

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

Civil No. 1:08-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.

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**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

PLAINTIFFS’ REPLY CONCERNING UNDISPUTED MATERIAL FACTS ..... 2

I. Voter Registration in Colorado ..... 3

    A. Voters Are Registered and Able to Vote When They Are Given  
    “Active” Status and Their Registration Notice is Mailed. .... 3

        1. The Registration Process..... 3

        2. Active – 20-Day Voters Are Eligible and Able to Vote by  
        Regular Ballot, Either in Person or by Mail. .... 8

    B. The 20-Day Rule Removes Registered Voters from the Rolls. .... 8

    C. Address Confirmation Is Required of All Voters. .... 10

II. Impact of the 20-Day Rule..... 10

    A. Thousands of Registrants Have Been Purged..... 10

    B. The 20-Day Rule Risks *Erroneous* Cancellation of Voters and  
    Potential Disenfranchisement. .... 10

    C. Cancelled Voters Who Are Able to Vote by Provisional Ballot or  
    Emergency Registration Are Nonetheless Harmed by the 20-Day  
    Rule. .... 12

    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..... 15

III. The Harm to Plaintiff Organizations..... 16

    A. Plaintiffs’ Organizational Purposes and Resources. .... 16

        1. Mi Familia Vota..... 16

        2. SEIU..... 17

        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.....	18
3.	Just Vote Colorado’s Election Protection Activities .....	18
C.	Plaintiffs Were Forced to Divert Resources to Counter Colorado’s Unlawful Voter Cancellation Practices.....	18
1.	Common Cause and SEIU .....	19
(a)	Common Cause and SEIU Devoted Resources to Countering the State’s Unlawful Purges.....	19
(b)	Common Cause’s and SEIU’s Work Against the Cancellations Diverted Resources from Other Planned Activities. ....	25
2.	Mi Familia Vota.....	28
(a)	Mi Familia Vota Devoted Resources to Countering the State’s Unlawful Purges.....	28
(b)	Mi Familia Vota’s Work Against the Cancellations Prevented It from Devoting Resources to Other Planned Activities. ....	30
D.	Harm to Plaintiff’s Organizational Activities.....	31
1.	Mi Familia Vota.....	31
2.	SEIU.....	32
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
	PLAINTIFFS’ RESPONSE TO DEFENDANT’S ADDITIONAL STATEMENT OF UNDISPUTED FACTS .....	38
	ARGUMENT .....	48

I.	Standard of Review.....	48
II.	Plaintiffs Are Entitled to Judgment as a Matter of Law that the 20-Day Rule Violates the Rights of Voters under the NVRA. ....	48
A.	Defendant Has Failed to Raise a Genuine Dispute as to Facts Showing That the 20-Day Rule Revokes the Registrations of Eligible and Registered Voters. ....	49
1.	Undisputed Facts and Uncontested Law Establish that the 20-Day Rule Affects Fully Registered Voters. ....	49
2.	Defendant Cannot Avoid Summary Judgment by Avoiding the Facts. ....	51
B.	As a Matter of Federal Law, the 20-Day Rule Unlawfully Revokes the Registrations of Voters Protected by the NVRA. ....	53
1.	The Scope of the NVRA’s Protections Is Governed by Federal Law, Not State Law. ....	53
(a)	The Meaning of “Registrant” Is Evident in the Text of the NVRA. ....	53
(b)	The Only Appellate Court to Have Considered the Issue Repudiated the Argument that “Registrant” Should Be Defined by State Law.....	54
(c)	Defendant’s Proposed Definition of “Registrant” Would Circumvent the NVRA’s Core Protections.....	56
2.	The 20-Day Rule Cannot Be Justified under the Guise of “Confirmation of Eligibility.”.....	57
3.	Defendant’s Invocation of Voter Fraud Does Not Cure the 20-Day Rule’s Violation of Federal Law.....	59
C.	Under State Law as Well, the 20-Day Rule Violates the Rights of Fully Registered Voters. ....	60
1.	Defendant’s Interpretation of the 20-Day Rule Is Contrary to the Undisputed Facts and Colorado Law.....	60
2.	The Pre-Voting Address Confirmation Requirement Does Not Aid Defendant’s Position.....	64

3.	The 20-Day Rule Results in the Erroneous Cancellations of Voters Who Are Eligible and Fully Registered Even under Defendant’s Reasoning .....	66
III.	Plaintiffs Have Standing to Seek Injunctive Relief Preventing the Enforcement of the 20-Day Rule. ....	68
A.	Plaintiffs Have Standing as Organizations to Seek Relief on Their Own Behalf. ....	69
1.	The Harm to the Voter Registration Efforts of SEIU and Mi Familia Vota Constitutes an Independent Basis for Organizational Standing.....	69
2.	Plaintiffs Diverted Resources into Counteract Defendant’s Practices at the Expense of Other Organizational Goals. ....	71
(a)	It Is Undisputed That SEIU and Common Cause Diverted Resources Away from Other Goals and Activities. ....	71
(b)	It Is Undisputed That Mi Familia Vota Diverted Resources Away from Other Priorities. ....	75
(c)	It Is Undisputed That All Three Plaintiffs’ Face an Imminent Threat of Additional Injury. ....	76
(d)	These Diversions of Resources Create Standing for Plaintiffs.....	76
3.	Defendant’s Counterarguments All Fail. ....	77
(a)	The Volume of Calls Was Prompted By Publicity Concerning the Purges. ....	77
(b)	Plaintiffs Are Not Required to “Quantify” Their Injuries. ....	78
(c)	Undisputed Facts Demonstrate the Plaintiffs’ Injuries Were Sufficiently Concrete and Particularized. ....	78
(d)	Defendant Has Not Raised a Genuine Issue Regarding Whether Press Reports Led to Hotline Calls Specifically Relating to the 20-Day Rule. ....	79

(e)	Plaintiffs Expenditures of Resources Are Sufficiently Traceable to Defendant’s Conduct.....	81
4.	The NVRA’s Private Right of Action Extends to Organizations, and Defendant’s Argument to the Contrary Is Baseless.....	83
B.	Plaintiffs Have Standing to Seek Relief on Behalf of Their Members. ....	84
IV.	Conclusion. ....	88

## INTRODUCTION

Plaintiffs' motion for summary judgment raises two questions: first, whether Colorado's summary removal of thousands of voters from the registration rolls under the 20-Day Rule violates the NVRA; and second, whether Plaintiff organizations have standing to seek injunctive relief against the statute pursuant to which the voter removals have taken place.

On the merits, the central issue is whether the 20-Day Rule affects "registrants" as that term is used in the NVRA. If so, Defendant has conceded that the 20-Day Rule violates the NVRA. It is abundantly clear from the undisputed facts and all applicable law, including the text of the NVRA, that this threshold has been met. As a result, voters stricken from the rolls under the 20-Day Rule are "registrants" who are entitled to NVRA protection. The revocation of their active voter status thus violates federal law and should be enjoined.

Plaintiffs have standing to seek this relief on three grounds: (i) Colorado voters who registered through Plaintiffs' voter registration drives were stricken from the rolls under the 20-Day Rule, (ii) the organizations have diverted scarce resources into counteracting the effects of the 20-Day Rule; and (iii) their members were harmed when they were removed from the rolls. The first two injuries confer standing on Plaintiffs to sue on their own behalf as organizations; the third creates standing for Plaintiffs sue as an association acting on behalf their members. Defendant ignores the first ground entirely, which effectively ends the standing debate. On the second and third bases for standing,

Defendant raises no genuine issue of material fact and provides no legal rationale for rejecting them.

Because Defendant has failed to demonstrate the existence of any genuine issue of material fact or demonstrate that Plaintiffs are not entitled to judgment as a matter of law, Plaintiffs' motion for summary judgment should be granted.

## **PLAINTIFFS' REPLY CONCERNING UNDISPUTED MATERIAL FACTS**

### **General Statement**

Although Defendant has devoted more than 60 pages to its Response to Plaintiffs' Statement of Undisputed Material Facts, he has raised no genuine issue as to any material fact. In most cases, the facts are either admitted outright or admitted in full with a series of notes or objections that do not constitute factual disputes. When Defendant purports to dispute a factual assertion in whole or in part, he generally fails to raise a *genuine* dispute, whether because all available evidence unambiguously contradicts his response or the "dispute" takes the form of legal conclusions or bald assertions with no factual support. The few legitimately disputed facts are immaterial in light of the mass of undisputed material facts.

For purposes of the statements of fact and corresponding responses, Plaintiffs simply agree to disagree with Defendant on the legal implications of certain terms used by both parties. For example, Plaintiffs generally will not respond to Defendant's objections to the use of terms such as "purged," "registered," and "cancelled." Plaintiffs also generally will not respond to Defendant's own use of analogous phrases, such as the

assertion that individuals deemed to have “failed” the 20-Day Rule were “never registered,” or that an “*application* failed the 20-Day Rule.” That said, it is sometimes necessary to object to such terminology in order to ensure that the replies herein are accurate, or to reply to legal conclusions masquerading as factual disputes.

**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***

1. There is no dispute that since January 1, 2008, at least 3,123 individuals have been deemed to have “failed” the 20-Day Rule. Whether their registrations were “cancelled” as a result of this failure is in part a legal question, addressed below at 48-68, and in part a factual question, addressed in connection with Statements 7 and 19, below. Defendant’s statements that the 20-Day Rule is “used to confirm the eligibility of electors who complete a voter registration application,” and that “applications” fail the 20-Day Rule, assert legal conclusions and thus do not raise a genuine dispute as to the facts.<sup>1</sup>

2. There is no dispute that the 20-Day Rule has been in effect since 1995.

3. Admitted by Defendant.

4. There is no dispute that individuals begin the registration process by completing one of several types of registration applications. The remainder of

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<sup>1</sup> Defendant incorporates this objection into every objection in which these phrases appear.

Defendant's response sets forth his (incorrect) interpretation of law, and thus does not raise a genuine dispute of fact.

5. Admitted by Defendant.

6. There is no dispute that county clerks enter an individual's information into SCORE upon receipt of the registration application. The final sentence of Defendant's response to Statement 6 asserts that the accuracy of an application is partly determined by "mailing a voter information card to the elector's address and waiting for the 20 day period to elapse without the return of the card." Insofar as Defendant asserts that an application's accuracy is determined only after the return (or non-return) of the Voter Information Card, their position is barred by Colorado law, as discussed *infra* at 64. (See also Pl. Stmt. Facts ¶ 8; Def. Opp. Facts ¶ 8.)<sup>2</sup>

7. Defendant does not dispute that an individual whose application is deemed complete by the county clerk will be designated "Active-20 Day Period" in SCORE.

Defendant disputes the terminology used to describe status designations, and implies that a voter's status does not become "Active" until the 20-day period has lapsed.

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<sup>2</sup> Note on citation forms: The parties' opening briefs on their cross-motions for summary judgment are abbreviated in citations as "Pl. Br" or "Def. Br." The parties' opposition briefs are cited as "\_\_\_ Opp. Br." The Statements of Undisputed Material Facts appearing in the parties' opening briefs are cited as "\_\_\_ Stmt. Facts." The responses to one another's Statements of Undisputed Material Facts are cited as "\_\_\_ Opp. Facts." The parties' Replies Concerning Undisputed Material Facts are cited as "\_\_\_ Reply Facts." Additional Statements of Undisputed Facts are cited as "\_\_\_ Add'l Facts." Plaintiffs' Responses to Defendant's Additional Statement of Undisputed Facts is cited as "Pl. Resp. to Def. Add'l Facts."

Yet Defendant fails to raise a *genuine* issue of fact, because he is wrong.<sup>3</sup> All of the documentary evidence in the record—the accuracy of which Defendant does not question—demonstrates that the terminology in Statement 7 is correct. In particular, the SCORE record for a new voter is given a “status” of “Active” and a “status reason” of “20 day period.” (See Pl. Ex. 6, “Issues in Voter Registration,” at 39, first bullet; Pl. Ex. 8, SCORE II User Guide, at 42 (SOS-000402), at “Figure – Voter Status Reasons”; *id.* at 94 (SOS-000454) ¶¶ 8-9; Pl. Ex. 60, SCORE Screenshots, at SOS-006020 (showing status as “Active” with pull-down menu for “Status Reason.”)) These status designations of “Active” with a status reason “20-day period” are applied *after* the registration application has been deemed “accurate and complete” (See Pl. Ex. 8 (SCORE II User Guide) at 93-94 (describing registration process in SCORE); Colo. Rev. Stat. ¶ 1-2-509(2) (requiring verification that application is accurate and complete before mailing of disposition notice.)), but *before* the voter is sent a Voter Information Card. (See Pl. Stmt. Facts ¶ 8; *infra* ¶ 8.) Defendant asserts that a voter’s status during the pendency of the 20-day period is “Active – 20 day period,” rather than the status being “Active” and the “status reason” being “20 day period.” The evidence he cites does not support that assertion (*see* Def. Ex. A-1, Rudy Supp. Aff. ¶ 9), and consists solely of conclusory

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<sup>3</sup> Defendant’s response also does not raise an issue of *material* fact, because Defendant admits the material portions of Statement 7.

statements unsupported by documents or other evidence, and as such does not raise a genuine issue of fact.<sup>4</sup>

8. Admitted by Defendant.

9. It is undisputed that Defendant's witness and affiant agreed that the Voter Information Card is a "notice of successful registration" (Pl. Ex. 2, Rudy Dep. at 34:2-34:6), although Defendant purports to dispute the "legal conclusions" drawn from that testimony.<sup>5</sup> It is also undisputed that the Voter Information Card provides the "Date Registered" and lists a voter's polling place. (*See* ¶ 10, immediately below.) The remainder of Defendant's response asserts legal conclusions and thus cannot create genuine issues of fact.

10. It is undisputed that the Voter Information Card states "Date Registered" and lists a voter's polling place. Defendant's objection to the statement's "imported meaning" makes no sense; the words of Statement 10 speak for themselves. Insofar as Defendant objects to inferences to be drawn from the facts, that is improper argumentation and, in any event, does not bring the facts themselves into dispute. The remainder of his objection consists of (incorrect) legal conclusions that do not raise a genuine dispute of fact and are refuted in the body of this brief.

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<sup>4</sup> *See Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir.1995) (conclusory affidavits not providing factual bases for their conclusions not sufficient to create fact question).

<sup>5</sup> Ms. Rudy has put herself forward as knowledgeable regarding Defendant's interpretation of relevant law and the compliance of state policies and procedures with those laws. Defendant should not be heard to dispute the accuracy of her testimony on that subject.

11-13. Admitted by Defendant.

14. It is undisputed that a voter designated as “Active – 20-Day” who accesses the registration website will be informed of his or her date of registration and registration status, which will be “Active.” Defendant disagrees with the inferences to be drawn from those facts, but the facts speak for themselves. Plaintiffs do not dispute that it is Defendant’s present intent to update the website. The remainder of Defendant’s assertion in response to Statement 14 is not supported by the referenced evidence. (*See* Def. Ex. A-1, Rudy Supp. Aff. ¶ 13; *see also infra* n.19.)

15. It is undisputed that Ms. Rudy testified that a voter who is able to retrieve his data on the Defendant’s on-line registration database is registered. (Pl. Ex. 2, Rudy Dep. at 43:24-44:12.) Defendant further admits that, but for an “exception” to Colorado law, an individual who finds his information on the Secretary’s website is registered. The existence of this purported “exception” is a legal issue refuted in the appropriate section of this brief. (*See infra* at 65.)<sup>6</sup>

16. It is undisputed that individuals with “Active – 20-day” designations appear on the poll books, with no distinction among voters with “Active” and “Active – 20-day” designations.

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<sup>6</sup> Defendant appears to characterize this statement as alleging, in essence, that a voter is registered *because* the website indicates they are in “Active” status, rather than the other way around. (*See* Def. Opp. Facts ¶ 15; Def. Opp. Br. at 84 n. 10.) That is not the factual assertion in Statement 15, which speaks for itself.

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

17. It is undisputed that voters with “Active—20-day” designations may cast a regular or mail-in ballot if they confirm their addresses at the polling place or on the mail-in ballot affidavit. It is also undisputed that *every* voter in Colorado must confirm his or her address before casting a ballot. (*See infra* Statement 21.)

18. It is undisputed that a ballot cast by an individual with an “Active – 20-day” designation will be counted even if the Voter Information Card is subsequently returned as undeliverable within the 20 day period. The remainder of Defendant’s response to Statement 18 is not relevant to the statement itself but to requirements regarding address confirmation.

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

19. It is undisputed that when a disposition notice is returned as undeliverable within 20 days, a voter’s status designation in SCORE is changed. There is no *genuine* dispute that the status is changed to “Cancelled,” or that the proper SCORE terminology is “Cancelled” with a “status reason” of “F2D - Failed 20 day” (hereinafter “Failed – 20 day”). Defendant’s assertion that the voter’s status is simply “Failed-20 day” is misleading and false. Defendant’s own Statement of Undisputed Material Facts and accompanying exhibits establishes that Defendant’s official interpretation of the term “Cancelled” contradicts his statements here. Defendant stated there that a new rule promulgated in March 2009 (after this litigation began) “clearly defined ... [the] cancelled status designation.” (Def. Stmt. Facts ¶ 27(b); *see also* Def. Ex. B.) The

pertinent rule states in part: “‘Cancelled status’ or ‘cancelled record’ means ... the applicant *has been deemed not registered in accordance with these rules and Title 1, C.R.S.,*” meaning the 20-Day Rule. (Def. Ex. B; *see also* Colo. Code Reg. § 1505-1, Rule 2.20.1(b), 2.20.2(b).)

Moreover, every relevant document in the record, including deposition testimony of Defendant’s affiant, Ms. Rudy, establishes beyond any plausible dispute that upon return of the disposition notice, the voter’s registration record is given a status of “Cancelled,” or “Cancelled/Failed 20-Day.” (*See, e.g.*, Pl. Ex. 2, Rudy Dep. at 32:19-32:22; 46:8-46:16, 90:12-90:21; Pl. Ex. 60, SCORE Screenshots, at SOS-006027; Pl. Ex. 6, Issues in Voter Registration, at 39, first and third bullets; Pl. Ex. 13 slides 36-38; Pl. Ex. 15, “Reinstating ‘Cancelled/Failed – 20 Day’ Voters,” at 1 (intro. paragraph), 2 ¶ 6; Pl. Ex. 18, Election Alert 2009-04 ¶ 3; Pl. Ex. 19, first page; *see also* Pl. Stmt. Facts ¶ 20; Pl. Stmt. Facts ¶¶ 24, 26, 27 (all admitted by Defendant).)

Further, Defendant’s objection has no proper evidentiary support. It simply repeats the verbatim paragraph 14 of Ms. Rudy’s affidavit.<sup>7</sup> But Ms. Rudy’s affidavit is flatly contradicted by her deposition testimony, by Defendant’s administrative rules and by all identified documents in the record.

20. It is undisputed that Defendant’s public statements, training material and other official documents characterize the 20-day rule as a basis for “Cancellation” and

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<sup>7</sup> Ms. Rudy’s affidavit itself does no more than state its conclusion, without providing any documentary support or other factual basis. As such, it is insufficient to raise a genuine issue of fact. *See Murray*, 45 F.3d at 1422.

refer to voters being “Cancelled” by operation of the 20-Day Rule. (*See supra*, ¶ 17.) Defendant disputes the “implication” that these documents constitute legal or factual admissions. This objection does not raise a genuine dispute, and the documents—which include administrative rules and news releases issued by Defendant—speak for themselves. (*See esp.* Def. Stmt. Facts ¶ 27(b); Def. Ex. B; Pl. Ex. 12.)

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

21. Admitted by Defendant.

22. Plaintiffs do not dispute Defendant’s response.

23. It is undisputed that every voter must confirm his or her address before casting a regular ballot at a polling place.

**II. Impact of the 20-Day Rule.**

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

24. Admitted by Defendant. Plaintiffs agree with the corrected figure of 3,123 rather than 3,128.

25-27. Admitted by Defendant.

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

28. Defendant does not dispute that the quoted document states in part: “The Secretary of State finds that in order to protect applicants from being possibly disenfranchised due to postal or other error, applicants who are deemed ‘not registered in accordance with [the 20-day rule]’ must be afforded additional protections. (Pl. Ex. 16.) Similarly, in the “Statement of Basis, Purpose, and Specific Statutory Authority”

accompanying the same rules, Defendant states that the new rule was “specifically necessary . . . to help ensure that eligible electors who apply for voter registration *are not precluded from becoming registered because of postal or other error.*” (*Id.* (emphasis added).) Defendant’s objection does not raise a genuine dispute; these documents speak for themselves.

29. Defendant disputes this statement on the ground that a heightened standard of review was applied to provisional ballots reviewed pursuant to the Stipulation. But the evidence cited in Statement 29 has nothing to do with the heightened standard of review. The email in Plaintiffs’ Exhibit 19, while written in the context of county review of ballots pursuant to the Stipulation, discusses voters placed in “Cancelled/Failed 20 day period” status because of “USPS errors.” It was the initial cancellation that was in error, not the county’s decision to reject or count the ballots. Defendant has not raised a genuine dispute as to the evidence; he has misread it.

In further support of Statement 29, Plaintiffs note that, according to Defendant’s Statement of Additional Undisputed Facts, at least five voters were erroneously cancelled when their disposition notices were returned outside the 20-day window. On January 19, 2010—three days before filing their opposition to the present motion—Defendant restored four of these five voters to the rolls. The fifth was restored in October 2009. (*See* Def. Add’l Facts ¶¶ 1(c), 3(d), 6(c), 10(c), 12(e).) These voters comprise two out of the three SEIU members identified by Plaintiffs as having been purged under the 20-Day Rule, and three out of nine individuals identified by Plaintiffs as having registered through Plaintiffs’ voter registration drives. The total number of Colorado voters

affected by similar errors is unknown. These facts indicate not merely the risk, but the probability that voters will be erroneously cancelled under the 20-Day Rule.

30. Defendant admits that “data entry error[s] often do[] not result in an incorrect cancellation of any record.” It follows that such errors *sometimes* result in incorrect cancellations, as asserted in Statement 30.<sup>8</sup>

31. The evidence cited in Statement 31 shows that county election officials made “judge’s error[s]” in applying the “heightened standard of review” mandated by the Stipulation. (*See, e.g.*, Ex. 22, column 13 (referring to “judge’s error”).) Defendant has not disputed that evidence.

32. The facts asserted in Statement 32 are not disputed.

33. Admitted.

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

34. Defendant admits that voting by provisional ballot or completing an emergency registration is *sometimes* more time consuming and less convenient than casting a regular ballot. He disputes only that this is *always* the case on the ground that sometimes the difference may be “*de minimus*” or “insignificant.”<sup>9</sup>

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<sup>8</sup> Plaintiffs note that Defendant’s characterization of Statement 30 is inaccurate. The statement does not assert “that all [clerical] error[s] regularly result in the incorrect cancellation of an application under the 20 day statute.”

<sup>9</sup> The irrelevance for standing purposes of the *degree* of the burden as opposed to its existence, *de minimus* or otherwise, is discussed at pages 78, below.

35. It is undisputed that, in order to cast a provisional ballot, a voter whose registration has been cancelled under the 20-Day Rule must first be told by a poll worker that he is not permitted to cast a regular ballot, and that he may vote only by casting a provisional ballot or going through emergency registration. Defendant also admits that at least sometimes a voter will need to wait in line just to have this conversation.

36. Admitted by Defendant.

37. Defendant admits that it is “common” for polling places to have separate tables for regular balloting and provisional balloting, and that a voter wishing to cast a provisional ballot must stop at both tables. Defendant also admits that sometimes there will be a line at one or both tables.

39. Plaintiffs do not dispute Defendant’s response.

40. Admitted by Defendant.

41. It is undisputed that a voter who casts a provisional ballot cannot confirm that the vote was counted until 14 days after the election, and must then log onto the a website or call a hotline. (*See* Statement 44, below.) There is thus no genuine dispute that a voter who casts a provisional is often unsure whether his or her ballot will be counted until 14 days after an election.

42. Admitted by Defendant. The remainder of Defendant’s response to Statement 42 is non-responsive and does not put the factual assertion into question.

43. Admitted by Defendant.

44. It is undisputed that it is Defendant’s policy that voters should only have to cast provisional ballots when necessary.

45. It is undisputed that a voter wishing to go through emergency registration must first stop at a regular balloting table and be told that his or her name is not listed on the poll books, which at least sometimes requires waiting in a line.

46. It is undisputed that a voter wishing to go through emergency registration must generally travel to a county clerk's office or a satellite location away from his or her regular polling station.

47. It is undisputed that, in order to go through emergency registration at an authorized location, the voter must at least sometimes wait in a line before completing the registration forms.

48. Defendant disputes Statement 48 because he asserts that the word "considerable" is vague and does not specify the number of minutes voters waited in lines at their polling places in the November 2008 election. He does not dispute that voters waited in lines in order to register on an emergency basis in the November 2008 election.

49. Admitted by Defendant.

50. In further support of Statement 50, Plaintiffs cite the testimony of Defendant's witness, Wayne Munster, at the October 29, 2008 hearing in this matter. (Pl. Ex. 1.) Mr. Munster testified that "if you have long lines—and I can speak to that from 2006—people will not wait, and they will go home, because they have other responsibilities, if the line is too long." (*Id.* 145:19-:21; *see also id.* 128:10-:15.)

51. Admitted by Defendant. Having admitted that he does not have the records described in Statement 16, he implies that Plaintiffs should have produced them. Defendant misses the point. The material fact is that Defendant does not have such

records, and is thus unable to determine whether an individual voter “did not attempt to vote.” (*See infra*, Pl. Resp. to Def. Add’l Facts, General Objection A.)

52. Defendant does not dispute that, at a minimum, voters who cast regular ballots *sometimes* face fewer lines and administrative steps than those who are in “Cancelled – failed 20-day” status. Read together with Defendant’s responses to Statements 33-37 and 45-47, *supra*, Defendant has not disputed that in *most* circumstances, voting by provisional ballot or after emergency registration involves more individual steps than voting regular ballot—that is, appearing at more locations within a polling place, interacting with more poll workers, completing more forms, and, in the case of emergency registration, traveling to a separate location altogether—and that many of these could involve waiting in more or longer lines.

**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.**

53-56. Admitted by Defendant.

57. Defendant does not dispute that he overturned the rejection of provisional ballots by counties in 51 out of 70 cases. He states only that “it is possible” that some rejections were overturned not because they were erroneous but because Defendant was applying a heightened standard of review.

58-60. Admitted by Defendant.

61. Admitted by Defendant, although the caveat to his response reflects a misunderstanding of the Statement. The Statement does not refer to provisional ballots cast before county records were transferred to SCORE; it refers to voters whose records

were placed in “Cancelled – Failed 20-day” status before that time. The point is that some provisional ballots cast by “Cancelled – Failed 20-day” voters in the November 2008 election were not reviewed pursuant to the Stipulation, and were therefore more likely to be rejected.

62. Defendant has not disputed that an unknown number of provisional ballots cast in the November 2008 would not have been counted but for the “heightened standards” applied by counties and Defendant pursuant to the Stipulation. (*See* Pl. Stmt. Facts *supra*, ¶¶ 29, 59, 60.) It is undisputed that, absent further injunctive relief, those heightened standards will not be applied in future federal elections. There is no *genuine* dispute that there is a risk that provisional ballots which should be counted will not be counted in future elections.

Defendant’s response to Statement 62, if accurate, reveals an even greater likelihood of harm. Defendant states that “electors who fail the 20-day statute are not registered” and therefore cannot have their provisional ballot counted. This not only proves there is a *risk* that some provisional ballots cast by “Cancelled—Failed 20-day” voters will not be counted; it *guarantees* that *none* of those ballots will be counted. In other words, all “Cancelled—Failed 20-day” voters who cast provisional ballots will be disenfranchised by virtue of the 20-Day Rule.

### III. **The Harm to Plaintiff Organizations.**

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

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

63-64. Admitted by Defendant.

65. It is undisputed that Mi Familia Vota had only two full-time staff members in the summer and fall of 2008, one of whom was dedicated to organizing and overseeing voter registration and outreach efforts. It is also undisputed that in the four weeks before the 2008 General Election, Mi Familia Vota temporarily supplemented its two full-time staff members with five to ten volunteers and eight to ten part-time staff, all of whom were intended to be dedicated to voter outreach efforts. (Pl. Ex. 27, Ramirez Dep. at 25:22-26:10.) It is undisputed that Mi Familia Vota had a budget of only \$250,000 for 2008. (See Def. Opp. Facts ¶ 65.)

66. Defendant does not dispute that Mi Familia Vota planned to devote the majority of its resources in the weeks preceding Election Day in 2008 to a voter outreach effort aimed at new, first-time, or low-propensity voters. Indeed, the evidence shows that Mi Familia Vota intended to devote all 5 to 10 of its temporary volunteers and all 8 to 10 of its part-time staff to its voter outreach program, along with part of the time of one of its two full-time staff persons. (Pl. Ex. 27, Ramirez Dep. at 25:22-26:10.)

67. Admitted by Defendant.

2. *SEIU*

68-71. Admitted by Defendant.

3. *Common Cause.*

72-74. Admitted by Defendant.

75. It is undisputed that in the fall of 2008 Common Cause had five paid staff members, two interns, and typically between two and four volunteers working in their offices at any given time

76-77. Admitted by Defendant.

**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.*

78-86. Admitted by Defendant.

2. *The Just Vote Colorado 2008 Agenda*

86. Admitted by Defendant.

87. Admitted by Defendant.

88. There is no dispute that in 2008 Common Cause planned to pursue several issues related to election reform through Just Vote Colorado.

89. Admitted by Defendant.

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

90-96. Admitted by Defendant.

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

97. It is undisputed that on October 9, 2008, the *New York Times* reported on what the *Times* characterized as the “remov[al] from the rolls” of large numbers of voters in the period before the 2008 primary and general elections. (*See* Pl. Ex. 39.) It is also

undisputed that media outlets in Colorado subsequently reported on the same issues, including that voters had been cancelled under the 20-Day.

98. It is undisputed that after *The New York Times* article appeared, Defendant issued a news release. That document speaks for itself. Plaintiffs note that the news release disputed the *number* of cancelled voters reported in the *New York Times* article, and provided a table purporting to list “all cancelled voters since July 21, 2008 and the reasons for cancellation,” totaling 14,049 voters, including 1,136 voters cancelled pursuant to the 20-Day Rule. (*See* Pl. Ex. 12)

1. ***Common Cause and SEIU***

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

99. It is undisputed that, as part of its work on SCORE, Common Cause gave “a limited amount of attention” to Colorado’s voter cancellation policies and practices prior to October 2008. Defendant objects to the vagueness of the phrase in quotations. Plaintiffs submit that in the context of Statement 99’s assertion, the phrase is sufficiently concrete, and speaks for itself.

100. Defendant does not dispute that, prior to the *New York Times* article, Common Cause was not aware of the extent of the voter cancellations in Colorado. The remainder of Defendant’s response does not raise a factual dispute.

101. It is undisputed that media outlets publicly reported information concerning the State’s “cancellation practices” (in Defendant’s words) in early October

2008. It is also undisputed that the cancellation practices became a central focus of Common Cause's work.

102-104. Admitted by Defendant.

105. It is undisputed that the cancellation practices became a focus of the Just Voter Colorado steering community, and that the steering committee spent approximately 15-30 minutes per one- to two-hour meeting discussing issues related to Colorado's cancellation practices. Defendant asserts that whether Flanagan devoted "significant" time at several committee meetings to the issue is "relative" and "a matter of opinion." This response does not raise a genuine issue of any material fact, and Ms. Flanagan's testimony speaks for itself.

106. Defendant does not dispute that the Just Vote Colorado steering committee had a very full agenda. Defendant also notes that the evidence shows that one-quarter to one-half (15 to 30 minutes out of one to two hours) of those meetings was devoted to addressing Defendant's cancellation policies. Defendant also does not dispute that these policies were not among the issues on which the Just Vote Colorado program originally planned to focus. (*See supra* ¶¶ 86-89.) That other agenda were displaced is not genuinely in dispute.

107. Admitted by Defendant.

108. It is undisputed that SEIU law fellow Laurel Webb spent approximately 20-30 hours researching Colorado's cancellation policies and practices. The remainder of Defendant's response does not create a genuine issue of any material fact.

109. It is undisputed that almost immediately after the publication of the *New York Times* article, Common Cause’s Denver office began receiving calls from its members and the general public concerned about cancellations and the status of their own registrations. Defendant disputes the characterization of the number of calls as “large,” relying on evidence of the number of calls in other years. Defendant has failed to raise a genuine issue on this point. To begin with, it is undisputed that the volume of calls was more than Plaintiffs were prepared to handle, and that every witness to testify on the subject stated that the number of calls was above expectations and difficult to handle with existing resources. (*See, e.g.*, Pl. Ex. 34, Flanagan Dep. at 60:24-61:5 (stating she was on the phone “all day” fielding calls related to the cancellations); Pl. Ex. 20, Flanagan Supp. Decl. ¶ 15 (stating that Common Cause’s offices were “flooded” with calls); Pl. Ex. 38, Webb Dep. at 40:5-10 (stating that, while she was in Common Cause’s offices, answering calls related to the cancellations was “pretty much all that I did” for several days; that she “was glued to the phone”; that “it was a little ridiculous”; that it occupied “on average about 16 hours a day”); *id.* (stating that “the phone was literally ringing off the hook . . . with calls pertaining to people who had been cancelled or were concerned that they had been cancelled.”))

In addition, the comparison with call volume in prior years is irrelevant and invalid. (*See infra* ¶ 110.)

110. Defendant does not dispute that the Common Cause and SEIU were not prepared to handle the volume of calls actually received on the Voter Protection Hotline between October 9 and Election Day 2008. Defendant disputes whether Common Cause

and SEIU anticipated the volume of calls to the Voter Protection Hotline during that period. Uncontroverted testimony establishes that the volume of calls was higher than anticipated. (Pl. Ex. 34, Webb Dep. at 51:2-52:9.) In asserting that the evidence creates a dispute on this issue, Defendant relies on a false comparison between Common Cause's reports of the *estimated* number of calls received in prior years to the number of calls received in 2008 which were *actually recorded*. This comparison is invalid for several reasons. First, the evidence establishes that in prior years, the reported number was a very rough estimate (Pl. Ex. 34, Flanagan Dep. at 76:18-77:22), while in 2008, the reported number was the number of calls actually logged, which was only "a fraction" of those actually received. (Pl. Ex. 38, Webb Dep. at 78:19-78:21; *see also* Pl. Ex. 34, Flanagan Dep. at 77:12-13 (a "large number" of calls were not logged)). Second, the number of calls Defendant cites for prior years were those received on Election Day (Pl. Ex. 75), while this Statement states that in 2008, the volume of calls received *prior* to Election Day was greater than anticipated (*See* Pl. Ex. 38, Webb Dep. at 46:13-47:5 (discussing calls received between October 22, and October 24, 2008)). Thus, the evidence relied on by defendant creates no genuine dispute as to whether the call volume between October 9 and Election Day was higher than SEIU and Common Cause anticipated.

111. It is undisputed that Common Cause staff members, volunteers, and SEIU law fellows Ms. Webb and Mr. Granderson responded to cancellation-related calls and assisted voters whose registrations had been cancelled.

112. Admitted by Defendant.

113. Defendant does not dispute that between October 22 and October 24, 2008, SEIU law fellow Webb spent 7 to 15 hours in the Denver Common Cause office helping cancelled voters restore their voter registration status, and answering calls regarding cancellation issues.

114. It is undisputed that in the two weeks before the election, Ms. Webb spent 18 to 25 hours directly assisting voters who had problems with their voter registrations. Defendant states that Ms. Webb failed to testify that callers were cancelled under the 20-Day Rule specifically. That is neither surprising nor important. The evidence establishes that callers either had been or were concerned that they had been cancelled. (*See* Pl. Ex. 38, Webb Dep. at 52:17-52:18; Naifeh Supp. Decl. ¶¶ 6, 8-9.) In most cases, neither the caller nor the hotline volunteers determined the *reason* for the cancellation; only whether or not the voter was still registered. (Pl. Ex. 38, Webb Dep. at 46:8-46:12; 53:2-53:6.) Moreover, evidence provided by Defendant in discovery shows that of the 12 callers who provided sufficient details for Plaintiffs to determine the reason they had been cancelled, 4 had had their registration records cancelled under the 20-Day Rule, and only one of the four was able to resolve the issue and cast a ballot that was counted. (Pl. Ex. 76.)

115. It is undisputed that, on Election Day, Ms. Flanagan provided guidance to call center volunteers answering calls related to Defendant's cancellation practices, and that she answered some calls herself.

116. There is no dispute that 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. It is also undisputed that only a fraction of the calls to the

hotline were logged. (See Pl. Ex. 38, Webb Dep. at 78:19-:21.) It is undisputed that among the reasons not all of the calls were logged was the volume of calls and the complexity of dealing with calls related to the cancellation practices, though there may have been other reasons as well. In addition, the testimony suggests that calls related to the Defendant's cancellation practices were more likely than others to go undocumented. (Ex. 34, Flanagan Dep. at 73:5-:23.)

117. It is undisputed that at least 10 percent of the hotline calls dealt with questions arising out of the cancellation practices; that such calls were comparatively complex and time consuming; and that hotline staff and volunteers consequently spent more than 10 percent of their time on such calls. The remainder of Defendant's response fails to create a genuine issue of fact. Ms. Flanagan's testimony speaks for itself, and Defendant has offered no contrary evidence.<sup>10</sup>

118. It is undisputed that the diversion of resources to responding to calls from voters concerned about the Defendant's cancellation practices was not done in connection with this litigation.

119. Admitted by Defendant.

120. It is undisputed that Flanagan was required to verbally supplement Common Cause's written election protection training materials with information about the purges.

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<sup>10</sup> Ms. Flanagan testified that "it was *much more time* [than 10 percent] because [cancellation of voter registrations] was a complicated issue and it was a new issue." (See Pl. Ex. 34, Flanagan Dep. at 80:5-11 (emphasis added).)

121-126. Admitted by Defendant

127. It is undisputed that Flanagan spent time learning the details of the cancellation practices in order to prepare testimony for Colorado’s Election Reform Commission. Defendant disputes that the amount of time Ms. Flanagan spent was “considerable.” This dispute does not create a genuine issue of any material fact. Moreover, the evidence cited by Defendant shows that Ms. Flanagan spent more time preparing testimony on the Defendant’s cancellation practices than on the other issues on which she testified, even if she could not quantify the amount of time, and that because the Defendant’s cancellation practices had not been part of Common Cause’s election reform agenda prior to October 2008, having to prepare this testimony placed a strain on her resources. (Pl. Ex. 34, Flanagan Dep. at 105:12-106:5; 107:16-107:20.)<sup>11</sup>

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

128. Defendant does not dispute that the work Common Cause and SEIU devoted to counteracting Defendant’s voter cancellation practices meant that they could not devote those resources to issues and projects previously on their agenda. Defendant disputes that such additional work “wholly prevented [Plaintiffs] from devoting any

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<sup>11</sup> Defendant also cites evidence showing that Flanagan and Common Cause had been working “for years” on issues she testified on besides Defendant’s cancellation practices, and that she regularly testified before the Election Reform Commission, and followed pending election-related legislation. (Def. Opp Facts ¶ 127.) Defendant does not explain how this evidence creates a disputed issue regarding how much time Ms. Flanagan spent learning the details of Defendant’s cancellation practices.

resources” to those other issues and projects. But Plaintiffs make no such claim, and Defendant’s purported dispute does not raise a genuine issue as to the fact stated in this paragraph. Defendant also disputes that resources expended before the 2008 election to counteract his cancellation policies were diverted from post-election voter education programs. Again, this fact is not asserted in this paragraph, and Defendant has failed to raise a genuine dispute as to any material fact.

129. Defendant disputes Statement 129 because it does not specify a time-frame during which the diversion of resources into counteracting the cancellation practices prevented Common Cause from addressing the operation of SCORE. Ms. Flanagan testified that Common Cause was unable to devote resources to address the operation of SCORE “after October 2008, but leading up to Election Day.” (Pl. Ex. 34, Flanagan Dep. at 151:19-152:5.) Defendant has not disputed that testimony. Moreover, Plaintiffs have adduced evidence that, since the November 2008 election, Common Cause has continued and will continue to devote additional resources to counteracting the 20-day Rule. (See Pl. Add’l Facts ¶¶ 173-74, 179-84.)

130. It is undisputed that in the weeks leading up to the election, Common Cause reassigned its staff person from media and democracy work to full-time support for the Just Vote Colorado program.

131. The Defendant does not dispute that the diversion of Plaintiffs’ resources to responding to calls regarding Defendant’s cancellation practices prevented them from devoting those resources to efforts to make the Voter Protection Hotline and Election

Protection program more effective.<sup>12</sup> Defendant claims to dispute Statement 131 by suggesting that Plaintiffs' "inability" to carry out other programs was caused not by the "number and resource-intensive nature" of the calls received, but by Plaintiffs' failure to anticipate the volume of calls.<sup>13</sup> Defendant also disputes whether the planned use of resources to projects that would improve the hotline and the Election Protection program would have succeeded. These objections do not raise a genuine issue as to whether plaintiffs were prevented from using their resources as planned because they diverted those resources to respond to calls regarding the Defendant's cancellation practices,<sup>14</sup> a fact which is not in dispute.

132. Defendant does not dispute that Ms. Webb and Mr. Granderson were unable to complete all the work they had planned for the 2008 election cycle because they were devoting their time to responding to calls related to the Defendant's

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<sup>12</sup> Indeed, the evidence does not permit of a dispute on this point. Ms. Flanagan's Supplemental Declaration, for instance, states unequivocally that the need to answer cancellation-related calls to the hotline diverted resources away from other work intended to make Just Vote Colorado and the Voter Protection Hotline more effective and useful to voters. (Pl. Ex. 20, Flanagan Supp. Decl. ¶ 43.) And Ms. Webb testified that the high volume of calls related to the cancellations meant that hotline staff and volunteers were able to answer fewer calls regarding the issues they had anticipated having to address. (Pl. Ex. 38, Webb Dep. at 52:9-52:18.)

<sup>13</sup> As noted above in paragraph 110, Defendant's interpretation of the evidence as to the number of calls received in prior years does not bear scrutiny.

<sup>14</sup> Whether or not Plaintiffs anticipated or should have anticipated using their resources in that manner does not raise a genuine dispute, and in any event, Defendant has conceded that Plaintiffs were not prepared to handle the volume of calls they actually received. (*See supra* ¶¶ 109-110; *see also* Pl. Ex. 38, Webb Dep. at 19:2-8; 54:22-56:13; 56:20-25.)

cancellation practices and to other activities undertaken to counteract those cancellations. Once again, Defendant suggests that SEIU and Common Cause should have should have anticipated these diversions, but that does not raise a genuine issue as to the fact of or the reason for the diversions, the material facts asserted here. (*See supra* ¶ 131.)

133. It is undisputed that Plaintiffs were unable to establish and implement a plan to deploy monitoring teams as originally intended. Defendant objects to the use of the word “effectively.” This objection does not raise a genuine issue as to the fact asserted here.

134. It is undisputed that SEIU and Common Cause were unable to fulfill their plan to address the confusion over where mail-in ballots could be dropped.

135. Admitted by Defendant.

## 2. *Mi Familia Vota*

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

136. Admitted by Defendant.

137. Admitted by Defendant.

138. It is undisputed that volume of calls to Mi Familia Vota’s hotline increased directly after the publicity concerning Defendant’s cancellation practices. It is also undisputed that from October 9, 2008 through November 4, 2008, Mi Familia Vota’s hotline rang every two or three minutes “all day,” or that the hotline was staffed seven days a week until midnight.

139-40. Admitted by Defendant.

141. Defendant's objections do not raise a genuine factual dispute. *First*, as noted, there is no dispute that the volume of calls increased from once every 15 to 20 minutes to once every 2 to 3 minutes (that is, by a factor of 5 to 10) immediately after Defendant's cancellation practices received publicity on October 9, 2008, and that after that date, several calls a day were from voters concerned about the cancellations. (*See supra* ¶ 138; Ex. 53, Salazar Decl. ¶¶ 5-7.)

*Second*, Defendant's assertion that there was no change in his cancellation policies on October 9, 2008, the day after of the *New York Times* report, does not create any dispute about the fact asserted in this paragraph, and as a fact on its own, is immaterial. The evidence shows the hotline callers were concerned about *the cancellations*, not about the fact that they were being publicized.

*Third*, Defendant's assertion that the 20-Day Rule was not mentioned in the media coverage is plainly incorrect. Defendant's own news release, issued the same day the *Times* article appeared, admitted that more than 14,000 voters had been cancelled since July 21, 2008, and listed "Failed 20-day period" as the one of the largest categories of cancellations. (Pl. Ex. 12) In addition, an article in the *Rocky Mountain News*, also published on October 9, 2008, reporting on the Defendant's news release and a press conference held by the Defendant the same day, discussed in some detail the cancellation of what it described as voters who "failed to respond." (*See* Pl. Ex. 74.)

142. Admitted by Defendant.

143. Defendant admits that after October 8, 2008 Mi Familia Vota received multiple daily calls regarding Defendant's cancellation practices, and that Mi Familia

Vota added 10 to 15 minutes to training sessions and provided supplemental training to existing staff and volunteers to address the cancellation activities. Defendant disputes that the volume of calls was “large,” but uncertainty about the precise number of calls or whether it constitutes a “large” number does not raise any genuine issue as to the material facts asserted in this paragraph and conceded by Defendant.

144. Defendant does not dispute that volunteers responding to cancellation-related calls who were unable to address the caller’s concerns had to speak to a paid part-time staff member; that some of these staff members were located on different floor of the building in which Mi Familia Vota’s offices were located; or that responding to these voters’ concerns took approximately 30 minutes per call, more time than it took to respond to other types of calls. Defendant disputes that the amount of time required to respond to a call was “often” the result of the distance between volunteers and staff-members, be concedes that that “may have been” a factor. He does not dispute the underlying evidence in Statement 144, which speaks for itself, or offer any contrary evidence. Thus, Defendant does not genuinely dispute the material facts asserted in Statement 144.

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

145. Defendant does not dispute that Mi Familia Vota was required to divert 4 to 5 volunteers to respond to hotline calls; that these volunteers consequently spent less time on other planned activities; or that Mi Familia Vota volunteers would have engaged in the other activities specified in Statement 145 if the call volume had been lower.

Defendant only “disputes” the legal conclusion, not asserted in Plaintiffs’ Statement 145, that the call volume was attributable to his actions. There is no genuine dispute as to the facts asserted in this paragraph, for the same reasons discussed above. (*See supra* ¶¶ 138, 141.)

**D. Harm to Plaintiff’s Organizational Activities**

**1. *Mi Familia Vota***

146. Admitted by Defendant.

147. Defendant does not dispute that in 2008 Mi Familia Vota submitted the registration applications of 2,500 voters in a Voter Registration Drive, including the named voters. Defendant asserts that not all of these voters were “registered” because some of them “failed” the 20-Day Rule. This is a legal conclusion, and does not raise a genuine issue of fact.

148. Defendant “disputes” the facts asserted in this paragraph by asserting the legal conclusion that the named voters were not “registered” when they submitted their complete voter registration applications. This does not create a genuine dispute as to the fact that status of the voter registration records of these individuals was changed from “Active” to “Cancelled” and that the reason for this change was listed as “Failed-20 day period.” (*See* Pl. Ex. 42, SOS-004729; Pl. Ex. 41, SOS-004738; Pl. Ex. 59, SOS-006213; Pl. Ex. 58, SOS-006166.)

Defendant’s response also asserts additional facts, which do not create a dispute as to the facts asserted in this paragraph. Specifically, Defendant asserts that three of the four named individuals “have passed the 20 day statute.” Defendant does not dispute that

the SCORE registration records created as a result of the applications submitted by Mi Familia Vota on behalf of these voters were placed in “Cancelled – Failed-20 day” status prior the 2008 election. Defendant’s assertion that three of them have subsequently “passed the 20 day statute”—two as a result of “corrective action” taken during the pendency of this litigation—does not create a dispute as to the facts stated in this paragraph, and is addressed more fully below. (*See* Def. Add’l Facts ¶¶ 1-4; Pl. Resp. to Def. Add’l Facts ¶¶ 1-4.)

149. Admitted by Defendant.

150. Defendant does not dispute the factual assertions in Statement 150.

Rather, he counters the factual statement with a misplaced argument as to the legal import of these facts, which does not create any genuine dispute as to the facts themselves. The members identified in Statement 150 are members of the community Mi Familia Vota serves, not members of Mi Familia Vota.

151. Defendant disputes the facts asserted in this paragraph on the basis of a “lack of evidence in the record.” The testimony and declarations in the record, including the evidence cited by the Defendant in support of his purported dispute, establish that cancellation practices discussed in the *New York Times* article, in Defendant’s news release, and in other media outlets undermines Mi Familia Vota’s ability to engage voters in the electoral process.

## 2. *SEIU*

152-56. Admitted by Defendant.

157. Defendant does not dispute that SEIU submitted the registration applications of approximately 3,000 voters in its Voter Registration Drive, including the named voters. Defendant asserts that not all of these voters were “registered” because some of them “failed” the 20-Day Rule. This is a legal conclusion, and does not raise a genuine issue of fact.

158. Defendant does not dispute that the SCORE registration records created as a result of the applications submitted on behalf of these voters by Mi Familia Vota were placed in “Cancelled-Failed-20 day period” status prior the 2008 election. Defendant disputes the “conclusion of law” that these voters were “registered” (an assertion not made in the statement), but does not contend that this dispute raises a genuine factual issue. Defendant’s response also asserts additional facts, but again does not claim that they create a dispute as to the facts asserted in this paragraph. Specifically, Defendant asserts that one of the five named individuals has “passed the 20 day statute,” and that another is currently registered. These additional facts are addressed more fully below. (*See* Def. Add’l Facts ¶¶ 5-9; Pl. Resp. to Def. Add’l Facts ¶¶ 5-9.)

159. Defendant does not dispute that the U.S. Postal Service indicated that the named individual’s Voter Information Card sent pursuant to Colorado’s 20-Day Rule was returned as undeliverable, or that the Card did not provide a forwarding address or indicate that the voter was not known at the address listed, but disputes that the Card had no information as to why it was returned. The Card’s notation “return to sender-not deliverable as addressed-unable to forward” does not provide a reason as to why the Card was not deliverable as addressed.

160. Plaintiffs do not dispute Defendant's response.

161. Admitted by Defendant

162. Defendant disputes that the evidence establishes (i) that his voter cancellation activities cast doubt on whether people who registered to vote through SEIU's registration drive would actually be placed on the poll books and permitted to vote; and (ii) that these doubts harmed or will harm SEIU's voter registration efforts.

As to (i), Defendant has already conceded that five persons who attempted to register to vote through SEIU's voter registration drive were in fact not placed on voting rolls as a consequence of his application of the 20-Day Rule. (*See infra supra* ¶ 158; Def. Add'l Facts ¶¶ 5-9; Pl. Resp. to Def. Add'l Facts ¶¶ 5-9.) Defendant has maintained throughout this litigation that voters who fail the 20-Day Rule are not eligible to vote, and he has stated that none of the five SEIU registrants who were not placed on the rolls succeeded in voting. (*See* Def. Add'l Facts ¶¶ 5-9.)

As to (ii), SEIU Associate General Counsel Steve Ury testified that he believed defendant's failure to place voters registered by SEIU on the rolls and allow them to vote would negatively impact SEIU's ability to register voters, but that this harm has not yet materialized because SEIU's 2010 election season voter registration drive has not yet begun. (Pl. Ex. 30, Ury Dep. at 35:18-36:7.)

Defendant also contends that any doubt among voters was "incited" by "inflammatory" media coverage rather than by the voter cancellations he admitted carrying out in his own statements to the media, and that had the article been published at a different time, the doubt cast by his activities "may have been entirely different."

These efforts to blame the messenger have no foundation. In essence, Defendant is arguing that if no one had been paying attention, his cancellation of 1,136 voters under the 20-Day Rule in the weeks before the 2008 election would have gone unnoticed, and therefore not have caused concern and doubt among voters.

163. Defendant disputes that its cancellations made it more difficult for SEIU to engage newly registered voters in the political process. Evidence in the record, including the evidence cited by the Defendants, shows that the concern about Defendant's conduct was widespread, particularly among the low-propensity voters served by SEIU and Mi Familia Vota. (*See, e.g.*, Pl. Ex. 30, Ury Dep. at 41:10-19, 43:13-16; Pl. Ex. 53, Salazar Decl. ¶ 7.) Moreover, Defendant has not disputed that SEIU intends to engage in voter registration and education activities in 2010. (*See* Pl. Ex. ¶ 8, Ury Supp. Decl.)

#### 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. Defendant does not dispute that the voter registration records of SEIU members were placed in "Cancelled" status with a status reason of "Failed 20-day period" by operation of the 20-Day Rule. Defendant's only "dispute"—that Common Cause members never registered because "their applications failed the 20 day statute"—asserts a legal conclusion and does not raise an issue of fact.

165. Defendant disputes that Rudy Puente registered to vote on February 2, 2008, apparently on the basis of Plaintiffs' typographical error in the date of registration.

In his Additional Statement of Undisputed Facts, Defendant asserts, and Plaintiffs do not dispute, the Mr. Puente in fact registered on February 22, 2008. (*See* Def. Add'l Facts ¶ 10.) In addition, Defendant asserts that Mr. Puente's "Failed-20 day" status is outdated. Defendant does not mention that this status is only outdated as of January 19, 2010, the date on which Defendant restored Mr. Puente to the rolls in a "corrective action" based on the fact that Mr. Puente did not, in fact, fail the 20 day rule. (*Id.*) Mr. Puente was thus erroneously placed in cancelled status between March 27, 2008 and January 19, 2010, a period that encompassed both the 2008 federal primary and general elections. There is no dispute that Mr. Puente's registration record was placed in "Cancelled" status as a result of Colorado's application of the 20-Day Rule (even if the rule was applied in violation of the 20-day statute as written).

166. It is undisputed that SEIU member Diana Bain's active registration record was placed in "Cancelled" status under the 20-day rule on September 17, 2008.

167. Defendant admits that Timnit Twolde is an SEIU member and that she registered to vote on November 4, 2008. Defendant also admits that she was placed in "Cancelled" status pursuant to the 20-Day Rule on March 10, 2009. (*See* Def. Add'l Facts ¶ 12(d).) Defendant has disclosed that Ms. Twolde's "Failed-20 Day" status is outdated, again as a result of Defendant's "corrective action" taken on January 19, 2010. (*See also* Pl. Ex. 61, SOS-006020-SOS-006034.)

168. Defendant admits the assertions in this statement (as amended by Plaintiffs' notice of errata). The apparent confusion over Ms. Twolde's first name does not raise a genuine issue of fact.

169. There is no dispute that registration records Common Cause members were placed in “Cancelled – Failed 20-day period” pursuant to the 20-Day Rule. Defendant’s only “dispute”—that Common Cause members never registered because “their applications failed the 20 day statute”—asserts a legal conclusion and does not raise an issue of fact.

170. Defendant does not dispute that Common Cause member Gail Dubas was registered to vote in April 2008 and was placed in “Cancelled” status under the 20-day rule in May 2008 after her Voter Information Card was returned.

171. Defendant disputes that Ms. Dubas reregistered prior to the 2008 election because her prior voter registration record had been cancelled under the 20-Day Rule on the grounds that this “simply cannot be true.” Defendant has misread his own voter registration data. The unrebutted evidence shows that Ms. Dubas’s second voter registration record was created *after* her first record was cancelled. (*Compare* Def. Ex. N-1 at SOS-004637 (audit log of second record showing “new voter record created” on 6/27/2008), *with id.* at SOS-004645 (audit log showing first record was cancelled for “Failed-20 Day period” on 5/28/2008)). The explanation for why the voter registration application associated with the second record is dated April 4, 2008 is that it is the very same voter registration application that resulted in the creation of the first, cancelled record. (*Compare* Def. Ex. N-1 at SOS-004638, *with id.* at SOS-004646.)

172. Defendant admits that Luke Jesser, a Common Cause member, currently has a SCORE record in “Cancelled – Failed 20-day” status. Their purported “dispute” asserts a legal conclusion and does not raise an issue of fact.

**PLAINTIFFS' RESPONSE TO DEFENDANT'S  
ADDITIONAL STATEMENT OF UNDISPUTED FACTS**

**General Objections:**

A. Except as noted, Plaintiffs object to any implied legal conclusion that actions taken by Defendant after the point at which the voters discussed below were placed in “Cancelled” status by operation of the 20-Day Rule, or the fact that the current voter’s status may be other than “Cancelled,” remedied the harm caused by the cancellation.

B. Except as noted, Plaintiffs dispute any statement that a particular voter “did not attempt to vote.” Defendant, by his own admission, cannot determine whether a voter attempted to vote, because SCORE does not document an attempt to vote, and Defendant does not maintain other records that would establish that a voter did not attempt to vote. (Pl. Ex. 2, Rudy Dep. at 68:5-69:12.) Defendant would thus have no record of a voter who appeared at the polls, but whose registration had been cancelled, and who was deterred from casting a provisional ballot or attempting an emergency registration by time or distance constraints or other reasons. (*Id.* at 68:11-13, 9-21, 69: 4, 10-12.) Likewise, if a voter requested a mail-in ballot, but her registration record was cancelled prior to the time mail-in ballots were sent out, the voter would not have been mailed a ballot. *See* Colo. Election Rule 2.20(b)(2) (providing that mail-in ballots are not sent to voters in cancelled status). Such a voter has attempted to vote, notwithstanding that no record of that attempt appears in Defendant’s SCORE database.

### **Additional Information Concerning Persons Identified by Mi Familia Vota**

1. Defendant's additional information concerning Mi Familia Vota registrant Marion Anderson:

a. Admitted, subject to General Objection A, *supra*. Plaintiffs note in particular that Anderson's registration record was in "Cancelled" status at the time of the 2008 election. (Def. Ex. B-1, SOS-004733, SOS-004744.)

b. Admitted.

c. Plaintiffs dispute that the county marked the record as "cancelled-failed 20-day period" on October 15, 2009. Defendant's evidence clearly shows that Anderson's registration record was placed in "cancelled" status under the 20-day rule on September 17, 2008, effective as of September 15, 2008, and that on October 15, 2009, the county marked Anderson's record as "Inactive." (Def. Ex. B-1, SOS-004733.)

Plaintiffs admit the remaining facts stated in this subparagraph.

d. Admitted, subject to General Objection A.

e. Admitted, subject to General Objection A.

f. Plaintiffs do not dispute that Defendant violated Colorado law, in error or otherwise, when it cancelled Anderson's registration record. Plaintiffs object to the implied legal conclusion that had the voter information card been returned before the expiration of 20 days, it would have been lawful for Defendant to cancel Anderson's registration record. Plaintiffs also incorporate General Objection A.

g. Plaintiffs dispute that Anderson has not attempted to vote since July 29, 2008 for the reasons set forth in General Objection B. Plaintiffs admit that Anderson has not updated her registration record.

2. Defendant's additional information concerning Mi Familia Vota registrant Janine Lagare Low:

a. Admitted, subject to General Objection A. Plaintiffs note in particular that Low's registration record was placed in "Cancelled" status at the time of the 2008 election.

b. Admitted. Plaintiffs note that Low requested a mail-in ballot and that her voter information card was returned as undeliverable, and her registration record was cancelled, 50 days after Low submitted her voter registration application. (*See* Def. Ex. C-1 at SOS-004724 to SOS-004725.)

c. Plaintiffs dispute that Low has not attempted to vote since July 29, 2008 for the reasons set forth in General Objection B. Plaintiffs admit the remaining facts stated in this subparagraph.

3. Defendant's additional information concerning Mi Familia Vota registrant Zayatona Ahmed:

a. Admitted, subject to General Objection A. Plaintiffs note that Defendant's "corrective action" was not taken until on January 19, 2010, and that Ahmed's registration status was cancelled in September 2008, and remained cancelled during and long after the November 2008 election.

b. Admitted.

- c. Admitted.
- d. Admitted, subject to General Objection A.
- e. Admitted, subject to General Objection A.
- f. Plaintiffs do not dispute that Defendant violated Colorado law, in

error or otherwise, when it cancelled Ahmed's registration record. Plaintiffs note that Ahmed's status was not changed to "inactive-returned mail" until January 19, 2010. Plaintiffs object to the implied legal conclusion that had the voter information card been returned before the expiration of 20 days, it would have been lawful for Defendant to cancel Ahmed's registration record. Plaintiffs also incorporate General Objection A.

- g. Plaintiffs dispute that Ahmed has not attempted to vote since July 29, 2008 for the reasons set forth in General Objection B. Plaintiffs admit that Ahmed has not updated her registration record.

4. Defendant's additional information concerning Mi Familia Vota registrant Ivan A. Valverde:

- a. Admitted.
- b. Admitted.
- c. Denied. Plaintiffs dispute that Valverde did not attempt to vote in

the 2008 election for the reasons set forth in General Objection B.

**Additional Information Concerning Persons For Whom SEIU Submitted  
Registration Applications**

5. Defendant's additional information concerning SEIU registrant Jean Blaylock:

- a. Admitted.

- b. Admitted.
- c. Admitted.
- d. Plaintiffs dispute that Blaylock did not attempt to vote in the 2008

election for the reasons set forth in General Objection B. Plaintiffs do not dispute that Blaylock has not updated her registration record.

6. Defendant's additional information concerning SEIU registrant Aura Gomez:

- a. Admitted, subject to General Objection A. Plaintiffs note, however, that Gomez's registration was placed in "Cancelled" status before the 2008 election and Defendant's "corrective action" did not take place until January 19, 2010. Plaintiffs also note that Gomez requested a mail-in ballot for the November 2008 election when she submitted her registration application on August 7, 2008. (Def. Ex. G-1 at SOS-004671.) However, because her registration record was cancelled pursuant to the 20-Day Rule before mail ballots were sent out, it appears Defendant did not send Gomez a mail-in ballot. (*See* Pl. Ex. 2, Rudy Dep. at 39:21-40:4 (mail ballots were sent about 30 days before the election); Def. Ex. G-1 at SOS-004670 (Gomez's registration record cancelled on September 17, 2008); *see also* Colo. Election Rule 2.20(b)(2) (providing that mail-in ballots are not sent to voters in cancelled status).) Gomez's request for a mail-in ballot was an "attempt to vote," a fact Defendant apparently concedes.<sup>15</sup>

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<sup>15</sup> In the case of every other voter who did not successfully cast a ballot in 2008, Defendant has contended that the voter "did not attempt to vote." He has made no such contention in the case of Gomez.

Defendant's cancellation of her voter registration record and failure to send her a mail-in ballot effectively deprived her of her vote.

- b. Admitted.
- c. Admitted, subject to General Objection A.
- d. Admitted, subject to General Objection A.
- e. Plaintiffs do not dispute that Defendant violated Colorado law, in

error or otherwise, when it cancelled Gomez's registration record. Plaintiffs note that Gomez's status was not changed to "inactive-returned mail" until January 19, 2010. Plaintiffs object to the implied legal conclusion that had the voter information card been returned before the expiration of 20 days, it would have been lawful for Defendant to cancel Ahmed's registration record. Plaintiffs also incorporate General Objection A.

7. Defendant's additional information concerning SEIU registrant Vonray Little:

- a. Admitted.
- b. Admitted.
- c. Plaintiffs dispute that Little did not attempt to vote in the 2008 for

the reasons set forth in General Objection B. Plaintiffs do not dispute that Little has not updated his voter registration record.

8. Defendant's additional information concerning SEIU registrant Johnita Taylor:

- a. Admitted.
- b. Plaintiffs deny that Taylor did not attempt to vote in the 2008 for

the reasons set forth in General Objection B.

Plaintiffs do not deny that Taylor submitted a Voter Registration Drive application through SEIU on September 11, 2008, that the application triggered the mailing of a voter information card to the address on the application, that the voter information card was returned as undeliverable on October 2, 2008, that the county cancelled Taylor's registration under the 20-day rule on October 9, 2008, and that Taylor did not register to vote again before the November 2008 election.

c. Admitted.

d. Admitted.

e. Admitted.

f. Admitted.

g. Admitted, subject to General Objection A. Plaintiffs note that Taylor's registration was placed in "Cancelled" status prior to the November 2008 election.

h. Plaintiffs do not dispute Defendant's present intention to carry out the VoICE process as described.

9. Defendant's additional information concerning SEIU registrant Tameka Thompson:

a. Admitted

b. Admitted.

c. Plaintiffs dispute that Thompson did not attempt to vote in the 2008 election for the reasons set forth in General Objection B. Plaintiffs do not dispute

that Thompson has not updated her voter registration record since the November 2008 election.

**Information Concerning Identified Members of SEIU**

10. Defendant's additional information concerning SEIU member Rudy Puente:

a. Admitted, subject to General Objection A. Plaintiffs note that Puente's registration was cancelled prior to the 2008 election, and Defendant's "corrective action" reinstating Puente's voter registration record did not take place until January 19, 2010.

b. Admitted.

c. Admitted, subject to General Objection A.

d. Admitted, subject to General Objection A.

e. Plaintiffs do not dispute that Defendant violated Colorado law, in error or otherwise, when it cancelled Puente's registration record. Plaintiffs note that Puente's status was not changed to "inactive-returned mail" until January 19, 2010. Plaintiffs object to the implied legal conclusion that had the voter information card been returned before the expiration of 20 days, it would have been lawful for Defendant to cancel Puente's registration record. Plaintiffs also incorporate General Objection A.

f. Denied. Plaintiffs dispute that Puente did not attempt to vote in the 2008 election for the reasons set forth in General Objection B.

11. Defendant's additional information concerning SEIU registrant Diana Bain:

a. Admitted.

b. Admitted, subject to General Objection A. Plaintiffs note that Bain's registration was placed in "Cancelled" status prior to the November 2008 election.

c. Admitted.

d. Admitted.

e. Admitted.

f. Plaintiffs do not dispute Defendant's present intention to carry out the VoICE process as described.

12. Defendant's additional information concerning SEIU member Timnit Twolde:

a. Admitted, subject to General Objection A.

b. Admitted.

c. Admitted.

d. Admitted.

e. Plaintiffs do not dispute that Defendant violated Colorado law, in error or otherwise, when it cancelled Twolde's registration record. Plaintiffs note that Twolde's status was not changed to "inactive-returned mail" until January 19, 2010.

Plaintiffs object to the implied legal conclusion that had the voter information card been returned before the expiration of 20 days, it would have been lawful for Defendant to cancel Ahmed's registration record. Plaintiffs also incorporate General Objection A.

f. Admitted, subject to General Objection A.

g. Admitted.

h. Disputed. The evidence establishes, and Defendant has admitted, that Twolde appeared at the polls on November 4, 2008, and was given a provisional ballot. (*See* Def. Add'l Facts ¶ 12(c).) Because Twolde had not registered prior to Election Day, her ballot was not counted. (*See* Def. Opp. Facts ¶ 168.)

### **Information Concerning Identified Common Cause Members**

13. Defendant's additional information concerning Common Cause member Gail Dubas:

- a. Admitted.
- b. Admitted.
- c. Admitted.
- d. Admitted.
- e. Admitted, subject to General Objection A.
- f. Plaintiffs do not dispute Defendant's present intention to carry out

the VoICE process as described.

14. Defendant's additional information concerning Common Cause member Luke Jesser:

- a. Admitted.
- b. Admitted.
- c. Admitted.

## ARGUMENT

### I. Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Id.* at 323. Once that burden is met, the non-moving party must demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To do so, the non-moving party must refer to specific facts, beyond those in the pleadings. *Celotex*, 477 U.S. at 324. Bald allegations without “significant probative evidence” to support them are insufficient to create a genuine issue of fact. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995).

### II. Plaintiffs Are Entitled to Judgment as a Matter of Law that the 20-Day Rule Violates the Rights of Voters under the NVRA.

The merits of this dispute turn principally on a single question: whether Colorado’s 20-Day Rule affects voters who qualify as “registrants” for purposes of the NVRA. If so, Defendant does not dispute that the 20-Day Rule would violate Section 8 of the NVRA, which protects “registrants” from removal from the State’s “official list of eligible voters” except on narrow grounds and under specific procedures. 42 U.S.C. § 1973gg-6(a)(3).

Plaintiffs previously demonstrated that the material facts and uncontested law leave no doubt that the 20-Day Rule affects fully registered voters who are protected by

the NVRA. (Pl. Stmt. Facts ¶¶ 1-23; Pl. Br. at 36-44; Pl. Opp. Br. at 18-32.) This remains true after Defendant’s opposition to Plaintiff’s motion for summary judgment: the material—and now undisputed—facts and clear state and federal law show that Plaintiffs are entitled to judgment as a matter of law.

Defendant’s opposition offers various rationales for the 20-Day Rule. Most of these arguments are irrelevant, none of them have merit, and they should all be rejected by this Court.

**A. Defendant Has Failed to Raise a Genuine Dispute as to Facts Showing That the 20-Day Rule Revokes the Registrations of Eligible and Registered Voters.**

**1. *Undisputed Facts and Uncontested Law Establish that the 20-Day Rule Affects Fully Registered Voters.***

The material facts and points of law regarding the operation of the 20-Day Rule are not genuinely in dispute, and they compel summary judgment for Plaintiffs:

Registration

- All registration applications used in Colorado require the voter to affirm that he or she meets all eligibility criteria. (Pl. Stmt. Facts ¶ 5.)
- After a county clerk deems a voter’s application “accurate and complete,” the clerk must mail the voter a notice of “the registration.” COLO. REV. STAT. § 1-2-509(2). The notice lists the “Date Registered” and informs the voter of his or her polling place. (Pl. Stmt. Facts ¶¶ 8, 10; Pl. Reply Facts ¶¶ 8, 10.) This mailing acts as the mandatory notice of disposition required by the NVRA. (*Id.* ¶¶ 11-12.) Once the notice of disposition is mailed, a voter also may log on to the State’s public registration database and verify that his or her registration status is “Active” and learn his or her polling place. (*Id.* ¶¶ 13, 14.)
- Even before a disposition notice is sent, once the county clerk deems an application accurate and complete, the voter will be placed in “Active” status.

In SCORE, the status designation will be “Active” with a “status reason” of “20-day period.” (Pl. Stmt. Facts ¶¶ 6-7; Pl. Reply Facts ¶¶ 6-7.)<sup>16</sup>

#### Eligibility to Vote

- A voter in “Active” status has “no conditions or restrictions on [his or her] eligibility.” COLO. CODE REG. § 1505-1, Rule 2.20.1(a). There is no distinction between “Active” and “Active – 20 day” designations.
- An “Active” voter—including an “Active – 20 day” voter—may cast a regular or mail-in ballot on the same terms as any other voter. (*Id.* Rule 20.20.2(a); Pl. Stmt. Facts ¶¶ 17-18, 21; Pl. Reply Facts ¶¶ 17-18, 21.)
- Under Colorado law, only properly registered, eligible voters may cast a regular ballot. COLO. REV. STAT. § 1-2-703; *see also id.* § 1-7-103(1).

#### Cancellation

- If a voter’s disposition notice is returned as undeliverable within 20 days, the voter’s status is changed from “Active – 20 day” to “Cancelled.” In SCORE, the voter’s record is designated “Cancelled” with a “status reason” of “Failed 20-day.”<sup>17</sup> (*Id.* ¶¶ 19, 20.)
- A voter in “Cancelled” status, including one with a status reason of “Failed 20-day,” may not cast a regular or mail-in ballot. COLO. CODE REG. 1505-1, Rule 1.20.2(b).

(*See also* Pl. Opp. Br. at 18-20; Pl. Br. at 41-44.)<sup>18</sup>

In short, the 20-Day Rule encompasses a process in which a voter submits an accurate and complete registration application, is sent a notice of successful registration,

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<sup>16</sup> As detailed above, Defendant purports to dispute this terminology, but the terms are codified in administrative rules and unambiguously reflected in every single relevant document in the record. (*See* Pl. Reply Facts, *supra*, ¶ 7; Def. Opp. Facts ¶ 7; Rudy Supp. Aff. ¶ 10.) Defendant has thus not raised a genuine dispute. *See Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir.1995) (conclusory affidavits not providing factual bases for their conclusions are insufficient to create fact question).

<sup>17</sup> *See supra*, n. 16.

<sup>18</sup> This summary is not meant as a complete list of undisputed material facts.

is placed in “Active” status with no restrictions on eligibility, and is allowed to cast a regular ballot on the same terms as any other registrant; but is then removed from the State’s rolls of eligible voters with no notice or waiting period as required by the NVRA.

Faced with remarkably similar facts, the Sixth Circuit concluded in *U.S. Student Ass’n Found. v. Land* that

[A]n individual is a “registrant” under the NVRA at the time that he or she is listed as “Active” in the [Michigan voter database], and any such individual who is “rejected” under the Michigan system because his or her original voter ID card is later returned as undeliverable has had his or her rights, as defined by the NVRA..., violated.

546 F.3d 373, 386 (6thCir. 2008).

2. ***Defendant Cannot Avoid Summary Judgment by Avoiding the Facts.***

Defendant cannot rebut the facts summarized above—indeed he has conceded them—so he tries to evade them by casting the parties’ dispute as a “pure question of law.” (Def. Opp. Br. at 84-85.) Defendant is wrong.

The undisputed facts set forth above are undoubtedly material to the question of whether the 20-Day Rule violates the NVRA. Among other things, the facts demonstrate how the 20-Day Rule operates and when affected voters are placed on the State’s “official list of eligible voters” (42 U.S.C. § 1973gg-6(a)(3)) and are able to cast a regular ballot. *Cf. Land*, 546 F.3d at 375-78, 383 (analyzing factual record to determine point at which voters able to cast a regular ballot and thus become “registrants” for purposes of the NVRA). These issues are at the core of this dispute and merit elucidation by the factual record. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only

disputes over facts that might affect the outcome of the suit under governing law” will be considered material).

Defendant also contends that the facts “muddy the waters.” (Def. Opp. Br. at 84.) This is a curious argument on a motion for summary judgment and can be rejected out of hand.<sup>19</sup>

Although Defendant disagrees with certain of Plaintiffs’ factual assertions relevant to the merits, he raises no *genuine* issue as to any *material* fact. The majority of facts are either admitted outright or admitted but for marginal quibbles. (*See, e.g.*, Pl. Reply Facts ¶¶ 18, 42, 51.) In other instances, Defendant disputes the “imported meaning” of the asserted fact, or the inferences or legal conclusion to be drawn from them, but not the fact itself. (*E.g., id.* ¶¶ 10, 14.) Where Defendant purports to dispute a factual assertion outright, he generally fails to raise a *genuine* dispute. (*See, e.g., id.* ¶¶ 7, 19.) The very few legitimately disputed facts are immaterial in light of the mass of undisputed material facts. (*See, e.g., id.* ¶¶ 22, 39.) The material facts summarized on

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<sup>19</sup> Defendant points to Paragraph 15 of Plaintiffs’ Statement of Undisputed Facts as an example of “muddy[ing] the waters on a pure question of law.” (Def. Opp. Br. at 84 n.10.) That paragraph asserts that, “A voter who is able to retrieve his data on the Secretary of State on-line Registered Voter Search is registered.” The relevance of that assertion cannot be doubted. Rather than simply dispute the assertion in the appropriate portion of the brief, the Secretary provides a footnote in his argument about the technical capacities of the website and the propriety of the factual assertion. In essence, Defendant claims the issue is too confusing to be material. But Defendant protests too much. The issues are relatively straightforward and, even if complex, certainly appropriate for consideration on this motion. (The merits of Defendant’s footnote 10 are addressed in paragraph 15 of Plaintiffs’ Reply Concerning Undisputed Material Facts, *supra.*)

pages 3-16 above, are either undisputed or not genuinely disputed, and by themselves warrant summary judgment for Plaintiffs.

**B. As a Matter of Federal Law, the 20-Day Rule Unlawfully Revokes the Registrations of Voters Protected by the NVRA.**

**1. *The Scope of the NVRA’s Protections Is Governed by Federal Law, Not State Law.***

Defendant builds his position around the assertion that the term “registrant” should be determined by state law because the NVRA does not explicitly define the term. He contends that the statute’s ostensible silence on the issue means that Congress left it to the states to determine eligibility criteria “and confirmation of that eligibility.” (Def. Opp. Br. at 74, 78.) Accordingly, Defendant asserts that Plaintiffs must “show that 1) the NVRA defines ‘registrant,’ and 2) that the federal definition conflicts with Colorado’s approach to confirming elector eligibility.”<sup>20</sup> (Def. Opp. Br. at 77.)

**(a) *The Meaning of “Registrant” Is Evident in the Text of the NVRA.***

Defendant’s proposed analysis falters on its first step, because the text of the NVRA is *not* silent as to the meaning of “registrant.” The NVRA prohibits Colorado from removing “the name of a registrant . . . from the official list of eligible voters” unless limited exceptions apply or the State has followed the protective measures mandated by the NVRA. Thus, there can be no dispute that a person whose name appears on “the official list of eligible voters” is a registrant.

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<sup>20</sup> As detailed below, Defendant’s effort to escape the NVRA by focusing on Colorado’s “confirmation of eligibility” is unsuccessful. (*See infra* at 57-59.)

The undisputed facts show that this definition fits Colorado voters subject to cancellation under the 20-Day Rule exactly. (*See supra* at 51-53; Pl. Opp. Br. at 21; Pl. Reply Facts ¶¶ 16-18.) Such voters are thus entitled to the NVRA’s protections against removal. No recourse to state law is necessary or merited.

(b) *The Only Appellate Court to Have Considered the Issue Repudiated the Argument that “Registrant” Should Be Defined by State Law.*

If the NVRA’s text weren’t clear enough, the only federal appellate court to have considered the issue rejected Defendant’s core argument that the term “registrant”—and thus, the scope of the NVRA’s protections—should be defined by state law rather than federal law. *See Land*, 546 F.3d at 381-86. As detailed in prior briefs, the court in *Land* held, on highly similar facts, that a person becomes a “registrant,” and therefore entitled to protection by the NVRA’s prohibition on summary removal, “from the first moment that he or she is actually able to get 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. (*See* Pl. Br. at 38, 39-40; Pl. Opp. Br. at 22-24.) In Colorado, that moment is reached when a voter is designated “active,” not when 20 days lapse after the mailing of the voter’s disposition notice. *See* Colo. Code Reg. § 1505-1, Rules 2.20.1(a), 2.20.2(b).

Defendant’s efforts to evade *Land* are unpersuasive. He first relies upon the dissent in *Land*. The *Land* dissent is wrong, however, and the court’s opinion presents the better reasoned approach (as well as the law of the Sixth Circuit). (Pl. Opp. Br. at 22-24.)

Defendant also seeks to distinguish *Land* by distinguishing the 20-Day Rule from the Michigan statute at issue in *Land*. Specifically, Defendant points out that under the Michigan voter identification statute at issue in *Land*, once a voter had “active” status in the state’s registration database, he or she could “vote without further action or verification.” (Def. Opp. Br. at 80) (citation omitted). Defendant contends that the 20-Day Rule is categorically different from the Michigan statute because “Active 20-day” voters in Colorado must still verify their address before voting, meaning that, unlike Michigan voters, they are unable to go to the polls without further verification. (*Id.*)

As an initial matter, it is simply untrue that Michigan voters who cleared the returned-identification statute could cast a regular ballot without further action or verification. Michigan law requires voters a photo identification before casting a regular ballot. *See* M.C.L.A. § 168.523. The existence of a pre-ballot verification requirement in Michigan did not mean that voters who had satisfied all requirements, but not yet shown identification at the polling booth, were not “registrants.” In Colorado, too, the requirement that all voters verify their identification before casting a regular ballot does not mean that those who have not yet done so are not “registrants.” Defendant’s effort to distinguish *Land* is thus unavailing.

Moreover, Colorado’s requirement that “Active-20 day” voters must confirm their address before voting—which is cited repeatedly in Defendant’s brief as a sort of *coup de grace*—is in fact of no use whatsoever to Defendant. *Every* voter in Colorado must confirm their address before voting, whether their 20-day period is still running or not. *See* COLO. REV. STAT. §§ 1-7-109(2); 1-7-110(1); 1-8-114(1). Such an identification

requirement has no bearing on whether the voter is deemed registered. Rather, as in *Land*, it demonstrates that a voter still subject to the 20-Day Rule is entitled to vote on *exactly the same terms* as any other fully registered voter. (See also *infra* at 64.)

(c) *Defendant’s Proposed Definition of “Registrant” Would Circumvent the NVRA’s Core Protections.*

In place of *Land*’s careful analysis and the text of the NVRA itself, Defendant urges the Court to define a “registrant” as “a qualified voter who is *legitimately* on the voting rolls.”<sup>21</sup> (Def. Opp. Br. 79 (emphasis in original).) Defendant’s evident goal is to define the key operative NVRA term at issue in a way that excludes voters who Colorado deems to have “failed” the 20-Day Rule.

Defendant’s proposed definition of “registrant” demonstrates precisely why the term must be defined by federal law and not state law. As stated in *Land*, “[a] federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses.” 546 F.3d at 382. Here, Defendant proposes a definition that is inconsistent with the statutory text and would exclude an entire class of voters whose rights the statute is meant to protect. Defendant’s troubling approach would effectively eviscerate the NVRA’s

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<sup>21</sup> Defendant repeatedly asserts that the NVRA does not define “registrant,” and complains that the *Land* court offers its own interpretation. But Defendant’s proposed definition is completely unmoored by the text and any conceivable statutory purpose. The statute does not exclude registrants who are on the official voter rolls but whom the state believes do not belong there. In contrast, the *Land* definition is fully consistent with the language of Section 8 itself, which implies that a “registrant” is a person whose name is on “the official list of eligible voters.” 42 U.S.C. § 1973gg-6(a)(3).

protective scheme by allowing the State to identify voters it deems to be somehow “illegitimately” registered and summarily removing them from the “official list of eligible voters” 42 U.S.C. § 1973gg-6(a)(3); *cf. Land*, 546 F.3d at 382-83 (“If states could define ‘registrant’ they could circumvent the limitations of the NVRA by simply restricting the definition, and hence the federal protections, to a very limited class.”).

2. ***The 20-Day Rule Cannot Be Justified under the Guise of “Confirmation of Eligibility.”***

Defendant repeatedly attempts to shift the focus by asserting that the NVRA “leaves questions of eligibility—and confirmation of eligibility—entirely to the states,” and that the 20-Day Rule is thus not preempted by the NVRA. (Def. Opp. Br. at 74; *see also id.* at 78-79, 85.) But this analysis assumes a conclusion Defendant cannot hope to support. The 20-Day Rule does not “confirm[] elector eligibility”; it revokes it. Whatever the scope of the NVRA’s preemption of state law, the statute definitively forbids the cancellation of voter registrations except under conditions which are not present here.

States may of course establish certain eligibility criteria and ensure they are met. States also may of course take steps to remove ineligible voters from their rolls and otherwise maintain accurate registration lists. In fact, the NVRA *requires* them to do so. *See* 42 U.S.C. §§ 1973gg-6(a)(4), -6(b)-(d). As part of this mandate, states must attempt to remove registrants who may be ineligible because they do not live at the address listed in the voter rolls. *See id.* §§ 1973gg-6(a)(4)(b), -6(c)-(d). The NVRA thus does not foreclose—in fact, it is entirely consistent with—Colorado’s stated desire to ensure its

rolls are free of individuals who do not meet the state's residency requirements. But *any* removal of voters from a state's active voting rolls must follow the NVRA's mandatory procedures and observe its safeguards. *See* 42 U.S.C. § 1973gg-6(a)(3). For example, if a State believes a registrant does not live at the address of record, the State must follow a specific notice-and-waiting period. The 20-Day Rule obviously does not follow that procedure; rather, it operates to summarily strike a voter from the rolls as soon as it appears their address may be incorrect.

Defendant shows his hand by complaining that under the NVRA, "ineligible registrants must languish for at least four years."<sup>22</sup> (Def. Opp. Br. at 75.) That Defendant finds the NVRA's removal procedures cumbersome does not give Colorado license to disregard them.

The NVRA reflects an understanding of both the potential for error in determining residency and the fundamental importance of avoiding mistakes that would violate the rights of improperly removed voters.<sup>23</sup> As Defendant notes, the NVRA strikes a balance between encouraging voter participation and ensuring accurate voter rolls. (Def. Opp. Br. at 81.) Section 8 effectuates that balance by requiring, but carefully circumscribing, voter list maintenance. Defendant, however, seeks to strike that balance for himself under the guise of confirming eligibility.

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<sup>22</sup> Defendant does not mention that allegedly illegal or fraudulent registrations may be challenged under state law. *See* COLO. REV. STAT. Pt. 1, Art. 9.

<sup>23</sup> The potential for such mistakes in the context of the statute challenged here is demonstrated on pages 66-70, below.

The bright line in this dispute is whether the 20-Day Rule affects “registrants” protected by the NVRA. If it does—and the undisputed facts and law clearly establish as much—then it is irrelevant whether the NVRA preempts state standards and procedures for determining and confirming voter eligibility prior to registration. Any state procedures that removes the “official list of eligible voters” without observing the NVRA’s restrictions, as the 20-Day Rule does, are invalid under the NVRA.

3. ***Defendant’s Invocation of Voter Fraud Does Not Cure the 20-Day Rule’s Violation of Federal Law.***

Defendant also seeks to justify the 20-Day Rule by raising the specter of “voter fraud,” an issue he frequently refers to but never substantiates or fully explains. (*See* Def. Opp. Br. at 64, 75, 79, 81, 85.) Defendant cites a single clause of the NVRA’s legislative history indicating that some states have used disposition notices as a safeguard against fraud. House Rep. at 14 (Ex. J to Def. Br.) The legislative history does not say, however, that states have used or may use the notice as a basis for removing registered voters from the rolls without observing NVRA-mandated procedures.<sup>24</sup>

Moreover, Defendant has presented no facts, law, or any other support for his (undefined) position regarding fraud. No reasonable trier of fact could conclude on this record that fraud is or ever was a problem in Colorado; that the 20-Day Rule was meant to protect, or successfully does protect, against fraud; or that the balance between the

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<sup>24</sup> Nothing in the NVRA prohibits states from using the disposition notice to combat fraud, provided they do so consistently with the remainder of Section 8. For example, a state may use the disposition to initiate Section 8’s notice-and-waiting process for voter removal.

right to vote and fraud prevention is not adequately struck by overall compliance with the NVRA. (See Pl. Opp. Br. at 25-26.) Defendant offers no explanation, for example, why the same need is not met by the requirement that all voters show identification and affirm their address before voting.

Further, even if voter fraud were legitimately at issue, it would not affect the outcome here. States have many tools at their disposal to combat voter fraud. One tool they are expressly forbidden from using, however, is the summary removal of registered voters from the rolls.

**C. Under State Law as Well, the 20-Day Rule Violates the Rights of Fully Registered Voters.**

**1. Defendant's Interpretation of the 20-Day Rule Is Contrary to the Undisputed Facts and Colorado Law.**

Defendant claims his interpretation of the 20-Day Rule is an interpretation by a state agency entitled to *Chevron*-style deference. (Def. Opp. Br. at 81-82.) Defendant is wrong. The doctrine he invokes calls for deference to “*administrative* interpretations of statutes by agencies charged with their administration and enforcement.” *Tivino Teller House, Inc. v. Fagan*, 928 F.2d 1208, 1218 (Colo. 1996) (emphasis added). No such deference is due to the self-serving views of a state defendant expressed only in legal briefs. See *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 912 (2000) (“[I]t is clear that an interpretation contained in a legal brief, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking, does not warrant *Chevron*-

style deference.”) (internal quotation marks and citation omitted).<sup>25</sup> Defendant cites to no formal rulemaking or administrative opinion that embodies the interpretation he urges here, and is therefore not entitled to administrative deference.

In any event, Defendant’s interpretation of the 20-Day Rule falls apart under scrutiny. He asserts that “Colorado statutes distinguish between ‘applicants’ and ‘registrants’ in precisely the same manner contemplated by the NVRA’s legislative history.” (Def. Opp. Br. at 81.) This contention makes no sense, particularly because the term “registrant” does not appear in the 20-Day Rule at all, and is not defined anywhere in the election code.

Nevertheless, Defendant contends that “under Colorado law, an ‘applicant’ does not become a ‘registrant’ (and thus is not added to the state’s official voting rolls) until the conclusion of the 20-day period.” (Def. Opp. Br. at 81.) In support of this assertion, he cites only to Election Rule 2.17 (adopted after this litigation began). COLO. CODE REG. § 1505-1, Rule 2.17. But that rule does not support Defendant’s assertion. It states only that an applicant is “*deemed* ‘not registered’” when the disposition notice is returned

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<sup>25</sup> If *Chevron*-style deference is warranted at all, it is to the statutory interpretation expressed in administrative rules promulgated by Defendant. For example, Defendant recently adopted Rule 2.20, which directly bears on the operation of the 20-Day Rule. That rule states that “Active” voters may cast regular or mail-in ballots, while “Cancelled” voters may not. *See* COLO. CODE REG. 1505-1, Rule 2.20. Each designation applies to all voters with the status, with no distinction for those with a “status reason” of “20 day rule.” Voters made “Active” during their 20-day period have “no conditions or restrictions on [their] eligibility” and may vote, while voters placed in “Cancelled” status by operation of the 20-Day Rule have had their registrations “cancelled or revoked” and may not cast a regular or mail-in ballot. COLO. CODE REG. § 1505-1, Rule 2.20.1(a)-(b); *id.* Rule 20.20.2(a)-(b).

as undeliverable. *Id.* (emphasis added) It also says nothing at all about a voter’s registration status before the notice is returned—the period when the voter is designated “Active-20 day” and may vote. That the state uses labels such as “not registered” cannot change the fact that the voter was registered but the registration was subsequently revoked. *Cf. Land*, 546 F.3d at 383 (noting that determination of when a voter becomes a “registrant” cannot depend on “what label state law may attach to that individual.”).

Defendant’s effort to camouflage Colorado’s cancellation of voters’ registrations by describing these voters as having been “deemed ‘not registered’” is unsuccessful. *Cf. Land*, 546 F.3d at 384 (noting that “it does not matter whom Michigan decides to call a ‘registrant’; what matters is, functionally speaking, when an individual becomes able to cast a ballot.”). As a functional matter as well as a legal one, a voter is added to the State’s active voter rolls when the 20-day period *starts* running—that is, the point at which the voter’s application has been deemed accurate and complete, he or she is sent a notice of successful registration, and his or her registration record in SCORE has been given a status of “Active” and a status reason of “20-day period,” which entitles the voter to cast a regular ballot. (*See supra*, at 49-51.) Once a voter has crossed that threshold, “there are no conditions or restrictions on [the] voter’s eligibility,” COLO. CODE REG. § 1505-1, Rule 2.20.1(a), and the voter’s name “will appear on the poll book [and he or she] will be sent a mail ballot in a mail ballot election.” *Id.* Rule 2.20.2(a).

In addition, Colorado law forecloses Defendant’s contention that voters remain unregistered “applicants” during their 20-day periods. Individuals in “Active-20 day”

status may cast a regular ballot on the same terms as other registered voters.<sup>26</sup> Under Colorado law, however, only fully and properly registered voters may cast a regular ballot. COLO. REV. STAT. § 1-2-201(1); *see also id.* §1-7-103(1). By definition, then, Colorado law treats “Active – 20 day voters” as fully registered and able to cast a ballot—that is, as “registrants.” *See Land*, 543 F.3d at 383, 386 (*See also* Pl. Br. at 42-43; Pl. Opp. Br. at 26-27.)

Under Defendant’s approach, unregistered applicants would be able to cast a regular ballot and have that ballot counted, even if their disposition notice was later returned as undeliverable and the voter deemed ineligible. (*See* Pl. Stmt. Facts ¶ 18; Pl. Reply Facts ¶ 18.)

Similarly, the NVRA requires states to notify all voters of the disposition of their applications. 42 U.S.C. § 1973gg-6(a)(2). It is undisputed that the disposition notice sent pursuant to § 1-2-509(2) is meant to fulfill that requirement. (*See* Pl. Stmt. Facts ¶¶ 9, 11; Pl. Reply Facts ¶¶ 9, 11.) If a voter’s registration is finalized only after the notice is sent, and if no other notice is sent upon the purported finalization of the registration, then Colorado would be violating the NVRA by failing to send the mandatory disposition notice. (*See* Pl. Opp. Br. at 28-29.)

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<sup>26</sup> Defendant’s argument that “Active – 20 day” voters become registered only upon confirming their address at the polling place is addressed immediately below.

2. ***The Pre-Voting Address Confirmation Requirement Does Not Aid Defendant's Position.***

In light of the undisputed ability of “Active-20 day” voters to cast regular ballots, Defendant is left to assert again that such voters become “registrants” under state law and are allowed to cast a ballot only when they confirm their address at the polling place or otherwise. (*See* Def. Opp.Br. at 75, 80, 82-83.) But this is a false hope for Defendant. As noted, *all* voters in Colorado must confirm their address before voting. (Pl. Stmt. Facts ¶ 21; Pl. Reply Facts ¶ 21; COLO. REV. STAT. §§ 1-7-109(2); 1-7-110(1); 1-8-114(1)). “Active” voters whose 20-day period are still running are thus on precisely the same footing as all other registered voters.

Moreover, Defendant’s position would lead to absurd results. In essence, Defendant’s contention is that address confirmation at the polling place perfects the registration of “Active-20 day” voters—but not other voters. If that were true, one of two results would follow: either the address confirmation requirement would be superfluous for previously registered voters, or the requirement would perform different functions for different categories of voters. Both results are implausible at best.

Defendant’s position that a voter’s registration remains incomplete while the address is verified by virtue of the 20-day period also conflicts with the notice requirements of Colorado law and the NVRA. Defendant asserts that the address confirmation requirement functions as one of several ways of confirming the accuracy of a voter’s registration application. (*See* Def. Opp. Br. at 83.) Section 1-2-509(2), however, requires county clerks to “verify that the application is complete and accurate”

*before* they send the disposition notice informing the voter of “the registration.” If the disposition notice is sent before the voter’s address has been confirmed and the registration finalized, the notice requirement of § 1-2-509(2) has not been met. As noted, moreover, Defendant’s interpretation, if correct, would place Colorado in violation of the NVRA’s notice requirement. (*See supra* at 58).

Defendant also tries to portray the address confirmation requirement as applied to “Active – 20 day” voters as an “exception” to the 20-Day Rule. (*See* Def. Opp. Br. at 80-81, 83.) But this is pure fiction. As discussed in Plaintiffs’ Response Brief, there is no such exception: Defendants have not pointed to any codification or expression of the exception other than in his own briefs and discovery responses, and the statutes and rules make no mention of it. The purported “exception” also makes no logical or legal sense. (Pl. Opp. Br. at 30-32.)<sup>27</sup>

Finally, Defendant looks in vain to the legislative history of the 20-Day Rule for indications that Colorado voters are not “registrants” until their address is confirmed. (Def. Opp. Br. at 83; *see also* Def. Br. at 50.) As detailed in Plaintiffs’ Response Brief, Defendant’s misreads the legislative history, which does not support his position. (Pl. Opp. Br. at 29-30.) In addition, the statute as amended discredits his overall argument, specifying that after a registration is deemed accurate and complete, the clerk “shall

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<sup>27</sup> If it existed, the “exception” would apply not just to the 20-Day Rule but to Colorado’s the basic law of voter eligibility, which unequivocally (and unsurprisingly) provides that “no 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 election code. Colo. Rev. Stat. § 1-2-201(1). Defendants have not alleged or cited any exception either to this provision or to § 1-2-509.

notify the applicant of *the registration*.”<sup>28</sup> COLO. REV. STAT. 1-2-509(2) (emphasis added).

3. ***The 20-Day Rule Results in the Erroneous Cancellations of Voters Who Are Eligible and Fully Registered Even under Defendant’s Reasoning.***

The factual record demonstrates that the 20-Day Rule leads to the cancellation of registrations belonging to voters who have not technically “failed” the 20-Day Rule and are therefore eligible and registered to vote under Defendant’s own standards. Such removals provide an independent basis for enjoining the 20-Day Rule.

Erroneous cancellations are both a publicly recognized risk and a documented reality. For example, Defendant very recently took “corrective action” to place in “Active” status four voters identified by Plaintiffs as either members of Plaintiff organizations or individuals registered to vote by Plaintiffs’ registration drives. (*See* Def. Add’l Facts ¶¶ 3(d), 6(c), 10(c), 12(e).) A fifth voter was placed in “Active” status in October 2009. (*Id.* ¶ 1(c).) All five voters had been erroneously cancelled when their disposition notices were returned outside the 20-day window. Thus, two out of the three SEIU members identified by Plaintiffs as having been purged under the 20-Day Rule were thus erroneously stricken from the rolls, as were three out of nine individuals identified by Plaintiffs as having registered through Plaintiffs’ voter registration drives.

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<sup>28</sup> If the 1995 amendment to § 1-2-509 were meant to clarify the point at which “‘applicants’ ... become ‘registrants,’” as Defendant claims (Def. Opp. Br. at 83), it surely would have altered the quoted language.

The voters had been in “Cancelled” status for more than a year, and several of them were cancelled at the time of the 2008 general election.

In recognition of the possibility, even the likelihood, of error, Defendant promulgated, on an emergency basis, a new rule that creates a post-cancellation remedy for some cancelled voters. *See* COLO. CODE REG. § 1505-1, Rule 2.17 (effective Apr. 30, 2009). In the statements accompanying the issuance of the rule, Defendant found that it was necessary “in order to protect applicants from being possibly disenfranchised due to postal or other error,” and “to help ensure that eligible electors who apply for voter registration are not precluded from becoming registered because of postal or other error.” (Pl. Stmt. Facts ¶ 28; Pl. Reply Facts ¶ 28.)<sup>29</sup> Other evidence in the record further highlights the possibility of erroneous cancellations due to postal error. (*See* Pl. Stmt. Facts ¶ 29; Pl. Reply Facts ¶ 29.)

Thus, even if Defendant is correct (which he is not) that voters who “fail” the 20-Day Rule were never registered and were therefore never removed from the rolls, the rule still leads to violations of the NVRA under Defendant’s watch.

Moreover, these errors underscore why Defendant’s interpretation of the NVRA is wrong. The NVRA strikes a careful balance between requiring states to maintain accurate and current voter rolls and ensuring they do so in a way that minimizes error and abuse. That balance is achieved in part by Section 8’s forceful prohibition against

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<sup>29</sup> Defendant purports to dispute that these clear statements recognized a risk of disenfranchisement. (Def. Opp. Facts ¶ 28.) The text of the statements speak for themselves—and indisputably recognize the risk of both erroneous cancellation and disenfranchisement. (Pl. Reply Facts ¶ 28.)

removing registrants from the voter rolls except under conditions and procedures specified in the statute. If states are allowed to maneuver around these restrictions by defining “registrant” to exclude voters affected by a particular rule, the result will be not only the purposeful removal of voters pursuant to the rule (but in violation of the NVRA), but the risk—and in Colorado, the reality—of erroneous removal of voters.

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In sum, although Defendant tries to portray the 20-Day Rule as hand-in-glove with the purported scope of the NVRA’s preemption of state law, his reading of both statutes is inaccurate; his framework for analysis assumes an untenable conclusion and misses the point; and his effort to avoid dealing with the relevant facts is unpersuasive. Unless the 20-Day rule is permanently enjoined, it will continue to deprive voters of their rights under the NVRA to be protected against summary removal from the registration rolls.

### **III. Plaintiffs Have Standing to Seek Injunctive Relief Preventing the Enforcement of the 20-Day Rule.**

Plaintiffs have put forth sufficient facts, admitted by Defendant, to establish standing to challenge Defendant’s removal of voters from Colorado’s voter registration database on two independent grounds. First, evidence in the record establishes that Defendant’s acts have directly caused harm to Plaintiffs themselves giving them standing in their own right. Second, undisputed facts demonstrate that Defendant’s actions have harmed plaintiffs’ members by violating their rights under the NVRA and by burdening their right to vote, giving plaintiffs associational standing.

**A. Plaintiffs Have Standing as Organizations to Seek Relief on Their Own Behalf.**

An organization has standing to sue on its own behalf when the organization “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); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009), *cert. denied*, 174 L. Ed. 2d 271 (June 8, 2009) (Voting rights organization had standing where it was “forc[ed] . . . to divert resources to counteract [the defendant’s] illegal acts.”) (internal citations and quotation marks omitted). (*See* Pl. Br. at 55; Pl. Opp. Br. at 35-36.)

**1. *The Harm to the Voter Registration Efforts of SEIU and Mi Familia Vota Constitutes an Independent Basis for Organizational Standing.***

Defendant’s cancellation of the registration records of voters who registered through Mi Familia Vota’s and SEIU’s voter registration drives has harmed Mi Familia Vota and SEIU, giving them standing to sue. As detailed in Plaintiffs’ earlier briefs, an organization has standing to sue on its own behalf when a defendant’s conduct makes it more difficult for the organization to fulfill its goals. *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 264-65 (1991) . (*See* Pl. Br. at 52-53; Pl. Opp. Br. at 43.) Of particular relevance here, an organization conducting voter registration has a protected right under the NVRA to have voters whose registrations its submits be properly registered, and a state’s violation of that right confers standing on the organization to bring suit on its own behalf. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353-54 (11th Cir. 2005).

The following facts are undisputed and establish standing for Plaintiffs SEIU and Mi Familia Vota: Both SEIU and Mi Familia Vota operated registration drives before the 2008 election, and both intend to do so in 2010 and afterwards. (Pl. Stmt. Facts ¶¶ 152-56; 146-47, 149; Def. Opp. Facts ¶¶ 152-56; 146-47, 149; Pl. Reply Facts ¶¶ 152-56; 146-47, 149.)<sup>30</sup> Both organizations submitted applications for voters who registration records were cancelled by operation of the 20-Day Rule.<sup>31</sup> (Pl. Stmt. Facts ¶¶ 147-48; 157-58; Def. Add'l Facts ¶¶ 1-4, 5-9.)

These undisputed facts alone are sufficient to show that Defendant's conduct has burdened Mi Familia Vota's and SEIU's voter registration efforts and made those efforts less effective, and that harm to future voter registration efforts is imminent. *See Wesley*, 408 F.3d at 1353-54.

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<sup>30</sup> For ease of reference, further references to paragraphs in Plaintiffs' Statement of Undisputed Material Facts should be read to incorporate references to the corresponding paragraphs of Defendant's Response to Plaintiffs Statement of Undisputed Facts ("Def. Opp. Facts") and Plaintiffs' Reply Concerning Undisputed Material Facts ("Pl. Reply Facts"), unless otherwise noted.

<sup>31</sup> It is Plaintiffs' position that these voters were registered and then cancelled by operation of the 20-Day Rule. Defendant purports to dispute that these voters were in fact "registered" at the time their SCORE registration records were placed into "Cancelled" status. That issue, however, relates to the merits of Plaintiffs' claims. For purposes of the injury-in-fact analysis, the court must assume Plaintiffs will prevail on the merits of the 20-Day claim. *See Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008); *see also ACLU of New Mexico v. Santillane*, 546 F.3d 1313, 1319 (10thCir. 2008). (In any event, as explained above, Defendant has failed to create any genuine dispute, factual or otherwise, as to whether voters affected by the 20-Day Rule are registered for purposes of the NVRA.)

2. ***Plaintiffs Diverted Resources into Counteract Defendant's Practices at the Expense of Other Organizational Goals.***

In their earlier briefs, Plaintiffs set forth ample facts to demonstrate that they were forced to divert resources from other projects that were central to their organizational goals in order to counteract the 20-Day Rule, and that if the Rule is not enjoined, Plaintiffs will continue to divert resources to counteracting it. (Pl. Stmt. Facts ¶¶ 63-163 Pl. Br. at 55-60; Pl. Opp. Br. at 36-43.) Defendant's response is insufficient to defeat Plaintiffs' showing. Far from raising a genuine dispute as to the material facts, Defendant has conceded facts that conclusively establish Plaintiffs' standing to bring suit on their own behalf.

(a) *It Is Undisputed That SEIU and Common Cause Diverted Resources Away from Other Goals and Activities.*<sup>32</sup>

Defendant has admitted the following facts: Both SEIU and Common Cause are devoted to fostering political participation, ensuring fair elections, and protecting voters' rights. (Pl. Stmt. Facts ¶¶ 68-69, 82.) In the lead-up to the 2008 general election, Common Cause and SEIU intended to devote resources, including the time of SEIU Law Fellows Laurel Webb and Miles Granderson, to various election-related projects. These included assessing the SCORE system; addressing the shortage of polling sites and voting

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<sup>32</sup> Although all three Plaintiffs more than satisfy the requirements for organizational or associational standing, the Court need only conclude that a single plaintiff has standing in order for the case to proceed. *See, e.g., State of Utah v. Babbitt*, 137 F.3d 1193, 1216 n.36 (10th Cir. 1998) (holding that where one of three organizational plaintiffs had standing, the Court need not consider standing as to the other two); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (“Only injunctive relief is sought, and for that only one plaintiff with standing is required.”).

booths in parts of Colorado; creating mobile poll monitoring teams to address issues at specific sites; and addressing the significant confusion concerning how and where to drop off mail-in ballots. (*Id.* ¶¶ 83-84, 89.) Through its relationship with the Just Vote Colorado coalition, Common Cause also planned to operate a Voter Protection Hotline and an Election Protection program. (*Id.* ¶¶ 90-93.)

On October 9, 2008, the *New York Times* published an article about cancellation practices in several states. (Pl. Stmt. Facts ¶ 97; Pl. Reply Facts ¶ 97.) That same day, Defendant issued a news release which, while disputing the numbers of cancelled voters reported in the *Times*, admitted voters' registrations had been cancelled and detailed the categories of those cancellations, including 1,136 who in the category "Failed 20-day period." (Pl. Stmt. Facts ¶ 98; Pl. Reply Facts ¶ 98.) Additional news reports followed. (Pl. Stmt. Facts ¶ 97.) Between October 9, 2008, when Defendant's cancellation practices were first publicized, and Election Day 2008, Common Cause received more calls at its offices and on the Voter Protection Hotline than it was prepared to handle.<sup>33</sup> (*Id.* ¶¶ 109, 110, 118.) Ms. Webb, Mr. Granderson and Common Cause staff and volunteers responded to calls to Common Cause's offices and to the Voter Protection Hotline from voters whose registration records had been or may have been cancelled

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<sup>33</sup> Defendant has disputed the statement that the number of calls was "large," implying that the number was in fact small in comparison to the call volume in prior election years. As set forth in Plaintiffs' Reply Concerning Undisputed Facts, Defendant's argument misconstrues the facts and does not raise a genuine dispute. (*See, e.g.*, Def. Opp. Facts ¶¶ 109-10; Pl. Reply Facts ¶¶ 109-10.) More importantly, Defendant *concedes* the facts summarized in this section of the brief. (Def. Opp. Facts ¶¶ 109-112, 117-18.)

pursuant to Defendant’s cancellation practices, including the 20-Day Rule. (*Id.* ¶¶ 111-12, 117.) Common Cause’s offices were “flooded” with calls (*Id.* ¶ 109.), and “the phone was literally ringing off the hook . . . with calls pertaining to people who had been cancelled or were concerned that they had been cancelled.” (*Id.*) These calls took more time than calls about other issues. (*Id.* ¶ 112.)

Ms. Webb of SEIU spent approximately 20 to 30 hours researching Defendant’s cancellation policies and practices. (Pl. Stmt. Facts ¶ 108.) She also spent approximately 7 to 15 hours responding to calls from voters concerned about their registration status and a total of 18 to 25 hours assisting voters with their registration issues. (*Id.* ¶¶ 113-14.) The time she spent counteracting Defendant’s cancellation practices was unforeseen.<sup>34</sup> (*Id.* ¶ 118.) As a result, she was only able to devote 100 out of the 200 hours she had planned to devote to other election protection activities. (*Id.* ¶ 135.)

In addition, Common Cause and SEIU, with little notice, were required to supplement training materials with information about Defendant’s cancellation activities,

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<sup>34</sup> Defendant repeatedly implies that Plaintiffs should have anticipated the high volume of calls based on call volume in prior years. (*See, e.g.*, Def. Opp. Facts ¶¶ 109-10.) Defendant declines to explain the relevance of this suggestion, because it is not relevant. It is also incorrect. First, Defendant misconstrues the evidence; there is no proof that voter hotlines received more calls in 2004 or 2006 than in 2008. (*See* Pl. Reply Facts ¶ 110.) Second, there is no dispute that the volume of calls increased after Defendant’s conduct came to light. Finally, even if Plaintiffs had anticipated a greater call volume based on earlier patterns, the actual volume still would have increased when the purges became known to the public. The implicit suggestion that Plaintiffs could have avoided diverting resources from other projects had they had more resources in the first place is counterfactual and counterintuitive. In any event, there is no dispute that in order to handle the volume of calls related to voter removals, Plaintiffs were required to engage staff and volunteers who would otherwise have worked on different organizational goals and activities.

and to train volunteers and staff on how to address the voter cancellations and present the issues to the public. (Pl. Stmt. Facts ¶¶ 120-25.)

Common Cause also had to divert a staff person away from a media and democracy project to provide full time support for the Just Vote Colorado program to cope with Defendant's illegal cancellation practices. (Pl. Reply Facts ¶ 130.)

Having expended these resources to counteract Defendant's practices, Plaintiffs could not use them for their other activities, as planned. (Pl. Stmt. Facts ¶ 128.) The undisputed facts regarding the diversion of resources from other projects and goals are detailed in Plaintiffs' earlier briefs; those that Defendant has conceded are summarized here. (*See* Pl. Br. at 56-60; Pl. Opp. Br. at 37-39.) For example, Common Cause diverted resources away from addressing the operation of SCORE prior to the election (Pl. Stmt. Facts ¶ 129); conducting planned media and democracy work (*id.* ¶ 130); working with county clerks to address the shortage of polling places and monitoring teams (*id.* ¶¶ 132-33); and addressing confusion over mail-in ballot procedures. (*Id.* ¶ 134).<sup>35</sup>

Likewise, Ms. Webb of SEIU testified that the "main" tasks she had intended to accomplish fell to the "back burner" because of the time she spent fielding calls related to Defendant's cancellation policies. (Pl. Ex. 38, Webb Dep. at 54:22-56:13; Pl. Stmt. Facts ¶¶ 132-135.) She also testified that the issue "came to dominate" her work in Colorado,

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<sup>35</sup> On most other relevant facts, Defendant made assertions and purported objections but did not raise any genuine issue. This summary focuses on facts that Defendant explicitly admitted or on facts as to which defendant disputes only the legal import of the facts or Plaintiffs' choice of words but does not dispute the facts themselves.

and that as a result, she did “significant[ly] . . . less [work] than [she] had anticipated” on the mail ballot issue (Pl. Ex. 38, Webb Dep. at 19:4-8; Pl. Stmt. Facts ¶ 134); that she spent “virtually no time” addressing the sufficiency of polling site (Pl. Ex. 38, Webb Dep. at 19:2-4; Pl. Stmt. Facts ¶ 132); that SEIU’s work on mobile poll monitoring “wound up being a lot less focused and effective” (Pl. Ex. 38, Webb Dep. at 55:25-56:3; Pl. Stmt. Facts ¶ 133); and that the time spent addressing volunteers’ questions regarding cancellations “detracted from [their] ability to really focus [training] on the main things we wanted to be prepared for on election day.” (*Id.* 56:20-25; Pl. Stmt. Facts ¶¶ 131-135).

(b) *It Is Undisputed That Mi Familia Vota Diverted Resources Away from Other Priorities.*

Defendant has admitted the following facts: Mi Familia Vota planned to devote the majority of its resources in the weeks preceding the 2008 election to a voter outreach effort to contact new, first-time, or low-propensity voters and to collect and deliver mail ballots for voters unable to do so themselves. (Pl. Stmt. Facts ¶¶ 66-67.)

Immediately after the media reports and Defendant’s response appeared, Mi Familia Vota began receiving multiple calls every day from voters concerned that they may have been affected by the Defendant’s cancellation practices. (Pl. Stmt. Facts ¶¶ 139-40.) The volume of calls went from approximately one call every 15 to 20 minutes before October 9, to one call every 2 to 3 minutes “all day,” and the hotline was staffed until midnight. (*Id.* ¶¶ 137-38.) Mi Familia Vota was required to modify the training it provided to new call center volunteers to prepare them to address the many calls related

to cancellation practices, adding 10 to 15 minutes to each training session. (*Id.* ¶ 143.) The organization was also required to re-train existing staff and volunteers on the issue. (*Id.*) Calls from voters concerned about Defendant’s cancellation practices took more time—approximately 30 minutes per call—than calls on other issues. (*Id.* ¶ 144.)

As a result, Mi Familia Vota diverted 4 to 5 volunteers to responding to these calls. (*Id.* ¶ 145.) Mi Familia had originally planned to devote these volunteers to other duties, including voter outreach and get-out-the-vote efforts. (*Id.*)

(c) *It Is Undisputed That All Three Plaintiffs’ Face an Imminent Threat of Additional Injury.*

The undisputed facts establish that all three plaintiffs will continue to take steps to address the 20-Day Rule in the future, and in doing so will expend resources that would otherwise be devoted to other organizational priorities. (Pl. Add’l Facts ¶¶ 173-84; Pl. Opp. Br. at 40-41.)

(d) *These Diversions of Resources Create Standing for Plaintiffs.*

As detailed in Plaintiffs’ opening and opposition briefs, these undisputed facts are sufficient to create standing. (Pl. Br. at 55, 60; Pl. Opp. Br. 35-36, 41.) Organizational plaintiffs were held to have standing in other recent voter protection cases presented closely similar facts and resulted in rulings that the. In *Florida State Conference of the NAACP v. Browning*, for example, the Eleventh Circuit held that plaintiff organizations had standing to challenge a state voter registration statute as a violation of, *inter alia*, Section 8 of the NVRA. 522 F.3d 1153, 1165-66 (11th Cir. 2008). The court found that

the plaintiffs had demonstrated a concrete injury where they “reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and voters” with respect to the challenged statute, and to “resolving the problem of voters left off the registration rolls on election day.” *Id.* at 1165. The court noted that these actions would divert resources from the organizations’ planned “registration drives and election-day education and monitoring.” *Id.* at 1166; *see also Common Cause/Georgia*, 554 F.3d at 1351 (holding that organization had standing where it diverted resources from regular activities to assist voters in complying with state voter identification requirement).

3. ***Defendant’s Counterarguments All Fail.***

Having failed to raise a genuine dispute as to any of the above facts, Defendant rests his opposition to Plaintiffs’ motion on arguments that are unsupported by either facts or case law. None of these arguments have merit.

(a) *The Volume of Calls Was Prompted By Publicity Concerning the Purges.*

As to Mi Familia Vota, Defendant suggests (without any factual basis) that the increase in call volume was attributable to the proximity of the election, rather than public awareness of Defendant’s cancellation practices. (Def. Opp. Facts ¶ 141.) Defendant admits, however, that the volume of calls to Mi Familia Vota’s hotline increased immediately after the purges were publicized (Pl. Stmt. Facts ¶¶ 138-39.) Defendant also admits that the hotline received “multiple calls” per day regarding the purges, each of which took more time to respond to than calls on other issues. (*Id.* ¶¶ 139-40, 144.) Simply raising the possibility that the increase in volume was attributable

to some other factor does not create a genuine dispute as to these facts. *White*, 45 F.3d at 360 (bald allegations without “significant probative evidence” to support them are insufficient to create a genuine issue of fact.) In any event, there is no dispute that Mi Familia Vota fielded multiple time-consuming calls per day from voters concerned about or affected by the purges.

(b) *Plaintiffs Are Not Required to “Quantify” Their Injuries.*

Defendant also asserts that Mi Familia Vota’s failure to “quantify” their injury-in-fact renders the injury insufficiently “concrete and particularized.” (Def. Br. at 69; *see also, e.g.*, Def. Opp. Facts ¶¶ 133, 143.) He supports his position only by citing a case that does not address this issue. (*Id.*) Common sense and established law point in the opposite direction: an injury need not be “quantified” to create standing. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d* 128 S. Ct. 1610, 1615 n.7 (2008) (“The fact that the added cost [of assisting voters to get to the polls] has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.”).

(c) *Undisputed Facts Demonstrate the Plaintiffs’ Injuries Were Sufficiently Concrete and Particularized.*

Defendant appears to argue that because Common Cause planned to provide a hotline irrespective of the purges, the added volume caused by the purges “does not constitute a concrete and particularized injury.” (Def. Br. at 71.) Yet Defendant has conceded facts that make the concrete and particularized nature of the injury to all Plaintiffs abundantly clear. (*See supra* at 17-31.) It is undisputed that in order to address

the Defendant's cancellation of voters, Plaintiffs devoted a greater level of resources than they had planned to training volunteers, running the Voter Protection Hotline and Election Protection project, researching Colorado's cancellation practices, preparing for testimony, discussing the issue at meetings with coalition partners, and other activities, and that, because Plaintiffs resources are not unlimited, they were forced to diverted these resources away from other projects they had planned to carry out and hoped to carry out. The fact that the planned expenditures and the actual expenditures—that is, those related to dealing with Defendant's conduct—were both related to the election does not mean they were fungible from the perspective of Plaintiffs' organizational goals. To the contrary, the evidence is clear that the expenditures of resources responding to Defendant's cancellation practices came at the direct expense of Plaintiffs' goals for the 2008 election season. This diversion of resources into counteracting Defendant's unlawful conduct constitutes injury-in-fact. *See Common Cause/Georgia*, 554 F.3d at 1351

(d) *Defendant Has Not Raised a Genuine Issue Regarding Whether Press Reports Led to Hotline Calls Specifically Relating to the 20-Day Rule.*

Defendant next argues that because the *New York Times* article did not discuss the 20-Day Rule it was unlikely that callers to the hotlines were concerned with the effects of the 20-Day Rule. This argument suffers from several fatal flaws.

First, Defendant's assumption that the *New York Times* article was the sole reason for the public's concern about the purges is incorrect. Most notably, Defendant himself issued a press release the same day as the *Times* article that specifically identified the 20-

Day Rule as the basis for a significant number of cancellations. (*See* Pl. Reply Facts ¶ 98 (identifying more than 1,100 cancellations within the 90-day period prior to the primary and general elections).) Defendant also held a press conference discussing his release, and reports of that conference made reference to the 20-Day Rule.<sup>36</sup> (*See* Pl. Reply Facts ¶ 97.) Thus, Defendant’s suggestion that callers to Plaintiffs’ hotline could not have been concerned with the effect of the 20-Day Rule is simply wrong.

Further, the *Times* article, together with Defendant’s subsequent statements to the press, were not related only to one category of cancellations. Instead, they focused more generally on whether voter registrations were being cancelled improperly. The press coverage also highlighted the large number of cancelled registrations in Colorado in recent years. (*See* Pl. Stmt. Facts ¶¶ 97-98; Pl. Reply Facts ¶¶ 97-98 (noting unexplained number of cancellations in Colorado recent years).) And there is no dispute that a significant portion of the cancellations that were the subject of the *Times* article, as well as the follow-up press in Colorado, were cancellations pursuant to the 20-Day Rule, whether they were identified as such or not.

Defendant asks the Court to assume that callers to Plaintiffs’ hotline who had learned of the cancellations through the press could not have been concerned about the effects of the 20-Day Rule. But this is contrary to the evidence, which demonstrates that callers were generally concerned about the widespread cancellation of voter registrations,

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<sup>36</sup> The *Rocky Mountain News* article mentions that Defendant’s office had reported roughly 1,100 cancellations that were “listed as ‘failed to respond’ meaning they didn’t follow up with county clerks who made efforts to contact the voters to confirm addresses and other information.”

and that one of the publicly identified reasons for those cancellations was the 20-Day Rule. Moreover, Defendant hypothesizes an unrealistic scenario in which a caller is only concerned about one reason—or is even aware of any specific reason—pursuant to which his or her voter registration might have been unlawfully cancelled. In fact, the evidence shows that hotline callers were concerned about the purges, and as a result wanted to confirm their registration status. Voters who called Plaintiffs generally did not know whether their registrations had in fact been cancelled or, if so, the basis for that cancellation. Plaintiffs’ staff therefore spent time assisting voters in verifying and often resolving problems with callers’ registrations, making those calls longer and more resource intensive than others. (Pl. Stmt. Facts ¶ 112.)

In any event, the record reflects that the Voter Protection Hotline did receive calls from voters affected by the 20-Day Rule.<sup>37</sup> (Pl. Reply Facts ¶ 114.)

(e) *Plaintiffs Expenditures of Resources Are Sufficiently Traceable to Defendant’s Conduct.*

Finally, Defendant contends that Plaintiffs are required to provide, but have not provided, “specific evidence” detailing “the diversion of resources that were specifically directed to counteracting” the 20-Day Rule in particular. (Def. Br. at 71.) Defendant cites no authority for this supposed requirement that multiple causes of harm be parsed

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<sup>37</sup> The record indicates that 4 callers to the Voter Protection Hotline been cancelled under the 20-Day Rule (just over one-third of the callers identified as having been purged for a specific reason). (Pl. Reply Facts, ¶ 114; *see also* Pl. Opp. Facts ¶ 35.) Only a fraction of the total number of calls were logged, however, and even among those that were logged, the details Plaintiffs’ staff and volunteers collected from voters often did not permit a determination of the reason a voter was not on the rolls. (*See* Pl. Reply Facts ¶¶ 109-110.)

with particularity, and Plaintiffs have found no such authority. The governing standard is whether the harm suffered by Plaintiffs is “fairly traceable” to Defendant’s conduct.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). Plaintiffs have satisfied that standard.<sup>38</sup>

The undisputed evidence establishes that the harm suffered by Plaintiffs was fairly traceable to Defendant’s conduct. On the day the volume of hotline callers began to increase, Defendant’s press release identified cancellations pursuant to the 20-Day Rule as one category of cancellations. The *Times* article that day reported a large number of cancellations, without differentiating among categories—one of which was voters purged under the 20-Day Rule. The undisputed evidence also establishes that at least four of the logged hotline calls (one third of those that could be identified) were from voters who had been cancelled under the 20-Day Rule. (*See* Pl. Reply Facts ¶ 114; Pl. Opp. Facts ¶ 35.)<sup>39</sup>

That the 20-Day Rule was not the only issue discussed in news reports, or even the largest source of cancellations, does not negate its contributing role. The 20-day issue was indisputably one of issues that led to the higher call volume, and thus to the diversion

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<sup>38</sup> *Cf. Khodara v. Blakey*, 376 F.3d 187, 194-95 (3d Cir. 2004) (Alito, J.) (recognizing that the causation prong of standing is satisfied if a suit is directed at one source of harm, even if there are other sources).

<sup>39</sup> Given that in 2008 there were a particularly high number of new registrants, it is reasonable to infer that many of the calls were from new registrants concerned about their registration status. If the percentage of overall calls tracked the percentage of calls specifically identified - a reasonable inference - one third of the calls received from voters whose registrations had been cancelled were about this 20-Day Rule.

of resources away from Plaintiffs' other goals and activities. It also helped cause all plaintiffs to conduct more and longer training sessions, and engage in other activities—all of which diverted resources from previously planned work and other callers.

Plaintiffs are not required to demonstrate that a “significant amount” of the diversion of resources is attributable to the 20-Day Rule, on its own, as Defendant suggests. (Def. Br. at 71.) That plaintiffs suffered harm as a result of the 20-Day Rule (which they did) is sufficient. *See Common Cause/Georgia*, 554 F.3d at 1351 (noting that “a small injury, ‘an identifiable trifle,’ is sufficient to confer standing.”); *Crawford*, 472 F.3d at 951 (holding that plaintiffs need not “estimate” added costs imposed by challenged law, because standing “requires only a minimal showing of injury.”).

4. ***The NVRA’s Private Right of Action Extends to Organizations, and Defendant’s Argument to the Contrary Is Baseless.***

Defendant contends that the NVRA’s private right of action, 42 U.S.C. § 1973gg-9(a), does not extend to organizational plaintiffs, who must therefore demonstrate prudential standing. (See Def. Opp. Br. at 67.) As explained in Plaintiffs’ opposition brief, this argument was directly repudiated by the only court to have considered it; is contrary even to the cases cited by Defendant; and is directly contradicted by the very legislative history on which Defendant relies. (See Pl. Opp. Br. at 45-49.) *See Ass’n. of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 363-65 (5th Cir. 1999) (reviewing authorities and legislative history and holding that “the NVRA’s private-right-of-action provision . . . eliminate[s] prudential limitations on standing [and an organizational

plaintiff] therefore need only satisfy the standing requirements arising under Article III”).

The Court should therefore reject this groundless argument.

**B. Plaintiffs Have Standing to Seek Relief on Behalf of Their Members.**

Defendant opposes Plaintiffs’ motion for summary judgment as to associational standing with a single paragraph that does not even address the basis for motion, cites no evidence or law, and is premised on a misreading of Plaintiffs’ pleadings.

An association has standing to sue on behalf of its members when (i) its members would have standing to sue in their own right; (ii) the interests it seeks to protect are germane to its purposes; and (iii) neither the claim nor the relief requested require the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342-33 (1977). Defendant has never contested the second two steps in this analysis, which Plaintiffs easily meet. (See Pl. Br. at 61, 68-69; Pl. Opp. Br. at 49.)

The undisputed facts establish that members of Common Cause and SEIU have suffered injury-in-fact sufficient to create standing in two ways: first, they were removed from the active voter rolls in violation of the NVRA; and second, their rights to vote was burdened following the cancellation of their registrations. In each instance, injuries inflicted upon members in the past and the imminent threat of future injuries are sufficient to create standing.

There is no dispute that members of both SEIU and Common Cause have had their registrations cancelled by operation of the 20-Day Rule.<sup>40</sup> (See Pl. Ex. 20, Flanagan Supp. Decl. ¶¶ 48-52; Pl. Ex. 33, Murray Decl. ¶¶ 3-5; Pl. Ex. 50, Supe Decl. ¶¶ 3, 6; Pl. Ex. 49, Supe Supp. Decl. ¶¶ 3-6; Pl. Ex. 51, Naifeh Decl. ¶ 8; *see also* Pl. Exs. 56-57, 60-62.) That fact alone is sufficient to confer standing on Plaintiffs’ members, and thus on Plaintiffs, because the removal of members from the active voter rolls in violation of the NVRA constitutes injury-in-fact for standing purposes.<sup>41</sup> *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal interests, the invasion of which creates standing.”) (citation and internal quotation marks omitted). As detailed in Plaintiffs’ Response Brief, the court in *Charles H. Wesley Educ. Found., Inc. v. Cox* held that a voter had standing where she alleged that the state had rejected her voter registration application in violation

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<sup>40</sup> On January 19, 2010—one day before Defendant’s opposition to the instant Motion for Summary Judgment was originally due—Defendant took “corrective action” with respect to two SEIU members (as well as several Mi Familia Vota and SEIU registrants) whose registrations had previously been marked “cancelled.” The cancellations were apparently in error because the voters had not, in fact, failed the 20-Day Rule (their disposition notices were returned after the 20-day period had lapsed). These voters were cancelled because of the 20-Day Rule, even if the rule was improperly applied. The violation of these members’ rights persisted for more than a year, and for some of them, the violation existed at the time of the 2008 general election. (See Def. Add’l Facts ¶¶ 1, 3, 6, 10, 12.)

<sup>41</sup> Defendants concede that Plaintiffs’ members were cancelled (or “not registered”) pursuant to the 20-Day Rule, but contend that such action was not in violation of the NVRA. For purposes of the injury-in-fact analysis, however, the court must assume Plaintiffs will prevail on the merits of the 20-Day claim. *See Gutierrez*, 532 F.3d at 924.

of the NVRA—even though she remained registered to vote and alleged no other injury. 408 F.3d 1349, 1352 (11th Cir. 2005). Defendant has not contested these points.

There is also no dispute that members of both organizations face an imminent threat of future injury, which also constitutes injury-in-fact for standing purposes. *Lujan*, 504 U.S. at 561 (noting that harm to plaintiffs must be “actual or imminent” to satisfy injury-in-fact requirement) (internal quotation marks and citations omitted). Plaintiffs have established, for example, that they have members who intend to register to vote in Colorado in advance of the 2010 election. (*See* Pl. Add’l Facts ¶¶ 188-90.) Members who register or reregister will be subject to the 20-Day Rule and thus face the possibility that they will be removed from the rolls in violation of the NVRA. (*See* Pl. Br. at 64-67; Pl. Opp. Br. at 54-58.)

Members of Plaintiff organizations who register for the upcoming election and who are cancelled (or have in the past been cancelled) pursuant to the 20-Day Rule also face the imminent threat that, as “cancelled” voters, their right to vote will be burdened when they try to cast ballots in the next federal election. (Pl. Br. at 65-67; Pl. Opp. Br. at 54-58; 49-48; Pl. Stmt. Facts ¶¶ 33-52; Def. Opp. Facts ¶¶ 33-52; Pl. Reply Facts 33-52; Pl. Add’l Facts ¶¶ 185-90.) Voters in “Cancelled – Failed 20 day” status who wish to vote on election day must either cast a provisional ballot or vote after going through emergency registration, typically at a different location than their regular polling place. (Pl. Stmt. Facts ¶ 33; Pl. Reply Facts ¶ 52.)

There is no genuine dispute that both options involve more steps and are frequently more time consuming and less convenient than casting a regular ballot. (Pl.

Stmt. Facts ¶¶ 33-52; *supra* at 12-15.) The threat of these burdens on the right to vote is sufficient to create standing. *See Common Cause/Georgia*, 554 F.3d at 1351-52 (“requiring a registered voter either to produce photo identification to vote in person or to cast and absentee or provisional ballot is an injury sufficient for standing.”).

There is also a threat that those forced by virtue of their “Cancelled” status to cast provisional ballots in upcoming elections will not have their votes counted at all. (*See* Pl. Stmt. Facts ¶¶ 53-62; *supra* at 15-16.)

Defendant’s entire argument against Plaintiff SEIU’s and Common Cause’s associational standing is based on his erroneous assertion that the only injury sufficient to create such standing is full “disenfranchisement.”<sup>42</sup> Defendant failed to offer a single case to support this theory. As explained in Plaintiffs earlier briefs, Defendant’s position is contradicted by the weight of standing authority both under the NVRA and other voting rights statutes.<sup>43</sup> (*See* Pl. Br. at 62; Pl. Opp. Br. at 51-54.) *See, e.g., Wesley*, 408 F.3d at 1352 (“the franchise need not be wholly denied to suffer injury” for standing purposes.); *cf. Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding

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<sup>42</sup> As in the opening brief on his own motion, Defendant’s opposition brief again misstates the allegations in the pleadings. Neither the Complaint nor the Amended Complaint limits the alleged injury to “disenfranchisement”; both allege that Plaintiffs’ members are harmed by the cancellation of their records in violation of the NVRA. (*See, e.g.,* Compl. ¶¶ 1, 53, 55; Am. Compl. ¶¶ 22, 76.)

<sup>43</sup> Moreover, given that as to the merits, the mere cancellation of a voter registration record pursuant to the 20-Day Rule violates the NVRA, Defendant’s theory would illogically require a greater showing of injury for standing than on the merits.

that 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.”).

In short, the law is clear that Plaintiffs need only show their members were injured either (i) by a violation of their statutory rights, *see Warth*, 422 U.S. at 500; or (ii) by the imposition of a burden on their right to vote—a burden which may be short of a wholesale denial of the right to vote. *See, e.g., Common Cause/Georgia*, 554 F.3d at 1352; *Wesley*, 408 F.3d at 1352. Plaintiffs have adduced facts, which are not in genuine dispute, demonstrating both types of injury. Accordingly SEIU and Common Cause are entitled to judgment as a matter of law that they have standing to bring suit on behalf of their members.

#### **IV. Conclusion.**

For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted.

Date: February 4, 2010

Respectfully submitted by:

/s/ S. Gale Dick

James E. Johnson  
S. Gale Dick  
Elaina Loizou  
Stuart Naifeh  
Douglas Cuthbertson  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, NY 10022  
Tel: 212-909-6000  
Fax: 212-909-6836  
jejohnsn@debevoise.com  
sgdick@debevoise.com  
ejloizou@debevoise.com  
snaifeh@debevoise.com  
dcuthbertson@debevoise.com

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

Penda D. Hair  
Elizabeth S. Westfall  
Bradley E. Heard  
ADVANCEMENT PROJECT  
1220 L Street, NW, Suite 850  
Washington, DC 20005  
Phone: (202) 728-9557  
Fax: (202) 728-9558  
phair@advancementproject.org  
ewestfall@advancementproject.org  
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

Brian Siebel  
Karen Neuman  
Sarah Brannon  
FAIR ELECTIONS LEGAL NETWORK  
1730 Rhode Island Avenue, NW  
Suite 712  
Washington, D.C. 20036  
bsiebel@fairelectionsnetwork.com  
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 February 4, 2010, I electronically filed the foregoing Plaintiffs' Reply in Support of Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed parties via electronic mail.

Executed on February 4, 2010

/s/ S. Gale Dick

Monica M. Márquez  
Assistant Solicitor General  
Public Officials Unit  
Office of the Attorney General  
1525 Sherman St., 5th Fl.  
Denver, CO 80203  
303-866-5380  
Email: monica.marquez@state.co.us

Maurice G. Knaizer  
Colorado Attorney General's Office-State Services  
1525 Sherman Street  
Denver , CO 80203  
303-866-5280  
Email: maurie.knaizer@state.co.us

Melody Mirbaba  
Matt Grove  
Colorado Attorney General's Office  
1525 Sherman Street  
7th Floor  
Denver , CO 80203  
303-866-5380  
Email: melody.mirbaba@state.co.us