

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR
REFORM NOW and DIONNE O'NEAL,

Plaintiffs,

v.

DEBORAH E. SCOTT in her official capacity as Director of Missouri Department of Public Social Services, JANEL R. LUCK, in her official capacity as Director of Family Support Division, Missouri Department of Social Services, KANSAS CITY BOARD OF ELECTION COMMISSIONERS and MELODIE A. POWELL, JOSEPH D. SERRANO, CYNTHIA THOMPSON, QUENTIN JENNINGS, SHAWN L. KIEFFER, and SHELLEY McTHOMAS in their official capacities as members of the Kansas City Board of Election Commissioners, JACKSON COUNTY BOARD OF ELECTION COMMISSIONERS and TAMMY L. BROWN, WILLIAM J. BAKER, MICHAEL K. WHITEHEAD, CHARLES E. DUMSKY, CHARLENE DAVIS, and ROBERT C. NICHOLS, JR. in their official capacities as members of the Jackson County Board of Election Commissioners, ST. LOUIS CITY BOARD OF ELECTION COMMISSIONERS and SCOTT LEIENDECKER, MARY WHEELER-JONES, CAROL A. WILSON, EILEEN M. McCANN, JACK LARY, and CLARENCE E. DULA in their official capacities as members of the St. Louis City Board of Election Commissioners,

Defendants.

CIVIL ACTION NO.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
ARGUMENT	7
I. REASONABLE CAUSE EXISTS TO GRANT INJUNCTIVE RELIEF	7
II. PLAINTIFFS WOULD SATISFY THE “BALANCING THE EQUITIES” STANDARD IF IT APPLIED	9
A. Plaintiffs Face a Significant Threat of Irreparable Harm Absent Injunctive Relief	9
B. The Balance Between the Harm to Plaintiffs if an Injunction Is Not Issued, and the Harm, if any, Caused to Defendants by an Injunction, Strongly Favors Issuing an Injunction	12
C. Plaintiffs Have a Strong Likelihood of Success on the Merits	13
D. The Public Interest Strongly Favors Issuance of an Injunction	15
CONCLUSION.....	15

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>ACORN v. Miller</i> , 912 F. Supp. 989 (W.D. Mich. 1996)	8
<i>Burlington N. R.R. Co. v. Bair</i> , 957 F.2d 599 (8th Cir. 1992).....	7, 8, 9
<i>Charles H. Wesley Educ. Fund, Inc. v. Cox</i> , 408 F.3d 1349 (11 th Cir. 2005).....	8, 13
<i>Chemtech Indus., Inc. v. Goldman Fin. Group, Inc.</i> , 809 F. Supp. 729, 733 (E.D. Mo. 1992)	8
<i>Coleman v. Bd. of Educ. of the City of Mount Vernon</i> , 990 F. Supp. 221 (S.D.N.Y. 1997)	10
<i>Dataphase Sys., Inc. v. Cl Sys., Inc.</i> , 640 F.2d 109 (8th Cir. 1981).....	7, 9
<i>Dillard v. Crenshaw County</i> , 640 F. Supp. 1347 (M.D. Ala. 1986).....	10
<i>Fla. State of Conf. of NAACP v. Browning</i> , No. 07-15932, 2008 U.S. App. LEXIS 710 (11 th Cir. April 3, 2008)	12
<i>Harris v. Graddick</i> , 593 F. Supp. 128 (M.D. Ala. 1984).....	10
<i>Heartland Acad. Cmty. Church v. Waddle</i> , 335 F.3d 684, 689-91 (8th Cir. 2003)	9, 13
<i>Herman v. Associated Elec. Coop., Inc.</i> , 994 F. Supp. 1147, 1153 (E.D. Mo. 1998)	8
<i>Inland Steel Co. v. United States</i> , 306 U.S. 153 (1939).....	15
<i>NCSD Educ. and Legal Def. Fund v. Scales</i> , 150 F. Supp. 2d 845 (D.Md. 2001)	9
<i>Project Vote v. Blackwell</i> , 455 F. Supp. 2d 694 (N.D. Ohio 2006)	9, 15
<i>Puerto Rican Legal Defense and Education Fund v. City of New York</i> , 769 F. Supp. 74 (E.D.N.Y. 1991).....	10
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	10
<i>United States v. Berks County, Pa.</i> , 277 F. Supp. 2d 570 (E.D. Pa. 2003).....	10, 13
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964);.....	10
<i>Wilson v. United States.</i> , 878 F. Supp. 1324 (N.D. Cal. 1995).....	9
<i>Yakus v. United States</i> , 321 U.S. 414 (1944).....	15

Statutes

42 U.S.C. § 1973gg..... 2, 10, 15
42 U.S.C. § 1973gg-3 2
42 U.S.C. § 1973gg-5 1, 2, 5
42 U.S.C. § 1973gg-9 7, 8, 9

Other Authorities

11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.3 (2d ed. 1995)..... 14
Family Support Division, Annual Data Report Fiscal Year 1999 4
Family Support Division, Annual Data Report, Fiscal Year 2005 4, 5
Family Support Division, Annual Data Report, Fiscal Year 2006 4, 5
Family Support Division, Income Maintenance Manual, § 1130.015.15..... 6
Family Support Division, Income Maintenance Manual, § 1130.030.05..... 11
Federal Election Assistance Commission’s 2006 Election Administration and Voting Survey 5
Federal Election Commission/Election Assistance Commission, “The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office,”..... 4
H.R. Rep. No. 103-66 (1993) (Conf. Rep.)..... 2
H.R. REP. NO. 103-9 (1993)..... 1, 2
S. REP. NO. 103-6 (1993) 2
U.S. Census Bureau, Current Population Survey, November 2006 Voting and Registration Supplement..... 4

PRELIMINARY STATEMENT

Plaintiffs, by their undersigned counsel, submit this Memorandum in support of their motion for a preliminary injunction enjoining Defendants to implement immediately and completely the mandatory provisions of Section 7 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-5, and to take measures to remedy past and preclude future violations of Section 7. Preliminary injunctive relief is necessary as time is of the essence because of the upcoming presidential election in November and the State’s October cutoff for registration to vote in that election. Thus, Plaintiffs request that the Court convene a hearing on this matter at its earliest convenience.

STATEMENT OF FACTS

In addition to the facts outlined herein, Plaintiffs respectfully refer the Court to, and incorporate by reference herein, the facts as alleged in their Complaint in this action, and the accompanying declarations.¹

Congress enacted the NVRA to increase the number of citizens registered to vote, and thereby enhance voter participation in federal elections. The House Committee on House Administration expressed concern at the time of the NVRA’s enactment that “low voter turnout in Federal elections poses potential serious problems in our democratic society.” H.R. REP. NO. 103-9, at 4 (1993). The same committee determined that “failure to become registered is the primary reason given by eligible citizens for not voting.” *Id.* at 3. The Senate Committee on Rules and Administration expressed dismay that there were “almost 70 million eligible citizens who did not participate in the 1992 Presidential election because they were not registered to vote.” S. REP. NO. 103-6, at 2

¹ Accompanying this Memorandum of Law are the Declarations of Jeff Ordower of ACORN dated April 21, 2008 (“Ordower Decl”), Joseph Amrine of Kansas City dated March 11, 2008 (“Amrine Decl.”), Rodney Austin of Kansas City dated March 10, 2008 (“Austin Decl.”), Robert Bennett of Kansas City dated February 25, 2008 (“Bennett Decl.”), Elyshya Lowery Miller of Kansas City dated February 5, 2008 (“Miller Decl.”), Angie Hamilton of Jackson County, both dated March 11, 2008 (“Hamilton Decl.1” and “Hamilton Decl.2”), Plaintiff Dionne O’Neal of St. Louis City dated March 26, 2008 (“O’Neal Decl.”), Diana Moore of St. Louis City dated March 7, 2008 (“Moore Decl.”), and Norma Johnson of St. Louis City dated March 7, 2008 (“Johnson Decl.”).

(1993) . The House Committee ultimately concluded that “Congress should assist in reducing barriers, particularly government-imposed barriers, to applying for registration wherever possible.” H.R. REP. NO. 103-9, at 3).

It was with these concerns in mind that Congress enacted the NVRA. The NVRA requires states to increase voter registration opportunities in several ways, including: making registration available by mail; requiring that states include a voter registration form as part of all driver’s license applications; and requiring that voter registration services be provided at public assistance offices, disability offices, and other locations. 42 U.S.C. § 1973gg-3, 1973gg-5. Missouri, however, is not complying with the requirement to provide voter registration services by public assistance offices.

Section 7 of the NVRA requires, *inter alia*, that each state designate all state offices “that provide public assistance” as “voter registration agencies” (“VRAs”) and that all VRAs distribute voter registration applications with every application, recertification, or change of address with respect to public assistance, assist applicants in completing the applications, and accept completed applications for transmittal to the appropriate local election authority. 42 U.S.C. § 1973gg-5(a)(2)(a), 1973gg -5(a)(4)(a). Section 7 also requires VRAs to provide forms (“declination forms”) offering the opportunity to register and constituting documentation should an applicant decline to register or receive assistance in completing the application. 42 U.S.C. § 1973gg-5(a)(6)(A), (B).

Congress considered Section 7 necessary to ensure the registration of “the poor and persons with disabilities who do not have driver’s licenses and will not come into contact with the other principal place to register under this Act [motor vehicle agencies].” H.R. Rep. No. 103-66 (1993) (Conf. Rep.) (NVRA Conference Report); *see also*, 42 U.S.C. § 1973gg(b)(1). Moreover, because low-income citizens and citizens with disabilities are among those least likely to own motor vehicles, they are also the groups

least able to take advantage of voter registration through other bureaucratic agencies that are either required to or voluntarily provide voter registration opportunities. As a result, any failure to implement the procedures required by Section 7 will have a disproportionate impact upon low-income citizens, who are entitled, under federal law, to register to vote at state-designated voter registration agencies.

Defendants are responsible for implementing Section 7. Defendant Scott is the Director of Missouri's Department of Social Services ("DSS"). DSS is the state agency responsible for administering several public assistance programs that must comply with Section 7 of the NVRA, including federal Food Stamps, Medicaid, rehabilitation programs for the blind, MO HealthNet, and the TANF income assistance program. Each local office of the DSS that administers these programs is a VRA required to comply with Section 7.

Defendants Kansas City, Jackson County and St. Louis City Boards of Election Commissioners, including their respective members, are the designated election authorities responsible for supervising the registration of voters within their respective jurisdictions and for directing the activities of all deputy registration officials that they may appoint. Their duties include instructing and directing deputy registration officials, including voter registration agencies under the NVRA, in the performance of their duties, and supplying them with the proper registration forms. They also are required to retain all voter registration records and registration list records for a minimum of two years and to compile data necessary for NVRA compliance from the records.

In Missouri, large numbers of low-income citizens are not registered to vote. Analysis of data collected by the U.S. Census indicates that more than 250,000 adult citizens in households making less than \$25,000 per year in Missouri were not registered

to vote in November 2006.² Many of these low-income citizens apply for public assistance. According to DSS, it received an average of 56,078 applications per month in fiscal years 2005-06 for Food Stamps alone.³ Multiplied by the twenty-four months in fiscal years 2005-06, DSS received more than 1.3 million applications for Food Stamps in the latest two year period.

Despite the above data and the federal mandate to provide voter registration opportunities with every application (as well as every recertification, or change of address), DSS registers few voters. In 2005-06, Missouri registered only 15,568 voters from public assistance agencies. As shown in the table below, in the years since the NVRA was first implemented, this represents a decline of more than 90 percent from the 1995-96 period (the first two years NVRA compliance was required) and a consistent decline over the past twelve years:

Public Assistance Registrations⁴

Period:	1995-1996	1997-1998	1999-2000	2001-2002	2003-2004	2005-2006
Regis.:	143,135	68,475	51,951	34,923	17,637	15,568

This decline has occurred despite an overall increase in the number of households that receive Food Stamps: 238,699 households in fiscal year 1995⁵ to 300,498 households in fiscal year 2006.⁶

² See U.S. Census Bureau, Current Population Survey, November 2006 Voting and Registration Supplement, available at <http://www.census.gov/cps/>, using <http://dataferrett.census.gov/> to download.

³ Family Support Division (“FSD”), DSS, Annual Data Report, FY 2005 and 2006, available at <http://www.dss.mo.gov/re/fsdar.htm>.

⁴ Federal Election Commission/Election Assistance Commission, “The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office,” available at <http://www.eac.gov/clearinghouse/reports-and-surveys/>. Most public assistance VRAs in Missouri are under DSS. The Department of Health and Senior Services is responsible for the Women, Infants, and Children program.

⁵ FSD, Annual Data Report Fiscal Year 1999, available at <http://www.dss.mo.gov/re/pdf/fsd/fsd1999.pdf>

⁶ *Id.*, Fiscal Year 2006, available at <http://www.dss.mo.gov/re/pdf/fsd/fsd2006.pdf>.

DSS's poor performance in Jackson County and the City of St. Louis mirrors the low statewide numbers. According to DSS, for fiscal years 2005-06, DSS received a monthly average of 7,575 Food Stamp applications from Jackson County and 8,332 applications from St. Louis.⁷ When that monthly average is multiplied by the twenty-four months, DSS received more than 180,000 Food Stamps applications in Jackson County and almost 200,000 in St. Louis City, yet only registered 364 voters in Jackson County and 2,776 in St. Louis City in 2005-06.⁸

On August 23, 2007, counsel for Plaintiff ACORN, troubled by these figures, sent a letter to Defendant Scott, in her official capacity as Director of DSS, with a copy to Secretary of State Robin Carnahan, providing written notice of the NVRA violation. (Compl., Ex. A). The letter stated that in the absence of a plan to remedy DSS's failures to implement the NVRA, ACORN would have no choice but to commence litigation. Defendant Scott acknowledged receipt of the letter in her response of October 11, 2007. (Compl., Ex. B).

In her October 11, 2007 response, Defendant Scott attributed the decline in voter registrations through DSS to advances in technology that allow public assistance recipients to submit an application, recertification, or change of address by telephone or over the Internet rather than applying in person. (*Id.*) These changes, according to Scott, "do not lend themselves to voter registration." (*Id.*) Nonetheless, Section 7 mandates that DSS distribute both the mail-in voter registration application and the declination form "with *each* application for [its] service[s] or assistance, and with *each* recertification, renewal, or change of address form relating to such service or assistance. . . ." 42 U.S.C. § 1973gg-5(a)(6)(A), (B) (emphasis added). Providing a procedure for

⁷ FSD, Annual Data Report Fiscal Year 2005, available at <http://www.dss.mo.gov/re/pdf/fsd/fsd2005.pdf>; Fiscal Year 2006, available at <http://www.dss.mo.gov/re/pdf/fsd/fsd2006.pdf>.

⁸ Federal Election Assistance Commission's 2006 Election Administration and Voting Survey, available at <http://www.eac.gov/clearinghouse/data-files-and-survey-chapters>.

remote application or recertification for benefits or change of address does not relieve DSS of the voter registration requirements under Section 7.

Scott did not identify the number or percentage of transactions DSS now conducts by telephone or computer from remote locations, nor did Scott provide any other explanation for the staggering decline in voter registrations by Missouri VRAs. To the contrary, Scott asserted that the technological changes identified “do not...affect the department’s voter registration efforts when persons come into the local office.” (Compl., Ex. B). However, these efforts, if any, fail to comply with the mandates of Section 7.

Despite Defendant Scott’s assertions on behalf of DSS, the evidence demonstrates that Defendants, who are collectively charged with responsibility for Missouri’s compliance with the NVRA, have failed to ensure that the state fulfills its duties as mandated by Section 7. Specifically, the VRAs are not providing applicants, or those re-certifying or changing an address for public assistance benefits, the opportunity to register to vote as the NVRA requires. Defendant Scott’s assertions are belied by the fact that Food Stamps recipients who may conduct some transactions remotely are nevertheless required to meet with DSS in person once per year.⁹ More importantly, her claims are directly refuted by the experience of the individual Plaintiff, as well as several Declarants, who have visited VRA offices in person – in several instances, subsequent to the October 11 letter – and have not been offered the opportunity to register to vote. (*E.g.*, Hamilton Decls.1 and 2 (visited VRA in February 2008, not offered opportunity to register at new address); Johnson Decl. (visited VRA in March 2008, not offered opportunity to register at new address).)

⁹ See FSD, Income Maintenance Manual, § 1130.015.15, available at http://www.dss.mo.gov/fsd/iman/fstamps/1130-015-00_1130-015-15.html#1130.015.05.

Moreover, the VRA offices merely give the appearance of compliance to discourage and avoid scrutiny of their lack of voter registration efforts. For example, on February 15, 2008, after a security guard ejected an ACORN surveyor from the DSS office on Swope Parkway in Kansas City, the surveyor, who had returned to the office, overheard a DSS employee talking about receiving an e-mail advising of the requirements to ask clients if they wished to register to vote. (*See Amrine Decl.*). However, on February 25, 26, and 27, 2008 an applicant and three re-certifiers for Food Stamps who visited the Swopes Parkway office were not offered the opportunity to register to vote. (*See Austin, Hamilton 2, McDaniel, and Bennett Decls.*).

Accordingly, Plaintiffs seek injunctive relief to ensure that the State of Missouri complies with Section 7, and that the fundamental right to vote of every citizen is protected in Missouri.

ARGUMENT

Courts in this circuit typically determine preliminary injunction motions using a “balancing the equities” standard. *See Dataphase Sys., Inc. v. Cl Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981). When Congress expressly provides for injunctive relief to prevent violations of a federal statute, as here, the Eighth Circuit applies a less stringent “reasonable cause” standard, *see Burlington N. R.R. Co. v. Bair*, 957 F.2d 599 (8th Cir. 1992). Plaintiffs not only satisfy the reasonable cause standard that applies here but would meet the balancing the equities standard if it applied.

I. REASONABLE CAUSE EXISTS TO GRANT INJUNCTIVE RELIEF

The NVRA states that the Attorney General or a private party may “bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to [a violation of the NVRA]”. 42 U.S.C. § 1973gg-9. Given Congress’s express provision of injunctive relief, the Court should grant a preliminary injunction upon a showing of

reasonable cause for the Court to believe that a violation of Section 7 of the NVRA has or is about to occur. *Burlington N. R.R. Co.*, 957 F.2d at 603.

It is a well-established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction. See *United States v. City of San Francisco*, 310 U.S. 16, 31, 84 L. Ed. 1050, 60 S. Ct. 749 (1940); *Lennen*, 640 F.2d at 259-260 (citing numerous cases). In such situations, it is not the role of the courts to balance the equities between the parties. The controlling issue is whether Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in, or is about to engage in, any activity which the statute prohibits. . . . The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur.

Burlington N. R.R. Co., 957 F.2d at 601-02 (pinpoint citations to *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255 (10th Cir. 1981) omitted); see *Herman v. Associated Elec. Coop., Inc.*, 994 F. Supp. 1147, 1153 (E.D. Mo. 1998) (“where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction.”); *Chemtech Indus., Inc. v. Goldman Fin. Group, Inc.*, 809 F. Supp. 729, 733 (E.D. Mo. 1992) (recognizing reasonable cause standard, but questioning whether Eighth Circuit would apply it in an ERISA case).

Here, violations of the NVRA not only have occurred, but absent injunctive relief, undoubtedly will continue with future transactions with the DSS. (See *supra* at 4-7 and accompanying declarations). Moreover, Congress has already balanced the equities and has determined, as a matter of public policy, that violations of the statute be remedied and/or prevented by injunctive relief. See 42 U.S.C. § 1973gg-9(b)(2) (private action for declaratory or injunctive relief with respect to the violation). Courts have granted injunctive relief and entered orders requiring compliance in numerous cases involving violations of the NVRA. *Charles H. Wesley Educ. Fund, Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005); *ACORN v. Miller*, 912 F. Supp. 989 (W.D. Mich. 1996) (ordering prompt

compliance with NVRA requirements), *aff'd*, 129 F.3d 833 (6th Cir. 1997); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006); *NCSD Educ. and Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845 (D.Md. 2001) (determining injunctive relief an appropriate remedy); *Wilson v. United States.*, 878 F. Supp. 1324 (N.D. Cal. 1995). Defendants' violations of the NVRA are not merely technical, rather the failure to provide those who conduct transactions with the DSS the opportunity to register to vote violates the very purpose of the NVRA. *See Burlington N. R.R. Co.*, 957 F.2d at 603 (state discriminatory tax levied on railroad was not merely a technical violation, but violated the very purpose of section of the federal statute at issue). Therefore, the Court should issue a preliminary injunction under the NVRA, 42 U.S.C. § 1973gg-9(b)(2), to begin remedying past and preclude continuing violations of the statute.

II. PLAINTIFFS WOULD SATISFY THE “BALANCING THE EQUITIES” STANDARD IF IT APPLIED

In addition, although inapplicable to the matter at hand, each factor under the *Dataphase Sys., Inc.* standard weighs heavily in favor of issuing a preliminary injunction. In applying this standard, courts consider the following factors: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Sys., Inc.*, 640 F.2d at 113; *see Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 689-91 (8th Cir. 2003).

A. Plaintiffs Face a Significant Threat of Irreparable Harm Absent Injunctive Relief

The Supreme Court has long held that voting is among the most fundamental rights granted to United States citizens. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights are illusory if the right to vote is undermined.”

Wesberry v. Sanders, 376 U.S. 1, 17 (1964); see *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964). As such, the interference with the right to vote clearly constitutes irreparable harm. *United States v. Berks County, Pa.*, 277 F. Supp. 2d 570, 582 (E.D. Pa. 2003); *Coleman v. Bd. of Educ. of the City of Mount Vernon*, 990 F. Supp. 221, 226 (S.D.N.Y. 1997) (“The deprivation or dilution of voting rights constitutes irreparable harm.”); *Puerto Rican Legal Defense and Education Fund v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) (“it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm.”); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

Congress echoed this sentiment in the language of the NVRA: “The Congress finds that— (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the *duty* of the Federal, State, and local governments to *promote* the exercise of that right” 42 U.S.C. § 1973gg(a)(1)-(2) (emphasis added). The purpose of the NVRA was to remove barriers to voter registration, and therefore to voting itself. Section 7 of the NVRA makes it easier for low-income citizens and those with disabilities to become registered to vote. The repeated and continuing failure by Defendants to abide by the requirements of Section 7 causes irreparable harm to Plaintiff O’Neal and to other low-income and disabled Missouri citizens, who, because of Defendants’ violations of federal law, face an additional burden on their right to vote – a burden the NVRA was specifically intended to remove.

The denial of the fundamental right to vote cannot be compensated by an action at law for money damages. Further, any remedy that requires delay until the likely conclusion of this litigation will be inadequate. Such a delay will deprive hundreds of thousands of Missouri citizens of the registration opportunities to which they are entitled

under Section 7, and will certainly result in many of them not being registered to vote in the November 2008 election. This is especially the case because many beneficiaries of the programs implicated by Section 7, such as Food Stamps, recertify for their benefit programs only once every six months.¹⁰

Every election is uniquely historic and uniquely important.¹¹ The inability to participate in an election cannot be compensated after the fact, or assuaged by the ability to participate in the next. Without the preliminary injunctive relief Plaintiffs seek, therefore, irreparable harm will be the inevitable result.

In addition to the individual Plaintiff, ACORN members, on whose behalf ACORN is a party to this action, will suffer irreparable harm absent injunctive relief. ACORN represents individuals who are recipients of public assistance benefits and who are not registered to vote, or are not registered at their current address. (*See* Ordower Decl., ¶ 5.) These members should be offered the opportunity to register to vote each time they apply or recertify for public assistance benefits. It is clear, however, that Defendants have failed to follow the NVRA's requirements under Section 7. As a result, individuals who receive public benefits, including ACORN members, are not being offered the opportunity to register when they apply or recertify for benefits. The specific purpose of Section 7 of the NVRA is to provide the opportunity to register to vote through VRAs to make registering more convenient for recipients of public assistance benefits, including ACORN members, just as the NVRA makes it more convenient to vote for those who visit motor vehicle bureaus. Despite Section 7, however, that hardship remains, due to Defendants' failure to follow the requirements of the NVRA. ACORN members who are

¹⁰ *See*, FSD, Income Maintenance Manual, § 1130.030.05, available at http://www.dss.mo.gov/fsd/iman/fstamps/1130-030-00_1130-030-20.html#1130.030.05.

¹¹ Plaintiffs note that the upcoming November elections may be of particular interest to Missouri citizens. More than 1,415,000 Missourians voted in the state's presidential primary election on February 5, 2008, according to the Secretary of State's web site – a figure which represents an all-time record by a substantial margin. However, analysis of data collected by the U.S. Census indicates that in Missouri more than 250,000 adult citizens in households making less than \$25,000 annually were not registered to vote in November 2006.

not registered to vote, and who have not been offered the opportunity to register to vote when they applied or recertified for public assistance benefits or reported changes of addresses, as well as those ACORN members who are not registered to vote and have yet to apply or recertify for public assistance benefits or report changes of addresses but who will do so in the future, will remain unable to exercise their fundamental right to vote, and will therefore suffer irreparable harm absent injunctive relief.

In addition, Plaintiff ACORN continues to suffer harm in its own right as a result of Defendants' failure to adhere to Section 7. *See Fla. State of Conf. of NAACP v. Browning*, No. 07-15932, 2008 U.S. App. LEXIS 7100, *34-36 (11th Cir. April 3, 2008) (organizations alleging violation of Help America Vote Act established standing based on proof that responding to Florida third-party registration law diverted resources from voter registration drives and election day monitoring). Due to Defendants' failure, ACORN must devote its own resources to voter registration assistance efforts for its members outside VRAs. As such, the continuing failure of the DSS offices to offer voter registration opportunities as required by the NVRA has required ACORN to expend resources it would not otherwise have expended, thereby diverting resources ACORN needs for community organization, issues campaigns, and other programs in order to realize full achievement of its goals. ACORN cannot be compensated for its expenditures resulting from the Defendants lack of compliance because the NVRA provides only declaratory and injunctive relief, and not damages. Defendants' failure to abide by the requirements of the NVRA, therefore, has hampered and impeded ACORN's mission, and continues to cause ACORN irreparable harm. (*See* Ordower Decl., ¶ 16)

B. The Balance Between the Harm to Plaintiffs if an Injunction Is Not Issued, and the Harm, if any, Caused to Defendants by an Injunction, Strongly Favors Issuing an Injunction

As stated above, if the Court does not grant preliminary injunctive relief Plaintiff O'Neal will suffer significant irreparable harm, namely, deprivation of the opportunity to

register to vote as contemplated by Congress when it passed the NVRA. If an injunction is not granted, hundreds of thousands of low-income Missourians will lose the opportunity to register, and therefore to vote, in the upcoming November elections. In addition, ACORN will be forced to spend a significant portion of their limited time and resources outside VRAs assisting low-income voters with registering to vote, expenditures which would be unnecessary were Defendants complying with their obligations under the NVRA.

In contrast, to the extent the Defendants suffer any burden if the injunction is granted, it is a burden – compliance with the NVRA -- that has been mandated by the United States Congress, and must be accepted. *See Charles H. Wesley Educ. Fund*, 324 F. Supp. 2d at 1368 (NVRA required acceptance of bundled mail-in voter registrations), *aff'd*, 408 F.3d 1349 (11th Cir. 2005). In any event, the remedial relief sought is highly unlikely to cause Defendants more than minimal expense, and such expense is greatly outweighed by the fundamental rights of Plaintiff O’Neal and other Missouri citizens that an injunction would protect. *See Berks County*, 277 F. Supp. 2d at 582 (E.D. Pa. 2003) (“Defendants will not suffer irreparable harm if a permanent injunction is issued. Any small additional monetary expense to Defendants to conduct the election in compliance with the Voting Rights Act is far outweighed by the important fundamental right involved in this case.”). The balance of potential harms thus clearly weighs in favor of issuing a preliminary injunction.

C. Plaintiffs Have a Strong Likelihood of Success on the Merits

Based on the record already created, Plaintiffs have demonstrated that their likelihood of success on the merits of this case is high. However, it should be noted at the outset that “likelihood” in the mathematical sense is not required to meet the *Dataphase* standard. *Heartland Acad. Cmty. Church*, 335 F.3d at 690 (party seeking injunction “is not required to prove a mathematical (greater than fifty percent) probability

of success on the merits.”) (citing *Dataphase*, 640 F.2d at 113). Rather, to satisfy this prong of the *Dataphase* test, Plaintiffs are required only to show “a fair chance of prevailing.” *Id.*; see also 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.3, at 188 (2d ed. 1995) (in demonstrating likelihood of success, “plaintiff must present a prima facie case but need not show that he is certain to win.”).

Plaintiffs have clearly demonstrated that they have a substantial likelihood of success on the merits. In support of the statements contained in the Complaint, and in addition to the statistical data from Missouri and other evidence cited therein, Plaintiffs have submitted declarations from individuals who have entered public assistance agencies and conducted business, such as applying for or renewing an application for food stamps, that triggered Section 7’s requirement that DSS employees provide the declarants with voter registration forms and assistance in filling out the forms. (*See* accompanying declarations.) Each declarant states that at no time did anyone at the public assistance agency offer the opportunity to register to vote. *Id.* Among the declarants is the individual Plaintiff in this action, Dionne O’Neal. These declarations demonstrate that the miniscule number of VRA registrations reported are due to the Defendants’ consistent failure to comply with Section 7.

In addition, Plaintiffs have submitted the declaration of Joseph Amrine, who visited the site of a VRA and surveyed individuals conducting business with the agencies. (*See* Amrine Decl.) As described in his declaration, none of the people to whom Amrine spoke had been offered the opportunity to register to vote while conducting business at the VRA, despite all of the individuals having conducted business that triggered Section 7 requirements. *Id.* The events described in the declarations constitute clear evidence of Defendants’ consistent, ongoing failure to fulfill the federally-mandated obligations under Section 7 of the NVRA. Plaintiffs have demonstrated Defendants’ widespread and repeated violation of the NVRA and the injuries Defendants’ failures have inflicted upon

Plaintiffs – namely, Plaintiffs have not been given the opportunity to register to vote that the NVRA mandates they receive, and as a result they remain unregistered. As such, Plaintiffs have clearly demonstrated a likelihood of success on the merits of their claims.

D. The Public Interest Strongly Favors Issuance of an Injunction

The public interest should be given substantial weight by courts considering whether to grant a preliminary injunction. *See Yakus v. United States*, 321 U.S. 414 (1944); *Inland Steel Co. v. United States*, 306 U.S. 153 (1939). Here, it is clear that the public interest favors granting Plaintiffs’ motion for a preliminary injunction. The voting rights of not only Plaintiff O’Neal, but hundreds of thousands of Missouri citizens are at stake. The language of the NVRA itself makes clear where Congress stands on the question of public interest: “The Congress finds that— (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right” 42 U.S.C. § 1973gg(a)(1)-(2). The public interest is best served by an injunction that ensures that Missouri “stays true to the avowed *national* interests embodied within the National Voter Registration Act of 1993.” *Project Vote*, 455 F. Supp. 2d at 708.

The injunctive relief Plaintiffs seek requires only that Missouri and its public assistance agencies comply with Section 7 to prevent future harm and remediate clear past violations of the NVRA. In comparison to the paramount importance of the right to vote, the additional expenditure of money or resources an injunction would require would be insubstantial. Therefore, any opposition to the injunctive relief sought here would not be in the public interest. It is clear, then, that the significant public interests involved in this case weigh entirely in favor of granting an injunction.

CONCLUSION

For the reasons set forth above, Plaintiffs request this Court grant their Motion for a Preliminary Injunction. Plaintiffs expect to negotiate a schedule for expedited

discovery with opposing counsel within the next 10 days. At that time, we anticipate seeking a conference before this Court to approve the expedited discovery schedule.

Respectfully submitted,

ARTHUR BENSON & ASSOCIATES

By: _____
Arthur A. Benson II Mo. Bar #21107
Jamie Kathryn Lansford Mo. Bar #31133
4006 Central Avenue (Courier Zip: 64111)
P.O. Box 119007
Kansas City, Missouri 64171-9007
Telephone: (816) 531-6565
Telefax: (816) 531-6688
Email: abenson@bensonlaw.com
Email: jlansford@bensonlaw.com

DEWEY & LEBOEUF LLP
John M. Nonna
Richard J. Cairns
1301 Avenue of the Americas
New York, NY 10019
Telephone: (212) 259-8000
Telefax: (212) 259-6333
Email: jnonna@dl.com
Email: rcairns@dl.com
PRO HAC VICE APPLICATIONS TO BE
FILED

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Jon Greenbaum
Bob Kengle
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 662-8315
Telefax: (202) 628-2858
Email: jgreenbaum@lawyerscommittee.org
Email: bkengle@lawyerscommittee.org
Email: cponder@lawyerscommittee.org
PRO HAC VICE APPLICATIONS TO BE
FILED

DEMOS: A NETWORK OF IDEAS &
ACTION

Brenda Wright
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
Telephone: (617) 232-5885 ext. 13
Telefax: (617) 232-7251
bwright@demos.org

Allegra Chapman
220 Fifth Avenue, 5th Floor
New York, NY 10001
Telephone: (212) 419-8772
Telefax: (212) 633-2015
achapman@demos.org
PRO HAC VICE APPLICATIONS TO BE
FILED

PROJECT VOTE

Brian Mellor
Teresa James
196 Adams Street
Dorchester MA 02122
Telephone: (617) 282-3666
Telefax: (617) 507-6402
Email: electioncounsel1@projectvote.org]
Email: electioncounsel2@projectvote.org]
PRO HAC VICE APPLICATIONS TO BE
FILED

Attorneys for Plaintiffs