IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-2321-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 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Bernie Buescher, in his official capacity as the Colorado Secretary of State (the "Secretary"), submits this brief in support of his Motion for Summary Judgment.

INTRODUCTION

This case involves a broad challenge to the list maintenance procedures adopted by the Colorado Secretary of State pursuant to the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg et seq. Filed two weeks before the November 2008 general election, the lawsuit originally asserted two fairly narrow claims regarding the Secretary's procedures for ensuring: 1) that Colorado's voters were registered only once; and 2) that voter registration forms submitted to the Secretary accurately reflected each voter's identity and address. Over time, these

claims have expanded dramatically. As it now stands, the Amended Complaint challenges the Secretary's policies for managing Colorado's statewide voter registration database ("SCORE"), and the procedures for canceling duplicate registrations, confirming voter registration eligibility, and handling inactive voters. The Secretary disputes the Plaintiffs' standing to pursue the claims asserted, but in any event contends that Colorado's statutes, rules, and procedures concerning voter registration and list maintenance are consistent with the requirements of the NVRA.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Complaint

1. On October 24, 2008, Plaintiffs Colorado Common Cause (Common Cause), Mi Familia Vota (Mi Familia), and Service Employees International Union (SEIU), filed this action against Colorado Secretary of State Mike Coffman, seeking both prohibitory and mandatory injunctive relief. Compl. ¶ 1.

2. The Complaint alleged that Plaintiffs brought this action "to prevent the disenfranchisement of their members and citizens they registered to vote." Compl. ¶ 1.

3. The Complaint asserted that the Secretary violated the NVRA in two ways, by: (1) unlawfully removing registered voters from Colorado's official voter registration list within 90 days of a federal primary or general election, in violation of § 1973gg-6(c)(2)(A); and (2) "cancelling" new "registrations" in violation of § 1973gg-6(d) when a notice sent to the applicant by non-forwardable mail is returned as undeliverable within 20 days, pursuant to § 1-2-509(3), C.R.S. (2009). Compl. ¶ 2.

The Stipulation and Preliminary Injunction

4. Following a hearing on October 29, 2008, the parties entered into a Stipulation governing the handling of provisional ballots cast in the November 2008 election by persons whose registrations were cancelled for any reason between May 14, 2008 and November 4, 2008, as well as any person whose application failed the 20-day rule at any time. Am. Compl. ¶ 3.

5. Pursuant to the Stipulation, the Secretary generated a list ("the List") of all persons whose registrations were cancelled for any reason (death, felony conviction, duplicate, moved, etc.) between May 14, 2008 and November 4, 2008, as well as all attempted registrations that failed the "20-day" provision in Colo. Rev. Stat. § 1-2-509(3). Att. A, ¶ 5.

6. In accordance with the Stipulation, the Secretary reviewed the provisional ballots governed by the Stipulation that were rejected by the counties. Att. A (Rudy Affidavit) at ¶ 5.

7. Over 2.3 million votes were cast in Colorado in the 2008 general election. Att. A, ¶ 5b.

8. The List included a total of 46,069 cancelled and failed 20-day registrations. Att. A, ¶ 5b.

9. Of that total, only 8,470 persons statewide who appeared on the List (or 18.4% of the registrations at issue) actually voted in the November election. Att. A, ¶ 5b.

10. Of that group, fully 7,633 (or 90%) voted a regular ballot, meaning that the cancelled record had no impact on that individual's voting experience. Att. A, ¶

5b.

11. Only 570 persons statewide (1.2% of the voters on the List) voted a provisional ballot subject to the review processes set forth in the Stipulation.[1] Att. A, ¶ 5b.

12. The vast majority of these 570 provisional ballots were accepted by the counties; only 108 provisional ballots cast statewide (or 0.23% of the 46,069 cancelled registrations at issue) were rejected by the counties. Att. A, ¶ 5b.

13. The Secretary reversed some of these county decisions, reducing the total number of rejected provisional ballots to 45 (representing 0.01% of the 46,069 cancelled registrations at issue). Att. A, ¶ 5b.

14. Of these 45 rejected provisional ballots finally rejected by the Secretary, Plaintiffs agreed with 42 of the rejections and dispute the Secretary's decisions with respect to only three ballots. Att. A, ¶ 5b.

15. In an Order dated June 26, 2009, this Court, applying the presumption of validity contained in the Stipulation, found that the three disputed provisional ballots should be counted and ordered the Secretary to do so. *Order* dated June 26, 2009.

Discovery

16. In addition to complying with the provisional ballot review process and

1 Pursuant to the Stipulation, each county reviewed provisional ballots cast by persons in that county who had a cancelled record in that county. An additional 267 persons on the List voted a provisional ballot in a different county than the one in which the cancelled record appeared, meaning that the provisional ballot was required for reasons unrelated to the cancelled record (e.g., individuals who forgot to bring ID to the polls, or who requested a mail ballot but then appeared in person to vote). Att. A, ¶ 5.

generating the List, the Secretary has worked diligently with Plaintiffs since the election to permit Plaintiffs to conduct extensive formal and informal discovery. Att. A, ¶ 6.

17. For example, the Secretary voluntarily hosted two live, hands-on sessions with Plaintiffs' counsel to demonstrate Colorado's statewide voter registration database (SCORE) and to answer Plaintiffs' questions regarding Colorado's list maintenance procedures. Att. A, ¶ 8.

18. Two county clerks attended one session to answer Plaintiffs' questions regarding county procedures. Att. A, ¶ 10.

19. Pursuant to the Secretary's discovery obligations under Fed. R. Civ. P. 26 and in response to formal discovery requests made by the Plaintiffs, the Secretary's office has provided approximately one hundred thousand pages of written discovery, including voter records, voter histories, voter lists, policy and rulemaking materials, emails, and various other relevant and/or requested documents. Att. A, ¶ 7.

20. Many of these documents were uploaded to an ftp site for Plaintiffs' review. Att. A, ¶ 9.

21. The Secretary has continued to provide documents and offer access to SCORE even after the close of the formal discovery period. Att. A, ¶ 11.

The Amended Complaint

22. Plaintiffs filed an Amended Complaint on April 13, 2009. Am. Compl.

23. The Amended Complaint set forth significantly revised allegations regarding the two original claims (failed applications under the 20-day rule, *see* Am. Compl. ¶¶ 2(a), 15-22,72-76 (Count I); and cancellations within the 90-day window

prior to an election, *see* Am. Compl. ¶¶ 2(b), 23-31, 77-82 (Count II)).

24. It also contained three entirely new claims that broadly attacked Colorado's list maintenance procedures and alleged that the SCORE consolidation project now underway violates the NVRA. Am. Compl., ¶¶ 2(c), (d), (e).

25. Specifically, the Amended Complaint challenged the rules adopted by the Secretary for canceling duplicate registrations, *see* Am. Compl. ¶¶ 2(c), 32-54, 83-89 (Count III); the procedures for handling inactive voters, *see* Am. Compl. ¶¶ 2(d), 55-65, 90-96 (Count IV); and procedures for handling the registrations of convicted felons. *See* Am. Compl. ¶¶ 2(e), 66-71, 97-101 (Count V).[2]

Rulemaking

26. The Secretary has initiated three rulemaking proceedings relevant to the allegations in the Amended Complaint during the pendency of this lawsuit. *See* Att. B, C, D.

27. The first of these proceedings began in March 2009, and concluded with the adoption of New Rules 2.18, 2.19, and 2.20, along with additional rule changes not relevant here, in May 2009. Att. B

a. Rule 2.18 was intended to clarify the list maintenance process required by the NVRA and by Colorado statute, and ensures that electors are never canceled solely for failing to vote. Att. B, p. 1-2, 8.

b. Rule 2.20 clearly defined active, inactive, and cancelled status

[2]Count V was voluntarily dismissed by Plaintiffs and is no longer at issue.

designations, as well as the effect of each designation on the elector's eligibility to appear on the poll book, receive a mail ballot, and receive election notice mailings. This ensures that inactive-failed to vote electors will continue to receive election notices, stay on the pollbook and receive mail-in ballots. These changes were necessary due to legislative changes that created multiple categories of inactive voters outlined in several different statutes. The rule clarifies the definition of each inactive category and its effect in rule protects all voters by ensuring uniform and consistent treatment of these new categories. Att B, p. 2-3, 9.

28. The Secretary issued notice of the second set of rulemaking proceedings on September 30, 2009, and adopted extensive changes to 8 CCR § 1505-1 on December 8, 2009. These rules will take effect twenty days after their publication in the Colorado Register, and included the following changes relevant to the Plaintiffs' claims. Att. C.

a. New Rule 2.21 clarifies the policy for resolving discrepancies in name, suffix, and address for the purpose of determining whether two records are a match, and therefore indicate that the same elector has more than one registration record in SCORE. Att. C, pp. 1-2, 29-30.

b. New Rule 2.22 establishes a deadline of ninety days prior to a federal election for processing duplicate records for the same

elector. In order to permit the counties to complete their ongoing database consolidation efforts, Rule 2.22 does not take effect until January 2012. Att. C, p. 2, 30.

c. New Rule 2.23, which will be repealed in January 2012 (when Rule 2.22 will go into effect), requires the county to mail a notification letter to any elector whose registration is consolidated or cancelled as a duplicate within ninety days prior to a federal election. This requirement ensure that if any record is consolidated or cancelled incorrectly, the elector will have an opportunity to request reinstatement prior to election day. Att. C, p. 2, 30.

29. On December 8, 2009, the Secretary issued notice of rulemaking, a public hearing for which is scheduled for February 2, 2010. Att. D. The proposed rule amendments, if adopted in their current form, will repeal the requirement that the Secretary utilize the National Change of Address Database ("NCOA"), and would also preclude the counties from utilizing the service to update the registration address of any registration record or change the status of an elector to "inactive." Att. D, p. 3-4.

SUMMARY OF THE ARGUMENT

In their motion for a preliminary injunction, Plaintiffs claimed that the Secretary's "unlawful" "purges" of the voter registration rolls were likely to result in the "disenfranchisement" of "thousands of qualified Colorado voters" in the

November election, including individual members of Plaintiffs Common Cause and SEIU, as well as persons who registered to vote through Plaintiffs SEIU and Mi Familia. *See* Compl. ¶¶ 6, 9, 13; *Pls.' Br. in Support of Mtn. for Temporary Restraining Order and Preliminary Injunction*, at 1. Although the Amended Complaint reiterated these claims, the discovery process has demonstrated that these allegations lack a factual basis. Indeed, the facts developed during the discovery process demonstrate that Colorado's list maintenance procedures and provisional ballot processes worked as designed in the November 2008 election. As a result, the Plaintiffs are unable to establish that the Secretary's list maintenance procedures deprived any of their members or voter registration drive ("VRD") registrants of the right to have their votes counted.

As is discussed more fully below, Plaintiffs lack standing – either on behalf of themselves or their members – to bring the claims asserted here. Plaintiffs contend that they sued the Secretary to prevent *disenfranchisement* of Colorado electors,[3] and it is on this ground that any claim of associational standing must rest. The NVRA was designed in part to ensure that every eligible elector who wished to cast a ballot would be able to do so, and Congress wrote fail-safe measures such as provisional balloting into the bill to protect that right.

[3] 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 . . . .").

In order to establish that any of their members would have standing to sue, the Plaintiffs would need to demonstrate not only that the Secretary's policies were inconsistent with the NVRA, but also that the implementation of those policies deprived one or more of their members of the opportunity to cast a ballot. Yet, despite the fact that they have had access to the List of cancelled records for more than a year, Plaintiffs are unable to identify a single individual member of Common Cause or SEIU, or any person who registered to vote through SEIU or Mi Familia, who was actually deprived of the right to have his ballot counted as a result of an alleged unlawful cancellation. The mere fact that a person's registration was cancelled does not cause injury in and of itself, unless that cancellation deprives an eligible voter of the right to have his or her vote counted. Absent an additional showing that at least one of their members had a cast ballot rejected as a result of the Secretary's allegedly unlawful actions, the Plaintiffs do not have associational standing.

Nor is organizational standing available to Plaintiffs, pursuant to either Article III or the NVRA itself. The NVRA acknowledges that the United States Attorney General may file suit for "relief as is necessary to carry out this Act," and that "a person who is aggrieved by a violation of this Act" may commence civil action after providing written notice to the state's chief election official. The NVRA does not, however, create a cause of action for an organization to sue on its own behalf. The Court should conclude that the NVRA does not confer organizational standing on any of the Plaintiffs.

Even if this Court construes the NVRA to allow an organization to sue on its

own behalf, none of the Plaintiffs is able to demonstrate sufficient injury to its organizational interests to establish standing on their own behalf pursuant to Article III. All three Plaintiffs claim that the Secretary's conduct led to increased call volume on their voter hotlines, and, among other things, allege further that they devoted time to volunteer training, meetings, and legislative comment intended to counteract the effects of the Secretary's allegedly unlawful list maintenance activities. Critically, however, none of the Plaintiffs is able to show that these undertakings impaired their organizational goals during the 2008 general election.

Finally, even assuming Plaintiffs have standing to pursue their claims, the Secretary is entitled to judgment as a matter of law on the substantive claims raised in the Amended Complaint. New election rules adopted by the Secretary have mooted much of the Amended Complaint. As far as the other claims are concerned, the Secretary's procedures fully comply with the NVRA, and strike a proper balance between maximizing voter registration and enhancing the participation of eligible citizens as voters while still protecting the integrity of the electoral process by ensuring that the State's voter rolls remain as accurate and as current as possible.

ARGUMENT

Counts I and II of the Amended Complaint allege two relatively narrow violations of the NVRA that arise from: 1) the Secretary's enforcement of § 1-2-509(3), C.R.S. (2009), which requires the successful delivery of a voter confirmation card before a voter's registration is deemed complete; and 2) the Secretary's cancellation of duplicate voter records within 90 days of the 2008 primaries and

general election. Counts III and IV broadly challenge the Secretary's implementation of the SCORE database, with specific reference to the Secretary's procedures for canceling duplicate voter registrations and handling the registrations of inactive voters.

I. Standard of review for summary judgment motions.

The purpose of summary judgment is to determine whether a trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment may be granted when the pleadings, affidavits, depositions or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The Court must construe facts and draw inferences from them in the light most favorable to the non-moving party. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). The burden rests upon the moving party to demonstrate the absence of genuine issues of material fact. The party opposing the motion must show that there are genuine issues for trial. Summary judgment is appropriate when a reasonable trier of fact could not return a verdict for the non-moving party. *Celotex v Catrett*, 477 U.S. 317, 323 (1986).

II. The Plaintiffs do not have standing to pursue the claims asserted.

The Plaintiffs lack standing, either on behalf of their membership or themselves, to pursue any of the claims asserted in the Amended Complaint.

A. Applicable law and standard of review

The doctrine of standing requires federal courts to satisfy themselves that "the

plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal court jurisdiction." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (internal quotations omitted) (emphasis in original). Constitutional standing requires: (1) an injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To satisfy the injury in fact prong, a plaintiff must show an "invasion of a legally protected interest," which is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Stewart v. Kempthorne*, 554 F.3d 1245, 1253 (10th Cir.2009) (quotation omitted). Causation requires that "the injury is fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000). The redressability prong is met when "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 181.

In addition to satisfying the requirements of standing under Article III, a plaintiff asserting federal jurisdiction must also demonstrate prudential standing, a judicially-created set of principles that, like constitutional standing, places "limits on the class of persons who may invoke the courts' decisional and remedial powers." *Board of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002), *quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975). In deciding whether litigants have prudential standing, courts determine "what interest the litigant seeks to assert and then decide if that interest is arguably within the zone of the interests to be protected or regulated by the statute" in question. *Bonds v. Tandy*, 457 F.3d 409, 414 (5th Cir. 2006). Thus "[i]n cases where the plaintiff is not…the subject

of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes in the statute that it cannot reasonably be assumed that Congress intended to permit suit." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

The plaintiff, as the party asserting jurisdiction, bears the burden of showing that he has standing for each type of relief sought. *See id.; 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.

Each of the Plaintiffs here bears the burden of establishing standing to raise each of the claims asserted "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561. Thus, when the defendant moves for summary judgment because of lack of standing the plaintiff must submit affidavits and comparable evidence that indicate that a genuine issue of fact exists with respect to that issue. *See Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000).

B. There is no organizational standing under the NVRA.

Congress may eliminate prudential limitations by legislation. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 1000 (1979). "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain

circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton,* 405 U.S. 727, 732 (1972); *see also Sierra Club v. Black,* 622 F.Supp. 842, 847 (D. Colo. 1985).

The Plaintiffs do not qualify to file suit under the NVRA due to the express limitations that Congress placed on the scope of the Act. Applying principles of prudential standing to the terms of the NVRA compels the conclusion that Congress intended that the only parties able to enforce the NVRA through civil litigation are the United States Attorney General and individuals (i.e., natural persons) aggrieved by specific violations of the Act.

The plain language of the NVRA confers the ability to judicially enforce the NVRA on only two types of parties. The United States Attorney General is given the broad power to "bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this act." 42 U.S.C. § 1973gg-9(a). Individuals who have suffered violations specific to them may also file suit specific to those violations after providing adequate written notice the state's chief election official. Specifically, 42 U.S.C. § 1973gg-9(b)(1) confers the power to sue for enforcement of the NVRA on "a *person* who is aggrieved by a violation of this Act."

In contrast to many other federal statutes, including some that deal directly with federal election law, "Congress did not explicitly define what it meant by an aggrieved person under the NVRA." *ACORN v. Fowler,* 178 F.3d 350, 363 (5th Cir.

1999). When read in context of the NVRA as a whole, however, the definition of "person" is easily discerned. Section 1973gg-4(c), for example, provides as follows:

> (c) First-time voters
>
> (1) Subject to paragraph (2), a State may by law require a person to vote in person if –
>
> (A) the person was registered to vote in a jurisdiction by mail; and
>
> (B) the person has not previously voted in that jurisdiction.

42 U.S.C. § 1973gg-4(c). It is self-evident from the language of this section that, since organizations cannot vote, Congress's reference to "person" encompasses only natural persons.

In addition to representing the only way to harmonize the language of the NVRA as a whole, this interpretation of the term "person" is also consistent with the Congressional intent underlying the Act. Private organizations are conspicuously absent from the text of the NVRA. Indeed, the Act mentions the private sector only once. 42 U.S.C. § 1973gg-5(b) (encouraging cooperation between the federal government, states, and the private sector to establish voter registration agencies as required by the NVRA). The Senate Committee Report on the NVRA provides further support, noting that the Act allows an "aggrieved *individual"* to bring a civil action where necessary to enforce the NVRA. Att. N (Senate Rep., p. 38).

The Fifth Circuit's opinion in *Fowler,* which addresses this issue, is deeply flawed and wrongly concluded that an organization may, on its own behalf, invoke the NVRA's right to judicial enforcement. Ignoring the plain language of the NVRA and the contextual definition of "person," *Fowler* broadly construed the term to

conclude that organizational standing was consistent with Congressional intent. *Fowler*, 178 F.3d at 365. To reach this conclusion, *Fowler* relied heavily on the opinion in *FEC v. Akins*, 524 U.S. 11, 19 (1998), in which the Court commented that "[h]istory associates the word *aggrieved* with a congressional intent to cast the standing net broadly – beyond common-law interests and substantive statutory rights upon which prudential standing traditionally rested" (emphasis added). The term "aggrieved," however is far less important to the scope of prudential standing in the NVRA than is the term "person." Indeed, the Court in *Akins* did not have occasion to construe "person" because when it enacted FECA, Congress had already done so in the legislation itself. *See* 2 U.S.C. § 431(11) ("The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons"). That Congress defined "person" in one election-related statute while choosing not to do so in another is instructive, and strongly suggests that the NVRA should be construed far more narrowly than *Fowler* suggests.

Moreover, to the extent that the legislative history suggests that the NVRA extends to private organizations, *see Fowler*, 178 F.3d at 364, the Court should exercise the well-settled principles of prudential standing to limit the Act's alleged organizational protections to situations where associational standing already exists. It is certainly sensible to allow membership organizations whose members have been aggrieved by violations of the NVRA to sue on behalf of those members. Allowing such actions would allow membership organizations to draw on their more substantial resources to litigate violations of the NVRA. However, prudential standing principles

should nonetheless bar lawsuits, such as this one, which involve virtually no connection between the alleged violations and the parties challenging them.

In sum, Plaintiffs have failed entirely to demonstrate standing based on the actual disenfranchisement of even one member of 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. Moreover, even if the evidence does establish injury in fact sufficient for standing under Article III, the Court should apply the plain meaning of "aggrieved persons" in the NVRA to substantially limit the availability of organizational standing.

C. Because they have not demonstrated that the Secretary's allegedly unlawful conduct resulted in harm to any of their members or VRD registrants, the Plaintiffs have not satisfied the requirements of associational standing pursuant to Article III.

A full year of investigation by the Plaintiffs, which has included full and open access to the Secretary's records, has failed to identify a single person – let alone anyone affiliated in any way with any of the Plaintiff organizations – who was prevented from casting a ballot in the 2008 primaries or general elections as a result of the Secretary's list maintenance activities. Such a showing is a prerequisite to establishing associational standing.

1. Standard of review

An association has standing under Article III 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. Associational standing is available only to membership organizations acting on behalf of their members. *American Legal Foundation v. F.C.C.*, 808 F.2d 84, 89-90 (D.C. Cir. 1987). Mi Familia Vota has no members, Att. E, pp. 19:20-25, 20:1-5, and is thus unable to establish associational standing. Similar principles apply to SEIU's non-member VRD registrants. Assuming that any exist, SEIU could establish associational standing on behalf of any organizational members who were prevented from casting a ballot by Secretary's allegedly unlawful conduct. However, SEIU's associational standing would not extend to non-members whose sole connection with SEIU was participation in an organizational voter registration drive.

2. The Plaintiffs are unable to show that any of their members would have standing to sue in their own right.

Demonstrating an injury-in-fact to an organizational member is a prerequisite to establishing standing to sue on behalf of that member. The Plaintiffs are unable to make such a showing here.

a. Applicable Law

The test articulated in *Hunt* first requires an organization seeking associational standing to demonstrate that its members would have standing to sue in their own right. Thus, 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. "This requirement of naming the affected members has never

been dispensed with in light of statistical probabilities . . . ." *Id.* at 1152. As the Supreme Court recently observed in *Earth Island*, while it is possible – or perhaps even likely – that one individual will suffer the requisite harm, "that speculation does not suffice." *Id.* "'Standing,' we have said, 'is not an ingenious academic exercise in the conceivable' . . . [but] requires . . . a factual showing of perceptible harm.'" *Id.* (*quoting Lujan*, 504 U.S. at 566). "In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm – surely not a difficult task here, when so many thousands are alleged to have been harmed." *Id.*

Given this background, the key question here is the definition of "requisite harm" – the injury in fact required by *Lujan* – in the context of this case. According to the Plaintiffs themselves, the requisite harm is the "improper disenfranchisement of eligible Colorado voters[.]" Am. Compl., ¶ 1. Establishing injury in fact in the context of this case, however, is a two-step process that requires both of the following determinations: 1) that the Secretary's policies violate the NVRA; and 2) that one or more of the Plaintiffs' members was deprived of the right to vote as a result of those violations. Ideally, the Court would first determine whether the cancellations at issue were actually "unlawful," but adopting this approach would require the court to consider the merits of the case before addressing the question of standing. This is certainly within the Court's power, *see Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 124 n.16 (Stevens, J., dissenting) ("the Court has the power to construe the statute, as it is impossible to resolve the standing issue without construing some

provisions of EPCRA"), but a better approach would be to first address whether any of the Plaintiffs' members actually suffered the injury-in-fact that the Amended Complaint alleges. If the Plaintiffs are unable to show that any of their members were deprived of the opportunity to cast a ballot due to the Secretary's list maintenance procedures, then the injury-in-fact requirement will not be satisfied and it will be unnecessary to consider the lawfulness of those procedures at all.

b. Analysis

The discovery process has given the lie to the Plaintiffs' claim that one or more of their members was injured by the Secretary's list maintenance procedures. To be sure, some of the Plaintiffs' members did have registrations cancelled for various reasons: as duplicates, for example, or because their most recent registration indicated that they had moved. It is critically important, however, to note that none of these cancellations deprived those electors of the right to vote. The vast majority of cancelled registrations simply consolidated old records, leaving each voter with the opportunity to cast a regular ballot at his assigned polling place. And even in the rare situations where an elector's registration status did not allow him to cast a regular ballot at the polling place where he appeared, the fail-safe provisional balloting procedures outlined in the NVRA ensured that he would have an opportunity to cast a ballot and, in nearly every circumstance, have it counted.

This explains why, despite having access to the Secretary's registration records through SCORE for nearly a year, the Plaintiffs have categorically failed to identify a single organizational member or VRD registrant who attempted to cast a ballot and did not have it counted. *See, e.g.*, Att. E, Deposition of Jesse Ulibarri, at

41:21-25, 42:1-25; Att. F, Deposition of Laurel Webb, at 70-76; Att. G, Deposition of Jenny Flanagan, at 164:25-165:1-25. Plaintiffs attempt to sidestep this problem by pinning their hopes on the fact that some of their members or VRD registrants may have been inconvenienced by, for example, having to stand in an extra line in order to cast a provisional ballot. *See Plaintiff's Opposition to Defendant's Motion to Dismiss Amended Complaint* at pp. 22-25.[4] But arguing that mere inconvenience confers standing on a voter under the NVRA proves far too much. Indeed, the Supreme Court has repeatedly acknowledged that elections take place in a highly regulated environment, one consequence of which is that some individuals who wish to vote may have to suffer some inconvenience in order to do so. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 715, 730 (1975); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections"). Thus, the Supreme Court has repeatedly upheld as constitutional such "inconveniences" as requiring registration prior to election day, *Marston v. Lewis*, 410 U.S. 679 (1973), and demanding valid photo identification as a prerequisite to casting a ballot. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

4 See also Att. G, p. 156. "Common Cause thinks that any barrier to voting is a burden on the voter. In the broadest perspective, the right to vote -- the eligibility requirements of being 18 and being a citizen and meeting the registration requirements -- and even the registration requirements, we would argue, can be burdensome in themselves."

The practical upshot of this acknowledgment is that properly managed elections will inevitably result in some inconvenience to those wishing to cast a ballot, and that fair and reasonable regulatory schemes do not create constitutional difficulties for the states implementing them. Every regulation on voting, simply by the fact of its existence, places a burden on the right to vote. But minor burdens that are simply a side effect of ensuring fair and accurate election violate neither the Constitution nor the NVRA. Thus, although any given regulation might conceivably prevent one or more prospective voter from attending the polls, the Supreme Court has consistently declined to find fault with laws that properly balance the competing concerns underlying the NVRA. The NVRA is intended to increase voter participation, but neither it nor the Constitution requires, or indeed allows, the states to do so at the expense of managing elections fairly and accurately, minor inconveniences to voters notwithstanding.

In order to establish associational standing, then, Plaintiffs must establish that one or more of their members was deprived of the right to cast a ballot due to the Secretary's actions. Despite ample investigative opportunities, SEIU and Common Cause are simply unable to establish that any of their members attempted to cast a ballot in the 2008 primaries or general election and, as a result of the Secretary's actions, were unable to do so. Without such a showing, the Plaintiffs may not rely on associational standing to pursue their claims.

D. The Plaintiffs have not made the requisite showing for organizational standing under Article III.

In addition to lacking prudential standing under the terms of the NVRA and associational standing due to a lack of injury to their membership, the Plaintiffs also lack organizational standing under Article III. Plaintiffs are unable to demonstrate that the Secretary's list maintenance activities caused them organizational injury substantial enough to confer constitutional standing.

1. The Plaintiffs are unable to demonstrate an injury in fact sufficient to demonstrate standing under Article III.

To establish Article III standing to seek judicial relief on their own behalf as organizations, the Plaintiffs must 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.* Such well-pleaded facts must demonstrate "more than simply a setback to the organization's abstract social interest." *Id.* (internal quotations omitted). A showing of demonstrable injury to the organization's activities requires "more than allegations of damage to the organization's interest in 'seeing' . . . a social goal furthered." *See id.* (internal quotations omitted).

The allegations in the Amended Complaint do not establish standing for any of the Plaintiff organizations. Moreover, the discovery process has only served to highlight the fact that the Plaintiffs were not demonstrably harmed by the Secretary's allegedly unlawful actions.

a. Common Cause

The Amended Complaint alleges that Common Cause has organizational standing due to "the amount of time the organization's staff are required to spend investigating and taking measures to counteract the State's unlawful practices forces the diversion of necessary resources from Common Cause's voter protection and education activities." Am. Compl. ¶ 8. Jenny Flanagan, Executive Director of Colorado Common Cause, elaborated on this claim during her deposition. As Ms. Flanagan explained, Common Cause is heavily involved in lobbying and regularly testifies on and submits comments concerning proposed legislation, rulemaking procedures, and other regulatory activity. Att. G, pp. 15:20-25-16:1-22. Common Cause is also a founding member of Just Vote Colorado ("JVC"). Ms. Flanagan described JVC's mission as follows: "to monitor and document the elections, just try to watch and see what's happening and document what's happening with the elections in the state of Colorado; and then also to provide assistance to the voting public, to understand what the laws are, and to ensure that they have the tools that they need in order to vote." Att. G, p. 43:1-9.

As it had in the 2004 and 2006, Common Cause established a "Voter Protection Hotline" in the weeks prior to the 2008 general election. Att. G, p. 62:5-10. The hotline was designed to "monitor and document what's happening on

election day" and "to provide assistance to voters." Att. G, p. 62:24-25-63:1-3. Ms. Flanagan testified that about ten percent of the calls that the Voter Protection Hotline received were related to the Secretary's list maintenance activities. Att. G, p. 79:19. However, she also conceded that the Voter Protection Hotline recorded far fewer calls overall during the 2008 election than it had in 2004 or 2006. Att. G, p. 76:18-22 ("our best guess in '4 and '6 was around 20,000 calls. That's very different than the recorded calls that we had in 2008, which we only have recorded about 1800"). Ms. Flanagan also testified that Common Cause amended its training presentation to prepare its volunteers to answer questions regarding the Secretary's policies, Att. G, p. 93:6-11, and she and her staff devoted "a few hours over weeks" to investigate the Secretary's cancellation policies in the wake of a New York Times article describing them. Att. G, p. 118:19.

b. Service Employees International Union

SEIU alleged in the Amended Complaint that "Defendant's actions have required SEIU to expend its resources investigating and taking measures to counteract the unlawful practices, diverting resources from other planned voter education activities." Am. Compl. at ¶ 13. Laurel Webb, an SEIU law fellow, testified that SEIU's representatives on the Voter Protection Hotline received a significant number of calls related to the Secretary's list maintenance policies. Att. F, p. 48-56. Ms. Webb explained that SEIU devoted "a notable portion" of its call center training sessions to explaining issues associated with the Secretary's list maintenance activities, and went on to testify that the greater-than-anticipated call volume

interfered with her ability to organize and dispatch call monitor teams on election day. Att. F, p. 55:5-25-56:1-25.

c. Mi Familia Vota

Mi Familia alleges that "Defendant's actions have required, and will continue to require, Mi Familia to devote some of its limited resources and time to measures necessary to counteract the unlawful practices, and to divert resources from planned voter education efforts." *Id.* ¶ 11. Mi Familia's state director stated that the organization was involved in "phone-banking," but was unable to testify as to whether the organization received a significant number of calls related to the Secretary's list maintenance activities. Att. H, Deposition of Grace Lopez Ramirez, at p. 46:18-25-47:1-9. In fact, beyond vaguely asserting that the "number of calls went up once the media got ahold of the story," Ms. Ramirez was unable to identify any specific diversion of resources associated with the allegations made in the Amended Complaint.

d. Analysis

In order to establish organizational standing under Article III, the Plaintiffs must demonstrate that they suffered a drain on their resources that impaired their ability to fulfill their organizational goals. *See Havens Realty Corp., v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Devoting resources to litigation will not suffice: "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Association*

for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir.1994).

The Secretary does not question the Plaintiffs' assertions that one or more of their organizations devoted resources to track bills and comment on legislation and rules pertinent to the lawsuit at issue, that they participated in meetings where the instant allegations were discussed, and that some small percentage of callers to their phone banks had questions about the media's depiction of the Secretary's list maintenance activities. The relevant question for constitutional standing, however, is the extent to which these activities siphoned resources from the Plaintiffs day-to-day functions. For example, all three Plaintiff organizations maintained voter hotlines, and all three Plaintiff organizations claim to have received numerous phone calls from voters concerned about their registration status in the wake of media coverage occurring in the early part of October 2008. But there is no evidence that calls went unanswered due to increases in volume associated with the conduct complained of, nor is there any proof that these calls were prompted by any individuals having discovered that their registrations had actually been cancelled. Rather, the Plaintiffs themselves allege that the increase in call volume was prompted by the *media attention* caused by the October 9th New York Times article. Flanagan Supp. Decl. ¶ 14; Webb Supp. Decl. ¶ 5.

Nor does the Secretary's list maintenance appear to have substantially diverted resources from the Plaintiffs' other organizational activities. Ms. Flanagan, for example, testified that Common Cause makes an effort to track a broad range of election-related legislation and rules, Att. G, p. 24:14-16, and that the organization

would have engaged in the debate on H.B. 1018 "regardless" of the pending litigation. Att. G, p. 134:12-13. 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). 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, none of the additional alleged burdens on the Plaintiff 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.

III. The Secretary is entitled to judgment as a matter of law 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, the Secretary is entitled to judgment as a matter of law pursuant to Fed.R.Civ.P. 56. As discussed below, Colorado's list maintenance procedures do not violate the NVRA or HAVA. Counts I, II and III are based upon a misreading of the NVRA and HAVA. Counts III and IV are moot based upon new legislation and election rules, and in any event, lack merit because the Secretary's prior list maintenance activities complied with the NVRA and HAVA. Count V has already been dismissed.

A. Both the NVRA and HAVA require Colorado to maintain accurate and current voter registration rolls.

The NVRA, 42 U.S.C. § 1973gg, was enacted in 1993 "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," as well as to "protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (3)-(4). 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.

Section 1973gg-6(a)(3) of the NVRA allows for removal of the name of a registrant from the official list of eligible voters "at the request of the registrant;" for mental incapacity (as provided in State law); or upon criminal conviction (as provided in State law). § 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)).

In addition to the NVRA, Congress passed HAVA, Pub. L. 107-352, 116 Stat. 1706 (codified at 42 U.S.C. §§ 15301 through 15545). Title III of HAVA imposes requirements on the states in the areas of voter registration and election administration. Of relevance here, each state must create and maintain a computerized statewide voter registration list that contains the name and registration information of every legally registered voter in the State. HAVA further requires States to perform voter registration list maintenance on a regular basis. 42 U.S.C. § 15483(a)(2)(A); *see also id.* § 15483(a)(4)(A) (requiring States to have an election system that includes "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 eligible voters."). Such list maintenance shall be conducted in a manner that ensures that "only voters who are *not registered* or who are *not eligible to vote* are removed from the computerized list;" and

that "*duplicate names are eliminated* from the computerized list." *Id.* § 15483(a)(2)(B) (emphases added).

B. Colorado's procedures for removing duplicate registrations do not violate the NVRA or HAVA (Plaintiffs' Count III).

Plaintiffs' Amended Complaint focuses on Colorado's procedures for removing duplicate registrations. Plaintiffs' allegations regarding the cancellation of duplicates also claim that the SCORE consolidation project now underway violates the NVRA. *See* Am. Compl. ¶¶ 2(c), 32-54, 83-89 (Count III). Plaintiffs' claims are based on a misreading of the NVRA.

Plaintiffs assert that the NVRA requires that *duplicate* registrations can never lawfully be removed without following the specific NVRA procedures that govern removal of registrants who have "*changed residence*." *See* Am. Compl. ¶ 32. 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* Att. I. To remove the name of a registrant on the ground that the registrant has *changed residence*, the NVRA requires that the registrant "confirm[s] in writing that the registrant has changed residence," or 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).

The notice and waiting period requirements of § 1973gg-6(d)(1) simply do not apply to *duplicate* registrations. The NVRA provides additional safeguards to avoid the removal of persons who appear to have "changed residence" because the information supplied by the Postal Service indicating that a registrant has moved, *see* § 1973gg-6(c)(1), provides no indication that that individual has also re-registered to vote at his

new location. These procedures aim to avoid disruption of the individual's status as "registered" by notifying the voter and correcting the list in accordance with the change of residence information obtained (where the individual has moved within the registrar's jurisdiction), *see* § 1973gg-6(f), or providing "information concerning how the registrant can continue to be eligible to vote" (where the registrant has moved outside the registrar's jurisdiction), *see* § 1973gg-6(d)(2)(B). 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 does not give rise to the concerns animating the notice and waiting procedures that apply to mere changes of residence. By its very nature, 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 eligible registration records in the system which he may use to cast a regular ballot. The cancellation of an individual's outdated *duplicate* registration(s) therefore never "removes" that individual from the official list of electors. *See* Att. A, ¶ 17. The elector remains registered to vote in the current jurisdiction; only his outdated duplicate registration is cancelled. This ensures the elector cannot vote more than one regular ballot at an election.

A duplicate registration record may be created where an individual simply registers multiple times at the same address.[5] *See* Att. A, ¶ 19. More typically in Colorado, however, duplicate registrations have been generated when a person moved from one county to another county within Colorado and re-registered to vote. *Id.* Prior to the implementation of SCORE in 2008, separate voter registration lists were maintained in all 64 of Colorado's counties. *Id.* Thus, for example, a person who moved over time from Adams County to Denver County to Jefferson County – and dutifully re-registered to vote each time he moved – could now have 3 eligible and active records in SCORE: his current Jefferson County registration, plus two outdated duplicate registrations in Adams and Denver. *Id.* Importantly, the cancellation of an individual's *duplicate* registration(s) never "removes" that individual from the official list of voters. *Id.* The whole point is that the individual *remains registered to vote*. Indeed, his act of *re-registering* gives rise to the duplicate record in the first place. Thus, for duplicate records, the additional notice and waiting period protections that apply to mere "changes of residence" are not only unnecessary, but counterproductive.

As set forth above, the NVRA requires Colorado to ensure that its voter registration lists are "accurate and current." 42 U.S.C. § 1973gg(b)(4). The FEC Guide to Implementing the NVRA specifically notes that "[d]uplicate registrations . . . can threaten the integrity of the election process and increase the cost of administering elections." Att. I at 5-14. Indeed, 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)(A), (B) (emphasis added).

[5] For example, an overly enthusiastic first-time voter in 2008 might have filled out multiple voter registration applications just to "make sure" he was registered.

Under Plaintiffs' novel interpretation of the NVRA, the State could never cancel a known duplicate record without notice and a *four-year waiting period* – during which time a person inclined to commit voter fraud arguably could vote multiple times in an election using each of his multiple active records in different counties. Such fraud would escape detection because the system prevents attempts to cast multiple ballots on a single eligible record (*e.g.*, a person who requests and returns a mail ballot but also shows up in person to vote on election day), but it does not prevent a single ballot from being cast on each of multiple eligible records because the system (logically) assumes that each of those records belongs to a different individual. Because the elector would be casting ballots on separate active and eligible records, he would be casting a regular ballot for each eligible registration. Regular ballots are counted without any review process to ensure that the elector has not already cast a ballot. *See* Att. A, ¶ 22. Thus, under Plaintiffs' interpretation, election officials could not prevent this type of voter fraud.

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).

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 over-inflation of the voter registration rolls. 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."

Even putting this obvious potential for voter fraud to one side, requiring a four-year waiting period before removing a known duplicate record would clog the election management system at all levels. Given the mobility of Colorado's electorate, it would lead to an ever-mounting avalanche of records in the system, and would also cause unnecessary additional work for counties, who must mail ballots, print poll books and make other election preparations based on overinflated numbers. Plaintiffs' approach is directly contrary to the mandates of HAVA and the NVRA that the State maintain a list that is both "accurate and current." Moreover, 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).

1. Cancellation or consolidation of a duplicate registration record under § 1973gg-6(a)(3)(A) is done at the "request of the registrant;" the notice and waiting procedures for "change of residence" under § 1973gg-6(d) are inapplicable.

The proper NVRA provision governing the removal of duplicate registrations is § 1973gg-6(a)(3)(A). That subparagraph expressly provides that the name of a registrant

may be removed at any time "at the request of the registrant." While the phrase "request of the registrant" is not further defined in the text of the statute itself, it is specifically discussed in the legislative history of the Act. Notably, both the House and Senate Reports define "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 (Att. J); S. Rep. 31 (Att. N). Thus, under the NVRA, any time a registrant takes an action that results in that registrant being registered at a new address – such as moving and re-registering in a new jurisdiction – that action qualifies as a "request of the registrant" that his name be removed from the voter list in the prior jurisdiction. § 1973gg-6(a)(3)(A). The duplicate registrations here all fall within that excepted category, and therefore the State may lawfully cancel or consolidate them. *See also* Att. I at 5-5 (FEC Guide) (expressly noting that a "request" by the registrant includes registering in another jurisdiction) (quoting H.R. Rpt. 14).

Plaintiffs' interpretation also ignores 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 . . . .*'" Att. I at 5-7 (quoting H.R. Rep. 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.

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* Att. J (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."); Att. N (S. Rep. 31) (same); Att. I 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. 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.

Even assuming that § 1973gg-6(d) applies to duplicate registrations that are created when a person "changes residence" by moving and re-registering in a new county, by the very act of re-registering in the new jurisdiction, that voter has specifically and personally "confirmed in writing" his change of residence. As such, the State may properly cancel the outdated record. §1973gg-6(d)(1)(A). *See* Att. I at 5-7 (FEC Guide) (noting that "confirmation in writing" of a change of residence under §1973gg-6(d)(1)(A)

includes the act of registering in another jurisdiction or providing a change-of-address notice through the driver's license or agency process that updates the voter 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 cancel or consolidate duplicate registrations.

To the extent Plaintiffs challenge the matching criteria used in Colorado to determine whether a record is in fact a duplicate (and should be consolidated or canceled) their allegations fail to state a violation of HAVA or the NVRA; thus, the Secretary is entitled to judgment as a matter of law.

In support of their claim, Plaintiffs make wholly conclusory allegations that the minimum matching criteria are "unclear," "inconsistent," or "prone to error and abuse." Am. Compl. ¶ 38. 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 elector record transferred to a new county, unless there is a match of the elector's (1) full name, (2) date of birth, and (3) prior residence; or, if no prior residence is supplied, then a match of the voter's (1) full 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); Att. K.

As discussed above, when each of Colorado's 64 counties maintained its own voter registration database, duplicate records were generated when a person moved from one county to another and re-registered. *See* Att. A, ¶ 17 -21. When Colorado migrated to a single statewide voter registration database in SCORE in 2008, the consolidation of the 64 individual databases revealed these large numbers of duplicate records. *Id.* The SCORE consolidation project now underway will consolidate the thousands of cancelled duplicate records that remain in the system by properly tying multiple registration records

belonging to a single individual (each of which had a different voter ID number) into one voter record for that individual (with a single voter ID number). *Id.* Going forward, SCORE will eliminate the generation of duplicate records by simply "transferring" a voter's record from one county to another when that voter moves (meaning that the old county will no longer be able to modify that record in SCORE and the new county will).

Plaintiffs claim 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. Am. Compl. ¶¶ 38-40, 42. However, Plaintiffs have never identified 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 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. Therefore, the Secretary is entitled to judgment as a matter of law because Plaintiffs 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.

3. Plaintiffs' claims that Colorado's procedures for consolidating registration records under the VOICE project are moot due to legislative and rule-making changes since the Amended Complaint was filed.

Plaintiffs' Amended Complaint was filed shortly before the passage of House Bill 09-1018 (signed by the Governor on April 22, 2009) and before the adoption of Election Rule 2.21 (which further clarifies the requirements of HB 09-1018's matching criteria). *See* Att. C, K. 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 1018. House Bill 09-1018 and new election Rule 2.21 codified and standardized the minimum matching criteria required to permit the transfer of a voter registration record. *See* Att. C, K. Thus, to the extent that Plaintiffs' claims are based on a lack of formal legislative or rules that establish minimum matching criteria, such a claim is now moot.

Article III limits a federal court's jurisdiction to live "cases and controversies." *See* U.S. Const. art III, § 2, cl. 1. "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F. 3d 992, 996 (10th Cir. 2005). As a result, "[f]ederal courts may adjudicate only actual controversies." *Id.* A live controversy must exist at all stages of a case because a federal court has no power to give opinions upon moot questions or declare principles of law which cannot affect the matter in issue in the case before it. *Id.; Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008). A case becomes moot if an event occurs while a case is pending that makes it impossible for the court to grant any effectual relief to the prevailing party. *See Prier v. Steed*, 456 F.3d 1209, 1213 (10th Cir. 2006). The crucial question is whether determining the issues before the court will have some effect in the real world. *Id.* Here, a judgment would have no practical effect in the real world, particularly given that Plaintiffs failed to articulate any reason (legal or otherwise) that the matching criteria are not valid.

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 elector record transferred to a new county, unless there is a match of the elector's (1) full name, (2) date of birth, and (3) prior residence; or, if no prior residence is supplied, then a match of the voter's (1) full 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); Att. K. House Bill 1018 also provides that if the matching criteria are not met, the official may not cancel or (going forward) transfer the record, but may send notice to the elector by forwardable mail in an effort to obtain the requisite information. Att. K at p.4. If the required additional information is subsequently provided, the official may then cancel or transfer the record as appropriate. § 1-2-603(1)(c); § 1-2-604(3)(b).

The Secretary recently adopted election rules that set forth the matching criteria established by § 1-2-603(1)(c); § 1-2-604(3)(b), and clarify the meaning of a match to an elector's full name. *See* 8 CCR 1505-1, Rule 2.21; *See* Att. C. Rule 2.21 also ensures that the same matching criteria apply to the SCORE consolidation project (voter information consolidation effort, or "VoICE") now underway. *Id.* To the extent that Plaintiffs' claims were based on the lack of a statute or rule establishing minimum matching criteria, such a claim is now moot as statutes and rules now exist setting forth detailed minimum matching criteria for consolidations and cancelations of duplicate registrations.

C. 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 (Plaintiffs' Count II).

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." The NVRA carves out three specific exceptions to this prohibition on cancellations within the 90-day window: removal "at the request of the registrant"; removal by reason of criminal conviction or mental incapacity; or death of the registrant.

Plaintiffs set 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"). Without identifying which categories of cancellations they believe were improper, Plaintiffs simply allege 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.

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).

The 90-day provision only prohibits the State from conducting a "program" during that 90-day window that is designed to "*systematically* remove" the names of ineligible voters. Plaintiffs' own factual allegations confirm that the cancellations of voter registration records challenged here are not "systematic", but involve hands-on, *individualized* review by a human being examining specific voter records in the SCORE system to determine whether a particular record should be cancelled. *See* Att A. ¶ 20. As noted by Plaintiffs, this process involves review of scanned images of registration documents, including signatures. Am. Compl. ¶¶ 2(c), 36-39, 42. Thus, for this reason alone, Plaintiffs' allegations in Count II fail to state a violation of the NVRA and the Secretary is entitled to judgment as a matter of law.

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.

Att. J **(**House Report at 16); Att. N **(**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.*

Att. N **(**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.

In any event, Plaintiffs' claim that the "majority" of these cancellations violated the 90-day prohibition under § 1973gg-6(c)(2)(A) simply fails. Am. Compl. ¶¶ 29-30. All "deceased" cancellations fall within the specified exceptions in § 1973gg-6(c)(2)(B)(i). In addition, all "moved," "duplicate" and "withdrawn" cancellations fall within the "request of the registrant" exception noted in § 1973gg-6(c)(2)(B)(i). The "conversion" cancellations fall outside the 90-day window entirely, as Secretary of State Elections Division staffer Hilary Rudy testified to this Court at the preliminary injunction hearing. Tr. Hrg. 10-20-08 at 61:25-62:2; Att. A, ¶ 21. These involved cancellations conducted before the counties migrated to the SCORE system in April 2008, but for which no identified code was available in the county legacy system. Such cancellations were identified in the SCORE system as "conversion" cancellations, a catch-all term assigned to this category and occurred outside the 90 day window. *Id.* Att. A, ¶¶ 21.

Thus, the only remaining categories at issue under this claim are the "Failed 20-Day" and "Inactive" cancellations. As discussed in Sections III.D and III.E, *infra*, those

claims lack merit. The Secretary is entitled to judgment as a matter of law as to Count II of Plaintiffs' Amended Complaint.

D. Colorado's 20-day rule does not violate the NVRA. (Plaintiffs' Count I).

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). Plaintiffs' claim hinges on their assumption that persons who submit an application for registration are automatically deemed "registrants," without more. The Secretary is entitled to judgment as a matter of law because an applicant does not become a "registrant" under State law (and therefore able to cast a regular ballot) until the applicant's residency (and therefore his eligibility) is verified by confirmation of the residential address supplied on the application.

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

"registered to vote" under State law. Thus, the provisions of § 1973gg-6(d) apply only to removal of persons *actually registered to vote* under State law.

The Secretary acknowledges that in *United States Student Association v. Land*, 546 F.3d 373 (6th Cir. 2008), the Sixth Circuit concluded that the question of who is a "registrant" is a matter of federal law. 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.*

Att. J **(**House Report at 14) (emphases added).

This legislative history clearly expresses Congress' intent to leave processes such as Colorado's 20 day statute up to the States. Moreover, the passage above expresses Congress' acknowledgment that such address confirmation 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. 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. (2009) (emphasis added).[6] At the time of this notification, the applicant's status in the SCORE system is reflected as: "Active – 20 day." *See* Att. A, ¶24. "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. *Id.*

[6]For instance, if the application is incomplete or inaccurate, the county clerk notifies the applicant of this status, stating the additional information required. § 1-2-509(2), C.R.S. (2009).

If the county clerk receives information indicating that the address provided on an application is *invalid* – because the notification card is returned as undeliverable within 20 days after receiving the application – then Colorado law states that "the applicant *shall not be registered*." § 1-2-309(3) (emphasis added). The fact that an applicant temporarily appears in the system as "Active- 20 day" while confirmation is awaited does not change this analysis, because Colorado law is clear that where the notice is returned as undeliverable, such persons never become registered voters.

Amendments made to § 1-2-509 in 1995 confirm the Secretary's interpretation of this provision. Prior to 1995, section 1-2-509(2) stated in relevant part: "If the application is complete and accurate, *the applicant shall be deemed registered as of the date of the application*, and the county clerk and recorder shall notify the applicant of the registration." However, House Bill 95-1241 specifically deleted the above-italicized language from that provision. 1995 Colo. Gen. Sess. Laws ch. 187, § 22. *See* Att. L.

It is reasonable to infer from the 1995 amendment that the legislature intended to clarify that an "applicant" does *not* become a "registrant" unless and until the State receives confirmation of the validity of the applicant's address. Such confirmation is simply presumed where the notification letter is not returned as undeliverable within 20 business days. Colo. Rev. Stat. § 1-2-509(3).

As a general rule, for most of the year, the required address 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

confirm their address by casting and returning a mail-in ballot, or by confirming his address on the required signature card**,** or by verifying their address in the poll book in the polling place. Colo. Rev. Stat. § 1-8-114(1); Colo. Rev. Stat. §§ 1-7-109(2) & 1-7-110(1). 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 because under no circumstance will the applicant be permitted to cast a ballot that will count, whether it is a regular ballot, or a provisional ballot, without *first* confirming his residential address (and thus his eligibility to vote).

In sum, Colorado law consistently refers to such individuals as "applicants" throughout the process, which accurately describes individuals' status during the 20-day window in which the State awaits confirmation of that applicant's address. Contrary to Plaintiffs' suggestion, this provision does not operate to "cancel" any registered voter's registration in violation of the NVRA. Rather, as a matter of State law, such individuals are "applicants" who are not ever actually "registered." Thus, the Secretary is entitled to judgment as a matter of law on Plaintiffs' claims regarding the Colorado "20-day" provision under § 1-2-509(3) because the individuals involved are not "registrants" under the NVRA.

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

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. This claim is moot because now in Colorado, no

person's registration will be canceled solely based on their failure to vote. *See* Rule 2.20; Att. B. In other words, a judgment on this issue would have no practical effect in the real world because the practice that Plaintiffs allege violates the NVRA no longer exists. *See supra* p.42.

The Secretary's Rules 2.18.3 and 2.20.2(c) clarify that a voter designated as "inactive- failed to vote" will not be cancelled under § 1-2-605(7) just for failing to vote. *See* Att. B. Importantly, under Rule 2.20.2, voters deemed "Inactive-Failed to Vote" remain eligible voters; their names will appear on the poll book and they will be sent election notice mailings and mail ballots where required. *Id.* No registration record deemed "Inactive-Failed to Vote" may be cancelled.

In their Amended Complaint, Plaintiffs acknowledged that these rules were being considered at the time they filed their Amended Complaint. However, Plaintiffs alleged that because the rule was not adopted yet, "the rights and obligations of the parties remain unclear with respect to the issue of the state's authority to purge voters by reason of their failure to vote." *See* Am. Compl. ¶65. These rules have long since been adopted and effective, but Plaintiffs still have not dismissed their claim as to inactive voters, even though the rule moots the Plaintiffs' claim.

The Secretary is entitled to judgment as a matter of law on Plaintiffs' claims that Colorado's handling of "inactive" voters violate the NVRA because the Secretary's Rules make clear that no voter will have his registration cancelled solely for failure to vote.

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.

Respectfully submitted this 10th day of December, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this December 10, 2009, I served the foregoing Memorandum of Law in Support of Motion for Summary Judgment as stated below:

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