Daniel J. Adelman (011368)
Arizona Center for Law
In the Public Interest
352 E. Camelback Rd., #200
Phoenix, AZ 85012
(602) 258-8850
danny@aclpi.org

Jon Sherman* (DC Bar No. 998271)
Michelle Kanter Cohen* (DC Bar No. 989164)
Cecilia Aguilera* (DC Bar No. 1617884)
Fair Elections Center
1825 K St. NW, Ste. 450
Washington, D.C. 20006
(202) 331-0114
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org

John A. Freedman*
Jeremy Karpatkin*
Erica McCabe*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 942-5000
John.Freedman@arnoldporter.com
Jeremy.Karpatkin@arnoldporter.com
Erica.McCabe@arnoldporter.com

**Admitted pro hac vice*

Steven L. Mayer*
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 471-3100
Steve.Mayer@arnoldporter.com

Leah R. Novak*
Arnold & Porter Kay Scholer LLP
250 W. 55th Street
New York, NY 10019
(212) 836-8000
Leah.Novak@arnoldporter.com

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

v.

Katie Hobbs, et al.,

Defendants.

Case No: 2:22-cv-00509-SRB (Lead)
Case No: 2:22-cv-00519-SRB (Consol.)
Case No: 2:22-cv-01003-SRB (Consol.)
Case No: 2:22-cv-01124-SRB (Consol.)
Case No: 2:22-cv-01369-SRB (Consol.)

PODER LATINX, CHICANOS POR LA CAUSA, AND CHICANOS POR LA CAUSA ACTION FUND'S OPPOSITION TO STATE'S CONSOLIDATED MOTION TO DISMISS

(Honorable Susan R. Bolton)

Living United for Change in Arizona, et al.,
Plaintiffs,
v.
Katie Hobbs,
Defendant,
and
State of Arizona, et al.,
Intervenor-Defendants.

Poder Latinx, et al.,
Plaintiff,
v.
Katie Hobbs, et al.,
Defendants.

United States of America,
Plaintiff,
v.
State of Arizona, et al.,
Defendants.

Democratic National Committee, et al.,
Plaintiffs,
v.
State of Arizona, et al.,
Defendants,
and
Republican National Committee,
Intervenor-Defendant.

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I. PLAINTIFFS HAVE MORE THAN ADEQUATELY ALLEGED THEIR ARTICLE III STANDING.

Plaintiffs Poder Latinx ("PL"), Chicanos Por La Causa ("CPLC") and CPLC Action Fund ("Plaintiffs") have sufficiently alleged injuries in fact to show standing, both as organizations and on behalf of their constituents. At the motion to dismiss stage, "general factual allegations of injury" are sufficient to show standing. *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1209 (9th Cir. 2022).

Organizational standing is established where the plaintiff can demonstrate "(1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular [issue] . . . ." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). Allegations regarding diversion of resources and frustration of purpose suffice to defeat a motion to dismiss. *See, e.g.*, *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1096-97 (D. Ariz. 2011) (finding general allegations of diverted resources sufficient at pleading stage); *Smith*, 358 F.3d at 1104-06 (allegations that organization had to divert resources from "other efforts" to promote awareness of and compliance with laws "enough" to show a "diversion of resources").

Plaintiffs' detailed allegations in the First Amended Complaint ("FAC") [ECF No. 106] more than satisfy this standard. The citizen investigation provisions and DPOR requirements contained in HB 2492 and 2243 will force PL to significantly revamp its voter registration efforts, requiring printing new forms and materials, FAC ¶ 66, hiring new staff to contact voters erroneously identified as non-citizens, *id.* ¶ 67, reregistering voters who were erroneously rejected, *id.* ¶¶ 68 & 69, retraining canvassers and hiring additional staff, *id.* ¶ 70, and completely revising their voter registration program for prospective voters lacking a specific form of DPOR. *Id.* ¶ 73. CPLC will divert funds to reregister voters whose registrations are erroneously and unlawfully rejected, as well as registered voters unlawfully removed from the rolls. *Id*. ¶¶ 78-80. The improper denial and cancellation of registrations facilitated by PL and CPLC will also damage their hard-earned reputations as trusted entities with reliable registration programs in the Latinx community. *Id*. ¶¶ 71, 81.

The State and the Attorney General ("the AG") ("the Movants") incorrectly argue that Plaintiffs are required to enumerate the activities from which resources would be diverted. MTD [ECF No. 127] at 11. But there is no such requirement, and the Movants cite no Ninth Circuit authority to the contrary. Plaintiffs will "change[] their behavior as a result of" HB 2243 and HB 2492 and expend "additional resources that they would not have otherwise expended, and in ways that they would not have expended them." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (finding organizational standing due to deploying additional resources to register voters following change in law). This is more than sufficient to show standing at the pleading stage.

Plaintiffs also adequately allege their representational standing as non-membership organizations because they "serve[] a specialized segment" of the community which is "the primary beneficiar[y]" of their work. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021). Plaintiffs serve the Latinx community and recently naturalized citizens, who are the direct beneficiaries of Plaintiffs' activities. FAC ¶¶ 3, 18-20, 63-65, 66-68, 73, 75 (PL serves eligible Latinx voters, naturalized and limited English proficient applicants, voters who will be erroneously flagged as non-citizens, applicants who have incomplete voter registration forms, and applicants who do not have readily accessible means to fulfill the DPOR requirement), *id.* ¶¶ 78-79, 82 (detailing how CPLC serves Latino voters in Arizona, especially low-propensity Latino voters and recently naturalized U.S. citizens). Indeed, naturalized citizens shape and help implement Plaintiffs' programs. *Id.* ¶¶ 77, 85.

As to traceability and redressability, the FAC names three county recorders as defendants, FAC ¶¶ 24-26, but naming Secretary Hobbs suffices. The Movants argue Hobbs is not a proper defendant because she is not responsible for enforcing these laws. Not so. Hobbs plays a critical role in implementing and enforcing HB 2492 and 2243. HB 2492 creates three new provisions that expand the Secretary's role: Section § 16-143(A) requires Hobbs and the County Recorders to provide the AG a list of registered voters and registration applicants who have not provided DPOC; Section 16-143(D) authorizes the prosecution of voters on this list;

and Section 16-143(C) requires Hobbs to provide the AG access to various records and databases. HB 2243 requires Hobbs to compare the statewide voter registration database to the Arizona DOT database and report any voter's lack of citizenship. A.R.S. § 16-165(F), (G) (eff. Jan. 1, 2023).

Hobbs also plays an essential role in overseeing and managing voter registration and coordinating the state's NVRA responsibilities. A.R.S. § 16-142(A)(1). Hobbs is required to "develop and administer a statewide database of voter registration" and to "provide for maintenance of the database, including provisions regarding removal of ineligible voters that are consistent with [the NVRA] . . . and provisions to ensure that eligible voters are not removed in error." A.R.S. § 16-168(J). Hobbs has admitted her critical role in the voter registration process. Hobbs Answer [ECF No. 125] ¶ 21 (Secretary is "responsible for coordination of state responsibilities under the [NVRA]" and "promulgates binding rules and regulations for voter registration through the Election Procedures Manual (EPM)"). Thus, the Secretary's multiple and overlapping responsibilities for voter registration and enforcing HB 2492 and HB 2243 render this case wholly different from *Jacobson v. Florida Secretary of State*, where Florida law gave the Secretary of State no role in deciding the order of candidates on the ballot. 974 F.3d 1236, 1253 (11th Cir. 2020).

II. PLAINTIFFS' CLAIMS ARE RIPE.

The Movants' assertion that Plaintiffs' claims are unripe fails. A challenge to a state law meets constitutional ripeness requirements where plaintiffs assert an injury that is "definite and concrete, not hypothetical or abstract." *Wolfson v. Brammer,* 616 F.3d 1045, 1058 (9th Cir. 2010); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (ripeness requires "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement"). The "consummation of threatened injury" is not required for ripeness in certain constitutional challenges. *Wolfson,* 616 F.3d at 1058.

Here, enforcement of HB 2492 and HB 2243 is near-certain, since the statute's requirements regarding new registrations and purging of currently registered voters are

mandatory. Where the enforcement of a law is inevitable, a challenge is ripe even if there is a delay before the law comes into effect. *See Reg'l Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974); *see also Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) ("The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds."). The Movants' assertion that ripeness requires a "concrete plan" to violate the law, MTD at 12, is inapt. Plaintiffs are not affirmatively seeking to violate these laws; rather, the application of these arbitrary and discriminatory laws will thwart Plaintiffs' missions and deprive Plaintiffs' constituents of their right to vote, even as they take steps to conform to the requirements.

Plaintiffs' claims are also prudentially ripe. Prudential ripeness turns on (1) "the fitness of the issues for judicial decision"; and (2) "the hardship to the parties of withholding court consideration." *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1123 (9th Cir. 2022). A question is fit for decision when it can be decided without considering "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002). The plain text of the statute and Plaintiffs' factual allegations regarding the mechanics of voter registration and the flaws in the identified databases, *see, e.g.*, FAC ¶¶ 50-55, make the issues here ripe for adjudication even though the laws do not take effect until January 1, 2023. Once HB 2492 and 2243 take effect, registration applicants and registered voters, particularly naturalized citizens, will inevitably be subject to unwarranted extra scrutiny, arbitrarily and erroneously flagged as non-citizens, and/or faced with registration rejection or cancellation. Thus, Plaintiffs' claims raise issues that "are primarily legal." *Twitter*, 26 F.4th at 1123. Any further factual development can be addressed through the normal mechanisms of discovery. Consequently, Plaintiffs' allegations that HB 2492 and HB 2243 create error-prone systems which will reject eligible voters' registrations and purge eligible voters in an "arbitrary and disparate" manner in violation of *Bush v. Gore*, 531 U.S. 98, 104 (2000) and Section 8(b) of the NVRA, are ripe for review.

Moreover, HB 2492 and HB 2243 will imminently cause concrete harm to Plaintiffs, by forcing them to divert money, resources, and staff time to hire new employees, and train volunteers and canvassers on how to educate voters under the new laws. FAC ¶¶ 63-85. If adjudication is delayed, the voters Plaintiffs serve will suffer irreparable harm through arbitrary and discriminatory treatment. Plaintiffs are not required to wait until these voters' registrations are denied or revoked for Plaintiffs' claims to ripen.

III. PLAINTIFFS HAVE STATED CLAIMS UNDER THE NATIONAL VOTER REGISTRATION ACT.

Plaintiffs incorporate Sections II.A-B. of DNC/ADP's opposition to the motion to dismiss all NVRA claims. Movants' only specific argument against Plaintiffs' Section 8(b) claim—that neither DPOC nor "removal from the rolls of voters determined not [to] be citizens" constitute discrimination—fails because Plaintiffs do not challenge the underlying DPOC requirement, A.R.S. § 16-166(F), nor that a *properly confirmed* noncitizen can be legally removed from the voter rolls. Plaintiffs instead challenge the arbitrary processes HB 2492 added, which, as Plaintiffs have alleged in detail, will cause the non-uniform and discriminatory treatment of naturalized voters and of voters on the basis of race, ethnicity, and/or national origin. FAC ¶¶ 33-57, 86-98. Plaintiffs have also alleged that naturalized voter registration applicants and registered voters will be subjected to non-uniform and discriminatory treatment because of the vague standards and error-prone database-matching processes of HB 2492, both within and across counties. *Id.*

IV. PLAINTIFFS HAVE STATED A CLAIM UNDER THE CIVIL RIGHTS ACT OF 1964 ("CRA").

Plaintiffs state a claim under 52 U.S.C. § 10101(a)(2)(A) because A.R.S. § 16-165(I) (eff. Jan. 1, 2023) (enacted as A.R.S. § 16-165(H) in HB 2243) directs county recorders to subject voters to different standards, practices, and procedures. As Defendant Hobbs has acknowledged, HB 2243 authorizes and invites county recorders to act on their subjective biases to divide registered voters into two classes—those they suspect lack citizenship and those they do not—and then subject the former to different "standards, practices, or

procedures," namely having their registration checked against the outdated and error-prone SAVE system. *See* Hobbs Answer ¶ 103 (admitting HB 2243 applies different "standards, practices or procedures" when county recorder has "reason to believe" registered voter is not a U.S. citizen). Such arbitrary sorting and differential treatment violate the CRA in the absence of *specified documentary evidence of non-citizenship*. By contrast to the wildly open-ended "reason to believe" language in Section 16-165(I), DPOC itself applies uniformly to *all* registration applicants, A.R.S. § 16-166(F), not to a subset suspected of non-citizenship.

Congress enacted Section 10101(a)(2)(A) to prohibit election officials from imposing different registration standards or procedures in their registration laws or practices. 110 CONG. REC. 1,519, 1,693-95, 6,728-29 (1964); *see also* 110 CONG. REC. 6,735 (1964) ("uniform voter qualification standards" were necessary to guarantee nondiscriminatory registration). In the 1960s, many courts invoked this provision to bar registrars from discriminatorily rejecting Black registrants' applications. *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala. 1964); *United States v. Wilder*, 222 F. Supp. 749 (W.D. La. 1963); *United States v. McElveen*, 180 F. Supp. 10 (E.D. La. 1960). Requiring college students to take extra steps to prove their residency was also found to violate Section 10101(a)(2)(A). *Shivelhood v. Davis*, 336 F. Supp. 1111, 1115 (D. Vt. 1971) (barring county from subjecting college students to more stringent residency investigations); *Frazier v. Callicutt*, 383 F. Supp. 15, 19-20 (N.D. Miss. 1974) (finding referrals of students at predominantly black colleges to election boards for residency review unlawfully applied "obviously different standard"). Section 16-165(I) is much like the laws blocked in *Shivelhood* and *Frazier*; county recorders will subject some registrants to a citizenship investigation procedure that other eligible voters will never face.

Contrary to the Movants' assertion, state laws—not just executive deviation from state law—can be directly challenged under the CRA. To hold otherwise would allow the discriminatory voter registration regimes banned by the CRA to proliferate so long as they are codified into statute. Courts have previously heard challenges to state statutes under Section 10101 and have never found such an action is unavailable. *See, e.g.*, *Washington Ass'n of*

Churches v. Reed, 492 F. Supp. 2d 1264 (W.D. Wash. 2006); *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. 2008). This includes cases the Movants cite. *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006); *Gonzalez v. Arizona*, No. 06-CV-1268, 2007 WL 9724581 (D. Ariz. Aug. 28, 2007). Reading Section 10101 to exclude challenges to state statutes would rewrite the CRA and nullify its prohibitions.

But even reading the CRA as the Movants do, Section 16-165(I) violates Section 10101(a)(2)(A) because this provision expressly authorizes *ad hoc* executive action. The provision instructs county recorders to subject registered Arizona voters to different practices and procedures whenever a recorder has "reason to believe" an individual is not a citizen. Section 16-165(I) is devoid of objective criteria; instead, it invites county recorders to use their own subjective, even biased, criteria and thereby *guarantees* the very *ad hoc* executive action the Movants maintain Section 10101(a)(2)(A) prohibits. MTD at 27. As in the Jim Crow era, Section 16-165(I) greenlights the application of different standards and procedures in determining voters' qualifications.

To the extent the Movants argue Section 10101(a)(2)(A) is not violated because cancellation will only follow a notice-and-cure period, that argument has been tried and rejected. *Cf. La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 1651215, at *21 (W.D. Tex. May 24, 2022) (finding notice-and-cure period does not excuse initial Section 10101(a)(2)(B) violation).

Finally, as to the Movants' argument that no private right of action is available to enforce Section 10101, Plaintiffs incorporate the MFV/Voto Latino brief on this issue.

V. PLAINTIFFS HAVE STATED A CLAIM FOR A PROCEDURAL DUE PROCESS VIOLATION.

The Movants incorrectly assert that the Ninth Circuit has "squarely foreclosed" Plaintiffs from asserting a "freestanding" procedural due process claim against an election law. MTD at 16-17. *Arizona Democratic Party v. Hobbs*, the Movants' primary authority, held only that the *Anderson-Burdick* test applied to those plaintiffs' procedural due process claim because the plaintiffs did "not argue that their procedural due process claim differs in some

material way from their substantive [equal protection] claim." 18 F.4th 1179, 1195 (9th Cir. 2021). Unlike *ADP*, this suit does not challenge voting restrictions under the *Anderson-Burdick* framework, let alone raise "the same challenge under the banner of procedural due process." *See id.* Plaintiffs have not pleaded an undue burden on the right to vote. Instead, Plaintiffs' due process claim asserts that HB 2492 deprives registration applicants matched against non-citizenship information of "an opportunity to affirm their citizenship or even to submit DPOC prior to the rejection." FAC ¶ 142.

The Movants do not substantiate their assertion that *all* constitutional claims involving voting rights—no matter their substance or how they are pled—must be analyzed under *Anderson-Burdick*. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011), is not to the contrary. The Court's statements in *Dudum* are pure dicta, as the plaintiffs did "not suggest separate analyses for their First Amendment, Due Process, or Equal Protection claims." *Id.* Nor did plaintiffs in that case even bring a procedural due process claim. *See* Complaint, 2010 WL 3694706 ¶ 44 (N.D. Cal. Feb. 4, 2010). Similarly, *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018), did not address procedural due process, so is not applicable here. At most, *ADP* and *Dudum* stand for the proposition that where plaintiffs fail to differentiate their *Anderson-Burdick* and due process claims, courts will review the latter under the *Anderson-Burdick* framework. Plaintiffs, however, state well-differentiated procedural due process and equal protection claims targeting entirely different provisions of HB 2492 and 2243, and no *Anderson-Burdick* claim.

Election laws do not occupy a unique niche where basic procedural due process principles do not apply. Maintaining separate tests for undue burden and procedural due process makes sense: a court can rule that an election law provides notice and an opportunity to cure but is nevertheless unduly burdensome and can also rule that a law is not that burdensome but fails to provide notice and an opportunity to cure. Similarly, a voting law might impose a minimal burden and be justified by a legitimate state interest, surviving *Anderson-Burdick* scrutiny, but nevertheless be administered in an arbitrary and inconsistent

manner, an equal protection violation under *Bush v. Gore*. *Anderson-Burdick* is not a black hole that swallows all constitutional rules in the election law context, and no court has so held.

Finally, the Movants argue that HB 2492 does not violate due process because a voter registration applicant does not have a cognizable interest in being registered if he or she does not submit DPOC. MTD at 17. This misapprehends Plaintiffs' claim. Plaintiffs challenge the absence of due process for a registration denial premised on an *erroneous* finding of non-citizenship. Section 16-121.01(D) authorizes applicants to submit a federal form *without* DPOC, triggering a citizenship investigation process. If a voter meets the qualifications of Arizona law, they are entitled to be registered. Ariz. Const. art. VII, § 2(A); A.R.S. §§ 16-101, 16-121, 16-163(A). These provisions create a liberty interest or statutory entitlement requiring due process in the methods used to evaluate the applicant's qualifications—here, U.S. citizenship. *Mendoza v. Blodgett*, 960 F.2d 1425, 1428-29 (9th Cir. 1992); *Stivers v. Pierce*, 71 F.3d 732, 740-41 (9th Cir. 1995); *Holohan v. Massanari*, 246 F.3d 1195, 1209 (9th Cir. 2001); *Griffeth v. Detrich*, 603 F.2d 118, 121-22 (9th Cir. 1979). Count V challenges the failure of HB 2492 to provide sufficient due process for voters to rebut an erroneous flag or rejection under Section 16.121.01(E).

VI. PLAINTIFFS HAVE STATED A *BUSH V. GORE* EQUAL PROTECTION CLAIM.

The Movants do not expressly seek dismissal of Plaintiffs' *Bush v. Gore* claim targeting "arbitrary and disparate treatment," having failed to even mention this seminal case or its standard. 531 U.S. 98, 104 (2000). They argue this claim is governed by *Anderson-Burdick*, but this is belied by *Bush v. Gore* itself, which rested, not on the *Anderson-Burdick* framework, but on equal protection doctrine concerning arbitrary and disparate treatment of voters both in the "allocation of the franchise" and "the manner of its exercise." *Id*. The dicta in *Dudum* cannot bear the weight the Movants place upon it, as the plaintiff there did "not suggest separate analyses for his First Amendment, Due Process, or Equal Protection claims", 640 F.3d at 1106 n.15, and did not bring a *Bush v. Gore* equal protection claim. *See* Complaint, 2010 WL 3694706 ¶¶ 35-46. But Plaintiffs here have clearly asserted an equal protection claim

that is completely distinct from *Anderson-Burdick*: that the various citizenship investigation processes mandated by HB 2492 and 2243—carried out by different officials at different stages using vague standards—will result in arbitrary and disparate treatment of naturalized voters. FAC ¶¶ 120-132.

VII. PLAINTIFFS HAVE STATED A DISCRIMINATION CLAIM UNDER *LOUISIANA V. U.S.*

The Movants have not moved to dismiss Count III of the FAC insofar as it rests on the Fifteenth Amendment. They identify "AAANHPI's Fifteenth Amendment claim," MTD at 18 n.5, but never refer to Plaintiffs' Fifteenth Amendment challenge or the precedent upon which it is based, *Louisiana v. United States*, 380 U.S. 145 (1965). *Louisiana* has long stood for the proposition that arbitrary voter registration laws or practices *enable* discrimination. *Id*. at 152-53. Discrimination in voting rules has become less overt since the Jim Crow era, but A.R.S. § 16-165(I) is unique among the fifty states and not particularly covert. It is a very poorly camouflaged license to discriminate against any registered voters "who the county recorder has reason to believe are not United States citizens"—including on the basis of race and/or national origin. The absence of objective criteria and boundaries on this open-ended provision is unconstitutional under *Louisiana.* Racial discrimination "is the *inescapable* effect of a subjective requirement . . . barren of standards and safeguards, the administration of which rests in the uncontrolled discretion of a registrar." *United States v. Louisiana*, 225 F. Supp. 353, 381 (E.D. La. 1963) (emphasis added), *aff'd Louisiana v. United States*, 380 U.S. 145 (1965).

VIII. CONCLUSION

Accordingly, the Motion to Dismiss Plaintiffs' claims should be denied.

RESPECTFULLY SUBMITTED this 17th day of October, 2022.

/s/ Daniel Adelman
Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 E. Camelback Rd., Suite 200
Phoenix, AZ 85012
danny@aclpi.org
(602) 258-8850

Jon Sherman
D.C. Bar No. 998271
Michelle Kanter Cohen
D.C. Bar No. 989164
Cecilia Aguilera
D.C. Bar No. 1617884
Fair Elections Center
1825 K St. NW, Ste. 450
Washington, D.C. 20006
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org
(202) 331-0114

John A. Freedman
Jeremy Karpatkin
Erica McCabe
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001
John.Freedman@arnoldporter.com
Jeremy.Karpatkin@arnoldporter.com
Erica.McCabe@arnoldporter.com
(202) 942-5000

Steven L. Mayer
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Steve.Mayer@arnoldporter.com
(415) 471-3100

Leah R. Novak
Arnold & Porter Kaye Scholer LLP 250 West 55th Street
New York, NY 10019
Leah.Novak@arnoldporter.com
(212) 836-8000

Counsel for Plaintiffs