4)(A)); upon written confirmation of a change of address to a location outside the registrar’s jurisdiction (§§ 1973gg-6(a)(4)(B) & (d)(1)(A)); and upon a voter’s failure to respond to certain confirmation mailings and failure to vote for two consecutive general federal elections (§§ 1973gg-6(a)(4)(B) & (d)(1)(B)).

HAVA likewise requires States to perform voter registration list maintenance. 42 U.S.C. § 15483(a)(2)(A). HAVA specifically requires Colorado to perform regular list maintenance in a manner that ensures that “*duplicate names are eliminated* from the computerized list.” 42 U.S.C. § 15483(a)(2)(B) (emphasis added).

See Exhibit 16 to Plaintiffs’ Brief in Support of Motion for Temporary Restraining Order. As noted in the Secretary’s motion to dismiss at 20 n.6, this Court may take judicial notice of its own files and records, as well as facts that are a matter of public record, without converting a motion to dismiss to a motion for summary judgment. *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).

1. The State may properly remove a duplicate registration record under § 1973gg-6(a)(3)(A) as a “request of the registrant” without having to follow the notice and waiting procedures that apply to removal for “change of residence” under § 1973gg-6(d).

Plaintiffs contend that any *duplicate* registration record for a voter generated when a person moves and re-registers cannot be removed without following the specific notice and waiting procedures in § 1973gg-6(d)(1) that apply to voters whom the state has reason to believe have merely “changed residence.” Pls.’ Resp. at 48-49. As argued in the Secretary’s motion to dismiss, Plaintiffs’ argument is based on a misreading of the NVRA.

The NVRA prohibits removal of a voter’s name from the list on the ground that the registrant has *changed residence*, unless the registrant “confirms in writing that the registrant has changed residence,” or the registrant fails to respond to a required notice and thereafter fails to vote in two consecutive federal elections. 42 U.S.C. § 1973gg-6(d)(1). This makes sense, because information indicating that a registrant has simply moved (such as change-of-address information obtained from the Postal Service) provides no assurance that that individual has also re-registered to vote at his new location. These notice and waiting procedures seek to confirm the change with the voter and preserve the voter’s one known registration record pending confirmation of that change.

By contrast, a *duplicate* registration is created only when an individual *actually re-registers to vote*. At issue here is not the potential cancellation of the voter’s one known registration record. Rather, in a duplicate registration scenario, the individual has actually re-registered in his new jurisdiction and now has two or more registration records in the system.

The cancellation of an individual's outdated *duplicate* registration(s) therefore never "removes" that individual from the official list of voters. The voter remains registered to vote in the new jurisdiction; only his outdated duplicate registration is cancelled.

Plaintiffs' interpretation ignores the legislative history of the NVRA and the FEC Guide. As argued in the motion to dismiss, under subparagraph 1973gg-6(a)(3)(A), the name of a registrant may be removed at any time "at the request of the registrant." Both the House and Senate Reports discussing the NVRA define the phrase "request of the registrant" to include "actions that result in the registrant being registered at a new address, such as *registering in another jurisdiction* or providing a change of address notice through the driver's license process that updates the voter registration." H.R. Rep. 14-15 (Sec'y Br. Attachment 2); S. Rep. 31 (Sec'y Br. Attachment 3). This interpretation of the phrase is confirmed in the FEC Guide. *See* Sec'y Br. Attachment 1 at 5-5 (FEC Guide) (expressly noting that a "request" by the registrant includes registering in another jurisdiction) (quoting H.R. Rpt. 14).

Thus, where a person moves and re-registers (thereby generating multiple registration records for that individual), the state may lawfully remove the voter's outdated duplicate record(s) under § 1973gg-(6)(a)(3)(A) as a "request of the registrant." Notably, the legislative history and FEC Guide contemplate that a voter in this situation has, in fact, changed residence. *See* Sec'y Br. Attachment 2 (H.R. Rep. 14-15) (defining "request of the registrant" to include "actions that result in the registrant being registered *at a new address*, such as registering *in another jurisdiction* or providing a *change of address* notice through the driver's license process that updates the voter registration."); Attachment 3 (S. Rep. 31) (same); Attachment 1 at 5-5

(FEC Guide) (same). Yet, neither Congress nor the FEC Guide suggests that the State must follow the notice or waiting procedures in § 1973gg-6(d) in this context.

Plaintiffs claim (without citation to any authority) that a “request of the registrant” instead means “those instances where a registrant affirmatively asks that that [sic] his or her name be *withdrawn* from the rolls.” Pls.’ Resp. at 51 (emphasis added). Plaintiffs then contend that, because Colorado law specifically provides for a registrant to “withdraw” his registration, *see* Colo. Rev. Stat. § 1-2-601, only such requests to withdraw qualify as a “request of the registrant” under the NVRA. Pls.’ Resp. at 51. This argument fails. That Colorado law establishes a process for a voter to withdraw his registration does not somehow modify the meaning of the phrase “request of the registrant” under *federal* law, or otherwise limit the circumstances under which the State may lawfully cancel a duplicate registration in compliance with § 1973gg-(6)(a)(3)(A).

Even assuming that the provisions of § 1973gg-6(d) apply to duplicate registrations generated when a person “changes residence” by moving and re-registering in a new county, a voter “confirms in writing” his change of residence by the very act of re-registering in the new jurisdiction. Accordingly, the State may properly cancel the outdated record. *See* § 1973gg-(6)(d)(1)(A) (permitting removal where the registrant “confirms in writing” that he has changed residence to a place outside the registrar’s jurisdiction). Plaintiffs object to this interpretation, arguing that a person who moves and re-registers may fail to note his prior address on the registration form; as such, that person has not actually confirmed in writing that he has “changed residence.” Pls.’ Resp. at 49-50.

Plaintiffs again ignore the FEC Guide, which expressly notes that “confirmation in writing” of a change of residence under § 1973gg-6(d)(1)(A) “includes any actions by the registrant ‘that result in the registrant being registered at a new address, such as *registering in another jurisdiction . . .*’” *See* Sec’y Br. Attachment 1 at 5-7 (quoting Hse. Rpt. 14) (emphasis added). Contrary to Plaintiffs’ interpretation, the FEC commentary does not carve out an exception for persons who fail to note their prior address on their registration form. Again, in the “duplicate” context, the very act of re-registering both confirms the move *and* ensures that the voter is actually registered at the new address. The voter’s act of re-registration distinguishes this situation from a mere “change of residence.” By re-registering, the voter has created the duplicate record; because that voter is actually registered at the new address, the cancellation of that voter’s outdated duplicate record does not “remove” that voter from the registration list.⁸

Plaintiffs’ interpretation carries serious consequences. Under Plaintiffs’ view of the NVRA, the State can never cancel a known duplicate record in SCORE without first sending notice and waiting for two federal election cycles. Under this interpretation, any person who moves and re-registers to vote is essentially entitled to have every one of his registration records in SCORE remain both active and protected against cancellation for up to four years. Such an approach not only invites voter fraud but practically ensures that it would go undetected. The SCORE system can prevent an attempt to cast multiple ballots on a single active record, but because the system logically treats each active record in SCORE as belonging to a different individual, it does not prevent a voter with multiple records in the state from voting a regular

⁸ In reality, Plaintiffs’ argument here goes to the adequacy of the matching criteria used to determine whether a record is in fact a duplicate. Those arguments are addressed below in part I.A.2.

ballot on each of his active records. Thus, the system can prevent John Doe (with one active record in Denver) from voting a mail ballot and also voting in person on Election Day. It could not, however, prevent Jane Doe (with active records in Denver, Adams, and Jefferson County) from, say, voting a mail ballot in Denver, voting early in Adams, and voting a third time on Election Day in Jefferson County.

Plaintiffs complain that the Secretary has offered no evidence of voter fraud at this motion to dismiss stage of the litigation. Pls.' Resp. at 52. Such evidence is irrelevant for purposes of this motion to dismiss. Plaintiffs miss the point; if the State were required to follow Plaintiffs' interpretation of the NVRA, it would leave the doors wide open to such fraud, without means to detect or prevent it. The State has an inherently legitimate – indeed, compelling – interest in protecting the integrity of the election process from voter fraud. Moreover, such fraud must be detected *before* a fraudulent regular ballot is cast. Once a regular ballot is cast (as could happen in the scenario above), the voter's identity is forever separated from the content of his voted ballot. His fraudulently cast votes will count, and there is no way to remedy the tally in a given race. The U.S. Supreme Court recently observed:

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1619 (2008).

Similarly, no evidence is required to reach the commonsense conclusion that leaving duplicate registration records in the system for up to four years leads to ever-mounting

overinflation of the voter registration rolls. *See* Sec’y Br. at 21. While Plaintiffs claim that their allegations of unlawful cancellation render the Secretary’s concerns meritless, *see* Pls.’ Resp. at 52, the issue is not merely one of serious administrative burdens. Plaintiffs’ interpretation directly contravenes the mandates of HAVA and the NVRA that require the State to maintain a statewide computerized voter registration list that is both “accurate and current.” Plaintiffs’ reading of the NVRA would require the State to wait up to four years before cancelling a known duplicate record. Under that approach, Colorado could never hope to have a list that is even remotely “accurate” or “current.”

Finally, Plaintiffs argue that on a motion to dismiss their allegation must be accepted as true (*i.e.*, the cancellation of duplicates violates the NVRA because it fails to adhere to the notice and waiting procedures § 1973gg-6(d)(1)). Pls.’ Resp. at 51. This is no more than a bare legal conclusion; it is not entitled to any presumption of truth. *See Ashcroft*, 129 S. Ct. at 1949 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. As a matter of law, Plaintiffs’ claim fails on the merits for the reasons articulated above. The State is not required to follow the notice and waiting procedures under § 1973gg-6(d)(1) before removing a known duplicate registration.

2. Plaintiffs point to nothing in the NVRA or HAVA requiring more specific minimum matching criteria than what is currently used by Colorado.

To the extent Plaintiffs challenge the matching criteria used in Colorado to determine whether a record is in fact a duplicate, their allegations fail to state a violation of HAVA or the NVRA.

Plaintiffs' Amended Complaint was filed shortly before the passage of House Bill 09-1018 (signed by the Governor on April 22, 2009). As discussed in the motion to dismiss, the SCORE system consolidated the 64 county databases in Colorado into a single statewide database. Under the new SCORE system, a voter who moves from one county to another and updates his voter registration will no longer generate a duplicate registration. Instead, the voter's record will be simply "transferred" from the old county to the new county. Sec'y Br. at 23; Attachment 4. House Bill 09-1018 codified and standardized the minimum matching criteria required to permit the transfer of a voter registration record. Under sections 1-2-603 and -604 of the Colorado Revised Statutes, as amended by H.B. 09-1018, a duplicate record will not be cancelled, nor a voter record transferred to a new county, unless there is a match of the voter's (1) name, (2) date of birth, and (3) prior residence; or, if no prior residence is supplied, then a match of the voter's (1) name, (2) date of birth, and (3) either a driver's license number or social security number. *See* Colo. Rev. Stat. § 1-2-603(1); 1-2-604(3); Attachment 4. The same

matching criteria in House Bill 1018 are being applied to the SCORE consolidation project (voter information consolidation effort, or “VOICE”) now underway.⁹

Plaintiffs’ Amended Complaint alleged only that Colorado’s procedures are “unclear, inconsistent, and vulnerable to error and abuse” and that the matching criteria are not sufficient to ensure that the registrations relate to the same person. Am. Compl. at ¶¶ 35-44, 51-54. Such allegations attacked the law as it existed before the passage of House Bill 1019; as such, they are now moot. Even if applied to current law, these allegations are wholly conclusory. Plaintiffs fail to allege how or why the minimum matching criteria under current law are “unclear,” “inconsistent,” or “vulnerable to error and abuse.”

In their response to the motion to dismiss, Plaintiffs claim they have essentially alleged that the State has “failed to establish the requisite minimum standards of accuracy and safeguards” in its list maintenance programs to ensure that purportedly duplicate records relate to the same person. Pls.’ Resp. at 44. However, neither the Amended Complaint nor Plaintiffs’ response to the motion to dismiss identifies what “minimum standards of accuracy” Colorado fails to meet under HAVA or the NVRA, or what particular “safeguards” required by those federal laws that Colorado has failed to implement. They point to no language in the NVRA or HAVA (or any other authority) mandating more specific matching than that already required by

⁹ Plaintiffs intimate that they “cannot be sure” that the Secretary is in fact applying the same criteria to the VOICE consolidation process. Pls.’ Resp. at 47. The Secretary not only informed Plaintiffs of these plans, but provided Plaintiffs with written documentation of these processes in mid May 2009, before filing his motion to dismiss. The Secretary has recently supplied further documentation of these processes in response to formal discovery.

Colorado law. Indeed, they cannot; nothing in the NVRA or HAVA requires the matching of specific points of information or requires any particular safeguard to be implemented.

In paragraph 15483(a)(4) (titled “minimum standard for accuracy of state voter registration records”), HAVA provides simply, “The State election system shall include provisions to ensure that voter registration records in the State are *accurate and are updated regularly*,” including “*a system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of voters*” and “*safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.*” 42 U.S.C. § 15483(a)(4)(A)-(B).

Thus, to the extent HAVA purports to define the “minimum standards” Colorado must meet, it simply requires the State to update its records regularly, make reasonable efforts to remove ineligible voters, and include some kind of safeguards against error. Plaintiffs do not allege here that Colorado fails to update its records regularly, or that it fails to make reasonable efforts to remove ineligible voters. Plaintiffs therefore state no claim that Colorado fails to meet the “minimum standards” required by HAVA. To the extent Colorado’s election system must include “safeguards” against error, the minimum matching criteria required by Colorado law provide such safeguards. Plaintiffs fail to allege how these statutory minimum matching criteria (a required match of the same first and last name, the same date of birth, *and* the same social security number, driver’s license number, or address) fail to constitute a “safeguard” to ensure that the records at issue belong to the same person. In short, Plaintiffs cannot simply allege that Colorado’s matching criteria are “insufficient” under HAVA or the NVRA without identifying what more specific matching criteria are required by those laws, or without identifying how

Colorado’s minimum matching criteria, clearly set forth in statute, create a plausible risk that voters will be disenfranchised.

A careful reading of the Amended Complaint reveals that Plaintiffs’ claim does not really hinge on the matching criteria, but rather, boils down to Plaintiffs’ legal conclusion that the State is always required to follow the notice and waiting procedures in 42 U.S.C. § 1973gg-6(d) before removing a duplicate record. Am. Compl. ¶¶ 47-50. As discussed above, this claim fails.

In sum, Plaintiffs’ non-conclusory allegations in the Amended Complaint fail to state a violation of the NVRA or HAVA. Plaintiffs’ claim regarding the treatment of duplicate registrations therefore must be dismissed.

B. The Secretary did not systematically cancel registrations of thousands of voters within 90 days of the 2008 primary or general election in violation of the NVRA.

Section 1973gg-6(c)(2) of the NVRA provides that the “State shall complete, not later than 90 days prior 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.” (Emphasis added.)

1. The challenged cancellations were not “systematic.”

The 90-day provision prohibits the State from conducting a “program” during the 90 days before an election, the purpose of which is to “systematically” remove the names of ineligible voters. 42 U.S.C. § 1973gg-6(c)(2).

The word “systematic” must be interpreted in the context in which it is used. *Johnston v. Bowersox*, 119 F. Supp. 2d 971, 981 (E.D. Mo. 2001), *aff’d*, *Johnson v. Luebbers*, 288 F.3d 1048

(8th Cir. 2002) (interpreting “systematic exclusion” to mean inherent in the particular jury selection process); *Ciafrei v. Bentsen*, 877 F. Supp. 788, 793 (D.R.I. 1995) (“systematic” violations under Title VII consists of overarching policy directed to all employees and not just to an individual).

In his motion to dismiss, the Secretary noted that even Plaintiffs’ own allegations in the Amended Complaint confirm that the cancellations of voter registration records challenged here are not “systematic”, but involve hands-on, individualized review by a human being, including the review of scanned images of registration documents and signatures. Am. Compl. ¶¶ 2(c), 36-39, 42. Plaintiffs’ allegations in Count II therefore fail to state a violation of the NVRA because such a process is not “systematic.” Again, the legislative history of the NVRA proves illuminating. Both the House and Senate Reports on this provision state:

This requirement applies to the *State outreach activity such as a mailing or a door to door canvas* and requires that such activity be completed by the 90-day deadline. This section *does not prohibit a State during that 90-day pre-election period from removing names from the official list of eligible voters on the basis of the request of the registrant*, as provided by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act.

Attachment 8 (House Report at 16); **Attachment 9** (Senate Report at 32) (emphases added).

The Senate report also states:

It is intended by this requirement that the *State outreach activity, such as the mailing of list verification notices or conducting a canvas*, must be concluded not later than 90 days before an election, *however, this would not prevent a State from making the appropriate changes to the official lists pursuant to the Act during the 90-day pre-election period.*

Attachment 9 (Senate Report at 18-19) (emphases added).

These comments indicate that Congress understood that a “program” designed to “systematically” remove names of ineligible voters applies, for example, to broad-based “outreach activity” conducted by the State. Clearly, Congress did not intend to prevent States from continuing necessary list maintenance activity leading up to an election, certainly where it concerns requests of the registrant, convictions, deaths, or other “corrections” or “appropriate changes” to the voter registration lists. Thus, while the NVRA does not define the word “systematic” as used in § 1973gg-6(c)(2), the legislative history of the Act indicates that Colorado’s individualized review process is certainly not the kind of “outreach activity” contemplated by Congress under that provision.

Plaintiffs respond that Colorado’s individualized review process is “systematic” because it is routinized and methodical. Pls.’ Resp. at 39-40. Under that definition of “systematic,” however, *all* list maintenance in Colorado would be deemed “systematic,” regardless of when it is conducted, and regardless of the number of voter record files (one or dozens) examined in that effort. In other words, any time a county clerk takes the time to “methodically” compare a first name and last name, date of birth, SSN, driver’s license, prior residence, or look at actual scanned images of voter records to compare signatures before cancelling a record, such a process is “systematic” and therefore prohibited anytime within 90 days of an election. This cannot be the case, particularly given the exceptions expressly carved out in § 1973gg-6(c)(2)(B)(i) (stating that the 90-day window “shall not be construed to preclude the removal of names” based on the request of the registrant, felony conviction, or death).

Plaintiffs suggest that these exceptions permit only the removal of “individual ‘names’” for these excepted categories (deaths, felons, requests of the registrant) during this window, but

still prohibits “systematic” cancellations in these categories during that time frame. *See* Pls.’ Resp. at 43. Plaintiffs further contend that the exception applies only to voters in those categories who “become ineligible” *during* that 90-day window before an election. *Id.*

Plaintiffs’ interpretation of § 1973gg-6(c)(2)(B)(i) defies the plain language of that provision. The exception applies to the *categories* of cancellations, not a window of time. In other words, the categories identified (deaths, convictions, requests of the registrant) are cancellations that may occur at any time. Moreover, the exception expressly refers to the “removal of names” from the official lists; it is not limited to “individual” names, nor does it suggest that only a few persons (but not everyone) in those categories may have their records cancelled.

Plaintiffs’ position also makes no logical sense. The individualized review process used in Colorado is the same regardless of when it is conducted or how many records are reviewed. Surely the State must follow the same “methodical” individualized review process (including matching the required minimum criteria) before canceling even an “individual” registration record (as permitted under Plaintiffs’ interpretation). (Indeed, it is hard to envision what kind of process Plaintiffs would want the State to follow to remove an “individual name” that would *not* be “methodical” or involve individualized review). Yet, by Plaintiffs’ definition, such an approach is inherently “systematic” and therefore barred under *any* circumstance within the 90-day window. Similarly, Plaintiffs suggest that the exceptions listed in § 1973gg-6(c)(2)(B)(i) apply only to persons who “become ineligible” during the 90-day window before an election. Even under Plaintiffs’ interpretation of that exception, surely the State would be permitted to cancel the registrations of *all* persons who become ineligible to vote within that 90-day window

(*e.g.*, all convicted felons). Yet, Plaintiffs claim the State may remove only “individual names”; the “systematic” removal of all felons during that window is still prohibited.

In short, the word “systematic” cannot bear the overly broad definition Plaintiffs would attach to it. Consequently, for this reason alone, Plaintiffs’ allegations in Count II fail to state a violation of the NVRA.

2. All of the cancellations within the 90-day window were proper.

As discussed in the motion to dismiss, the Amended Complaint sets forth two tables listing the categories of cancellations conducted within the 90 days before the 2008 primary and general elections. Am. Compl. ¶¶ 29-30 (Tables 1-2, listing “Conversion,” “Moved,” “Duplicated,” “Deceased,” “Failed 20-day,” “Felon,” “Withdrawn,” “Inactive,” “Not A Citizen,” and “Voter Fraud”). The Amended Complaint fails to identify which categories of cancellations they believe were improper, but simply alleges that “the majority of the above voters were purged, in violation of the NVRA’s 90-day rule, for reasons other than those permitted by law”. Am. Compl. ¶ 29.

Plaintiffs’ claim must be dismissed to the extent that any of the cancellations at issue fall within the express exceptions listed in § 1973gg-6(c)(2)(B)(i). These include any cancellations based on death, criminal conviction, or made at the “request of the registrant.” Thus, the “Deceased” and “Felon” categories above meet the exception; moreover, as discussed above in Part II.A.1, all “Duplicate” registrations fall within the “request of the registrant” exception. By Plaintiffs’ own argument, all “Withdrawn” cancellations meet this exception as well. *See* Resp.

at 41, 51. In their response brief, Plaintiffs do not even attempt to argue that the “Conversion,”¹⁰ “Not A Citizen,” or “Voter Fraud” cancellations were improper. In sum, to the extent Count II of the Amended Complaint purports to encompass any of these categories of cancellations, it must be dismissed.

Thus, the only remaining categories at issue under this claim are the “Moved,” “Failed 20-Day” and “Inactive” cancellations. The “Moved” cancellations meet the same “request of the registrant” exception discussed above. As stated in the Secretary’s Brief in Opposition to Plaintiffs’ Motion for Temporary Restraining Order at page 2, and as testified to at the Preliminary Injunction hearing, a record is not cancelled as “moved” unless there is confirmation that the voter has not only changed residence but also *re-registered* at his new location. *See* Tr. Hrg. 10-29-08 at 57:16 – 58:13. As discussed below in Part II.C, the Failed 20-day applications do not violate the NVRA 90-day provision because a failed 20-day applicant is never “registered” to vote under Colorado law. The NVRA only prohibits the removal of “registrants,” not failed *applicants*. *See* § 1973gg-6(a)(3); *cf.* HAVA § 15483(a)(2)(B) (permitting removal of names from the list of persons who are “not registered”).

Finally, as discussed below in Part II.D, the cancellation of Inactive voters complies with the requisite notice and waiting period provisions under the NVRA.

In sum, the cancellations conducted between May 14, 2008 and November 4, 2008 did

¹⁰ Plaintiffs claim that “additional discovery” is needed to determine whether the Conversion cancellations were unlawful. Pls.’ Resp. at 43 n.20. As set forth in the motion to dismiss, testimony at the preliminary injunction proceedings established that these cancellations fell outside the 90-day window entirely. Sec’y Br. at 26 (citing Tr. Hrg. 10-29-08 at 61:25- 62:2). Plaintiffs’ Amended Complaint offers no factual allegations disputing this testimony.

not violate the NVRA. Plaintiffs' Count II must be dismissed.

C. Colorado's 20-day rule does not violate the NVRA.

Plaintiffs claim that Colorado's "20-day" provision violates the NVRA because it allows an election official to remove the name of a "registrant" based on the return of undeliverable mail within 20 days of registration. Am. Compl. ¶¶ 2(a), 15-22,72-76 (Count I).

The NVRA prohibits the removal of names of "registrants" based on returned mail until the voter confirms a change of address in writing, or fails to respond to a notice and thereafter fails to vote on two consecutive federal elections. § 1973gg-6(d). Plaintiffs correctly recognize that their claim hinges on their contention that any person who submits an application for registration is automatically a "registrant," without more.

As discussed in the motion to dismiss, the NVRA does not define "registrant." It clearly distinguishes between "applicants" and "registrants", however. The provisions of § 1973gg-6(d) apply only to removal of "registrants." Logically, an "applicant" does not become a "registrant" until he is validly registered to vote.

Notably, the NVRA does not "register" voters, or provide for who may become a registered voter. 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. As argued in the motion to dismiss, 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 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. During the pendency of these 20 days, Colorado law plainly treats these individuals as “applicants,” not “registrants.”

Plaintiffs rely on *United States Student Association v. Land*, 546 F.3d 373 (6th Cir. 2008) for the proposition that the question of who is a “registrant” is a matter of federal law. Pls.’ Resp. at 33. Plaintiffs correctly note that the Sixth Circuit is the only federal appellate court to date to consider this issue. The *Land* case, however, is neither binding on this Court, nor is it persuasive.

First, the *Land* matter was briefed and decided in five days, shortly before the election, in the rushed context of an emergency motion to stay an injunction entered by the district court. Thus, the ruling is *not* a merits decision. Further, the panel was split 2-1, with the dissent emphasizing that the very same issue had been decided the other way 13 years earlier in *Association of Community Organizations for Reform Now (“ACORN”) v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995) – a decision affirmed by the Sixth Circuit. *Land*, 546 F.3d at 389-90 (Vinson, J., dissenting) (citing *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997)). The dissent

points out that the earlier case reached the opposite conclusion: that *state law* determines when an applicant is registered. *Id.* at 390 (Vinson, J., dissenting). Moreover, the dissent points out that the ruling is inconsistent with other Sixth Circuit precedent in which the court observed that, “Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place.” *Id.* at 391-92 (quoting *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004)). The dissent reasoned that, a “registrant” is a qualified voter who is *legitimately* on the voting rolls; although the majority appeared to take the position that *everyone* who is entered in the database is per se qualified, there was no justification for that conclusion. *Id.* at 393. “There is a presumption that if your mail is not delivered to you then you do not reside at the listed address. That presumption is used in the law and in business every single day.” *Id.* The dissent concluded, “[B]ased on existing precedent, the practice being challenged does not appear to even conflict with or violate the NVRA.” *Id.*

The *Land* majority concludes that state law cannot control the definition of “registrant,” and therefore resolves the meaning of “registrant” under federal law. *Land*, 546 F.3d at 383. Because the NVRA does not define “registrant,” however, the majority simply crafts its own definition, stating that a person becomes a “registrant” for purposes of the NVRA “from the first moment that he or she is actually able to go to the polls and cast a regular ballot.” *Id.* at 383.

Not only does the majority’s improvised definition find no support anywhere in the text of the NVRA, but it ignores the legislative history of the Act. As stated in the House Report, these matters of notice were clearly left to the States:

Each State election official is required to give notice to each applicant regarding the disposition of his or her voter registration application. *The means of notifying each applicant is not specified,*

*so that each state may continue to use whatever means is required or permitted by State law or regulation. States may adopt whichever procedure they deem best suited to provide notice to the applicant and to provide the registrar with verification of the accuracy of the information provided by the applicant. **The Committee recognizes that such notices are sent by most States as a means of detecting the possibility of fraud in voting registration and intends to give each State discretion to adopt a means of notification best suited to accomplish that purpose** as well as providing a means for notifying an applicant, who has not had direct contact with the voter registrar's office, of the appropriate voting place for his or her residence. *The Committee believes that accurate and current voter registration lists are essential to the integrity of the election process and for the protection of the individual.**

Attachment 8 (House Report at 14) (emphases added).

This legislative history clearly expresses Congress' intent to leave these processes for notifying applicants up to the States. Moreover, the passage above expresses Congress' acknowledgment that such notification processes are used by States specifically as a means of detecting possible fraud. For all of these reasons, the majority opinion in *Land* is not persuasive and should not govern this Court's resolution of this claim.

States may make different public policy choices in their efforts to strike a balance between protecting the right to vote and protecting against voter fraud. In Colorado, the legislature has made the public policy choice to use the 20-day procedure to ensure that applications for voter registration contain valid addresses. This carries particular importance in state and local elections, particularly mail ballot elections when clerks need assurance that mail ballots are being sent to valid addresses. Thus, as argued in the motion to dismiss, an applicant is not deemed "registered" under Colorado law until the applicant's address has been confirmed. Colorado law consistently refers to such individuals as "applicants", which accurately describes

individuals' status during the 20-day window in which the State awaits confirmation of that applicant's address.

Plaintiffs claim that the Secretary's position is unsupported by logic and would lead to absurd results because an applicant may cast a ballot and have his vote counted before the 20-day period has passed. Pls.' Resp. at 36. As a general rule, for most of the year, the required confirmation occurs simply by passage of the 20 days. The State recognizes a narrow exception, however, when an applicant seeks to register close to the registration deadline. In that instance, the election may occur before the passage of the 20 business days. In light of that possibility, the State has chosen to err on the side of protecting those applicants by allowing them to request a mail ballot and to simply confirm the address in that process or in person at a polling place. The fact that Colorado has recognized this narrow exception for applicants during the actual election period does not negate the purpose of the 20-day provision, nor is Colorado's effort to protect last-minute applicants illogical or absurd.

In sum, Plaintiffs' allegations regarding the 20-day provision under Colo. Rev. § 1-2-509(3) fail to state a violation of the NVRA because the individuals at issue are not "registrants" under the NVRA. Thus, Count I must be dismissed.

D. Colorado's statutes and procedures for handling "inactive" voters do not violate the NVRA because no voter is removed solely for failure to vote.

In their Amended Complaint, Plaintiffs assert that Colorado's procedures for handling "inactive" voters violates the NVRA because Colorado law "creates a mechanism for the eventual removal from the rolls of eligible and registered voters that is triggered solely (sic) their failure to vote." Am. Compl. ¶ 2(d), 56; *see also* ¶ 60.

As discussed in the motion to dismiss, Plaintiffs fail to state a violation of the NVRA because the Secretary's Rule 2.18.3¹¹ now clarifies that a voter designated as "inactive- failed to vote" will not be cancelled under § 1-2-605(7). Sec'y Br. at 30-33, Attachment 6 at 2. In other words, Plaintiffs' claim is moot in light of the new Rule.

Under Rule 2.18, Colorado will receive information from the National Change of Address ("NCOA") on or before June 1 of each odd-number year. The Secretary will send the NCOA information to each county clerk. The clerk will send a confirmation card to each voter who appears to have change of address and marks the record "Inactive- NCOA status." Electors who are designated "Inactive-NCOA" status are eligible voters whose names appear on the pollbook. Inactive-NCOA status electors will remain eligible to vote unless they have been mailed a confirmation card, fail to respond to the card and then fail to vote in two consecutive federal elections.

In their response to the motion to dismiss, Plaintiffs contend that the promulgation of Rule 2.18.3 does not moot the case because they are entitled to mandatory injunctive relief to correct violations that may have occurred prior to the enactment of the rule. In essence, Plaintiffs seek mandatory injunctive relief. Plaintiffs are not entitled to a mandatory injunction. The NVRA is an intrusion upon the operations of state government. *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995). The courts must exhibit "an adequate sensitivity to the principle of federalism." *Id.* Thus, while prospective injunctive relief is appropriate if a state continues to violate the law, mandatory relief should not

¹¹ The Secretary has rulemaking authority under Colo. Rev. Stat. §§ 1-1-107(2)(a), 1-1.5-104(1)(e).

be imposed, except in extraordinary circumstances. *Id.* (reversing a mandatory injunction requiring Illinois to designate a person responsible for coordinating NVRA efforts, take all necessary steps to ensure that no one's registration is canceled for failure to vote, and assure that Illinois does not remove names unless the reason for cancellation is death, criminal conviction, mental capacity or the registrant's request).

A mandatory injunction is particularly inappropriate where third parties may be affected. *Id.* at 797. In this case, Plaintiffs seek an order requiring the Secretary to reinstate names of persons whose registrations may have been cancelled as inactive for failure to vote prior to the promulgation of Rules 2.18 and 2.20. Under Colorado law, the Secretary does not actually modify any voter registration records; the county clerks perform this function. The Secretary merely coordinates the activities. Colo. Rev. Stat. § 1-1-107(1)(d). It is the county clerks who would be required to provide the relief, even though they are not parties to this action.¹²

Plaintiffs contend that Colorado's procedure under Rule 2.18 still violates the NVRA as it applies to persons who appear from the NCOA check to have moved within a jurisdiction. Pls.' Resp. at 54-55. According to Plaintiffs, where the NCOA information indicates that a person has moved *within* a jurisdiction (*e.g.*, within a county), the county clerk must immediately correct the voter's registration in SCORE to the address indicated in the NCOA list, without first getting confirmation from that voter. Plaintiffs further argue that the county clerks may *never* thereafter cancel the registration of such an individual, even though the individual thereafter fails

¹² In any event, it would be impracticable, if not impossible, to provide the requested relief. Given the consolidation of records from the various county databases when Colorado moved to the SCORE system in 2008, it is virtually impossible to identify those persons who were previously canceled as inactive for "failure to vote" (as opposed to other bases, such as for returned mail).

to respond to a confirmation card sent by forwardable mail asking the voter to confirm the new address, and thereafter fails to vote in two consecutive elections. Plaintiffs' argument again misreads the NVRA.

1. Colorado's procedures comply with § 1973gg-6(c)(1)(B)(i).

Under section § 1973gg-6(a)(4), Colorado must “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official list of eligible voters by reason of ... (B) a change in the residence of the registrant, in accordance with section (b), (c), and (d).” Colorado may choose to meet this requirement by using the NCOA program “to identify registrants whose addresses *may* have changed.” 42 U.S.C. § 1973gg-6(c)(A).

(Emphasis added.)

Under Plaintiffs' view, if a county receives information from the NCOA check process in Rule 2.18 indicating that an elector moved to another address within the same county, then under § 1973gg-6(c)(1)(B)(i), the county must automatically update the elector's registration to the new address.

Plaintiffs' argument hinges on the meaning of the phrase “changes the registration records to show the new address” in § 1973gg-6(c)(1)(B)(i). Under the process outlined in subsection (c), if it “*appears* from information provided by the Postal Service that” a registered elector “has moved to a different residence address in the same jurisdiction in which the elector is presently registered,” the clerk “*changes the registration to show the new address* and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed

return form by which the registrant *may verify or correct* the address information.” 42 U.S.C. § 1973gg-6(c)(1)(B)(i). (Emphases added.).

Under present procedures, a county clerk who receives NCOA information indicating that a voter has moved within the jurisdiction does not automatically update the registration to the new address (thus moving the voter in SCORE to a new precinct). Rather, the clerk enters the forwarding address information from the NCOA check into a holding field in the SCORE system. This process “changes” the registration record to “show the new address”, but without actually moving the voter to the new precinct until confirmation is received from the voter.

Colorado takes this approach because NCOA lists are not necessarily accurate or reliable. Of critical importance is the fact that the information that appears on an NCOA match is far less stringent than the minimum matching criteria required for every other kind of transfer or cancellation process used in Colorado. As discussed above in Part II.A.2, to transfer or consolidate a record in SCORE, clerks must have a match of (1) first and last name, (2) date of birth, and (3) either a driver’s license, SSN, or prior residence address. The NCOA information, however, provides nothing more than a name and address. It does not provide a birthdate or social security number or driver’s license or any other unique identifying information that can be used to distinguish individual members of a given household (*e.g.*, a father and son with the same name). Moreover, an NCOA form may contain simply the family name, and inadvertently capture an entire household instead of just an oldest child who has left for college).

The NVRA does not require states to use NCOA checks. The Secretary has opted in Rule 2.18 to use the NCOA process to assist the county clerks in trying to locate and reach out to voters who have failed to vote. However, NCOA information is insufficient (particularly in light

of the minimum matching requirements in Colorado law) to warrant formally correcting a registration record without confirmation from the voter. Although moving a voter *within* a county may not affect a voter's federal election choices, it has significant implications for state and local elections. For example, moving a voter within Denver County from Sloan's Lake (NW Denver) to Stapleton (East Denver) places that voter in entirely different state house and state senate districts, city council districts, and other special taxing districts. If the NCOA information is incorrect (or captures the wrong person in the household) and the voter has *not* actually moved, the clerk must (under Plaintiffs' view) nevertheless automatically update the voter registration record to the new address, without first confirming the information with the voter directly. That voter, without his consent and through no fault of his own, will have been registered at some new address even though he never actually moved.

Under the Secretary's approach, the voter remains registered and is contacted by a confirmation card sent by forwardable mail. A voter who *did* move within the jurisdiction but failed to respond to the confirmation card will still be permitted to vote under the procedures set forth in section 1973gg-6(e)(1)-(2). If that voter appears to vote in his new precinct, he can affirm on the provisional ballot affidavit that he has resided at the new address for at least 30 days. When the check is run in SCORE, the new address will match the forwarding address in the holding field, the registration will be formally updated and the ballot will count. Moreover, even if that voter fails to vote in two subsequent elections and his registration is cancelled, State law allows for reinstatement of such voters anytime up to six years after the cancellation. Colo. Rev. Stat. § 1-2-605(10). Thus, anyone who has had a registration record cancelled under these provisions may be reinstated during that time and permitted to vote.

Under Plaintiffs' interpretation, a county *must* move the voter without first receiving confirmation. A voter who did *not* actually move will no longer appear on the pollbook at his residence, even though he never left. While that voter may also cast a provisional ballot and affirm that he never moved, resolving the situation is potentially trickier because his actual registration address is now listed in SCORE as the address provided by the NCOA (as opposed to a potential forwarding address noted in a holding field, under the Secretary's approach). As a matter of common sense, voters who move realize they need to update their registration, just as they need to notify others of their change of address. However, a voter who did *not* actually move is understandably upset when the county moves his registration without his consent, which is exactly what your Plaintiffs' would require.

Plaintiffs' interpretation is especially troubling here, given that Plaintiffs insist under Count III of their Amended Complaint that Colorado's current minimum matching criteria fail to meet minimum standards of accuracy and lack sufficient safeguards for purposes of transferring, updating, or consolidating voter records in SCORE. Yet, Plaintiffs would demand that clerks automatically change a voter's registration – without question – based solely on NCOA (name and address) information indicating a within-jurisdiction change of address. Plaintiffs' position in this context is wholly inconsistent with the arguments they make elsewhere in this litigation.

The Secretary notes that the NVRA itself reflects caution regarding the reliability of NCOA information. Notably, the NVRA does not state that the clerk must "correct" the registration upon receiving the NCOA information indicating a within-jurisdiction; rather, the clerk must "change" the records to "show the new address," and the provision requires the clerk to send a confirmation notice. 42 U.S.C. § 1973gg-6(c)(1)(b). However, the list is not required

to be actually “corrected” for a within-jurisdiction move unless the clerk receives confirmation of a “change of address *for voting purposes.*” See 42 U.S.C. § 1973gg-6(d). Changes of address “for voting purposes” include re-registering in a new jurisdiction or other actions *taken by the voter* to update his registration. Under this view, the person is not officially registered at the new address until the *voter* takes some action to confirm the new address.

2. Colorado may properly cancel the registration of a voter who has moved within a jurisdiction, where that voter has failed to respond to a confirmation card and thereafter fails to vote in two consecutive federal elections.

Plaintiffs separately contend that a voter who moves within a jurisdiction can never be removed from the rolls, even if that voter fails to respond to a confirmation card and fails to vote in two consecutive federal elections. While Plaintiffs focus on section 6(c) to support this contention, they ignore the processes outlined in section 6(d), which do permit removal of voters – including those who move within a jurisdiction – provided the notice and waiting procedures in section 6(d)(1)(B) are followed.

Pursuant to 42 U.S.C. § 1973gg-6(d)(1)(B), the Secretary cannot remove the name of a registered elector unless the elector “(i) has failed to respond to a notice described in paragraph (2); and (ii) has not voted or appeared to vote (and, if necessary, correct the registrar’s record of the registrant’s address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.” The confirmation letter must contain a notice to the following effect:

“(A) If the registrant did not change his or her residence or changed residence but remained in the registrar’s jurisdiction,

the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). *If the card is not returned*, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal 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, *and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters*"

42 U.S.C. § 1973gg-6(d)(2)(A) (emphases added).

Similarly, under the Help America Vote Act ("HAVA"), the Secretary must make reasonable efforts to remove registrants who are ineligible to vote from the official registration list. 42 U.S.C. § 15483(a)(4)(A). "[R]egistrants who have not responded to a notice and who have not voted in two consecutive general elections for Federal office *shall be removed* from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Id.* (Emphasis added.) HAVA also amended the NVRA, 42 U.S.C. § 1973gg-6(b)(2), to read as follows:

Any state program or activity to protect the activity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

—
(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—*

(A) *has not* either notified the applicable registrar (in person or in writing) or *responded* during the period

described in subparagraph (B) *to the notice sent by the applicable registrar*; and then

(B) *has not voted or appeared to vote in 2 or more consecutive general elections* for Federal office.

42 U.S.C. § 1973gg-6(b)(2) (emphases added).

Under Plaintiffs' view, after receiving NCOA information pursuant to the rule and sending a confirmation card, the county cannot thereafter remove the elector from the pollbook even if the elector does not respond to the confirmation notice and fails to vote in two subsequent federal elections. This interpretation does not comport with NVRA and HAVA. Under the existing statutory framework, confirmation notices must be sent to all electors for whom the Secretary has received information that the elector has moved, including registrants who appear to have moved within the same county. 42 U.S.C. § 19733gg-6(d)(2). If the voter does not respond to the notice and thereafter fails to vote for two consecutive elections, the elector may be removed from the registration list. 42 U.S.C. § 1973gg-6(d)(1)(B); 42 U.S.C. § 15483(a)(4).

Again, the legislative history of the NVRA confirms the Secretary's view:

If a State determines that a registrant may have changed residence, the State may send by forwardable mail a [return card to confirm the address] together with a notice which states that, if the registrant has not changed residence or has changed residence within the jurisdiction, the registrant should return the card before [the registration deadline]. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant would be permitted to vote [in the next two election cycles]. If the registrant has not appeared to vote in an election during that period, the registrant's name will be removed from the list.

Attachment 8 (House Report at 16) (emphases added); **Attachment 9** (Senate Report at 32-33)

(same).

In sum, Plaintiffs' allegations regarding Colorado's handling of "inactive" voters fail to state a violation of the NVRA. For these reasons, the Court must dismiss Claim IV.

CONCLUSION

For the foregoing reasons and authorities, the Amended Complaint should be dismissed for lack of standing and/or for failure to state a claim for relief.

Submitted this 14th day of August, 2009.

JOHN W. SUTHERS
Attorney General

s/ *Monica M. Márquez*
MONICA M. MÁRQUEZ*
Deputy Attorney General

s/ *Maurice G. Knaizer*
MAURICE G. KNAIZER*
Deputy Attorney General

s/ *Melody Mirbaba*
MELODY MIRBABA*
Assistant Attorney General
Attorneys for Defendant Secretary of State
1525 Sherman Street, 2nd Floor
Denver, Colorado 80203
Phone: 303-866-4500
Facsimile: 303-866-4765
Email: maurie.knaizer@state.co.us
Email: monica.marquez@state.co.us
Email: melody.mirbaba@state.co.us

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2009, I served a true and complete copy of the within **SECRETARY'S REPLY BRIEF IN FURTHER SUPPORT OF HIS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** upon all parties by the method indicated below:

Party Type	Attorney	Firm and/or Address	Method
Plaintiffs	James E. Johnson jejohnson@debevoise.com S. Gale Dick sgdick@debevoise.com	Debevoise & Plimpton, LLP 919 Third Avenue New York, NY 10022	Email
Plaintiffs	Richard Rosenblatt Rosenblatt@cwa-union.org	Richard Rosenblatt & Associates, LLC 8085 East Prentice Avenue Greenwood Village, CO 80111	Email
Plaintiffs	Penda D. Hair phair@advancementproject.org Elizabeth S. Westfall ewestfall@advancementproject.org Bradley Heard bheard@advancementproject.org	Advancement Project 1220 L. Street NW, Suite 850 Washington, DC 20005	Email
Plaintiffs	Wendy Weiser Wendy.weiser@nyu.edu Myrna Perez Myrna.perez@nyu.edu Jennifer Rosenberg Jennifer.rosenberg@nyu.edu	Brennan Center for Justice at NYU School of Law 161 Avenue of the Americas 12 th Floor New York, NY 10013	Email
Plaintiffs	Stephen P. Berzon sberzon@altshulerberzon.com Stacey M. Leyton sleyton@altshulerberzon.com Barbara J. Chisholm bchisholm@altshulerberzon.com	Altshuler Berzon, LLP 177 Post Street, Suite 300 San Francisco, CA 94108	Email
Plaintiffs	Karen Neuman kneuman@fairelectionsnetwork.com Sarah Brannon sbrannon@fairelectionsnetwork.com	Fair Elections Legal Network 1730 Rhode Island Avenue, NW Suite 712 Washington, DC 20036	Email

s/ Monica M. Marquez

ATTACHMENT

#7

(Declaration of Hilary Rudy in
Support of Secretary's Motion
to Dismiss Amended
Complaint)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-02321-JLK-KMT

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.

BERNIE BUESCHER, in his official capacity as Secretary of State
for the State of Colorado,

Defendant.

**DECLARATION OF HILARY RUDY IN SUPPORT OF SECRETARY'S
MOTION TO DISMISS AMENDED COMPLAINT**

I, Hilary R. Rudy, hereby declare:

1. I am employed at the Colorado Department of State as a legal specialist. My job duties include interpreting and analyzing federal and state election laws to assist with the development of programs and rules consistent with those laws. I provide guidance and to Colorado's 64 county clerks ("counties") with regard to the Secretary of State's ("Secretary") interpretation of those laws. I am specifically involved with the State of Colorado's Registration and Election system ("SCORE") to ensure that the development and implementation of the system is consistent with federal and state election law. I also help develop processes for the counties to follow in using this system and provide guidance to the counties in following those processes consistent with state and federal election law. In my role, I have developed a strong

knowledge of SCORE, which includes the ability to conduct thorough research of registration records maintained in the SCORE system. Based upon the research I am able to conduct in the SCORE system, I am able to determine whether an elector voted in an election, the method by which the elector voted (e.g., on Election Day, mail-in, early voting), whether the elector received voting credit, whether the elector has an active eligible registration in SCORE, and whether an elector's registration has been canceled, transferred, re-designated or otherwise modified as indicated in the registration records.

2. I have had an opportunity to review Plaintiffs' Opposition to Defendant's Motion to Dismiss Amended Complaint, all declarations and attachments thereto ("Pls.' Response").

3. In their Response to the Secretary's Motion to Dismiss, Plaintiffs identified 37 electors or applicants allegedly harmed by the Secretary's list maintenance practices. In particular, Plaintiffs alleged that SEIU registered 15 individuals whose registration records were "removed" from SCORE, 11 members of SEIU whose registration records were "removed" from SCORE, and 11 members of Common Cause of Colorado whose registration records were "removed" from SCORE. I conducted research in the SCORE database for registration records for each of those identified individuals based upon the information Plaintiffs provided for each individual as set forth in the Response; specifically, the Allen Declaration, (Ex. A & B) (Webb Decl., ¶ 7), and the Flanagan Supplemental Declaration, ¶ 52.

4. Based upon the research I conducted in the SCORE system and the information Plaintiffs provided, I can reasonably conclude that, of the 37 individuals identified by Plaintiffs, every individual who attempted to vote in the 2008 election was able to cast a ballot that was issued from their active registration record. Specifically, 27 voted a ballot from their active

record; 10 did not attempt to vote at all. Of the 27 individuals who voted, 26 received regular ballot vote credit (that is, their regular ballots were counted). I am unable to disclose whether one elector received voting credit because that individual voted a provisional ballot, issued from his active record, on grounds that he had been previously issued a mail ballot from his active record that was not returned. The Help America Vote Act of 2002 (“HAVA”) mandates that information regarding provisional ballots be provided only to the affected voter. *See* 42 U.S.C. § 15482(a) (“Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”).

5. My conclusions are based upon reasonable inferences from the information Plaintiffs have alleged and the information found within the SCORE system for each identified individual. Attached to this declaration is a summary spreadsheet (*see* Exhibit A), as well as screen shots that were taken directly out of the SCORE database for each individual Plaintiffs identified; the screen shots support the reasonable conclusions outlined herein with respect to each identified voter and are consistent with Plaintiffs’ factual contentions regarding each identified individual. *See* Exhibits B, C, and D.

6. Of the 11 Common Cause members Plaintiffs identified, eight individuals voted a mail-in ballot, one voted a regular ballot on Election Day, one voted a regular ballot during early voting, and one did not attempt to vote at all. *See* Exhibit B.

7. Of the 15 individuals SEIU identified as individuals whom SEIU registered to vote, seven voted a mail-in ballot, one voted a regular ballot on Election Day, one voted a provisional ballot on Election Day from his active record (because he requested a mail-in ballot for that same active record) and six did not attempt to vote at all. *See* Exhibit C.

ATTACHMENT

#8

(Excerpt from Exhibit 16 to
Plaintiffs' Brief in Support of
Motion for Temporary
Restraining Order, Docket #3)

APPENDIX B

THE HOUSE COMMITTEE REPORT ON THE ACT

103D CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
103-9

NATIONAL VOTER REGISTRATION ACT OF 1993

FEBRUARY 2, 1993.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SWIFT, from the Committee on House Administration, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 2]

[Including cost estimate of the Congressional Budget Office]

The Committee on House Administration, to whom was referred the bill (H.R. 2) to establish national voter registration procedures for Federal elections, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 11, beginning on line 5, strike out "substantially".
Page 22, strike out line 16 and all that follows through line 21 and insert in lieu thereof the following:

(2) The first sentence of section 2401(c) of title 39, United States Code, is amended by striking out "and 3626(a)-(h) and (j)-(k) of this title," and inserting in lieu thereof "3626(a)-(h), 3626(j)-(k), and 3629 of this title".

(3) Section 3627 of title 39, United States Code, is amended by striking out "or 3626 of this title," and inserting in lieu thereof "3626, or 3629 of this title".

PURPOSE

The purpose of H.R. 2 is to establish national voter registration procedures for Federal elections.

63-579

through the driver's license process that updates the voter registration.

States are required to inform applicants of voter eligibility requirements, the penalties provided by law for the submission of a false voter registration application, and ensure that the identity of the voter registration agency through which any particular voter is registered is not publicly disclosed.

Subsection (b) sets forth the standards for the confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current registration roll for Federal elections shall be (1) uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965; and (2) shall not result in the removal of the name of any person from the official list because of a failure to vote.

The purpose of this requirement is to prohibit selective or discriminatory purge programs. This requirement may not be avoided by a registrar conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity. The term "nondiscriminatory" is intended to mean that the procedure complies with the requirements of the Voting Rights Act of 1965.

The term "uniform" is intended to mean that any purge program or activity must be applied to an entire jurisdiction.

It is the intent of this section to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity that is used to start, or has the effect of starting, a purge of the voter rolls, without regard to how it is described or to whether it also may have some other purpose. For example, the mailing of sample ballots is clearly a program that has another purpose but might provide the basis for a purge of voter rolls. If it is to be used for that purpose and the registrar uses it to serve as his or her reason to send notices under subsection (d), that sample ballot mailing program must meet the standards of this section.

The Committee is mindful of the need to keep accurate and current voter rolls. The Committee is concerned that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing. Abuses may be found in the design of a program as well as in its implementation. In order to provide some guidance to the States, subsection (c) provides that a State may meet the requirements of conducting a general program that makes a reasonable effort to keep voting lists clean, by establishing a program which uses the National Change of Address ("NCOA") program of the U.S. Postal Service. Use of the NCOA program by a State or any of its registration jurisdictions could be deemed to be in compliance with the requirements that the program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

By using the NCOA, a State may use change of address information to identify registrants whose addresses may have changed. If it appears from the information provided that a registrant has moved to a different address within the jurisdiction of the same voting registrar, the registrar is required to make the address change

SECTION 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION

Subsection (a) provides that any person registered to vote not later than 30 days, or a lesser period as provided by State law, before a Federal election shall be permitted to vote. For these purposes, registration is complete upon submitting the form to the voting registrar, motor vehicle office, designated agency or office, or on date of postmark, if mailed. While the Act is clear with regard to the motor-voter and agency-based registration deadline requirement, the mail situation may be in need of some clarification. The reference, "or a lesser period as provided by State law" means, with regard to mailed registration application, that the shorter State period would apply only if it is referenced to "date of postmark". If the shorter period provided by State law refers to the date of receipt in the registrar's office, the thirty day period provided for here would apply. It is not intended here to penalize a registration applicant; thus, if the application is postmarked after thirty days, but is received before the deadline specified by State law, it should be accepted. Also, one postmarked before thirty days but received after the deadline under State law, should also be accepted as timely.

Each State election official is required to give notice to each applicant regarding the disposition of his or her voter registration application. The means of notifying each applicant is not specified, so that each State may continue to use whatever means is required or permitted by State law or regulation. States may adopt whichever procedure they deem best suited to provide notice to the applicant and to provide the registrar with verification of the accuracy of the information provided by the applicant. The Committee recognizes that such notices are sent by most States as a means of detecting the possibility of fraud in voting registration and intends to give each State discretion to adopt a means of notification best suited to accomplish that purpose as well as providing a means for notifying an applicant, who has not had direct contact with the voter registrar's office, of the appropriate voting place for his or her residence. The Committee believes that accurate and current voter registration lists are essential to the integrity of the election process and for the protection of the individual.

This section also provides that the name of a registered voter may not be removed from the official list of eligible voters except: at the request of the registrant; as provided by State law, by reason of criminal conviction or mental incapacity; or, in accordance with the requirements of the Act, by reason of the death or a change in the residence of the registrant. Recognizing the essential need to maintain the integrity of the voter registration lists, the bill requires that States 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 death or by a change of residence.

A "request" by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change-of-address notice

mining the number of signatures that may be required under State law for ballot access, the number of precincts that may be needed to service voters, or the number of ballots or voting machines that may be required in the administration of the voting process.

The term "registrant's jurisdiction," as used in connection with the NCOA program and with regard to the "affirmation" or "confirmation" requirements, is a term of art for the purpose of this Act and is not intended to dictate to the States their actual administrative structure for the purpose of registering voters. The Committee intends that a "registrant's jurisdiction" for the purposes of the Act be no smaller than a county, parish, city or town. This conforms to current practice. A State would be free, for example, to divide a very large county or city into 2 or more administrative units for registering voters as long as the county continued to be treated as the "registrant's jurisdiction" for those purposes of the Act hereinafter specified. First, that provision pertaining to a person who returns the postcard described in section 8(d) indicating that the registrant has moved to another residence within the jurisdiction of the same voter registrar must have his or her registration corrected to reflect the new address. Second, the provision that requires that a person who has not sent in the card is entitled to vote after affirming or confirming that his or her new residence is within the same congressional district and the same registrar's jurisdiction as that of his or her former residence. And third, the provision that use of the national change of address program could be considered to be in compliance with the requirements of the Act that pertain to list maintenance programs could protect the State if used Statewide or a registrar if used within the registrar's jurisdiction. As long as these protections are maintained a State would be free to alter its administrative structure and jurisdiction for the purpose of registering voters for Federal elections.

Subsection (e) establishes the procedures for voting in a Federal election where the registrant fails to return the card in accordance with the procedures outlined in subsection (d). If a registrant has moved from one residence to another within the jurisdiction of the same polling place, the person shall be permitted to vote at that polling place upon oral or written affirmation of the registrant's change of address, before an election official at the polling place. If a registrant has moved from a residence in one polling place to a residence in another polling place within the jurisdiction of the same voting registrar, the registrant shall be permitted to vote, in one of the following ways, at the option of the voter: (1) at the registrant's former polling place upon written or oral affirmation of the new address; or (2) at a central location, upon written affirmation of the new address; or (3), shall be permitted to correct the voting records at the appropriate polling place for the current address, and, if permitted by State law, shall be permitted to vote upon confirmation of the registrant's new address by such means as required by law. However, if a State permits the registrant to vote at the new polling place by oral or written affirmation of the current address, it need not provide the alternatives of the former polling place or a central location.

If the registration records incorrectly indicate that a registrant has changed his or her residence, the registrant shall be permitted

automatically and send the registrant a notice by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information. If the registrant appears to have moved to an address outside of the jurisdiction of the registrar, the registrar may not remove the name of the voter until the registrar has sent a notice to the registrant as provided in subsection (d).

The section requires that a State complete any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters at least 90 days before a primary or general election for Federal office. This requirement applies to the State outreach activity such as a mailing or a door to door canvas and requires that such activity be completed by the 90-day deadline. This section does not prohibit a State during that 90-day pre-election day period from removing names from the official list of eligible voters on the basis of the request of the registrant, as provided by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act.

Subsection (d) prohibits a State from removing the name of a registered voter by reason of a change in residence, unless the registrant confirms in writing that he or she has changed residence outside the jurisdiction in which registered; or has failed to respond to a notice sent by the State and has not voted or appeared to vote within two general elections for Federal office since the date of the notice.

If a State determines that a registrant may have changed residence, the State may send by forwardable mail a postage prepaid return card on which the registrant may state his or her current address, together with a notice which states that: if the registrant has not changed residence or has changed residence within the same jurisdiction, the registrant should return the card before the time for closing registrations for the next Federal election, i.e. 30 days before an election, or such lesser period as may be provided by State law. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant would be permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the second general Federal election that occurs after the date of the notice. If the registrant has not appeared to vote in an election during that period, the registrant's name will be removed from the list. If the registrant has moved to a residence outside the jurisdiction, the notice on the mailing must include information concerning how the registrant may continue to be eligible to vote.

Within the official list of eligible voters, notations (such as an asterisk or "I" for inactive status) may be made of those eligible voters who have failed to respond to a notice under Section 8(d)(2). The requirement that names with notations be maintained on the official list of eligible voters permits the State to decline to use these names in performing the type of routine, administrative responsibilities that do not impair the right of such voters to vote as set forth in the Act, and as protected by the Voting Rights Act. For example, those who have failed to respond to a Section 8(d)(2) notice need not be included for administrative purposes in deter-

Subsection (i) provides that each State shall maintain for two years all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of addresses on the official list of eligible voters. The records must be made available for public inspection and, where available, photocopying at reasonable costs. The records shall include lists of names and addresses of all persons to whom notices were sent and information concerning whether or not each person has responded to the notice as of the date of inspection.

Provisions of this Act pertaining to voter registration programs require that information regarding a person's declination to register not be used for any purpose other than registration. There was also concern that information not be made public as to what voters registered at a particular agency, such as a welfare or unemployment office. Therefore, these records may not contain any information relating to a declination to register or the identity of a voter registration agency through which any particular voter is registered, or a list of those persons registered through a particular agency.

SECTION 9. FEDERAL COORDINATION AND REGULATIONS

Subsection (a) provides that the Federal Election Commission shall prescribe appropriate regulations necessary to carry out this Act, consult with chief election officers of the States to develop a mail voter registration application form for Federal elections, and submit by June 30 of each odd-numbered year, a report to the Congress assessing the impact of the Act on the administration of elections for Federal office and recommendations for improvements in Federal and State procedures, forms, and other matters, and provide information to the States with respect to the responsibilities of the States under this Act. It is the Committee's intent that the Commission carefully determine which regulations are necessary and appropriate.

Nothing in the Act prohibits the Federal Election Commission from gathering the appropriate statistics necessary to meet its reporting requirements.

Subsection (b) sets forth the requirements of the mail registration form to be developed by the FEC. This form may only require such identifying information (including the signature of the applicant) and other information (including data relating to previous registrations) as is necessary to enable the appropriate State election official to assess the applicant's eligibility. The form must also include a statement that specifies each eligibility requirement (including citizenship); contain an attestation that the applicant meets such requirements, and require the signature of the applicant under penalty of perjury. This form may not include any requirement for notarization or other formal authentication.

SECTION 10. DESIGNATION OF CHIEF STATE ELECTION OFFICIAL

Each State shall designate a State officer or employee as the chief State election official to be responsible for the coordination of State responsibilities under this Act. Various provisions of this Act assign to this official certain responsibilities regarding the promul-

to vote upon oral or written affirmation that the registrant continues to reside at the same address.

This section of the bill attempts to incorporate an underlying purpose of the Act; that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction. This section ensures that if a registered voter moves within the jurisdiction of the same registrar, he or she should be permitted to vote. However, while this section sets out where an individual may vote, it is silent as to how that individual may be permitted to vote. Under certain circumstances it would be appropriate, and in compliance with the requirements of this Act, to require that such a person vote by some form of provisional ballot. It is not the intent of this provision to pre-empt any State requirement that a person whose eligibility to vote is challenged may be required to vote by a special ballot that is subject to post-election rejection, where the challenge is sustained.

Subsection (f) provides that in the case of change of residence within the jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters, nor may a registrant be required to re-register as a result of such a change of residence. The obligation of the registrar to change the rolls to reflect the new residence is triggered by notice to the registrar of such change, not the date of such change. The intent of this requirement is that it is the responsibility of a registrar, upon notification of a change of residence by a voter to another residence within the registrar's jurisdiction, to make the necessary correction of the records. A registrar may not impose requirements, such as re-registration, upon such a voter. Although such notice of change of address might be made by the voter through the use of the motor-voter or agency-based registration process, the registrar's responsibility to make the correction is not dependent on the voter giving such notice; such notice may come through the Postal Service change of address program or other means conducted in conformance with the requirements of the Act, subject to verification by the voter.

Some State election officials expressed concern to the Committee that they had experienced difficulty in obtaining information regarding convictions for Federal offenses from the Federal courts which is needed to remove the names of persons convicted of certain offenses from the voter rolls under State law. Subsection (g) requires a United States Attorney to inform the appropriate State election official of the felony conviction of any person. Such notice must give the name, age, and address of the offender; the entry date of judgment; a description of the offenses on which the person was convicted; and the sentence imposed. Additional information may be provided at the request of the election official if necessary to determine whether a conviction affects the person's eligibility to vote. If such a conviction is overturned, the United States Attorney shall give notice to the appropriate election official.

Subsection (h) provides lower postal rates to a State or local voting registration official for any mailing which is certified to be required or authorized by the Act. This lower postal rate is the rate for any class of mail which is made available to a qualified nonprofit organization.

ATTACHMENT

#9

(Excerpt from Exhibit 16 to
Plaintiffs' Brief in Support of
Motion for Temporary
Restraining Order, Docket #3)

APPENDIX C

THE SENATE COMMITTEE REPORT ON THE ACT

108 ^D CONGRESS <i>1st Session</i>	SENATE	Calendar No. 8 REPORT 103-6
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ESTABLISHING NATIONAL VOTER REGISTRATION PROCEDURES FOR FEDERAL ELECTIONS, AND FOR OTHER PURPOSES

FEBRUARY 25 (legislative day, JANUARY 5), 1993.—Ordered to be printed

Mr. Ford, from the Committee on Rules and Administration, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany S. 460]

The Committee on Rules and Administration, having considered S. 460, an original bill to establish national voter registration procedures for Federal elections, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSES

The purposes of the bill are to establish procedures which will increase registration of eligible citizens in elections for Federal office; to make it possible for Federal, State, and local governments to implement the Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; to protect the integrity of the political process; and to assure an accurate and current voter registration roll.

To increase registration of eligible citizens, this bill would require States that require registration to vote in elections for Federal office, to permit voter registration by the following means, in addition to any other method provided by State law: (a) by application simultaneous with an application for a motor vehicle driver's license—so-called "motor-voter" registration; (b) by use of a uniform mail application; and (c) by application in person at an

(1)

reach activity, such as the mailing of list verification notices or conducting a canvass, must be concluded not later than 90 days before an election, however, this would not prevent a State from making the appropriate changes to the official lists pursuant to the Act during the 90 day pre-election period.

A State or local subdivision may satisfy this requirement by using the National Change of Address program available through licensees of the U.S. Postal Service. The Committee strongly encourages all States to implement the NCOA program, which is efficient, is cost-effective once the start-up computerization expenses are absorbed, and properly implemented, is uniform and objective. Jurisdictions which choose not to use the NCOA program should implement another reasonable program which is designed to meet the requirements of the bill, *i.e.* that it be uniform, non-discriminatory and in conformance with the Voting Rights Act of 1965.

If in the course of using the NCOA program, it is determined that a voter has changed addresses within the jurisdiction of the same voting registrar, the registrar is directed to make the change on the official list of eligible voters and notify the voter of the change by sending a notice of the change by forwardable mail with a postage pre-paid return card for the registrant to verify or correct the information.

The Act allows the removal of a person's name from the official list by reason of a change of residence outside the jurisdiction of the registrar, only if the voter notifies the registrar of such a change or has failed to respond to a notice sent by the registrar and has failed to vote or appear to vote in two Federal general elections following date of the notice.⁵ Under this notice requirement, the notice must be sent by forwardable mail, with a return postage prepaid and preaddressed card, on which the registrant may state his or her current address. This mailing must include a notice to the registrant that if he or she has not changed residence, or changed residence within the jurisdiction of the registrar, that the card should be returned no later than the time period provided for registration by mail. Further, if the card is not returned, confirmation or attestation may be required before the registrant is permitted to vote in the Federal election during the period between the date of the notice and ending after the second general election for Federal office that occurs after the date of the notice. If the registrar does not vote or appear to vote, his or her name will be removed from the list of eligible voters. This mailing must also give information to the registrant concerning how the registrant can continue to vote if he or she has moved outside the jurisdiction of the registrar. A voting registrar shall correct the roll based on information obtained through this program.

As previously noted, one of the guiding principles of this legislation to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction. Thus, when a registrant fails to return a card to the voting registrar, the voter must be permitted to vote if he or she appears at the polls within

⁵ A "request" by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change of address notice through the Drivers license process that updates the voter registration.

tice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

Such purging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again.

Although purge systems may be inefficient and costly, the Committee and other participants are well aware of the need for the States to maintain accurate voting rolls. An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis. The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud. These processes, however, must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register. Such processes must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.

One of the advantages of the bill is the fact that the motor-voter and agency-based programs are ongoing and that applications and renewals may serve as updating the addresses of registered voters. Thus, the need for large scale purges and list cleaning systems becomes superfluous. Nevertheless, the bill requires States to conduct a program to maintain the integrity of the rolls. The Act requires that any program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll must be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965. Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act.

These programs may not remove the name of a voter from the list of eligible voters by reason of a person's failure to vote. States are permitted to remove the names of eligible voters from the rolls at the request of the voter or as provided by State law by reason of mental incapacity or criminal conviction.⁶

In addition, States are required to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence. Any program which the States undertake to verify addresses must be completed not later than 90 days before a primary or general election. It is intended by this requirement that the State out-

⁶ The bill also includes a provision which requires the U.S. Attorney to give notice to the chief State election official information regarding the criminal convictions of any person. This notice requirement will permit States to make a determination if such criminal conviction is reason for the removal of the person's name from the list of eligible voters.

in voting registration and intends to give each State discretion to adopt a means of notification best suited to accomplish that purpose as well as providing a means for notifying an applicant, who has not had direct contact with the voter registrar's office, of the appropriate voting place for his or her residence. The Committee believes that accurate and current voter registration lists are essential to the integrity of the election process and for the protection of the individual.

This section also provides that the name of a registered voter may not be removed from the official list of eligible voters except at the request of the registrant; as provided by State law, by reason of criminal conviction or mental incapacity; or, in accordance with the requirements of the Act, by reason of the death or a change in the residence of the registrant. Recognizing the essential need to maintain the integrity of the voter registration lists, the bill requires that States 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 death or by a change of residence.

A "request" by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change-of-address notice through the drivers license process that updates the voter registration.

States are required to inform applicants of voter eligibility requirements, the penalties provided by law for the submission of a false voter registration application, and ensure that the identity of the voter registration agency through which any particular voter is registered is not publicly disclosed.

Subsection (b) sets forth the standards for the confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current registration roll for Federal elections shall be (1) uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965; and (2) shall not result in the removal of the name of any person from the official list because of a failure to vote.

The purpose of this requirement is to prohibit selective or discriminatory purge programs. This requirement may not be avoided by a registrar conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity. The term "non-discriminatory" is intended to mean that the procedure complies with the requirements of the Voting Rights Act of 1965.

The term "uniform" is intended to mean that any purge program or activity must be applied to an entire jurisdiction.

It is the intent of this section to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity that is used to start, or has the effect of starting, a purge of the voter rolls, without regard to how it is described or to whether it also may have some other purpose. For example, the mailing of sample ballots is clearly a program that has another purpose but might provide the basis for a purge of voter rolls. It is

to the States to negotiate such arrangements with the appropriate Federal agencies. It is the Committee's intention that any agency or organization providing assistance under the terms of this Act would negotiate a mutually satisfactory arrangement, which could include, where appropriate or required, reimbursement for services provided.

Subsection (c) requires that a completed registration application shall be transmitted to the appropriate State election official no later than 10 days after the date of acceptance. If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application must be transmitted to the appropriate State election official no later than 5 days after the date of acceptance. An applicant may, if he or she chooses, mail the voter registration application directly to the appropriate State election official rather than returning it to the agency for transmittal. The agency providing voter registration services is prohibited from requiring a registrant to mail the form, and must accept it and forward it to the appropriate registration official if turned in by the applicant. Thus, the agency has an affirmative obligation to actively collect completed registration applications.

SECTION 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION

Subsection (a) provides that any person registered to vote no later than 30 days, or a lesser period as provided by State law, before a Federal election shall be permitted to vote. For these purposes, registration is complete upon submitting the form to the voting registrar, motor vehicle office, designated agency or office, or on date of postmark, if mailed. While the Act is clear with regard to the motor-voter and agency-based registration deadline requirement, the mail situation may be in need of some clarification. The reference, "or a lesser period as provided by State law" means, with regard to a mailed registration application, that the shorter State period would apply only if it is referenced to "date of postmark". If the shorter period provided by State law refers to the date of receipt in the registrar's office, the thirty day period provided for here would apply. It is not intended here to penalize a registration applicant; thus, if the application is postmarked after thirty days, but is received before the deadline specified by State law, it should be accepted. Also, one postmarked before thirty days but received after the deadline under State law, should also be accepted as timely.

Each State election official is required to give notice to each applicant regarding the disposition of his or her voter registration application. The means of notifying each applicant is not specified, so that each State may continue to use whatever means is required or permitted by State law or regulation. States should be aware that such notices should be drafted with regard to the purge provisions of the bill. States may adopt whichever procedure they deem best suited to provide notice to the applicant and to provide the registrar with verification of the accuracy of the information provided by the applicant. The Committee recognizes that such notices are sent by most States as a means of detecting the possibility of fraud

same jurisdiction, the registrant should return the card before the time for closing registrations for the next Federal election, i.e. 30 days before an election, or such lesser period as may be provided by State law. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant would be permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the second general Federal election that occurs after the date of the notice. If the registrant has not voted in an election during that period, the registrant's name will be removed from the list. If the registrant has moved to a residence outside the jurisdiction, the notice on the mailing must include information concerning how the registrant may continue to be eligible to vote.

Within the official list of eligible voters, notations (such as an asterisk or "I" for inactive status) may be made of those eligible voters who have failed to respond to a notice under Section 8(d)(2). The requirement that names with notations be maintained on the official list of eligible voters permits the State to decline to use these names in performing the type of routine, administrative responsibilities that do not impair the right of such voters to vote as set forth in the Act and as protected by the Voting Rights Act. For example, those who have failed to respond to a Section 8(d)(2) notice need not be included for administrative purposes in determining the number of signatures that may be required under State law for ballot access, the number of ballots or voting machines that may be required in the administration of the voting process.

The term "registrant's jurisdiction", as used in connection with the NCOA program and with regard to the "affirmation" or "confirmation" requirements, is a term of art for the purpose of this Act and is not intended to dictate to the States their actual administrative structure for the purpose of registering voters. The Committee intends that a "registrant's jurisdiction" for the purposes of the Act be no smaller than a county, parish, city or town. This conforms to current practice. A State would be free, for example, to divide a very large county or city into 2 or more administrative units for registering voters as long as the county continued to be treated as the "registrant's jurisdiction" for those purposes of the Act hereinafter specified. First, that provision pertaining to a person who returns the postcard described in section 8(d) indicating that the registrant has moved to another residence within the jurisdiction of the same voter registrar must have his or her registration corrected to reflect the new address. Second, the provision that requires that a person who has not sent in the card is entitled to vote after affirming or confirming that his or her new residence is within the same congressional district and the same registrar's jurisdiction as that of his or her former residence. And third, the provision that use of the national change of address program could be considered to be in compliance with the requirements of the Act if used State-wide or a registrar if used within the registrar's jurisdiction. As long as these protections are maintained a State would be free to alter its administrative structure and jurisdiction for the purpose of registering voters for Federal elections.

is to be used for that purpose and the registrar uses it to serve as his or her reason to send notices under subsection (d), that sample ballot mailing program must meet the standards of this section.

The Committee is mindful of the need to keep accurate and current voter rolls. The Committee is concerned that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing. Abuses may be found in the design of a program as well as in its implementation. In order to provide some guidance to the States, subsection (c) provides that a State may meet the requirements of conducting a general and comprehensive program that makes a reasonable effort to keep voting lists clean by establishing a program which uses the National Change of Address ("NCOA") program of the U.S. Postal Service. Use of the NCOA program by a State or any of its registration jurisdictions could be deemed to be in compliance with the requirements that the program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

By using the NCOA, a State may use change of address information to identify registrants whose addresses may have changed. If it appears from the information provided that a registrant has moved to a different address within the jurisdiction of the same voting registrar, the registrar is required to make the address change automatically and send the registrant a notice by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information. If the registrant appears to have moved to an address outside of the jurisdiction of the registrar, the registrar may not remove the name of the voter until the registrar has sent a notice to the registrant as provided in subsection (d).

The section requires that a State complete any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters at least 90 days before a primary or general election for Federal office. This requirement applies to the State outreach activity such as a mailing or a door to door canvass and requires that such activity be completed by the 90-day deadline. This section does not prohibit a State during that 90-day pre-election day period from removing names from the official list of eligible voters on the basis of the request of the registrant, as provided by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act.

Subsection (d) prohibits a State from removing the name of a registered voter by reason of a change in residence, unless the registrant confirms in writing that he or she has changed residence outside the jurisdiction in which registered; or has failed to respond to a notice sent by the State and has not voted or appeared to vote within two general elections for Federal office since the date of the notice.

If a State determines that a registrant may have changed residence, the State may send by forwardable mail a postage prepaid return card on which the registrant may state his or her current address, together with a notice which states that: if the registrant has not changed residence or has changed residence within the