

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil No. 08-CV-02321-JLK

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,

vs.

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

Defendant.

---

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....v

INTRODUCTION .....1

STATEMENT OF UNDISPUTED MATERIAL FACTS .....4

I. VOTER REGISTRATION IN COLORADO.....5

A. Voters Are Registered and Able to Vote When They Are Given “Active” Status and Their Registration Notice is Mailed .....5

1. The Registration Process.....5

2. “Active – 20 day” Voters Are Eligible and Able to Vote by Regular Ballot, Either in Person or By Mail.....7

B. The 20-Day Rule Removes Registered Voters from the Rolls .....7

C. Address Confirmation Is Required of All Voters .....8

II. IMPACT OF THE 20-DAY RULE .....8

A. Thousands of Registrants Have Been Purged.....8

B. The 20-Day Rule Risks *Erroneous* Cancellation of Voters and Potential Disenfranchisement.....9

C. Cancelled Voters Who Are Able to Vote by Provisional Ballot or Emergency Registration Are Nonetheless Harmed by the 20-Day Rule .....10

D. Voters Purged Under the 20-Day Rule Would Not Have Had Their Votes Counted in the 2008 Election But for the Preliminary Relief Obtained in This Litigation .....13

III. THE HARM TO PLAINTIFF ORGANIZATIONS.....15

A. Plaintiffs’ Organizational Purposes and Resources .....15

- 1. Mi Familia Vota.....15
- 2. SEIU.....16
- 3. Common Cause.....17
- B. Common Cause’s and SEIU’s Just Vote Colorado Program’s 2008 Agenda Did Not Include Addressing Voter Purges.....18
  - 1. Common Cause’s Role in Just Vote Colorado .....18
  - 2. The Just Vote Colorado 2008 Agenda .....20
  - 3. Just Vote Colorado’s Election Protection Activities .....21
- C. Plaintiffs Were Forced to Divert Resources to Counter Colorado’s Unlawful Voter Cancellation Practices .....22
  - 1. Common Cause and SEIU .....22
    - a. Common Cause and SEIU Devoted Resources to Countering the State’s Unlawful Purges.....22
    - b. Common Cause’s and SEIU’s Work Against the Purges Diverted Resources from Other Planned Activities .....28
  - 2. Mi Familia Vota.....29
    - a. Mi Familia Vota Devoted Resources to Countering the State’s Unlawful Purges.....29
    - b. Mi Familia Vota’s Work Against the Purges Prevented It From Devoting Resources to Other Planned Activities .....31
- D. Harm to Plaintiffs’ Organizational Activities .....32
  - 1. Mi Familia Vota.....32

2. SEIU.....33

IV. HARM TO PLAINTIFFS’ MEMBERS .....35

A. SEIU and Common Cause Members Were Purged from the  
Registration Rolls by Operation of the 20-day Rule.....35

ARGUMENT .....36

I. COUNT I CAN BE DECIDED ON SUMMARY JUDGMENT AS  
A MATTER OF LAW .....36

II. THE NATIONAL VOTER REGISTRATION ACT PROHIBITS  
PURGING REGISTRANTS WHOSE VOTER INFORMATION  
CARDS ARE RETURNED AS UNDERLIVERABLE WITHIN  
20 BUSINESS DAYS.....37

A. The Meaning of “Registrant” Is Governed by Federal Law,  
Not State Law .....39

B. Voters Affected by the 20-Day Rule Are “Registrants” and  
Thus Fully Entitled to NVRA Protection.....41

C. Voters Affected by the 20-Day Rule are “Registered”  
Under Colorado Law As Well .....42

D. The 20-Day Rule Unlawfully Purges “Registrants.” .....43

E. The 20-Day Rule Violates the Statutory Rights of  
Thousands of Voters .....44

1. Thousands of Voters Have Been Unlawfully  
Purged .....44

2. Voters Would Have Lost Their Right to Have Their  
Votes Counted But for the Relief Obtained in This  
Litigation.....45

3. Voting By Provisional Ballot or Emergency  
Registration Independently Burdens the Right to  
Vote.....47

III. PLAINTIFFS HAVE STANDING TO SEEK A PERMANENT INJUNCTION PREVENTING ENFORCEMENT OF THE 20-DAY RULE .....49

A. Plaintiffs Have Organizational Standing to Assert the Claims on Their Own Behalf .....51

1. Defendant’s Voter Purges Harmed Mi Familia Vota’s and SEIU’s Voter Registration, Education, and Outreach Efforts, Inflicting Concrete Injury .....52

2. All Three Plaintiffs Diverted Resources to Counteract The Purges, Conferring Concrete Injury .....55

B. The Burden On Their Members’ Right to Proper Registration Under the NVRA Is Sufficient to Establish SEIU’s and Common Cause’s Standing as Associations .....61

1. Plaintiffs Members Suffer Injury-In-Fact When They Are Purged From Colorado’s Voter Registration Rolls in Violation of Their Rights Under the NVRA .....62

2. Protecting Their Members’ Voting Rights Is Germane to the Organizational Purposes of SEIU and Common Cause .....68

3. No Individual Participation by the Member is Necessary for the Court to Adjudicate This Dispute .....70

C. Plaintiffs’ Injuries Are Traceable to the Defendant’s Purging of Voters in Violation of the NVRA .....70

D. A Permanent Injunction Against Continued Application of the 20-Day Rule and Requiring Reinstatement of Plaintiffs’ Cancelled Members Will Redress Plaintiffs’ Injuries .....71

CONCLUSION.....72

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242 (1986).....72

*Association of Community Organizations for Reform Now v. Fowler*,  
178 F.3d 350 (5th Cir. 1999) .....50, 52, 55, 60

*Building & Construction Trades Council of Buffalo v. Downtown Development, Inc.*,  
448 F.3d 138 (2d Cir. 2006).....68

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986).....36

*Charles H. Wesley Education Foundation, Inc. v. Cox*,  
408 F.3d 1349 (11th Cir. 2005) ..... passim

*Common Cause/Georgia v. Billups*,  
554 F.3d 1340 (11th Cir. 2009), *cert. denied*, 174 L. Ed. 2d 271..... passim

*Department of Commerce v. United States House of Representatives*,  
525 U.S. 316 (1999).....50

*El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*,  
959 F.2d 742 (9th Cir. 1992) .....55

*Essence, Inc. v. City of Federal Heights*,  
285 F.3d 1272 (10th Cir. 2002) .....50

*Florida State Conference of N.A.A.C.P. v. Browning*,  
522 F.3d 1153 (11th Cir. 2008) .....55, 56, 58, 60

*Harper v. Va. State Board of Elections*,  
383 U.S. 663 (1966).....62

*Havens Realty Corp. v. Coleman*,  
455 U.S. 363 (1982).....51, 55

*Hooker v. Weathers*,

990 F.2d 913 (6th Cir. 1993) .....55

*Humane Society of the United States v. Hodel*,  
840 F.2d 45 (D.C. Cir. 1988) .....68

*Hunt v. Wash. State Apple Advertising Commission*,  
432 U.S. 333 (1977).....61

*Lujan v. Defenders of Wildlife*,  
504 U.S. 555 (1992).....50

*Metropolitan Wash. Airports Authority v. Citizens for Abatement of Aircraft  
Noise*,  
501 U.S. 252 (1991).....51, 52

*National Lime Association v. EPA*,  
233 F.3d 625 (D.C. Cir. 2000) .....68

*Northeast Ohio Coal. for the Homeless v. Blackwell*,  
467 F.3d 999 (6th Cir. 2006) .....68

*Oklahoma Chapter of American Academy of Pediatrics (OKAAP) v. Fogarty*,  
205 F.Supp.2d 1265 (N.D. Okla. 2002) .....55

*Pacific Legal Foundation v. Goyan*,  
664 F.2d 1221 (4th Cir. 1981) .....55

*Robey v. Shapiro, Marianos & Cejda, L.L.C.*,  
434 F.3d 1208 (10th Cir. 2006) .....50

*Spann v. Colonial Village, Inc.*,  
899 F.2d 24 (D.C. Cir. 1990).....52, 55

*U.S. Student Association Foundation v. Land*,  
585 F.Supp.2d 925 (E.D. Mich. 2008), *aff'd*, 546 F.3d 373 .....52, 54

*U.S. Student Associate Foundation v. Land*,  
546 F.3d 373 (6th Cir. 2008) ..... passim

*United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*,  
517 U.S. 544 (1996).....61, 70

*Village of Bellwood v. Dwivedi*,

895 F.2d 1521 (7th Cir. 1990) .....55

*Warth v. Seldin*,  
422 U.S. 490 (1975).....51, 63

*31 Foster Children v. Bush*,  
329 F.3d 1255 (11th Cir. 2003) .....64

**FEDERAL STATUTES**

42 U.S.C. § 1973 gg-6 ..... passim

42 U.S.C. 1973gg-9 .....45, 50

The Worker Adjustment and Retraining Notification Act, 102 Stat. 890,  
29 U.S.C. § 2101 *et seq.*.....61

**FEDERAL RULES**

Fed. R. Civ. P. 56.....4, 36, 50

**COLORADO STATUTES**

C.R.S. § 1-2-509 .....1

C.R.S. § 1-7-103 .....65

**COLORADO REGULATIONS AND ADMINISTRATIVE RULES**

8 CCR § 1505-1, Rule 26.3.1.....11

8 CCR § 1505-1, Rule 2.20.2.....42, 44

8 CCR § 1505-1, Rule 26.3.1.....48

## INTRODUCTION

Count I of the Amended Complaint in this case (“the 20-Day Claim”) challenges Defendant’s policy and practice of cancelling the registrations of voters pursuant to C.R.S. § 1-2-509(3) (the “20-day rule”) as a violation of the National Voter Registration Act of 1993 (the “NVRA”). In violation of the express terms of Section 8 of the NVRA, 42 U.S.C. § 1973gg-6, the 20-day rule requires cancellation of the registration records of new or re-registering voters when a non-forwardable confirmation card sent to the voter is returned as undeliverable within 20 business days of the registration. That rule denies registrants the protections afforded by the NVRA, which expressly provides that “a State shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the registrant” (A) “confirms in writing that the registrant has changed residence to a place outside the registrar’s jurisdiction” or (B) (i) has failed to respond to a notice sent by *forwardable* mail, *and* (ii) “has not voted or appeared to vote” in the next two federal elections. 42 U.S.C. § 1973 gg-6.

Plaintiffs brought the 20-Day Claim, together with other claims, in October 2008, and moved for preliminary and injunctive relief in advance of the November 2008 federal election. Following a hearing, this Court approved a Stipulated Preliminary Injunction (the “Preliminary Injunction”) that provided temporary relief that allowed voters impacted by Defendant’s conduct to have their votes counted in that election. The process set up by the Preliminary Injunction resulted in the ballots of at least 51 voters purged under the 20-day rule being counted that would otherwise have been rejected.

The Preliminary Injunction did not, however, permanently enjoin Defendant's unlawful practice or permanently restore the registration status of most of the voters who had been unlawfully purged under the 20-day rule. Without intervention by this Court, thousands of voters will be unable to vote a regular ballot or to have any certainty that their votes will be counted in future elections, including the upcoming 2010 federal primary and general elections.

The Secretary concedes that it has a policy and practice of cancelling from the list of eligible voters persons who have submitted valid and complete registration applications when the non-forwardable card sent to them confirming their registrations is returned within 20 business days of the submission of the complete registration applications. The Secretary also concedes that its policy and practice does not afford these persons the protections that Section 8 of the NVRA secures to registrants. The Secretary's only defense of its policy is its argument that persons who have submitted valid and complete registration applications are not "registrants" under the NVRA, and thus not entitled to its protections. That argument fails.

First, contrary to the Secretary's contention, the question of who is a "registrant" under the NVRA is a question of federal law, not of Colorado State law. As the Sixth Circuit recently held in *U.S. Student Assoc. Foundation v. Land*, 546 F.3d 373, 382 (6th Cir. 2008), "[i]f states could define 'registrant,' they could circumvent the limitations of the NVRA by simply restricting the definition, and hence the federal protection of the NVRA." In *Land*, a case that also involved a state (i.e., Michigan) cancelling registrants on the basis of the card notifying them of their registration being returned as

undeliverable, the Sixth Circuit held that “at the very least, a person becomes a ‘registrant’ for the 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.”

Here, it is uncontested that in Colorado, persons who submit complete and accurate registration applications are given a registration status of “Active” upon the submission of the application and may cast a regular or mail in ballot in federal elections. Those votes count, even if the voter’s Voter Information Card is later returned as undeliverable.

Under the *Land* analysis, which is a compelling interpretation of the term “registrant” in the NVRA, persons who have submitted a valid and complete registration application are “registrants” in Colorado. This is so regardless of whether the Voter Information Card sent to them confirming that registration status and informing them of their polling place is returned as undeliverable within 20 business days. Accordingly, the Secretary’s policy of cancelling registrants whose Voter Information Cards are returned as undeliverable violates the NVRA.

Second, under Colorado law as well, persons who have submitted completed registration applications are “registrants.” Colorado statutes provide that “upon receipt of an application, the county clerk and recorder shall verify that the application is complete and accurate. If the application is complete and accurate, the county clerk and recorder shall notify the applicant of the *registration*.” Colorado Revised Statute 1-2-509(2) (emphasis added). Similarly, under Colorado law, “[n]o person shall be permitted to cast a regular ballot at any election *without first* having been registered within the time and in

the manner required by the provisions of this article. . . .” CRS § 1-2-201(1) (emphasis added). Even if Colorado law did inform the definition of “registrant” under the NVRA, persons who have submitted valid and complete registration applications are “registrants” in Colorado upon the submission of the valid completed application.

Since the Secretary’s policy and practice of cancelling persons whose Voter Information Cards confirming their registration are returned as undeliverable within 20 business days does not afford “registrants” the protections afforded them by the NVRA, that policy violates the NVRA. Accordingly, pursuant to Fed. R. Civ. P. 56, Plaintiffs request that this Court grant summary judgment in their favor on Count I.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Fed. R. Civ. P. 56 and this Court’s Pretrial and Trial Procedures, Plaintiffs Common Cause of Colorado, Mi Familia Vota, and SEIU respectfully assert, in support of their motion for partial summary judgment, that the following material facts are not genuinely in dispute.

1. Since January 1, 2008, Colorado has purged at least 3,123 voters from its voting roles by cancelling their voter registration records under the 20-day rule.

Declaration of James M. Finberg in Support of Plaintiffs’ Motion for Summary Judgment<sup>1</sup> Ex. 51, Naifeh Decl. ¶ 17.

2. These unlawful cancellations began well before January 1, 2008 and continue today. *Id.* ¶ 18.

---

<sup>1</sup> All exhibits cited in this brief are exhibits to the Finberg Declaration, and will be cited as “Ex. \_\_\_.”

3. A voter in “Cancelled” status, including by operation of the 20-day rule, does not appear on the poll books and may not cast a regular ballot in any federal election.

## **I. VOTER REGISTRATION IN COLORADO**

### **A. Voters Are Registered and Able to Vote When They Are Given “Active” Status and Their Registration Notice Is Mailed.**

#### ***1. The Registration Process***

4. Voter registration in Colorado is achieved by completing one of several types of voter registration application. Ex. 2, Rudy Dep. at 12-15. Ex. 6 at slides 11-18 (titled “Types of Voter Registration Applications”)

5. Each form requires applicants to affirm that they meet the basic criteria for eligibility to vote. Ex. 2, Rudy Dep. at 12:14-15:9; Ex. 7; Ex. 6 at slides 9-10.

6. Once the county clerk for the county in which the applicant resides determines that a registration application is complete and accurate, she enters the information from the application into the statewide computerized voter registration database, known as SCORE. Ex. 2, Rudy Dep. at 23:11-:18; Ex. 8 (“SCORE II User Guide: Statewide Colorado Registration & Election”) at 92-94.

7. Prospective voters whose applications are “complete and accurate” are given a registration status of “Active” and a “status reason” of “20 day Period.” Ex. 1, Hrg. Tr. (Rudy Direct) at 47:15-48:1; Ex. 2, Rudy Dep. at 23:11-:18; 31:21-33:5; Ex. 6, slide 39 (titled “Failed 20-day Period”); Ex. 8 SOS-000401-402; SOS-000452-454, ¶¶ 8-9.

8. A voter in “Active – 20-day” status is sent a notice of the disposition of

his application in the form of a Voter Information Card. Ex. 1, Hrg. Tr. (Rudy Direct) at 47:24-48:6; Ex. 2, Rudy Dep. at 23:11-:18; Ex. 10 (“Voter Information Card Flowchart”).

9. The Voter Information Card informs the voter that he is registered. Ex. 2, Rudy Dep. at 54:16-18; Ex. 9, “Voter Information Card.”

10. The Voter Information Card informs a voter of the “Date Registered” and lists his polling place. Ex. 9, “Voter Information Card”; Ex. 2, Rudy Dep. 34:13-15.

11. The Voter Information Card functions as the notice of disposition required by the National Voter Registration Act (“NVRA”). Ex. 2, Rudy Dep. at 34:2-12.

12. No other notice of successful registration is sent. Ex. 2, Rudy Dep. at 34:2-12.

13. The Secretary of State’s website allows individuals to conduct a registered voter search to retrieve their registration data and confirm that status of their voter registration record. This search option is available to the general public. *See* Colorado Secretary of State website, Elections Center, at <https://www.sos.state.co.us/Voter/secuVoterHome.do>.

14. Individuals in “Active – 20 day” status who log on to the Secretary of State’s website to verify their registration are informed of their “Date of Registration” and their polling place, and will see that their registration status is “Active,” with no limitation, qualification, or condition. Ex. 11 (SCORE record and Registered Voters Screenshots for Patrick Lynn Adams).

15. A voter who is able to retrieve his data on the Secretary of State on-line Registered Voter Search is registered. Ex. 2, Rudy Dep. 43:24-44:12.

16. “Active – 20 day” registrants appear on the registration rolls at polling places, with no distinction made among types of “active” voters. Ex. 2, Rudy Dep. at 36:3-8; Ex. 8 at SOS-000371 (screenshot of poll book).

2. ***“Active – 20 day” Voters Are Eligible and Able to Vote by Regular Ballot, Either in Person or by Mail.***

17. Voters in “Active” status, including “Active – 20-day” status, are eligible to vote and may cast a regular or mail-in ballot in federal elections. Ex. 1, Hrg. Tr. (Rudy Cross) at 76:7-10; Ex. 2, Rudy Dep. at 35:8-14.

18. A ballot cast by an individual classified as “Active – 20 day” will be counted, even if the Voter Information Card is later returned as undeliverable. Ex. 2, Rudy Dep. at 36:9-23.

**B. The 20-Day Rule Removes Registered Voters from the Rolls.**

19. If a Voter Information Card is returned as undeliverable within 20 days, election officials immediately change the status of the corresponding registration record from “Active” to “Cancelled” with a “status reason” of “Failed 20 day.” Ex. 15 (“Election Alert 2008 – 03: Reinstating ‘Cancelled/Failed 20 Day’ Voters”) at 1; Ex. 18 (“Election Alert 2009 – 04: Processing Failed 20 Day Applicants); Ex. 2, Rudy Dep. at 46:8-:16.

20. In training material and other documents, including public statements, the Secretary’s office routinely characterizes the 20-day rule as a basis for “Cancellation” and refers to voters being “cancelled” by operation of the 20-day rule. Ex. 12 (“News Release: Coffman Responds to NY Times Article Inaccuracies,” Oct. 9, 2008); Ex. 13 at

slide 28 (titled “Cancelling Voters: Reasons”), at slide 36 (titled “Failed – 20 Day Period,” C.R.S. 1-2-509(3)); Ex. 14 at 12, slide 34 (titled “Cancellation Reasons), at 10, slide 30 (“Failed 20 Day Period”); Ex. 6 at slide 30 (“Cancellation Reasons”); *id.* at slide 39 (“Failed 20 Day Period”); Ex. 15 (SOS-000290-293) at 1.

**C. Address Confirmation Is Required of All Voters.**

21. Every voter in Colorado must confirm his or her address before casting a ballot. Ex. 1, Hrg. Tr. (Rudy Cross) at 76:14-25; Ex. 2, Rudy Dep. at 48:18-49:4.

22. A voter who casts a regular ballot at a polling place must orally recite his or her address to a poll worker. Ex. 1, Hrg. Tr. (Rudy Cross) at 76:18-:22.

23. A voter who casts a regular ballot at a polling place must also check that the address on the poll books is still accurate or write his or her address on a signature card. Ex. 2, Rudy Dep. at 48:18-49:4.

**II. IMPACT OF THE 20-DAY RULE**

**A. Thousands of Registrants Have Been Purged.**

24. Between January 1, 2008 and November 4, 2008, approximately 3,128 individuals were placed in “Cancelled” status by operation of the 20-day rule. Ex. 51, Naifeh Decl. ¶ 17.

25. As of October 21, 2009, approximately 5,531 individuals were in “Cancelled – Failed 20 day” status. Ex. 51, Naifeh Decl. ¶ 3.

26. Of these, approximately 1,515 individuals were placed in “Cancelled” status by operation of the 20-day rule between November 4, 2008 and October 21, 2009. Ex. 51, Naifeh Decl. ¶ 19.

27. Of the individuals described in ¶ 25, above, approximately 1,400 were placed in “Cancelled” status by operation of the 20-day rule before January 1, 2008. Ex. 51, Naifeh Decl. ¶ 18.

**B. The 20-Day Rule Risks *Erroneous* Cancellation of Voters and Potential Disenfranchisement.**

28. The Secretary has recognized that the 20-day rule creates the risk that impacted voters might be “disenfranchised due to postal or other error.” Ex. 16 at “Statement of Justification and Reasons for Adoption of Temporary Rules.”

29. This risk is not theoretical: Some voters have been placed in “Cancelled” status and been unable to vote a regular ballot because of postal service errors and clerical mistakes. Ex. 19 (Email from Josh Liss to HAVA Mailbox, 11/10/2008, Re “FW: Jefferson County response to Order on Cancelled Records.”).

30. Clerical errors result in erroneous cancellation under the 20-day rule. Ex. 2, Rudy Dep. at 65:4-66:3.

31. County election officials erroneously reject provisional ballots cast by voters who failed the 20-day rule. *E.g.*, Ex. 22 (“Additional Records Reviewed after SOS Audit of County Provisional Ballot Review”); Ex. 2, Rudy Dep., at 52:19-53:22.

32. At least 51 such provisional ballots cast in the November 2008 election would not have been counted but for the procedures and standards for review of provisional ballots put in place by the Stipulated Preliminary Injunction in this litigation. Ex. 2, Rudy Dep. at 51:4-:23; Ex. 22 (“Additional Records Reviewed after SOS Audit of

County Provisional Ballot Review”); Ex. 23 (Email from Hilary Rudy to Bill Kottenstette entitled “Provisional Spreadsheet”) at 5.

**C. Cancelled Voters Who Are Able to Vote by Provisional Ballot or Emergency Registration Are Nonetheless Harmed by the 20-Day Rule.**

33. An individual whose registration status is “Cancelled – Failed 20 day” and who wishes to cast a ballot on election day must either cast a provisional ballot or register to vote through emergency registration at the office of the county clerk and recorder or authorized branch location. Ex. 2, Rudy Dep. at 66:15-23; 18:5-18:21;

34. Voting through provisional ballot or emergency registration is more time consuming and less convenient than casting a regular ballot. Ex. 1, Hrg. Tr. (Rudy Cross) at 77:11-78:5; 79:1-24, (Munster Cross) at 136:16-137:1. Ex. 2, Rudy Dep. at 47:18-:25; 18:22-18:24; 19:15-21:3.

35. A voter whose registration has been cancelled pursuant to the 20-day rule must first wait in line to cast a regular ballot and be told that their names are not on the poll book before she is told of her status and that she may cast a provisional ballot. Ex. 1, Hrg. Tr. (Rudy Direct) at 52:10-17; Ex. 20, Flanagan Supp. Decl. at ¶ 25.

36. Such a voter must then wait for election judges to attempt to resolve any discrepancy. Ex. 1, Hrg. Tr. (Rudy direct) at 52:18-53:2; Ex. 2, Rudy Dep. at 18:5-11.

37. A voter wishing to cast a provisional ballot must then wait in a separate line at a provisional ballot table. Ex. 2, Rudy Dep. at 18:11-14; Ex. 20, Flanagan Supp. Dec. at ¶ 25.

38. A voter wishing to cast a provisional ballot must fill out an affidavit on the ballot affidavit confirming her residence address and eligibility to vote on the envelope. This affidavit is the same as the voter registration application. Ex. 1, Hrg. Tr. (Rudy cross) at 77:16-78:5.

39. Filling out the paperwork associated with a provisional ballot often requires the assistance of a poll worker. Ex. 1, Hrg. Tr. (Munster cross) at 136:16-19.

40. Once the paperwork associated with a provisional ballot is filled out, it is reviewed by an election judge. Ex. 1, Hrg. Tr. (Rudy direct) at 52:18-24.

41. A voter who casts a provisional ballot is often unsure whether her vote will be counted. Ex. 1, Hrg. Tr. (Rudy cross) at 77:7-10; Ex. 2, Rudy Dep. at 18:17-21.

42. If a voter makes an error on the provisional ballot affidavit, his or her vote may not be counted. 8 CCR § 1505-1, Rule 26.3.1.

43. When a voter has been required to vote by provisional ballot, to find out if her vote was counted, the voter must wait 14 days from the date of the election, and then log on to a Secretary of State website or call a hotline. Ex. 1, Hrg. Tr. (Rudy direct) at 53:25-54:10.

44. In view of these burdens, it is the policy of the Secretary of State's office to try to avoid voters having to cast provisional ballots. Ex. 1, Hrg. Tr. (Rudy Direct) at 52:18-53:2.

45. A voter wishing to go through emergency registration must first wait in the regular ballot line and be told that his name is not on the rolls. Ex. 1, Hrg. Tr. (Rudy cross) at 52:10-20.

46. A voter wishing to vote through emergency registration generally must then travel to a county clerk's office or a satellite location that is in a different location than his regular polling station. Ex. 1, Hrg. Tr. (Rudy direct) at 50:2-7; 70:3-16; Ex. 2, Rudy Dep. at 19:15-21:2.

47. After arriving at the county clerk's office or satellite location, the voter must wait in line in order to complete an emergency registration. Ex. 2, Rudy Dep. at 19:19-20:1; Ex. 14 "Issues in Voter Registration" at 8, slide 23.

48. On the day of the 2008 general election, voters had to wait in considerable lines to receive assistance at many county clerks' offices. Ex. 20, Flanagan Supp. Decl. ¶ 26.

49. Finally, the voter may cast a regular ballot. Ex. 14 "Issues in Voter Registration" at 8, slide 23.

50. Faced with the added time and inconvenience of voting by provisional ballot or emergency registration, some individuals may not vote at all. Ex. 2, Rudy Dep. at 48:2-17.

51. The Secretary of State has no records indicating the number of voters who do not vote rather than face the added time and inconvenience of voting by provisional ballot or through emergency registration. Ex. 2, Rudy Dep. at 68:2-69:12.

52. In contrast to voters in "Cancelled-Failed-20 day" status, a voter who is in "Active" status appears on the voting rolls at the polling place, must wait in only one line, need not wait for a poll worker to call a county clerk to confirm her registration status, need complete no paperwork other than signing the poll book and voting her ballot, need

not travel to another location to cast a ballot, and can leave the polling place knowing her ballot will be counted. Ex. 2, Rudy Dep. at 18:5-21:3.

**D. Voters Purged under the 20-Day Rule Would Not Have Had Their Votes Counted in the 2008 Election But for the Preliminary Relief Obtained in This Litigation**

53. At least 268 voters who had failed the 20-day rule prior to November 4, 2008 cast provisional ballots in the 2008 primary or general elections, or both. Ex. 51, Naifeh Decl. ¶ 16.

54. Pursuant to the Stipulated Preliminary Injunction entered by this Court on October 29, 2008, county election officials applied particular procedures and standards in reviewing provisional ballots cast by individuals who had failed the 20-day rule. Ex. 21 (October 19, 2008 Order) at ¶ 2; Ex. 2, Rudy Dep. at 53:11-13.

55. The Stipulated Preliminary Injunction required the Secretary of State to review provisional ballots that had been rejected at the county level. Ex. 21 (October 19, 2008 Order) at ¶ 4.

56. No such review would have occurred absent the Stipulated Preliminary Injunction. Ex. 2, Rudy Dep. at 53:11-16.

57. Out of 70 provisional ballots cast by voters who failed the 20-day rule that were rejected at the county level and reviewed by the Secretary pursuant to the Stipulated Preliminary Injunction, the Secretary concluded that county officials had erroneously rejected 51 ballots. Ex. 22 (“Additional Records Reviewed after SOS Audit of County Provisional Ballot Review”); Ex. 23 (Email from Hilary Rudy to Bill Kottenstette entitled

“Provisional Spreadsheet”) at 5; *see also* Ex. 2, Rudy Dep. at 51:4-52:10. This number represents 73 percent of the ballots rejected at the county level and nearly 20 percent of the 268 provisional ballots cast by failed 20-day voters.

58. Following a challenge by Plaintiffs, the Court directed that three additional provisional ballots cast by voters cancelled under the 20 day rule be counted despite the Secretary’s determination that those ballots had properly been rejected. Ex. 24, June 26, 2009 Order.

59. At least 54 provisional ballots would not have been counted but for the Stipulated Preliminary Injunction. Ex. 2, Rudy Dep. at 51:4-52:9; Ex. 22 (“Additional Records Reviewed after SOS Audit of County Provisional Ballot Review”); Ex. 23 (Email from Hilary Rudy to Bill Kottenstette entitled “Provisional Spreadsheet”) at 5 (showing 33 provisional votes cast by voters classified as “Failed – 20 day period” rejected by counties and overturned by Secretary’s office); Ex. 22 (showing another 18 such ballots rejected at county level and overturned by Secretary’s office); Ex. 24 (6/26/2009 Order Granting Motion to Enforce).

60. An unknown number of additional provisional ballots which were counted at the county level would not have been counted had county officials not been applying the standards and procedures set forth in the Stipulated Preliminary Injunction. Ex. 2, Rudy Dep. at 53:5-:22.

61. Provisional ballots cast by some voters placed in “Cancelled – Failed-20 Day” status before county voter registration data was transferred to SCORE were not

reviewed under the standards and procedures set forth in the Stipulated Preliminary Injunction. Ex. 21, October 19, 2008 Order.

62. If the 20-day rule is not permanently enjoined, there is a risk that election officials in future elections will reject provisional ballots cast by eligible voters who fail the 20-day rule but meet all the criteria for having their provisional ballots counted. Ex. 2, Rudy Dep. at 51:4-:23; Ex. 22 (“Additional Records Reviewed after SOS Audit of County Provisional Ballot Review”); Ex. 23 (Email from Hilary Rudy to Bill Kottenstette entitled “Provisional Spreadsheet”) at 5.

### **III. THE HARM TO PLAINTIFF ORGANIZATIONS**

#### **A. Plaintiffs’ Organizational Purposes and Resources**

##### ***1. Mi Familia Vota***

63. Mi Familia Vota’s organizational mission includes engaging the members of Latino community in the electoral process and educating them about the importance of political participation. Ex. 26, Lopez Supp. Decl. ¶ 2; Ex. 27, Ramirez Dep. at 11:15-23; Ex. 28, Ulibarri Dep. at 17:15-18, 18:4-11.

64. To achieve those goals, Mi Familia Vota operates voter registration drives at various community events and conducts voter education about the mechanics of voting and issues in upcoming elections. Ex. 27, Lopez Ramirez Dep. at 12:4-13:12; Ex. 28, Ulibarri Dep. at 10:11-21, 17:19-18:11.

65. Mi Familia Vota has limited resources. In the summer and fall of 2008, Mi Familia Vota employed two full-time staff-members, one of whom was dedicated to

organizing and overseeing voter registration and outreach efforts. Ex. 27, Lopez Ramirez Dep. at 16:24-17:6, 25:24-26:1.

66. Mi Familia Vota had planned to devote all of its resources in the weeks preceding Election Day to an outreach effort to contact new, first-time or low-propensity voters, encourage them to vote, and educate them on the voting process. Ex. 27, Lopez Ramirez Dep. at 22:24-24:9; 26:7-26:10; 57:1-4.

67. In addition, Mi Familia Vota operated a program to collect and deliver mail ballots from voters who were unable to mail or deliver them themselves, and it intended to perform this service in the 2008 General Election. Ex. 27, Lopez Ramirez Dep. at 24:2-5, 56:24-57:1.

## 2. *SEIU*

68. SEIU's goals include empowering working people in the workplace and in government, and ensuring that every American, including every SEIU member, has the right and the opportunity to vote. Ex. 29, Ury Supp. Decl. ¶ 3; Ex. 30, Ury Dep. at 23:7-23:19, 63:18-63:21.

69. As part of this goal, SEIU works to ensure that historically marginalized working people are empowered to participate in the political process and to elect government, including through voter registration. Ex. 29, Ury Supp. Decl. ¶ 4; Ex. 30, Ury Dep. at 13:15-23:19.

70. Since 2004, in federal election years, SEIU has operated an election protection program to help ensure that individual voters are able to go to the polls and vote. Under this program, members of the SEIU legal department contact local

registration officials in various states to address anticipated issues that may make it more difficult to vote, and assist in training poll monitors. Ex. 30, Ury Dep. at 15:17-17:10; 47:13-19.

71. SEIU Associate General Counsel Steve Ury and SEIU Law Fellows Laurel Webb and Miles Granderson devoted time to working on SEIU's election protection program in Colorado in the period leading up to the November 2008 federal election. Ex. 30, Ury Dep. at 48:2-8, 54:1-10.

### 3. *Common Cause*

72. According to its mission statement, one of Common Cause's organizational purposes is "to strengthen public participation and faith in our institutions of self-government; ... promote fair . . . elections ...; [and] protect the civil rights and civil liberties of all Americans." Ex. 20, Flanagan Supp. Decl. ¶ 4; *see also* Ex. 34, Flanagan Dep. at 42:1-18; Ex. 35, Common Cause Mission Statement; Ex. 36, Colorado Common Cause website: "Our Issues" <http://www.commoncause.org>.

73. In addition, Common Cause is committed to ensuring that every eligible American, and every eligible Common Cause member, has the right to vote and the opportunity to exercise that right. Ex. 20, Flanagan Supp. Decl. ¶ 5; Ex. 34, Flanagan Dep. at 101:5-102:17.

74. Consistent with this mission, Common Cause works actively on a variety of election reform issues including "the development of fair and effective voter database management protocols so that voters are not inadvertently purged from the rolls," other

problems that may adversely impact Coloradans' ability to vote. Ex. 20, Flanagan Supp. Decl. ¶¶ 4, 7; Ex. 34, Flanagan Dep. at 103:10-104:19.

75. Common Cause has limited resources. During the fall of 2008 Common Cause employed five paid staff-members, including Executive Director Jennifer Flanagan, and two interns, and typically between two and four volunteers at any given time. Ex. 20, Flanagan Supp. Decl. ¶ 3; Ex. 34, Flanagan Dep. at 33:8-16, 33:23-34:4, 116:22-117:11.

76. One of these staff members, however, was hired to devote 60% of her time to non-election issues. It was intended that she would devote 60% of her time to issues relating to media and democracy. Ex. 34, Flanagan Dep. at 115:9-17.

77. As part of Common Cause's election reform work, Flanagan regularly engages in lobbying efforts and testifies at public hearings on issues of importance to Common Cause. Ex. 34, Flanagan Dep. at 15:24-16:21; 18:3-5; 21:13-16.

**B. Common Cause's and SEIU's Just Vote Colorado Program's 2008 Agenda Did Not Include Addressing Voter Purges.**

***1. Common Cause's Role in Just Vote Colorado.***

78. Just Vote Colorado is a coalition of organizations which, among other things, supervised election protection efforts in Colorado. Ex. 20, Flanagan Supp. Decl. ¶ 12; Ex. 34, Flanagan Dep. at 26:7-27:4; 42:21-43:9.

79. Most of the organizations which participated in or used the services of the Just Vote Colorado coalition are not and have not been involved in the present litigation. Ex. 20, Flanagan Supp. Decl. ¶ 20. SEIU participated in the Just Vote Colorado

Coalition. Ex. 30, Ury Dep. At 60:13-19, 68:24-69:4; Ex. 37, Exhibit 7 to Ury Dep. (e-mail from Flanagan to Nunez); Ex. 38, Webb Dep. at 15:20-17:2, 19:25-20:6, 20:22-24.

80. Approximately seventy percent of Common Cause's 501c3 funding in 2008 was raised for the purpose of election administration work through Just Vote Colorado, providing 90% of the program's budget in 2008. Ex. 20, Flanagan Supp. Decl. ¶¶ 5, 12; Ex. 34, Flanagan Dep. at 41:25-42:18, 44:9-10, 49:20-50:4, 52:18-23, 101:5-102:17.

81. Flanagan was responsible for running Just Vote Colorado as part of her duties as executive director of Common Cause. Ex. 20, Flanagan Supp. Decl. ¶ 13; Ex. 34, Flanagan Dep. at 52:9-11, 55:3-20.

82. Supervision of the Just Vote Colorado coalition is the primary way that Common Cause carries out its mission of ensuring honest, fair and accurate elections and protecting voting rights. Ex. 34, Flanagan Dep. at 42:11-43:9.

83. In October of 2008, SEIU made law fellows Laurel Webb and Miles Granderson available to Common Cause and the Just Vote Colorado coalition to assist with voter protection efforts. Ex. 30, Ury Dep. at 60:13-19, 68:24-69:4; Ex. 37, Exhibit 7 to Ury Dep. (email from Flanagan to Nunez).

84. During the period Webb and Granderson assisted Common Cause and the Just Vote Colorado coalition with voter protection work, SEIU continued to pay their salaries. Ex. 30, Ury Dep. at 60:20-21.

85. On or about October 9, Webb began conducting this work from her office in Los Angeles, and on October 20, she traveled to Colorado, where she worked from

Common Cause's offices and at the Just Vote Colorado call center on Election Day 2008. Ex. 34, Webb Dep. at 15:22-17:2, 19:25-20:3, 20:22-24; Ex. 30, Ury Dep. at 60:13-19, 68:24-69:4; Ex. 37, Exhibit 7 to Ury Dep. (email from Flanagan to Nunez).

## **2. *The Just Vote Colorado 2008 Agenda***

86. As executive director of Common Cause, Flanagan manages the Just Vote Colorado coordinating steering committee, which identifies issues the coalition will focus on during each election cycle. Ex. 34, Flanagan Dep. at 55:21-56:3, 56:20-57:3.

87. The steering committee met from approximately October or November 2007 through Election Day 2008. Ex. 34, Flanagan Dep. at 56:6-15.

88. Common Cause planned to pursue several issues on its election reform agenda for 2008 through Just Vote Colorado. Ex. 34, Flanagan Dep. at 55:21-56:3, 56:20-57:3.

89. These efforts were to include assessing the SCORE system; addressing (with the help of Webb) the shortage of polling sites and voting booths in parts of Colorado; creating mobile poll monitoring teams to address issues at specific sites (also with Webb's assistance); and addressing the significant confusion concerning how and where to drop off mail-in ballots (again utilizing Webb). Ex. 20, Flanagan Supp. Decl. ¶ 41; Ex. 34, Flanagan Dep. at 58:19-59:3, 113:7-14, 121:7-18, 152:5-16, 176:6-17; Ex. 38, Webb Dep. at 18:6-19:1, 19:2-8, 54:22-56:3; Ex. 37, Ex. 7 to Ury Dep.; Ex. 30, Ury Dep. at 51:15-24, 52:2-8, 87:7-23. 88:13-89:5; Ex. 63, Correspondence from Susannah Goodman, Jenny Flanagan and Elena Nunez to Joanne Wright; Ex. 64, Just Vote

Colorado Steering Committee Meeting Notes; Ex. 41, Draft of Just Vote Colorado Mission Statement and 2008 Agenda.

**3. *Just Vote Colorado's Election Protection Activities***

90. Just Vote Colorado operates the Voter Protection Hotline in Colorado, which assists the general public with questions or concerns about voting. Ex. 20, Flanagan Supp. Decl. ¶¶ 12; Ex. 38, Webb Dep. 40:4-40:19; Ex. 34, Flanagan Dep. at 43:1-9, 62:24-63:3, 64:3-15, 65:10-15; 65:25-66:6.

91. Calls to the hotline number were fielded at the Common Cause offices before Election Day, and by an off site call center on Election Day. Ex. 38, Webb Dep. at 38:2-20; 38:23-39:3; 39:15-20.

92. Just Vote Colorado also operated an Election Protection program on Election Day that sent volunteer poll monitors to various polling sites and county clerks' offices throughout the state. Ex. 34, Flanagan Dep. at 33:19-21, 67:21-68:7, 68:19-69:2.

93. The Voter Protection Hotline and Election Protection program were staffed by volunteers and by staff of the member organizations, including Common Cause and SEIU staff. Ex. 20, Flanagan Supp. Decl. ¶ 12; Ex. 38, Webb Dep. 40:4-19; Ex. 34, Flanagan Dep. at 33:16-21.

94. On Election Day, 30-40 volunteers staffed the hotline and "upwards of 200 plus" volunteers worked as poll monitors. Ex. 34, Flanagan Dep. at 33:16-21.

95. Flanagan ran and supervised the Voter Protection Hotline and Election Protection program, and was responsible for drafting training materials for both efforts. Ex. 20, Flanagan Supp. Decl. ¶¶ 13, 23.

96. In preparation for the Just Vote Colorado hotline and Election Protection program, Common Cause conducted between four and eight training sessions for volunteers beginning on or about October 16, 2008. Ex. 34, Flanagan Dep. at 93:18-94:1.

**C. Plaintiffs Were Forced to Divert Resources to Counter Colorado's Unlawful Voter Cancellation Practices.**

97. Colorado's cancellation of large numbers of voter registrations in the period before the 2008 primary and general elections was widely publicized in a *New York Times* article that appeared on October 9, 2008 and in stories in Colorado Papers, other media outlets and on the Colorado Spanish-language Univision station. Ex. 27, Ramirez Dep. at 52:5-13.

98. After the *New York Times* story appeared, the Secretary issued a press release which, while disputing the alleged number of purged voters, acknowledged that over 11,000 cancellations had taken place, including 1,136 persons purged under the 20-day rule. Ex. 12, October 9, 2008 *New York Times* Article.

**1. Common Cause and SEIU**

**(a) Common Cause and SEIU Devoted Resources to Countering the State's Unlawful Purges.**

99. As part of its work on SCORE, Common Cause had given a limited amount of attention to Colorado's voter cancellation policies and practices prior to October 2008. Ex. 20, Flanagan Supp. Decl. ¶ 11; Ex. 34, Flanagan Dep. at 59:6-8; 81:11-17; 112:10-24; 114:8-20.

100. Prior to the *New York Times* article, Common Cause had not been aware of the extent of Colorado's voter purges. Ex. 34, Flanagan Dep. at 59:4-60:5, 80:23-81:17; 106:25-107:7.

101. After the widespread publicity concerning these issues in early October, 2008, purges issues became a central focus of Common Cause's work for the remainder of the election cycle and beyond. Ex. 34, Flanagan Dep. at 59:10-12, 59:20-60:5.

102. Initially, Common Cause's staff researched the allegations in the *New York Times* article regarding Colorado's voter purges. Ex. 20, Flanagan Supp. Decl., ¶¶ 16-17; Ex. 20, Ex. C to Flanagan Supp. Decl. (October 9, 2008 e-mail from Derek Cressman); Ex. 34, Flanagan Dep. at 60:8-23; 124:12-16.

103. Based on this research, Common Cause sought to develop a strategy for responding to the purges and fielding inquires from Common Cause members, coalition partners, and media. Ex. 20, Flanagan Supp. Decl., ¶¶ 16-17; Ex. 20, Ex. C to Flanagan Supp. Decl. (October 9, 2008 e-mail from Derek Cressman); Ex. 34, Flanagan Dep. at 60:8-23; 124:12-16.

104. Flanagan responded to calls from members of the Just Vote Colorado coalition regarding Colorado's voter purge practices. Ex. 20, Flanagan Supp. Decl. ¶ 15; Ex. 34, Flanagan Dep. at 123:16-123:24.

105. The purges also became a focus for the Just Voter Colorado steering committee, and Flanagan devoted significant time at several committee meetings to the issue. Ex. 20, Flanagan Supp. Decl. ¶¶ 15, 18, 19; Ex. 34, Flanagan Dep. at 59:10-12, 59:20-60:5, 123:16-24.

106. The need to address the unlawful purges necessarily displaced other items on the Just Vote Colorado steering committee's very full agenda. Ex. 20, Flanagan Supp. Decl. ¶ 18; Ex. 34, Flanagan Dep. at 125:20-22, 127:18-24.

107. Common Cause's effort to provide information to the Just Vote Colorado coalition was in support of the work of the Coalition and was not done in anticipation of or preparation for litigation. Ex. 20, Flanagan Supp. Decl. ¶ 15.

108. After it became clear that the purges would become a significant part of her work in Colorado, SEIU law fellow Webb spent approximately 20-30 hours researching Colorado's cancellation policies and practices. Ex. 38, Webb Dep. at 20:13-24.

109. Almost immediately after the purges became a public controversy, Common Cause's Denver office received a large number of phone calls from its members and the Colorado public concerned about the cancellations and the status of their own registrations. Ex. 20, Flanagan Supp. Decl. ¶ 15; Ex. 34, Flanagan Dep. at 60:24-61:5, 123:1-8; Ex. 38, Webb Dep. at 40:5-10.

110. The volume of calls to Voter Protection Hotline between the publication of the New York Times article on October 9, 2008 and Election Day was much higher than Common Cause or SEIU had anticipated or were prepared to handle. Ex. 38, Webb Dep. at 51:2-4, 51:14-52:9.

111. Common Cause staff and volunteers, as well as SEIU law fellows Webb and Granderson, responded to these purge-related calls to the hotline and assisted voters

whose registrations had apparently been unlawfully cancelled. Ex. 30, Ury Dep. at 50:1-9; Ex. 38, Webb Dep. at 40:5-19; 40:23-25; 53:7-22.

112. The calls to the Voter Protection Hotline from impacted voters required more time than calls about other issues. Ex. 38, Webb Dep. at 51:5-13.

113. Between approximately October 22 and October 24, SEIU law fellow Webb spent between 7 and 15 hours in the Common Cause office in Denver answering calls regarding cancellation issues and helping purged voters to restore their voter registration status. Ex. 38, Webb Dep. at 40:5-17; 45:18-46:24; Ex. 34, Flanagan Dep. at 129:20-130:2.

114. In the weeks SEIU law fellow Webb was in Colorado before Election Day, she spent approximately 18-25 hours directly assisting purged voters. Ex. 38, Webb Dep. at 53:7-13.

115. On Election Day, Flanagan was in the hotline call center providing guidance to volunteers who were answering calls related to Colorado's illegal purges, and answering some such calls herself. Ex. 20, Flanagan Supp. Decl. ¶ 24; Ex. 34, Flanagan Dep. at 79:24-80:4.

116. Approximately 1,800 of the calls to the Voter Protection Hotline during the 2008 election cycle were documented on paper or in an electronic tracking system, although the high volume of calls and the complexity of calls dealing with the unlawful cancellation prevented staff from documenting all calls. Ex. 20, Flanagan Supp. Decl. ¶ 43; Ex. 34, Flanagan Depo at 72:4-74:2.

117. Approximately 10 percent of the calls dealt with questions arising out of the purges, but because such calls were comparatively complex and time consuming, they absorbed much more than 10 percent of staff volunteer time. Ex. 34, Flanagan Dep. at 79:18-20; 80:5-81:7.

118. The time spent by SEIU law fellows Webb and Granderson and Common Cause staff in the Common Cause office and at the call center on Election Day responding to calls about voter purges was unforeseen and was not done in anticipation of or in preparation for litigation. Ex. 20, Flanagan Supp. Decl. ¶ 15; Ex. 38, Webb Dep. at 51:2-52:9; Ex. 30, Ury Dep. at 53:2-5.

119. Common Cause had drafted the training materials for hotline and election protection volunteers before the Secretary's Press Release was release and before it understood the nature and extent of the Secretary's unlawful conduct. Ex. 20, Flanagan Supp. Decl. ¶ 23; Ex. 34, Flanagan Dep. at 87:8-88:3.

120. Accordingly, Flanagan was required to supplement the training materials with information about the purges. Ex. 20, Flanagan Supp. Decl. ¶¶ 13, 23; Ex. 34, Flanagan Dep. at 86:1-5, 87:2-21; 87:25-88:11; 90:19-24; 91:6-13; 91:20-24.

121. Flanagan spent approximately three additional hours of preparation time in order to prepare the supplemental information for these training sessions. Ex. 34, Flanagan Dep. at 92:8-21.

122. In addition, SEIU law fellows Webb and Granderson and Common Cause staff prepared written materials to give to poll monitors and Voter Protection Hotline

volunteers on purge-related issues. Ex. 38, Webb Dep. at 19:9-19:24; 40:22-40:23; Ex. 30, Ury Dep. at 51:6-10; Ex. 34, Flanagan Dep. at 96:11-98:2.

123. Similarly, they prepared written materials to help inform voters of their rights in relation to cancellation of their registrations. Ex. 38, Webb Dep. at 19:18-24; 42:11-43:23; Ex. 55, Ex. 4 to Ury Dep.

124. Flanagan conducted all of the training sessions for call-center volunteers, and many of the training sessions for poll monitors, and she instructed other trainers how to present the issues arising out of the unlawful cancellations. Ex. 34, Flanagan Dep. at 92:24-93:11.

125. Each training session for volunteers lasted approximately one and one half to two hours, and the need to address the voter cancellations added an additional 15-20 minutes to the length of each session. Ex. 34, Flanagan Dep. at 92:3-7; 92:21-23; Ex. 38, Webb Dep. at 56:4-19.

126. After the election, Common Cause began working on key election-related problems identified in the 2008 election cycle, principally including the state's voter cancellation policies. Ex. 20, Flanagan Supp. Decl. ¶ 8; Ex. 34, Flanagan Dep. at 109:11-14.

127. Flanagan spent considerable time learning the details of the cancellation practices in order to prepare testimony for Colorado's Election Reform Commission. Ex. 34, Flanagan Dep. at 105:21-106:5, 107:2-5, 107:16-20; 108:11-24; 110:16-17; Ex. 65, Colorado Common Cause, Testimony to Election Reform Commission.

**(b) Common Cause's and SEIU's Work Against the Purges Diverted Resources from Other Planned Activities.**

128. All of the additional work Common Cause and SEIU were required to carry out to respond to counteract the Secretary's voter purges prevented them from devoting the resources to the issues and projects previously on their agendas. Ex. 20, Flanagan Supp. Decl. ¶ 41.

129. For example, Common Cause was not able to expend resources to addressing the operation of SCORE. Ex. 20, Flanagan Supp. Decl. ¶ 41; Ex. 34, Flanagan Dep. at 151:13-152:16.

130. Common Cause was also required to divert its funded staff person from media and democracy work to full time support for the Just Vote Colorado program. Ex. 20, Flanagan Supp. Decl. ¶ 41; Ex. 34, Flanagan Dep. at 105:13-5, 115:14-20, 115:25-116:6, 118:7-120:24, 122:3-10, 152:5-16, 154:5-13; 176:18-24.

131. The number and resource-intensive nature of calls about the purges from affected voters who had been affected by them, forced Common Cause away from other work that could have made the hotline and Election Protection program more effective, including away calls regarding other voter issues. Ex. 20, Flanagan Supp. Decl. ¶ 43; Ex. 38, Webb Dep. at 52:9-18.

132. Similarly, Common Cause and SEIU were forced to divert SEIU law fellows Webb and Granderson's efforts toward addressing the unlawful conduct and away from planned work with county clerks to address the shortage of polling places,

which reduced the effectiveness of that effort. Ex. 38, Webb Dep. at 55:9-56:3; Ex. 34, Flanagan Dep. at 152:5-16.

133. Similarly, neither SEIU law fellows Webb or Granderson nor any other Common Cause or SEIU staff person were able to set-up the details and implement the plan to deploy monitoring teams as effectively as originally intended. Ex. 38, Webb Dep. at 55:9-56:3, 57:18-58:21; Ex. 34, Flanagan Dep. at 121:7-18.

134. Finally, the diversion of resources prevented Common Cause and SEIU from devoting sufficient resources to address the confusion over where mail-in ballots could be dropped. Ex. 20, Flanagan Supp. Decl. ¶ 42; Ex. 37, Ex. 7 to Ury Dep.; Ex. 38, Webb Dep. at 18:17-19:1, 19:4-8, 54:22-55:4; Ex. 30, Ury Dep. at 51:15-24; 52:2-8; 87:7-23; 88:3-7; 88:24-89:5.

135. Altogether, SEIU law fellow Webb was able to spend only 100 hours out of the 200 she worked in the period from October 10, 2008 through November 4, 2008 on the issues she intended to spend the entire period working on. Ex. 38, Webb Dep. at 60:2-16.

## 2. *Mi Familia Vota*

### (a) **Mi Familia Vota Devoted Resources to Countering the State's Unlawful Purges.**

136. From approximately May 2008 to November 4, 2008, Mi Familia Vota operated a Spanish-language voter hotline to assist with questions and concerns about voter registration or voting. Ex. 27, Lopez Ramirez Dep. at 46:19-22, 47:3-5; 59:12-22.

137. Before the Secretary's unlawful purges were publicized, Mi Familia Vota received a call to the hotline approximately once every 15 to 20 minutes. Ex. 27, Lopez Ramirez Dep. at 52:3-17.

138. After the publicity, the call volume increased substantially: October 9, 2008 through November 4, 2008, Mi Familia Vota's hotline rang every two to three minutes throughout the day until midnight, seven days a week. Ex. 27, Lopez Ramirez Dep. at 27:1-9; 46:23-47:2, 52:18-53:10.

139. At daily staff meetings, Mercy Salazar, Mi Familia Vota's community organizer, reported to executive director Grace Lopez on the nature of the calls received on the information line. Every day after October 8, 2008, Salazar reported that Mi Familia Vota had received and responded to multiple calls about the illegal purges. Ex. 27, Lopez Ramirez Dep. at 53:15-54:1; Ex. 53, Salazar Decl. ¶¶ 3-9.

140. In responding to these calls, Mi Familia Vota spent time verifying callers' registration status and addressing callers' concerns about what they had heard about the purges. Ex. 27, Lopez Ramirez Dep. at 46:2-10; Ex. 53, Salazar Decl. ¶ 8.

141. But for the Secretary's unlawful conduct, the volume of calls to the Mi Familia Vota hotline would have remained similar to what it had been prior to October 9. Ex. 27, Lopez Ramirez Dep. at 53:11-14; Ex. 53, Salazar Decl. ¶ 6.

142. Prior to October 9, 2008, Mi Familia Vota had trained its call center volunteers on how to answer the types of questions it anticipated voters would ask. Ex. 27, Lopez Ramirez Dep. at 55:14-19.

143. After Mi Familia Vota began receiving large numbers of calls regarding the illegal purges, it had to provide additional training on how to address voter concerns on that issue, which added about 10-15 minutes to the training sessions and, in addition, required supplemental training of existing staff and volunteers. Ex. 27, Lopez Ramirez Dep. at 55:20-56:4, 56:14-16, 57:17-58:10.

144. If a call volunteer responding to purge-related calls was unable to address the caller's concerns, the volunteer would consult one of the paid part-time staff, often on a different floor of the building in which Mi Familia Vota's offices were located, thus requiring the resources of two persons and considerable time to respond to a single voter's purge-related call. Ex. 27, Lopez Ramirez Dep. at 58:10-23. Responding to concerns raised by persons calling about purge issues took approximately 30 minutes per call. Ex. 53, Salazar Decl. ¶ 8.

**(b) Mi Familia Vota's Work Against the Purges Prevented It from Devoting Resources to Other Planned Activities.**

145. Because of the volume of calls coming into Mi Familia Vota's offices about the unlawful cancellation of voter registrations, Mi Familia Vota was required to divert 4-5 volunteers to responding solely to these calls, and they therefore spent less time reaching out to new and low propensity voters or assisting with the delivery of mail ballots. Ex. 27, Ramirez Dep. at 23:5-11; 26:18-23; Ex. 53, Salazar Decl. ¶ 10. If the incoming call volume had been lower, Mi Familia Vota volunteers and part time staff members would have been engaged in activities directed at getting out the vote. Those activities would have included individuals knocking on doors, distributing leaflets, and

calling people to encourage them to vote. Mi Familia Vota was able to do less of those things than it had planned to do because of the Secretary's purge activities. Ex. 27, Ramirez Dep. at 56:20-57:4; Ex. 53, Salazar Decl. ¶ 10.

**D. Harm to Plaintiffs' Organizational Activities**

***1. Mi Familia Vota***

146. In 2008, Mi Familia Vota conducted a Voter Registration Drive with VRD No. 08-200.

147. Under this VRD, MFV registered approximately 2500 voters, including Marian Anderson, Janine Legare Low, Zayatona Ahmed, and Ivan A. Valverde. Ex. 26, Lopez Supp. Decl. ¶ 3; Ex. 42, SOS-004725; Ex. 41, SOS-004734; Ex. 59, SOS-006215; Ex. 58, SOS-006168.

148. The registrations of these four voters were cancelled, and the stated reason for the cancellation was "Failed – 20 day period." Ex. 42, SOS-004724; Ex. 41, SOS4733; Ex. 59, SOS-006208; Ex. 58, SOS-006161.

149. Mi Familia Vota intends to engage in voter registration activities in the future, including in 2010 in anticipation of the 2010 Federal election. Ex. 28, Ulibarri Dep. at 54:12-55:2; Ex. 64, Ulibarri Decl. ¶ 3.

150. Mi Familia Vota concentrates on registering and engaging primarily Spanish-speaking low-income and low-propensity voters, a group that has historically been hesitant to engage in the political process. Mi Familia Vota was aware through its engagement with these communities that many of their members did not believe their votes would be counted. Through its extensive efforts in communicating with the voters

and educating them about the importance elections and the registration and voting process, Mi Familia Vota built up a level of trust where these voters were comfortable registering to vote and getting out to vote. Ex. 27, Lopez Ramirez Dep. at 17:13-20:3.

151. As a result of the extensive and unlawful cancellation of voter registration records, many of these voters lost the trust in the electoral system that Mi Familia Vota had cultivated, making it more difficult for Mi Familia Vota to engage these voters in the electoral process or persuade them to register to voter. Ex. 27, Lopez Ramirez Dep. at 19:6-8, 20:18-21:1, 54:2-55:10; Ex. 53, Salazar Decl. ¶ 7.

## 2. *SEIU*

152. In 2008, SEIU conducted a Voter Registration Drive with VRD No. 08-182.

153. Approximately 30-35 SEIU staff and members worked full time from July 2008 to October 5, 2008, the close of the registration period in Colorado, registering voters in Colorado. Ex. 30, Ury Dep. at 31:19-32:10.

154. Some of the staff assisting SEIU in its voter registration effort were hired on a temporary basis solely to work on the voter registration drive. Ex. 30, Ury Dep. at 33:18-22.

155. SEIU members who took time of from their jobs to assist in the voter registration effort were paid by SEIU. Ex. 30, Ury Dep. at 32:20-23.

156. Some of the SEIU staff who assisted in the voter registration drive traveled to Colorado from other states and were housed and provided at SEIU's expense

with office space and other materials necessary to carry out their work. Ex. 30, Ury Dep. at 33:6-12.

157. Under this VRD, SEIU registered approximately 3000 voters, including Jean Blaylock, Aura Gomez, Vonray Little, Johnita Taylor, and Tameka Thompson. Ex. 30, Ury Dep. at 34:20-21; Ex. 44, SOS-004663; Ex. 45, SOS-004688; Ex. 46, SOS-004717; Ex. 47, SOS-004702; Ex. 48, SOS-004671.

158. The voter registrations of these five voters were cancelled, and the stated reason for the cancellation was “Failed – 20 day period.” Ex. 44, SOS-004661; Ex. 45, SOS-004682; Ex. 46, SOS-004711; Ex. 47, SOS-004690; Ex. 48, SOS-004666.

159. In the case of Gomez, the US Postal Service information indicated that the Voter Information Card sent pursuant Colorado’s 20 day rule was undeliverable, but did not indicate a reason or provide a forwarding address. Ex. 48, SOS-004672.

160. The address indicated on the card was in fact Gomez’s correct address.

161. SEIU intends to conduct additional voter registration drives in the future. Ex. 30, Ury Dep. at 36:7, 84:23-85:17.

162. Because the Defendant’s cancellation cast doubt on whether people who registered to vote through SEIU’s registration drive would actually be placed on the voting rolls and permitted to vote, SEIU’s voter registration efforts were harmed, and will likely be harmed in the future. Ex. 30, Ury Dep. at 35:18-36:7; Ex. 29, Ury Supp. Decl. ¶ 6.

163. In addition, these cancellations made it more difficult for SEIU to engage newly registered voters in the political process, in part because when “people have a

sense that they are not going to be able to vote, it undermines [SEIU's] ability to educate people about voting, about issues, about registration in general.” Ex. 30, Ury Dep. at 36:18-37:4, 41:10-19, 43:13-16, 43:24-44:5; Ex. 38, Webb Dep. at 45:18-24; 53:14-22.

#### **IV. HARM TO PLAINTIFFS' MEMBERS**

##### **A. SEIU and Common Cause Members Were Purged from the Registration Rolls by Operation of the 20-day Rule**

164. Members of SEIU were removed from the rolls by operation of the 20-day rule. Ex. 50, Supe Decl., ¶¶ 3, 6; Ex. 49, Supe Supp. Decl., ¶¶ 3-6.

165. For example, SEIU member Rudy Puente, registered to vote on February 2, 2008, and on May 7, 2008 his registration was cancelled under the 20-day rule. Ex. 50, Supe Decl. ¶¶ 4-8; Ex. 57, SOS-004657.

166. Likewise, Diana Bain is an SEIU member whose active registration was cancelled under the 20-day rule on September 17, 2008. Ex. 50, Supe Decl. ¶¶ 4-8; Ex. 49, Supe Supp. Decl., ¶ 6; see also Ex. 57, SOS-004649-56; Ex. 60, SOS-006020-SOS006034.

167. Timmit Twolde, another SEIU member, registered to vote on November 4, 2008 and on March 10, 2009 was cancelled under the 20-day rule, and remains in cancelled status. Ex. 49, Supe Supp. Decl., ¶ 51; Ex. 61, SOS-006035-SOS-006042.

168. In the November 2008 election, [while in cancelled 20-day status,] Twolde cast a provisional ballot as “Timmit Twolde.” Ex. 51, Naifeh Decl. ¶¶ 12-14.

169. Common Cause members were also removed from the rolls by operation of the 20-day rule. Ex. 33, Michael Murray Decl. ¶¶ 3-5; See Ex. 20, Flanagan Supp. Decl. ¶¶ 48-52;

170. Gail Dubas, a Common Cause member, was registered to vote in April 2008, but cancelled under the 20-day rule on May 2008 after her Voter Information Card was returned. See Ex. 20, Flanagan Supp. Decl. ¶¶ 48-52; Ex. 33, Michael Murray Decl. ¶¶ 5-8; see also Ex. 56, SOS-004632-40.

171. Because her registration had been cancelled, Ms. Dubas re-registered to vote 2008 General Election. Ex. 56, SOS-004632-48.

172. Luke J. Jesser is a Common Cause member who registered to vote but was cancelled under the 20-day rule on May 21, 2009 and remains in “cancelled” status. Ex. 51, Naifeh Decl. ¶ 8; Ex. 62, SOS-005504.

## ARGUMENT

### **I. COUNT I CAN BE DECIDED ON SUMMARY JUDGMENT AS A MATTER OF LAW.**

Summary judgment is appropriate where there is no “genuine issue as to any material fact” and the “moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); Fed. R. Civ. P. 56(c). Here, the relevant facts are undisputed. The issue before this Court on Count I involves the definition of the term “registrant” in section 8 of the National Voter Registration Act. If, in Colorado, persons who have a registration status of “Active – 20-day” are “registrants,” plaintiffs are entitled to summary judgment as a matter of law.

**II. THE NATIONAL VOTER REGISTRATION ACT PROHIBITS PURGING REGISTRANTS WHOSE VOTER INFORMATION CARDS ARE RETURNED AS UNDELIVERABLE WITHIN 20 BUSINESS DAYS.**

Section 8 of the NVRA prohibits states from removing registrants from the rolls of eligible voters except under very limited conditions. Once a valid and timely registration application is submitted and the disposition notice is sent, the remaining provisions of Section 8 treat the prospective voter as a “registrant.” *Id.* § 1973gg-(6)(a)(3) et seq. After that point, Section 8 explicitly prohibits states from removing “the registrant ... from the official list of eligible voters” except on narrowly defined grounds and in accordance with specific and limited procedures. *Id.* § 1973gg-6(a)(3). The NVRA prohibits states from removing a registrant from the official list of eligible voters based on a change of address unless the registrant (A) has confirmed in writing his or her change of address to a new jurisdiction, or (B) has both (i) failed to respond to a forwardable notice and (2) has not voted in two consecutive general elections following the notice. *Id.* § 1973gg-6(a)(3), 6(d)(1). Pursuant to the express terms § 1973gg-6(d)(1), in the absence of express confirmation of the voter, this notice and waiting procedure is the only permissible mechanism under the NVRA for changing a registrant’s eligibility status, including on the basis of returned mail.

Directly contrary to the NVRA’s protections, the Secretary of State’s interpretation of CRS 1-2-509(3) (2009) requires election officials to cancel eligible and registered voters from the rolls if a non-forwardable notice of registration, which is mailed to the voter after his or her registration application is deemed valid and complete, is returned as undeliverable within 20 days. *See* CRS § 1-2-509(3) (2009).

The Secretary has advanced a single argument in favor of its practice of cancelling registrants whose Voter Identification Cards are returned as undeliverable: that under Colorado law, voters purged by the rule are not “registrants” under the NVRA and are therefore not entitled to the NVRA’s protections. That argument fails. *First*, the question of who qualifies as a “registrant” for purposes of the NVRA’s protections is a question of federal law, not state law. The term “registrant” under the NVRA has been interpreted to include persons who have submitted registration applications “from the first moment that he or she is actually able to go to the polls and cast a regular ballot.” *U.S. Students Assoc. Foundation v. Land*, 546 F.3d 373, 384 (6th Cir. 2008).

Here, it is undisputed that if the person with “Active 20-Day status” seeks to verify his registration status on the Secretary of State’s website during the 20-day period, he is informed that his registration status is “Active,” with no limitation. Ex. 2, Rudy Dep. 43:24-44:12. The name of a voter in “Active – 20 day” status appears on the poll books, with no distinction made among types of “active” voters and no restriction. 8 CCR § 1505-1, Rule 2.20.2(a); Ex. 2, Rudy Dep. at 36:3-:9. A person in “Active 20-day status” is eligible to cast a regular ballot in any Colorado election, either in person (including in early voting) or by mail. *Id.*; Ex. 1, Hrg. Tr. (Rudy Cross) at 76:7-10; Ex. 2, Rudy Dep. at 35:8-14. A ballot cast by an individual who voted while classified as “Active – 20 day” will be counted without restriction, even if the Voter Information Card is later returned as undeliverable. Ex. 2, Rudy Dep. at 36:9-16.

Accordingly, under the NVRA, persons in “Active 20-Day status” are “registrants” and entitled to the full protections of the NVRA. The Secretary’s policy of

purging them if their Voter Information Card confirming registration is returned as undeliverable violates the NVRA.

*Second*, Colorado law also make it clear that the Secretary’s 20-day rule results in the cancellation of registered and eligible voters who are fully entitled to NVRA protection. Colorado election code provides that “upon receipt of an application, the county clerk and recorder shall verify that the application is complete and accurate. If the application is complete and accurate, the county clerk and recorder shall notify the applicant of the *registration*.” Colorado Revised Statute 1-2-509(2) (emphasis added). Similarly, under Colorado law, “[n]o person shall be permitted to cast a regular ballot at any election *without first* having been registered within the time and in the manner required by the provisions of this article. . . .” CRS § 1-2-201(1) (emphasis added). Thus, even if Colorado law did inform the definition of “registrant” under the NVRA, persons who have submitted valid and complete registration applications are “registrants” in Colorado upon the submission of the completed application.

**A. The Meaning of “Registrant” Is Governed by Federal Law, Not State Law.**

The Secretary’s argument that the State of Colorado is entitled to define the term “registrant” by way of state law, and that only when a person becomes a “registrant” under state law is he or she entitled to the protections given to “registrants” under the NVRA was specifically rejected and repudiated by the only federal appellate court to have considered this issue. *See United States Student Assoc. Foundation v. Land*, 546 F. 3d 373, 381-83 (6<sup>th</sup> Cir. 2008) (finding that “state law cannot control the definition of

‘registrant’” and holding that Michigan law providing for cancellation of a voter’s registration when original disposition notice is returned as undeliverable likely violates NVRA).

In *Land*, as in this case, the State of Michigan argued that its version of the 20-day Rule, which likewise involved cancellations if voter records upon the return of voter ID cards as undeliverable, did not violate the NVRA because under state law the individuals whose registrations were cancelled were not “registrants”:

Defendants contend that, because the NVRA does not define “registrant,” state law must provide the definition. Defendants also assert that, under Michigan law, an individual is registered to vote only after he or she has received an original voter ID card. Defendants argue that an individual whose original voter ID card was returned as undeliverable was never a registrant in Michigan such that the protections of the NVRA apply.

*Id.* at 382.

In rejecting Michigan’s argument, the Sixth Circuit concluded that “making the question of who is a ‘registrant’ a matter of state law would frustrate the NVRA’s purpose of regulating state conduct of elections, by essentially permitting states to decide when they will be bound by the NVRA’s requirements.” *Id.* (citations and internal quotation marks omitted). Rather, whether someone is a “registrant” for purpose of the NVRA is a question of federal law. *Id.* at 383. And under federal law, a person becomes a “registrant” entitled to the protections of the NVRA “from the first moment that he or she is actually able to go to the polls and cast a regular ballot ... regardless of what label state law may attach to that individual.” *Land*, 546 F.3d at 383. A notice of disposition,

the court said, merely alerts the individual that the state has made an eligibility determination; it is not an eligibility criterion. *Id.* at 384.

**B. Voters Affected by the 20-Day Rule Are “Registrants” and Thus Fully Entitled to NVRA Protection.**

Under the *Land* criteria, persons with “Active 20-Day” status in Colorado are “registrants” under the NVRA. The relevant facts are undisputed:

- Once a prospective voter is determined to have submitted a complete and accurate application, he or she is given “Active – 20 day” status. Ex. 1, Hrg. Tr. (Rudy Direct) at 46:23-47:19; Ex. 2, Rudy Dep. at 23:11-:18; 31:21-33:5; Ex. 6, slide 39; Ex. 8 at 92-94, ¶¶ 8-9;
- “Active” status means that there are no conditions or restrictions on the voter’s eligibility.” 8 CCR § 1505-1, Rule 1.20.1.
- All “Active” voters, including those whose “status reason” is “20 day,” will have their names in poll books and may cast a regular ballot either by mail or in person. Ex. 1, Hrg. Tr. (Rudy Cross) at 76:7-10; Ex. 2, Rudy Dep. at 35:8-14.
- A ballot cast by an individual classified as “Active 20-Day” will be counted, even if the Voter Information Card is later returned as undeliverable. Ex. 2 Rudy Dep. at 36:9-16.

Nothing further is required under *Land*: “Active – 20 day” voters are “registrants” and are entitled to NVRA protection, “regardless of what label” the Secretary may wish to attach to them. *Land*, 546 F.3d at 383. By removing those registrants from the rolls under the 20-day rule, Colorado violates the NVRA. *See* 42 USC § 1973gg-6(a)(3).

The Secretary’s contrary position would lead to the absurd result that someone who is not registered or eligible to vote may nevertheless vote by regular ballot. That ballot would be counted even if the voter’s disposition card is later returned as

undeliverable, purportedly confirming the voter's ineligibility. Ex. 2, Rudy Dep. at 36:9-16.

In *Land*, the Sixth Circuit emphasized that “[b]ecause a notice of disposition alerts an individual that the state has determined that he or she meets State eligibility requirements, it necessarily follows that the eligibility decision has already been made. Indeed, the voter who checks his or her status after his or her name has been entered on the QVF will find the message “Yes, You Are Registered!” even before the Voter ID Card is mailed to him or her.” *Land* at 384. So too here, if persons who have an “Active 20-Day” status check on the Colorado Secretary of State’s website, they are informed that they are registered, with no qualifying language. Ex. 11, SOS-004768-4770.

**C. Voters Affected by the 20-Day Rule are “Registered” Under Colorado Law As Well.**

The Secretary’s view is barred by Colorado statutes no less than by the NVRA. Pursuant to the state’s Election Law, “[n]o person shall be permitted to cast a regular ballot at any election *without first having been registered within the time and in the manner required* by the provisions of this article. ...” CRS § 1-2-201(1) (emphasis added); *see also id.* § 1-7-103(1).

Thus, even if the Secretary were correct that the meaning “registrant” is a matter of state and not federal law, his interpretation of the term would be legally barred, given the reality that purportedly unregistered “Active – 20-day” voters appear on the rolls and may vote. If, as the Secretary asserts, voters do not become registered until the passage of the 20-day period, it would be illegal for them to cast a regular ballot. But they can

cast regular ballots, as the Secretary has conceded. Ex. 1, Hrg. Tr. (Rudy Cross) at 76:7-10; Ex. 2, Rudy Dep. at 35:8-14. By definition, then, such voters must be registered to vote under state law.

In addition, Colorado Revised Statute 1-2-509(2) provides that the Voter Information Card notifies applicants of the “registration.” The most natural reading of that provision is that the person is registered when the card is sent.

Only one reading of § 1-2-509 avoids absurd result, is consistent with the Secretary’s treatment of persons with the status of “Active 20-Day” as “registrants” and is consistent with the remainder of the legal framework: A person becomes a “registrant” when her application is complete and she is designated an “Active” voter in SCORE.

**D. The 20-Day Rule Unlawfully Purges “Registrants.”**

When a voter fails the 20-day rule, election officials affirmatively change the voter’s SCORE status from “Active” to “Cancelled.” Ex. 15 at p.1; Ex. 18; Ex. 2, Rudy Dep. at 46:8-:16. Unlike “Active” voters, “Cancelled” voters do not appear in the poll books and cannot cast a regular ballot. 8 CCR § 1505-1, Rule 2.20.2(b).

That the 20-day rule results in a cancellation of a voter’s existing registration is confirmed by the Secretary’s public statements. For example, in responding to allegations raised by the *New York Times* in October 2008 (before this litigation began), the Secretary issued a press listing “all cancelled voters since July 21, 2008 and the reasons for cancellation.” Ex. 12. One of the largest groups of “cancelled” voters were those who had failed the 20-day rule. *Id.*

Materials used in training county election officials also contradict the Secretary's litigation position. The Secretary's office has routinely classified the 20-day rule as one of several grounds for "Cancellation" and state that a "voter" who fails the rule "shall be cancelled" pursuant to § 1-2-509. Ex. 12; Ex. 13 at slides 28, 36; Ex. 14 at 12, slide 34; *id.* at 10, slide 30; Ex. 6 at slide 30; *id.* at slide 39; Ex. 15 at 1. One such document states:

**Failed – 20 Day Period C.R.S. 1-2-509(3)**

Here is the process:

1. Voter Registers
2. County sends confirmation card
3. Card is returned as undeliverable
4. Voter is cancelled.

Here is an example...

Ex. 13 at slide 36. The example consists of two SCORE screenshots, the first of an "Active – 20 day" voter record, the second of a voter who has been "cancelled" on the basis of "Failed – 20 day period." *Id.* at slides 37-38.

A more succinct description of an NVRA violation is difficult to imagine. Voters are first "register[ed]" and then "cancelled." The basis of cancellation is a returned notice of disposition; there is no further notice and no waiting period of two federal election cycles. This is precisely what Section 8 of the NVRA prohibits.

**E. The 20-Day Rule Violates the Statutory Rights of Thousands of Voters.**

***1. Thousands of Voters Have Been Unlawfully Purged.***

Thousands of voters have been unlawfully stricken from Colorado's registration rolls by operation of the 20-day rule, and these voter purges are ongoing. It is undisputed

that between January 1, 2008 and November 4, 2008, at least 3,128 individuals were placed in “Cancelled” status by operation of the 20-day rule. Ex. 51, Naifeh Decl. ¶ 17. It also is undisputed that as of October 21, 2009, approximately 5,531 individuals were in “Cancelled – Failed 20 day” status. Ex. 51, Naifeh Decl. ¶3. These figures exclude voters who were stricken from the rolls under the 20-day rule but later re-registered or were otherwise reinstated. Each one of these voters was purged in violation of the NVRA, and each suffered a legally cognizable injury by virtue of their cancellation. *See* 42 U.S.C. 1973gg-9.

**2. *Voters Would Have Lost Their Right to Have Their Votes Counted But for the Relief Obtained in This Litigation.***

In the 2008 election, an individual whose registration status is “Cancelled – Failed 20 day” wishing to cast a ballot on election day was required either to cast a provisional ballot or to register to vote through emergency registration at the office of the county clerk or a satellite office. Ex. 2, Rudy Dep. at 66:15-23; 18:5-21. Approximately 268 voters who had been cancelled by operation of the 20-day prior to Election Day 2008 rule cast provisional ballots in the 2008 primary or general elections. Ex. 51, Naifeh Decl. ¶6. Under the terms of the Stipulated Preliminary Injunction entered by this Court on October 29, 2008, all provisional ballots cast in the general election by voters purged under the 20-day rule were subjected to a heightened review by county clerks, in that they were required to count all these ballots unless there was clear and convincing evidence that the voter was not eligible; the Secretary used the same standards to review those

ballots rejected at the county level. Ex. 21 (October 29, 2008 Order) at ¶ 2; Ex. 2, Rudy Dep. at 53:11-13.

The Secretary concedes that many of the ballots counted during this process would not have been counted if they had not been reviewed under the procedures and standards set forth in the Stipulated Preliminary Injunction. Ex. 2, Rudy Dep. at 53:11-16, Ex. 24 (June 26, 2009 Order).

At the very least, this would include approximately 51 provisional ballots that were initially rejected by county officials but counted after the Secretary overturned the rejections. Ex. 23 (Email from Hilary Rudy to Bill Kottenstette, entitled “Provisional Spreadsheet”), p. 5 (showing 33 provisional votes cast by voters classified as “Failed – 20 day period rejected by counties and overturned by Secretary’s office)- Ex. 22 (showing another 18 such ballots rejected at county level and overturned by Secretary’s office); Ex. 23 (Email from Hilary Rudy to Bill Kottenstette, entitled “Provisional Spreadsheet”) at 5.

That figure does not include ballots that were counted by county officials under the heightened standards required by the Stipulated Preliminary Injunction that might otherwise not have been counted, which the Secretary also concedes. Ex. 2, Rudy Dep. at 53:11-13. It also excludes voters who failed the 20-day period but whose provisional ballots were not among those reviewed under the standards and procedures set forth in the Stipulated Preliminary Injunction, such as failed 20-day voters who cast provisional ballots in the primary election.

Finally, it is undisputed that none of the above figures reflect the likelihood that registrants cancelled by the 20-day rule may not have voted when confronted with the

added inconvenience and time required to vote by provisional ballot or emergency registration – the only options available to them at the polling place. Ex. 2, Rudy Dep. at 18:5-20:2. Those burdens are discussed immediately below. The Secretary of State’s office has no records indicating the number of registrants who do not vote under these circumstances. Ex. 2, Rudy Dep. at 68:2-69:12.

**3. *Voting By Provisional Ballot or Emergency Registration Independently Burdens the Right to Vote.***

Even for voters whose provisional ballots are ultimately counted, or who go through emergency registration and cast regular ballots, the 20-day rule burdens the right to vote. There is no genuine dispute as to the following material facts:

Voting through provisional ballot or emergency registration is less convenient and more time consuming than casting a regular ballot. Ex. 1, Hrg. Tr. (Rudy Cross) at 77:11-78:5; 79:1-24; 136:16-137:1. Ex. 2, Rudy Dep. at 47:18-:25; 18:22-:24; 19:15-21:4. Ex. 34, Flanagan Dep. at 157:13-158:18. Voters who cast provisional ballots must (i) first wait in line to cast a regular ballot; (ii) be informed that their names are not on the poll books; (iii) wait for election judges to attempt to resolve any discrepancy; (iv) wait in another line at the provisional ballot station; (v) fill out the form on the provisional ballot envelope (this form is an affidavit and the same form used to register to vote, so the individual must in effect re-register to vote); and then (vi) wait for an election judge to review the additional form – all before being able to cast a ballot. Ex. 1, Hrg. Tr. at 52:10 to 53:2, 77:11-78:5, 79:1-24, 136:16-137:1; Ex. 2, Rudy Dep. at 18:5-24, 19:15-

21:4, 47:18-:25; Ex. 20, Flanagan Supp. Decl. at ¶ 25. Casting a regular ballot, by contrast, simply requires showing identification and signing one's name. CRS § 1-7-110. The inconvenience does not always end when the ballot is cast: voters who make errors in completing the provisional ballot affidavit may be asked travel to county clerks' offices to correct errors. CRS § 1-8.5-105(3)(a).

Even if they are willing to endure this process, voters who cast provisional ballots are unsure whether their vote will be counted. Ex. 1, Hrg. Tr. (Rudy cross) at 77:7-:10; Ex. 2, Rudy Dep. at 18:17-:21. This is a real risk, because if a voter makes an error on the extensive provisional ballot affidavit, his or vote may not be counted. 8 CCR § 1505-1, Rule 26.3.1. Even registrants who cast correct and fully valid provisional ballots face a significant risk that their votes will not be counted. Experience in the 2008 general election shows that county officials erroneously rejected over 20% of the provisional ballots cast by a subset of such voters. *See* Ex. 2, Rudy Dep. at 51:4-52:10.

To find out if their vote was counted, provisional voters must wait 14 days and then log on to a Secretary of State website or call a hotline. Ex. 1, Hrg. Tr. (Rudy direct) at 53:25-54:10. At that point, the results of most elections will have been announced and the feeling that one's vote has made a difference will have dissipated. Not surprisingly, the Secretary's office views provisional ballots as a less desirable option to be avoided wherever possible. Ex. 2, Rudy Dep. at 78:19-:25.

Emergency registration is equally inconvenient, if not more so. First, as with a provisional ballot, a voter must wait in the regular ballot line, be told that his name is not on the rolls, and often wait for an election judge to resolve any discrepancy. Ex. 1, Hrg.

Tr. (Rudy cross) at 52:10-:20; Ex. 2, Rudy Dep. at 19:15-21:3. The voter then generally must travel to a county clerk's office or satellite location away from his regular polling station. Ex. 1, Hrg. Tr. (Rudy direct) at 50:2-:7; 70:3-:16; Ex. 2, Rudy Dep. at 19:15-21:2. Once there, the voter must wait in another line, which can be quite long. Ex. 20, Flanagan Supp. Decl. ¶ 26. The voter then must complete a new registration form and, finally, cast a regular ballot. Ex. 2, Rudy Dep. at 19:19-20:1; Ex. 14 at 8, slide 23.

A third option for voters cancelled by the 20-day rule was only recently created. Under 8 CCR s. 1505-1, Rule 2.17.2, such a voter may be restored to "Active" status by completing certificate of registration. This option is only slightly less burdensome, if at all, than provisional voting and emergency registration. It puts the burden on voters to cure the violation of their own rights by (i) somehow learning their rights were violated and they are in cancelled status; (ii) learning of the option created by administrative rule; (iii) traveling to a county clerk's office; (iv) completing a certificate of registration; and finally (v) presenting identification. A voter must take all of these affirmative steps only to regain a right that should never have been taken from them.

### **III. PLAINTIFFS HAVE STANDING TO SEEK A PERMANENT INJUNCTION PREVENTING ENFORCEMENT OF THE 20-DAY RULE.**

The undisputed facts show that the Secretary's unlawful actions have injured Plaintiffs by making their voter registration efforts less effective and more expensive, by causing them to divert resources from other activities to addressing and counteracting Defendant's unlawful purges, and by cancelling SEIU's and Common Cause's members' voter registration records from the Colorado voter registration database. These facts

show a sufficiently concrete injury to Plaintiff organizations themselves and to their members to satisfy the requirements of Article III standing.<sup>2</sup>

In order to establish standing to sue, a plaintiff must show (i) that it has suffered “injury in fact;” (ii) that the injury is traceable to the actions of the defendant; and (iii) that the requested relief will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). On a plaintiffs’ motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, where “plaintiffs’ standing is at issue, . . . a plaintiff must establish that there exists no genuine issue of material fact as to justiciability.” *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002) (citing *Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316, 329 (1999)) (internal quotation marks removed).

All three plaintiff organizations have established undisputed facts showing that they have diverted some of their limited resources to counteracting the challenged practices and that their mission has been frustrated. In addition, SEIU and Mi Familia Vota have proffered evidence establishing beyond genuine dispute that their voter registration efforts have been harmed and that persons they have registered to vote have

---

<sup>2</sup> The NVRA creates a private right of action for any “person who is aggrieved by a violation of th[e] Act.” 42 USC § 1973gg-9(b)(1). The NVRA’s private right of action provision “eliminate[s any] prudential limitations on standing,” and requires only that Plaintiffs “satisfy . . . the standing requirements under Article III . . . .” *Association of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999); *see also Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006) (“Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights.”).

been or may in the future be unlawfully purged from Colorado's voter registration rolls. Likewise, SEIU and Common Cause have demonstrated beyond genuine dispute that their members have been harmed by being subjected to Defendant's unlawful policies and by being purged from the voting rolls. As explained below, these undisputed facts are sufficient to establish all three organizations' standing to assert Count I of the Amended Complaint in their own right, and Common Cause's and SEIU's standing to assert that claim as associations on behalf of their members.<sup>3</sup>

**A. Plaintiffs Have Organizational Standing To Assert The Claims On Their Own Behalf.**

The Supreme Court has "recognized that organizations are entitled to sue on their own behalf for injuries they have sustained." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n. 19 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Where the defendant's "practices have perceptibly impaired [the organizational plaintiff's] ability to provide [the services it was formed to provide] . . . there can be no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379. In order to satisfy this standard, an organization must point to a "concrete and demonstrable injury to [its] activities." *Id.*

There are two ways an organization can demonstrate a concrete injury to its activities for standing purposes. First, it can show that the defendant's conduct has made it more burdensome for the organization to carry out its activities. *See Metropolitan*

---

<sup>3</sup> Plaintiff Mi Familia Vota is not a membership organization and does not assert associational standing.

*Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 264-65 (1991) (“CAAN”) (organization had standing where challenged statute made it more difficult for it to achieve its goal of reducing noise at National Airport in Washington). Second, it can show that it “devotes resources to counteract a defendant's allegedly unlawful practices.” *Ass’n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (citing *Havens*). The undisputed facts establish both forms of injury.

**1. Defendant’s Voter Purges Harmed Mi Familia Vota’s And SEIU’s Voter Registration, Education, and Outreach Efforts, Inflicting Concrete Injury.**

The law is clear that the impact of Defendant’s unlawful conduct on Plaintiff organizations’ activities is of a type and degree that confers standing on these Plaintiffs to bring this suit. As stated, an organization has standing to sue on its own behalf where the defendant’s conduct has made it more difficult for the organization to achieve its goals. *CAAN*, 501 U.S. at 265. This includes non-economic goals such as political advocacy and encouraging political participation. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27-29 (D.C. Cir. 1990) (finding injury to organization’s interest in encouraging open housing sufficient to create standing). In a recent case involving claims closely similar to those asserted here, the court found that a voting rights organization could show injury in fact if its expenditures of time and money on voter registration drives “have been rendered a waste in any significant measure because the voters they registered at those drives were unlawfully taken off the rolls.” *U.S. Student Ass’n Found. v. Land*, 585 F. Supp. 2d 925, 934 (E.D. Mich. 2008), *aff’d*, 546 F.3d 373 (6th Cir. 2008).

Similarly, in *Charles H. Wesley Educ. Found., Inc. v. Cox*, the court found that an organization that conducted voter registration drives had a right under the NVRA to have the applications of the voters it registered processed in accordance with the NVRA's requirements. 408 F.3d 1349, 1353 (11th Cir. 2005). The Court reasoned that because the NVRA "requires" states to accept voter registration forms if valid, "regulate[s] the states" by ensuring that valid registration forms are timely registered, and "limits the states' ability to reject forms meeting [the NVRA's] standards," it creates a statutory right on the part of voters registering through voter registration drives to have their voter registration applications processed in accordance with the NVRA. *Id.* Once the NVRA was found to regulate the alleged conduct at issue – acceptance and processing of voter registration forms – failing to comply with those requirements violated a legally protected interest, and met the injury in fact standard for standing. *Id.* Moreover, the court held that an organization that registered voters whose applications were rejected itself suffered injury in fact. *Id.*

By any standard within this legal framework, facts adduced by Plaintiffs are sufficient to warrant judgment as a matter of law. Plaintiffs have submitted evidence that SEIU and Mi Familia Vota expended significant resources to register, educate, and engage voters during the 2008 election, efforts that were undermined by Defendant's unlawful conduct. First, the evidence establishes that SEIU and Mi Familia Vota expended significant resources to register voters during the 2008 election season. SUMF 65-68, 146-150, 152-157. They have submitted further evidence from Defendant's own voter registration database indisputably showing that a number of voters Mi Familia Vota

and SEIU registered were purged from the voting rolls pursuant to the 20-day rule prior to the November 2008 election. See Ex. 41, SOS-004733-34; Ex. 42, SOS-004724-25; Ex. 44, SOS-004661, SOS-004663; Ex. 45, SOS-004682, SOS-004688; Ex. 46, SOS-004711, SOS-004717; Ex. 47, SOS-004690, SOS-004702; Ex. 48, SOS-004666, SOS-004671.

These actions by defendant made it more difficult for SEIU and Mi Familia Vota to achieve their goal of registering voters in marginalized communities and made their voter registration efforts less effective. See *Land*, 585 F. Supp. 2d at 934 (purging voters registered by plaintiff organization could create injury-in-fact). In addition, having registered these voters, Plaintiffs had a legally protected interest in having the state observe the NVRA by making those registrations effective and cancelling them only according to specific grounds and procedures. *Wesley*, 408 F.3d at 1353 (failing to process applications of voters registered by plaintiff in accordance with NVRA sufficient to confer standing).

Furthermore, Plaintiffs have submitted uncontroverted evidence that Defendant's past and ongoing purge of eligible voters will continue to impair SEIU's and Mi Familia Vota's voter registration efforts and efforts to engage the communities they serve in the electoral process through education, outreach and get-out-the vote programs, both because voters who are not registered cannot effectively participate in the political process and because Mi Familia Vota and SEIU will be required to expend greater time and resources to persuade voters to participate in the political process. Ex. 53, Salazar Decl. ¶ 17; Ex. 27, Lopez Ramirez Dep. at 17:13-19:5 (Low income Latinos are "wary of

government in general. . . . [T]hey felt comfortable with us. But the purging undermines that relationship.”)

Such “concrete and demonstrable injur[ies] to [their] activities” is sufficient to establish SEIU’s and Mi Familia Vota’s standing to assert the claims in this case.

*Havens*, 455 U.S. at 379.

**2. *All Three Plaintiffs Diverted Resources To Counteract The Purges, Conferring Concrete Injury.***

“[A]n organization has standing to sue on its own behalf if the defendant’s illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.” *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009), *cert. denied*, 174 L. Ed. 2d 271 (June 8, 2009) (internal citations and quotations marks omitted); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (same); *see also Oklahoma Chapter of American Academy of Pediatrics (OKAAP) v. Fogarty*, 205 F. Supp. 2d 1265, 1271 (N.D. Okla. 2002) (“[Plaintiff social services organization] has been injured, or suffers the threat of injury, because of the resources it has to divert to provide the health services allegedly not provided by defendants or to counteract the effects of the alleged lack of health care services to the children and families to whom it provides services.”) (citing *Havens*, 455 U.S. at 378-79).<sup>4</sup>

---

<sup>4</sup> Although the Tenth Circuit has yet to address it, this rule has been embraced by nearly every other circuit. *See Common Cause/Georgia*, 554 F.3d at 1350; *Fowler*, 178 F.3d at 360 (organization has standing in its own right if it can show “a ‘drain on its resources’ resulting from counteracting the effects of the purportedly” unlawful conduct); *Hooker v.*

In *Browning*, in circumstances similar to this case, the court found that plaintiff organizations whose missions include “increas[ing] voter registration and participation” among members of various groups of voters had standing to challenge a voter registration requirement that could result in qualified voters not being entered onto Florida’s voting rolls in violation, inter alia, of § 8 of the NVRA. 522 F.3d at 1158. The court, finding that the plaintiffs “reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and voters on compliance with [the challenged voter registration requirement] and to resolving the problem of voters left off the registration rolls on election day” and that “[t]hese resources would otherwise be spent on registration drives and election-day education and monitoring,” held that the plaintiff had suffered a sufficiently concrete injury in fact to establish standing. 522 F.3d at 1165-66.

In *Common Cause/Georgia*, the plaintiffs challenged Georgia’s voter identification law, contending that it violated the United States Constitution. 554 F.3d at 1345. The court held that plaintiff NAACP had standing in its own right where it would

---

*Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (organization had standing where it devoted resources to investigating the defendants’ allegedly unlawful practices); *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) (“The allegation that the EOIR’s policy . . . requires the [plaintiff] organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing.”); *Spann*, 899 F.2d at 27-29 (organization had standing where it devoted resources to educate black home buyers and renters who were steered away from real estate opportunities); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (“[T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency’s time and money from counseling to legal efforts directed against discrimination.”); *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1224 (4th Cir. 1981) (organization alleged sufficient injury due to increased time and expense necessary for it to monitor FDA activities under new agency regulation).

have had to “divert resources from its regular activities to educate and assist voters in complying with the statute that requires photo identification.” *Id.* at 1350. The court found that the NAACP was “involved in voter education, including providing a political forum, distributing literature, grading politicians on important issues, and voter mobilization, including transporting voters to the polls,” and that it had limited resources to conduct these activities. *Id.* The NAACP submitted evidence that “it would have to divert volunteers and resources from ‘getting [voters] to the polls’ to helping them obtain acceptable photo identification.” Accordingly, the court held that “[b]ecause it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards, the NAACP established an injury sufficient to confer standing to challenge the statute.” *Id.* at 1350-51. Here, the undisputed facts establish that all three Plaintiffs in this case have diverted and will continue to divert limited resources to counteracting Defendant’s unlawful purges, prominently including those pursuant to the 20 day rule, resources which would otherwise have been used for other purposes. As in *Billups*, Plaintiffs here are “involved in voter education . . . and voter mobilization.” *Billups*, 554 F.3d at 1350. Early in 2008, Common Cause was aware of Defendant’s unlawful voter registration practices and even then had devoted some resources to researching them, but it was not yet aware of the extent of the purges the state was carrying out. Ex. 20, Flanagan Supp. Decl. ¶ 11; Ex. 34, Flanagan Dep. at 59:4-60:5, 80:23-81:17; 106:25-107:7; 112:10-24; 114:8-20. Beginning in October 2008, Common Cause and SEIU diverted significant amounts of both SEIU Fellow Laurel Webb’s and Common Cause Executive Director Jennifer

Flanagan's time, as well as that of other staff and volunteers, to researching the purges and responding to inquires from concerned members, voters, and coalition partners about the purges, and about the impact of the purges on individual voters. Ex. 20, Flanagan Supp. Decl., ¶¶ 16-17; Ex. C to Flanagan Supp. Decl. (October 9, 2008 e-mail from Derek Cressman); Ex. 34, Flanagan Dep. at 60:8-23; 124:12-16; Ex. 38, Webb Dep. at 20:13-24. As in *Browning*, Webb and other staff and volunteers sought to counteract the purges by assisting voters in confirming whether they were still on the voter rolls and in reinstating their registration records if they were not. Ex. 38, Webb Dep. at 40:5-17; 45:18-46:24; 53:7-13; Ex. 34, Flanagan Dep. at 129:20-130:2; see *Browning*, 522 F.3d at 1166 (plaintiffs had standing where they had to "divert personnel and time " to resolving the problem of voters left off the registration rolls on election day"). And again as in *Browning*, Flanagan provided training to hotline workers and poll monitors about the purges to enable them to assist impacted voters. Ex. 20, Flanagan Supp. Decl. ¶¶ 13, 23; Ex. 34, Flanagan Dep. at 86:1-5, 87:2-21; 87:25-88:11; 90:19-24; 91:6-13; 91:20-29, 92:8; see *Browning*, 522 F.3d at 1166 (plaintiff organization had standing where it diverted "personnel and time to educating volunteers and voters on compliance with [the challenged voter registration requirement]". After the election, Flanagan drafted and submitted written and oral comments on the unlawful cancellations and the state's purge policies to the Colorado Election Reform commission in the hopes of persuading the state to change its registration statutes and regulations. Ex. 34, Flanagan Dep. at 110:16-111:1.

Diversion of all of these resources resulted in Common Cause and SEIU being unable to carry out some of the work they had planned for the month before the election, for Election Day itself, and for the period after the election. Webb had several election-administration projects on her agenda for the month of October that either did not get done at all or did not get done to the extent they would have had she not had to devote so much time to countering the purges. Similarly, Flanagan had intended to devote time and staff-resources to investigating the technical operation of SCORE and to address the shortage of polling sites and voting booths in parts of Colorado; and to address the significant confusion concerning how and where to drop off mail-in ballots. See Ex. 20, Flanagan Supp. Decl. ¶ 41; Ex. 34, Flanagan Dep. at 58:19-59:3, 113:7-14, 152:5-16, 176:6-17, 121:7-18; Ex. 38, Webb Dep. at 18:6-19:1, 19:2-8, 54:22-56:3; Ex. 37, Ex. 7 to Ury Dep.; Ex. 30, Ury Dep. at 51:15-24, 52:2-8, 87:7-23. 88:13-89:5. Because she had to devote so much of her own and her volunteers' time to addressing issues relating to the purges, she was unable to carry out this project. See *id.* In addition, she had to wholly divert one staff person who had a grant to spend 60% of her time studying media and democracy to assist with responding to calls about the purges. Ex. 20, Flanagan Supp. Decl. ¶ 41; Ex. 34, Flanagan Dep. at 105:13-5, 115:14-20, 115:25-116:6, 118:7-120:24, 122:3-10, 152:5-16, 154:5-13; 176:18-24. None of these diversions of resources, from the preliminary investigations of the purge practices in early 2008 through the substantial efforts carried out from October through to Election Day and beyond, would have been necessary if the Defendant had not had a policy and practice of cancelling voter registrations in violation of the NVRA.

Likewise, beginning on October 9, 2008, after Colorado's illegal voter purges began receiving widespread public attention, including on the Spanish-language television station Univision, Mi Familia Vota began receiving large numbers of calls from members of the community it serves expressing concern about the purges and seeking assistance in ensuring they were still on the voter rolls. Ex. 27, Lopez Ramirez Dep. at 52:3-54:1. As a result, just as in *Billups*, Mi Familia Vota had to divert 4 or 5 of its approximately 10 volunteers from other voter outreach and assistance and "get out the vote" efforts it had on its agenda to assisting voters affected by the 20 day rule and other provisions of Colorado law, *see Billups*, 554 F.3d at 1350, meaning those planned efforts were not completed or carried out at all. Ex. 27, Lopez Ramirez Dep. at 26:11-27:9; 56:20-57:4; Ex. 53, Salazar Decl. ¶ 10. In addition, Mi Familia Vota was required to provide training to its staff and volunteers to enable them to assist the callers, adding approximately 15-20 minutes to the formal training of each volunteer as well as additional on the job training. Ex. 27, Lopez Ramirez Dep. at 55:12-56:13; 57:9-58:6.

Under *Common Cause/Georgia, Browning*, and other cases, these diversions of resources to counteract the Defendant's unlawful conduct are more than sufficient to establish all three plaintiff organizations' standing in their own right to bring the 20 day claim asserted in this case and to seek the requested relief. *Browning*, 522 F.3d at 1165-66; 554 F.3d at 1345; *Fowler*, 178 F.3d at 361.

**B. The Burden On Their Members' Right To Proper Registration Under the NVRA Is Sufficient Injury To Establish SEIU's and Common Cause's Standing as Associations.**

Article III standing can be conferred on an associational plaintiff acting on behalf of its members when (i) "its members would otherwise have standing to sue in their own right," (ii) the interests it seeks to protect are "germane to the organization's purposes," and (iii) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977), *abrogated by statute on other grounds*, The Worker Adjustment and Retraining Notification Act, 102 Stat. 890, 29 U.S.C. § 2101 *et seq.*

Plaintiffs SEIU and Common Cause meet all three of these requirements. First, the undisputed facts establish that members of both organizations have been unlawfully purged from the voting rolls pursuant to the 20-day rule, that their members continue to be subjected to these unlawful policies, and that members face an imminent threat that they will be not be on the voter registration list when they go to vote in the next federal election. Second, both SEIU and Common Cause have alleged that they have an organizational purpose involving voter registration, election monitoring, and increasing political participation, all of which are directly implicated by the interest they seek to protect in this suit. Finally, the individual participation of an organization's members is "not normally necessary when an association seeks prospective . . . relief for its members." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

***1. Plaintiffs Members Suffer Injury-In-Fact When They Are Purged From Colorado's Voter Registration Rolls in Violation of Their Rights Under the NVRA.***

Plaintiffs have adduced facts beyond any genuine dispute that their members would have standing to sue in their own right because they have suffered a concrete and particularized injury as a direct result of the operation of the 20-day rule. The 20-day rule both burdens these members' right to vote and violates their rights under the NVRA to register to vote and not to have their registrations cancelled except in accordance with the provisions of the Act. A burden on the right to vote, regardless of whether the plaintiff is able to overcome that burden, constitutes a sufficient injury-in-fact for standing purposes. *Common Cause/Georgia*, 554 F.3d at 1351-1352 (the burden on the right to vote posed by the requirement that an individual plaintiff secure or even produce at the polls an acceptable form of identification was sufficient to establish standing); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (poll tax infringes voting rights "whether the citizen . . . has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay it"); *Wesley*, 408 F.3d at 1352 (noting "a plaintiff need not have the franchise wholly denied to suffer injury" for standing purposes). "The slightness of their burden also is not dispositive . . . a small injury, 'an identifiable trifle,' is sufficient to confer standing." *Common Cause/Georgia*, 554 F.3d at 1351 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

Moreover, “[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, *the invasion of which creates standing* .” *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added) (quotations omitted). In other words, where, as here, a Defendant has violated a statutory right, “standing exists ‘even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.’” *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (quoting *Warth*, 422 U.S. at 514). In *Wesley*, an organization that had conducted a voter registration drive and one individual voter brought suit alleging that the state’s rejection of voter registration applications on federally approved forms violated, *inter alia*, their rights under the NVRA. *Wesley*, 408 F.3d at 1351. The court found the individual’s claim that the state rejected her change of address notification in violation of her statutorily created right under the NVRA to use the federal form was sufficient to confer standing despite the fact that she remained registered and eligible to vote at her former address. *Id.* at 1352.

The statutory provisions at issue in the instant case could hardly be more similar. The NVRA regulates voter registration by setting out what constitutes a valid registration and requires states to timely register valid registrations. 42 USC § 1973gg-6; *Id.* § 1973gg-6(a)(3) et seq. Once these requirements are met the NVRA prohibits states from removing a registrant from the official list of eligible voters except on specific grounds and following specific procedures as described above. 42 USC § 1973gg-6(a)(3), 6(d)(1). The right to be properly registered and to remain on the voter rolls unless the required procedures are followed is equivalent to the right to use a federally approved

form for an address change notification in *Wesley*, and Colorado's violation of that right under the 20-day rule is sufficient to confer standing on Plaintiffs' members.<sup>5</sup>

Furthermore, because Plaintiffs also seek to prevent imminent future harm to their members by the ongoing application of the challenged provisions of Colorado law, they need not wait until individual members have been purged under the 20-day rule and prevented from casting regular ballots at their designated polling places. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) ("In order to satisfy the 'injury in fact' requirement of standing, a plaintiff need not wait for an injury to occur. An allegation of future injury satisfies this prong of standing so long as the alleged injury is 'imminent' or 'real and immediate.'") (internal citations omitted). A future injury is imminent "when the threatened acts that will cause injury are authorized or part of [a governmental] policy," because "it is significantly more likely that the injury will occur." *Id.* at 1266.

The evidence establishes that the voter registrations at least two Common Cause and at least three SEIU members' voter registrations were cancelled by operation of Defendant's 20-day rule. SUMF at ¶¶164-172. Common Cause member Gail Dubas, for example, was deemed an "Active" voter, and thus registered, in April of 2008; but her registration was cancelled in May of 2008, shortly after her Voter Identification Card was returned to the counter clerk by the US Postal Service. *See* Ex. 56, SOS-004632-48. As

---

<sup>5</sup> In fact, the statutory right discussed in *Wesley*, 408 F.3d at 1352, regarding voter use the federal form is grounded in one of the NVRA provisions at issue the instant case: 42 USC § 1973gg-6(a)(1) (requiring that voters who deliver timely, valid forms be registered).

a consequence, she was forced to reregister at the same address on or around June 27, 2008. *Id.* SOS-004637. The active registration of Common Cause member, Luke Jesser, was cancelled on account of the 20-day rule on May 29, 2009. His registration record remains in cancelled status, and unless this is corrected,<sup>6</sup> he will be unable to vote a regular ballot in the 2010 federal primary or general election. Similarly, the SEIU members Rudy Puente, Diana Bain, and Timnit Twolde were enrolled as “Active” voters, then cancelled on May 7, 2008; September 17, 2008; and March 10, 2009, respectively. The registrations of Puente and Twolde remain cancelled as of the close of discovery in this case. These undisputed facts and the Defendant’s stipulation that these members’ registration records have been cancelled, are sufficient to create injury in fact.<sup>7</sup>

Without this court’s intervention, Defendant will continue to cancel registered voters, very likely including some of plaintiffs’ members, pursuant to the 20-day rule, as it has since the expiration of the Stipulated Preliminary Injunction. Every voter who registers or who moves and reregisters will be subjected to the 20-day rule, and will face an imminent risk of cancellation in the event her voter information card is returned within

---

<sup>6</sup> Pursuant to Colorado Code of Regulations, Rule 2.17.2, voters who have been cancelled under the 20-day rule to travel to the clerk’s office, complete a “Certificate of Registration” and present identification within the 28 days before an election. Like casting a provisional ballot, complying with this process requires an additional expenditure of time and effort by voters, and, moreover, it requires that the voter learn well in advance of the election that her registration has been cancelled, despite the fact that the cancellation is carried out with no notice.

<sup>7</sup> For standing purposes, it is irrelevant whether the plaintiffs ultimately prevail on the merits of their claim that these purges violate the NVRA. For standing, it is sufficient that the undisputed facts show that the purges of plaintiffs members implicate the registration provisions of the NVRA. *Wesley*, 408 F.3d at 1353-54.

20 days as undeliverable for any reason, including postal error. Any voter whose registration is so cancelled or whose registration has already been cancelled and not reinstated, as in the case of Common Cause's Jesser and SEIU's Puente and Twolde, confronts the imminent danger that her right to vote will be burdened or denied altogether the next time she attempts to vote. A voter in "cancelled" status because of the 20-day rule may not cast a regular ballot at her assigned polling place at a primary or general election. C.R.S. § 1-7-103. *First*, in order to vote at all such voters must either cast a provisional ballot or submit to emergency registration. Both options require a voter to confront hurdles not faced by voters with active registrations.

*Second*, even if they succeed in casting a provisional ballot, members who are now or will at the time of future federal elections be in cancelled status because of the 20-day rule, unlike certain voters in the 2008 general election, will not have the benefit of the heightened standard or the second level of review secured by Plaintiffs in the Stipulated Preliminary Injunction to ensure their votes are counted. Indeed, at the Preliminary Injunction Hearing, acknowledging the real and imminent threat that voters might be disenfranchised if there was no special protection for cancelled Colorado voters, this Court cautioned, "But I'm very concerned that the provisional ballots have to be used, they have to be counted, they have to be evaluated, irrespective of what the results are." *See* Hearing at Preliminary Injunction at 155 (Oct. 29, 2008). In fact, this real concern was borne out by the functioning of the Stipulated Preliminary Injunction in practice: Out of 297 provisional ballots cast by failed 20-day voters, over 20% were found on review by the Secretary of State to have been erroneously rejected by the

counties, despite the heightened standard the counties were required to apply. Ex. 2, Rudy Dep. at 51:4-52:10. The imminent danger that Plaintiffs' members will arrive at polling places to find their registrations have been cancelled, and therefore be forced to vote provisionally (if they are not dissuaded from voting all together), only to never have their votes not count, is sufficient to confer standing.

The provisional ballot process places real and immediate burdens on voters. Casting a provisional vote or going through emergency registration is less convenient and more time consuming than casting a regular ballot. *See* Statement of Undisputed Facts, *supra*, ¶ 34. To do so, a voter must wait in additional lines and complete additional paperwork. *Id.* at ¶¶ 35-40. Once they have voted, they face uncertainty regarding whether their votes will count – an issue voters who cast regular ballots do not have to confront at all. *Id.* at ¶¶ 43, 52. Emergency registration likewise requires additional procedural and bureaucratic steps, and generally involves travel away from one's regular polling place in order to wait in still other lines. *Id.* at ¶¶ 45-50. The NVRA provides that eligible voters who submit timely and complete registration forms, such as Luke Jesser, Rudy Puente, and Timnit Twolde should merely have to show identification and sign their name in order to cast a regular ballot that is free from uncertainty. *See* CRS § 1-7-110. In Colorado, however, they face the prospect of a far more burdensome process.

Defendant's violations of the NVRA's statutory protection of the right to remain on the voter rolls once deemed registered, therefore, create injuries and ongoing, real threats to Plaintiffs' members that provide constitutional standing.

**2. *Protecting Their Members' Voting Rights Is Germane To The Organizational Purposes Of SEIU And Common Cause.***

Protecting voting rights, including those of their members, is germane to SEIU's and Common Cause's organizational purposes, and they easily satisfy the second prong of the *Hunt* test. In *National Lime Association v. EPA*, the D.C. Circuit held that the "requirement of germaneness is 'undemanding'; 'mere pertinence between litigation subject and organizational purpose' is sufficient." 233 F.3d 625, 636 (D.C. Cir. 2000) (quoting *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)).

More recently, the Second Circuit, in *Building & Construction Trades Council of Buffalo v. Downtown Development, Inc.*, 448 F.3d 138, 148 (2d Cir. 2006), finding it "significant that the *Hunt* Court used the word 'germane,' rather than the phrase 'at the core of,' or 'central to,' or some word or phrase indicating the need for a closer nexus between the interests sought to be protected by the suit in question and the organization's dominant purpose," rejected the defendant's argument that the organization must be established "for the purpose of" vindicating the rights at issue. The court concluded, "[a] court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the association." *Id.* at 149 (citing *Humane Society*, 840 F.2d at 56). On the basis of this rule, the court found that the plaintiff trade union had standing to pursue claims under a number of federal environmental statutes.<sup>8</sup> *Id.* at 150.

---

<sup>8</sup> *Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), the sole case relied on by Defendant on this issue in support of his Motion to Dismiss,

Here, the undisputed facts show that the SEIU is committed to ensuring that every eligible SEIU member has the right to vote and the opportunity to exercise that right and that one of SEIU's purposes is to "empower working people . . . [a]nd that includes being involved in making sure that working people . . . are participating in the political process." Ex. 30, Ury Dep. at 23:3-19. Ensuring that the voting rights of its members are not infringed is "germane" to these purposes. Likewise, it is undisputed that Common Cause has as its purpose "to strengthen public participation . . . in our institutions of self-government" and "to promote fair elections," purposes to which protecting the voting rights of its members are much more than merely germane. *See* Ex. 20, Flanagan Supp. Decl. ¶¶ 2-4; *see also* Ex. 34, Flanagan Dep. at 42:1-18; Ex. 35, Common Cause Mission Statement; Ex. 36, Colorado Common Cause website: "Our Issues" <http://www.commoncause.org>. These facts show that protecting their members' voting rights is germane to SEIU's and Common Cause's organizational purposes.

---

provides no support for the argument that Plaintiffs' organizational purposes must "specifically" encompass "voter registration activities." Def. Br. at 12-13. Contrary to Defendant's suggestion, *Blackwell* required no such exact overlap between an organization's purpose and the interests at stake in the litigation. Rather, *Blackwell* held that the plaintiff organizations could not establish associational standing because they had not alleged any injury to their members. 467 F.3d at 1010. Its passing suggestion that there were "substantial questions" about whether the plaintiffs had satisfied the germaneness prong of the standing test was based on the vagueness of the plaintiffs' allegations regarding their organizational purposes. *Id.*

3. ***No Individual Participation by the Members is Necessary for the Court to Adjudicate This Dispute.***

Because plaintiffs seek only prospective relief, the individual participation of their members will not be necessary. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

Accordingly, the undisputed facts establish that all three prongs of the associational standing test are satisfied, and Plaintiffs have standing on behalf of their members to seek to enjoin the 20-day rule.

**C. Plaintiffs' Injuries Are Traceable to the Defendant's Purging of Voters in Violation of the NVRA.**

There can be no genuine question, based on the undisputed facts, that the injuries suffered by plaintiffs and their members are traceable to the actions of the Secretary. In order to satisfy the traceability prong of the standing analysis, “[a] plaintiff need only demonstrate, as a matter of *fact*, a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant.” *Wesley*, 408 F.3d at 1352 (emphasis in original) (quotations omitted). In *Wesley*, the Secretary of State’s denial of a valid voter registration form in alleged violation of the NVRA constituted sufficient causation. *Id.* Here, the state has cancelled the registrations of a number of Plaintiffs members pursuant to 20-day rule, and there can be no dispute that this was caused by anything other than the state’s implementation of that rule. Defendant does not dispute this fact; indeed, he concedes it, but contends that he is permitted to carry out these cancellations. With respect to the organizations, undisputed facts show that the operation

of the 20-day rule resulted in the cancellation of persons registered by SEIU and Mi Familia Vota. SUMF at ¶¶ 147-148, 157-160. Under *Wesley*, this is sufficient to satisfy the traceability prong of the standing test. 408 F.3d at 1353-54. In addition, undisputed facts show that all three plaintiffs diverted resources to investigate Defendant's policies and practices and to assist voters who were purged or who were concerned that they may have been purged pursuant to the 20-day rule and other provisions of Colorado law at issue in this suit, and that Common Cause expended resources in an effort to have these provisions overturned by the legislature, and that these resources would not have been expended had Defendant not been engaged in this conduct, but would have been spent on other activities on Plaintiffs' agendas. SUMF at ¶¶ 127-129.

**D. A Permanent Injunction Against Continued Application of the 20-Day Rule and Requiring Reinstatement of Plaintiffs' Cancelled Members Will Redress Plaintiffs' Injuries.**

There can likewise be no dispute that Plaintiffs' injuries will be redressed by the relief sought in this case. Enjoining the 20-day rule will ensure that no member of SEIU or Common Cause will be purged by its operation in the future, and will remove the need for plaintiffs to continue assisting voters to overcome it or to lobby the legislature to change it. Moreover, reinstating those voters who have already been cancelled pursuant to its terms, including Plaintiffs' members, will ensure they are able to vote a regular ballot at their designated polling places in the next election.

The Stipulated Preliminary Injunction secured by Plaintiffs in this case made clear that the relief sought here can redress the injuries asserted. The injunction resulted in many contested votes being counted. The harm threatened by the purges can be

redressed by the relief sought in this case, namely restoring those voters to the voting rolls and enjoining further application of the unlawful policies.

There is no genuine issue of material fact that Plaintiffs have standing to challenge the 20-day rule. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

### CONCLUSION

Plaintiffs have satisfied the requirement of standing both in their own right and as associations on behalf of their members to assert Count I of the Amended Complaint challenging the legality of Colorado's 20-day rule. The undisputed facts and relevant law establish that the Secretary's policy and practice of purging from the election rolls registrants whose Voter Information Cards sent confirming their registration are returned as undeliverable within 20 business days violates the NVRA. Accordingly, Plaintiffs request this Court to grant their motion for summary judgment, and to enter judgment for Plaintiffs on Count I of the Amended Complaint, and to order all appropriate relief.

Date: December 10, 2009

Respectfully Submitted by:

/s/James M. finberg

Stephen P. Berzon  
James M. Finberg  
Stacey M. Leyton  
Barbara J. Chisholm  
ALTSHULER BERZON LLP  
177 Post Street, Suite 300  
San Francisco, California 94108  
Tel: 415-421-7151  
Fax: 415-362-8064  
sberzon@altshulerberzon.com  
jfinberg@altshulerberzon.com

sleyton@altshulerberzon.com  
[bchisholm@altshulerberzon.com](mailto:bchisholm@altshulerberzon.com)

James E. Johnson  
S. Gale Dick  
Elaina J. Loizou  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, New York 10022  
Tel: 212-909-6000  
Fax: 212-909-6836  
jejohnsn@debevoise.com  
sgdick@debevoise.com

Richard Rosenblatt, Esq.  
RICHARD ROSENBLATT &  
ASSOCIATES, L.L.C.  
8085 East Prentice Avenue  
Greenwood Village, Colorado 80111  
Tel: 303-721-7399 x11  
Fax: 720-528-1220  
[rosenblatt@cwa-union.org](mailto:rosenblatt@cwa-union.org)

Penda D. Hair  
Elizabeth S. Westfall  
Bradley Heard  
ADVANCEMENT PROJECT  
1730 M Street, NW #910  
Washington, D.C. 20036  
Tel: 202-728-9557  
Fax: 202-728-9558  
phair@advancementproject.org  
ewestfall@advancementproject.org  
[bheard@advancementproject.org](mailto:bheard@advancementproject.org)

Wendy Weiser  
Myrna Pérez  
BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW  
161 Avenue of the Americas  
12th Floor  
New York, New York 10013  
Tel: 212-998-6284

Fax: 212-995-4550  
wendy.weiser@nyu.edu  
myrna.perez@nyu.edu

Karen Neuman  
Sarah Brannon  
FAIR ELECTIONS LEGAL  
NETWORK  
1730 Rhode Island Avenue, NW  
Suite 712  
Washington, D.C. 20036  
kneuman@fairelectionsnetwork.com  
[sbrannon@fairelectionsnetwork.com](mailto:sbrannon@fairelectionsnetwork.com)

*Attorneys for Plaintiffs Common Cause  
of Colorado, Mi Familia Vota Education  
Fund and Service Employees  
International Union*

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2009, I electronically filed the foregoing Brief in Support of Plaintiffs' Motion for Partial Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered, interested parties via electronic mail.

Executed on December 10, 2009

/s/ James M. Finberg