

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

Civil No. 08-CV-2321-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' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS  
AMENDED COMPLAINT**

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**PRELIMINARY STATEMENT**

This case concerns Colorado's ongoing and systematic removal of eligible, registered voters from its voter rolls in violation of the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act ("HAVA"). Plaintiffs initially brought some of these claims and moved for preliminary and injunctive relief in advance of the November 2008 federal election. Following a hearing, this Court approved a Stipulated Preliminary Injunction (the "Stipulation") that provided temporary relief that allowed voters impacted by Defendant's conduct to cast ballots and have their votes counted in that election. The Stipulation did not, however, permanently enjoin Defendant's unlawful practice or permanently restore the registration status of most of the voters who had been unlawfully purged.

Plaintiffs Amended Complaint challenges the same practices as its original complaint, as well as several additional, independent violations of the NVRA and HAVA. Defendant has moved to dismiss the Amended Complaint on grounds of standing, pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

In the months leading up to the 2008 federal elections, Defendant cancelled more than 46,000 names from the lists of eligible votes pursuant to practices Plaintiff alleges are unlawful. Plaintiffs allege, and Defendants admit, that some of those cancellations removed eligible and properly registered voters from the rolls. And Defendant's brief concedes that at least some of those purged voters would not have had their ballots counted in the November election but for the relief Plaintiffs obtained at the Preliminary Injunction phase of this litigation.

Defendant recites these facts and claims that "the system worked." Def. Br. at 4-5. In fact, precisely the opposite is true. At the very least, hundreds of eligible, registered voters would likely not have had their votes counted had Defendant's unlawful conduct gone unchallenged. Those votes were counted only under standards and procedures imposed by the Stipulated Preliminary Injunction approved by the Court on October 29, 2008.

More importantly, it is clear from the factual allegations on this motion that – in just the 2008 election – the number of voters who were deprived of their votes or unlawfully stricken from the voter rolls is far higher, likely in the thousands or tens of thousands. And these estimates are based on data relating only to voters who were purged in the months prior to the 2008 federal elections and all voters cancelled as a result of the so-called 20-day rule. Defendants' unlawful conduct began long before the recent election cycle, is ongoing, and includes several violations in addition to the 20-day rule.

As discussed below, Plaintiffs have asserted facts and supplied evidence sufficient to show Article III standing to sue in their own right and on behalf of their members. Likewise, Plaintiffs have alleged facts sufficient to state a cognizable claim for relief as to the counts of their Amended Complaint.<sup>1</sup> Accordingly, Defendant’s Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure should be denied.

## ARGUMENT

### I. STANDARD OF REVIEW.

Defendant moves to dismiss Plaintiffs’ Amended Complaint both for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and for lack of standing under Fed. R. Civ. P. 12(b)(1). When reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). The complaint need allege “only enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the alleged facts “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).<sup>2</sup>

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<sup>1</sup> Plaintiffs intend to file forthwith a voluntary dismissal of their Fifth Cause of Action, which relates to the cancellation of voter registration records of individuals convicted of felonies or under supervision by the Department of Corrections.

<sup>2</sup> Notwithstanding Defendant’s attempt to portray them as fundamentally changing the standard applicable on a motion to dismiss, *Twombly* and *Iqbal* do not discard “the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.” *Robbins v. Okla. ex rel. Dep’t of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. Okla. 2008).

Likewise, “[a] facial attack on the complaint’s allegations regarding subject matter jurisdiction [under Rule 12(b)(1)] questions the complaint’s sufficiency and requires the court to accept the allegations as true.” *Smith v. United States*, 561 F.3d 1090, 1097-1098 (10th Cir. 2009) (citing *Paper, Allied-Indus., Chem. & Energy Workers Int’l Union v. Cont’l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005)); see *Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990) (when reviewing a motion to dismiss for lack of standing under Fed. R. Civ. P. 12(b)(1), “courts treat all material allegations in the complaint as true and construe the complaint in favor of the plaintiff.”).<sup>3</sup>

## II. **STANDING.**

### A. ***Factual Background.***

#### 1. The Unlawful Conduct Challenged In This Action Required Plaintiffs To Divert Resources From Other Planned Activities.

##### a. *Common Cause.*

Plaintiff Common Cause of Colorado (“Common Cause”) has approximately 2,000 dues-paying members and 4,000 online members within the state of Colorado, many of whom are registered to vote and regularly vote in Colorado. Supplemental Declaration of Jennifer Flanagan, July 15, 2009 (“Flanagan Supp. Decl.”), ¶ 2. As of March 2009, Common Cause has employed two full-time individuals and one part-time legal intern. *Id.* ¶ 3. During the fall of 2008, Common Cause employed five individuals and two legal interns. *Id.*

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<sup>3</sup> Here, although Defendant makes numerous unsupported factual assertions in his challenge to Plaintiffs’ standing, his motion to dismiss challenges the legal sufficiency of the Amended Complaint’s allegations and not their veracity. Thus, his 12(b)(1) motion constitutes a facial attack on the complaint’s jurisdictional allegations, and the court should accept the allegations of the complaint as true. *Smith*, 561 F.3d at 1097-1098. Nevertheless, in an abundance of caution, Plaintiffs have provided declarations and other evidence in support of their allegations as to standing.

After the *New York Times* publicized the voter purges challenged in this litigation, Common Cause devoted substantial resources to counteracting Defendant's unlawful conduct. For example, Common Cause's offices were flooded with calls from members concerned about the purges and their own registration status. *Id.* ¶¶ 14-15. Common Cause also worked on purge-related issues with members of Just Vote Colorado, a coalition supervised by Common Cause devoted to voter support and election monitoring in Colorado. *Id.* ¶¶ 12-13, 18-20. But for Defendant's unlawful voter purges, the staff time devoted to this work would have been available for other important election reform activities on Common Cause's agenda for 2008, such as addressing the technical operation of SCORE, educating voters about where to drop off mail-in ballots (a subject of substantial confusion), and making the voter protection hotline more effective and useful to voters. *Id.* ¶¶ 40-43. The resources devoted to responding to calls from members, briefing the members of the Just Vote Colorado coalition, and taking other actions to respond to the purges of voters were devoted to Plaintiffs' broader voter protection and education efforts—not to preparing this litigation. *Id.* ¶¶ 15, 17, 19-20, 22.

Similarly, in January of 2009, the Secretary of State introduced and lobbied for a bill that would provide for the cancellation of millions of allegedly duplicate registration records by merging them into certain existing registration records. *Id.* ¶ 27. Common Cause devoted considerable time and resources to opposing the passage of the bill, arguing that the inadequate protections for voters in the bill would likely violate the NVRA, lobbying legislators and the governor of Colorado, and putting forth amendments to this bill that would provide adequate protections to voters. *Id.* ¶¶ 28-32. But for Defendant's efforts to pass this legislative initiative and many other statutory and regulatory initiatives which Common

Cause believes violate the NVRA, Common Cause would have devoted these resources to other important election issues on its agenda. *Id.* ¶¶ 33-40, 44-46.

b. *SEIU.*

SEIU is a labor union representing employees working in the fields of healthcare, property services and the public sector. Declaration of Steven K. Ury, Oct. 23, 2008 (“Ury Decl.”), Ex. B to Declaration of S. Gale Dick, July 15, 2009 (“Dick Decl.”), ¶ 3. SEIU has several locals in Colorado and approximately 10,000 members across the state, including many who are registered to vote or who have sought to register to vote in Colorado. *Id.* ¶ 5.

Voter protection, education and registration are integral SEIU organizational goals and activities, and SEIU has devoted significant time, energy and resources to these activities in Colorado, including by registering substantial numbers of new Colorado voters. *Id.* ¶¶ 3, 4, 6.

In the fall of 2008, SEIU staff member Laurel Webb went to Colorado to assist in SEIU’s election-day voter support, turnout, and education efforts. Supplemental Declaration of Laurel Webb, July 14, 2009 (“Webb Supp. Decl.”), ¶ 3. Instead, Webb spent substantial time addressing concerns related to Defendant’s voter purges, including handling calls to the Just Vote Coalition’s Voter Protection Hotline from individual voters concerned about their registration status. *Id.* ¶ 5; *see also* Supplemental Declaration of Steven K. Ury, July 14, 2009 (“Ury Supp. Decl.”), ¶ 4. These resources were diverted from other voter protection and education efforts SEIU had planned for the period leading up to 2008 election, which are detailed in ¶ 6 of Webb’s supplemental declaration. Webb Supp. Decl. ¶ 6; Ury Supp. Decl. ¶ 4. The time and resources devoted to responding to voter calls related to Defendant’s conduct were unanticipated, were not expended in preparation for this litigation, and continued after this action was initiated. Webb Supp. Decl. ¶¶ 7; Ury Supp. Decl. ¶ 5.

c. *Mi Familia Vota.*

Plaintiff Mi Familia Vota is a non-partisan civic engagement organization working with Latino and immigrant families to bring positive change to their communities and improve their lives. Declaration of Grace Lopez, Oct. 23, 2008, (“Lopez Decl.”), Ex. C to Dick Decl., ¶ 3. Part of Mi Familia Vota’s mission is to empower members of the Latino and immigrant communities by registering eligible citizens to vote, educating voters about their rights, and encouraging registered voters to participate in the electoral system. Lopez Decl. ¶¶ 3-4; Supplemental Declaration of Grace Lopez, July 13, 2009 (“Lopez Supp. Decl.”), ¶ 2.

In advance of the November 4, 2008 election, Mi Familia Vota expended significant resources and staff time on voter registration activities, registering approximately 2,500 persons. Lopez Supp. Decl. ¶ 3. Mi Familia Vota has continued to be engaged in voter registration efforts since the 2008 election. *Id.* ¶ 6; Declaration of Jessie Ulibarri, July 13, 2009 (“Ulibarri Decl.”), ¶ 3. In the fall of 2008, Mi Familia Vota devoted resources to addressing issues related to Defendant’s purges, including responding to inquiries from members of the Latino and immigrant community concerned about their registration status. Lopez Supp. Decl. ¶ 4. The devotion of resources was over and above any resources expended in pursuit of this litigation and continued after the Complaint was filed in this action. *Id.* ¶¶ 4-5. Mi Familia Vota has limited resources and has been required by Defendant’s conduct to divert such scarce resources from its planned voter registration and education efforts. Lopez Decl. ¶ 9.

2. Members Of SEIU And Common Cause Were Purged From The Colorado Voter Registration List.

In November 2008, Plaintiffs gained access to several lists created by Defendant’s office identifying voters whose registrations had been cancelled by Defendant (the “Purge

Lists”): One list included the names of voters purged by operation of the 20-day rule; a second included the names of all voters whose records were cancelled from May 14, 2008 through November 4, 2008;<sup>4</sup> and a third contained the names of voters whose records were cancelled from August 2007 through September 2008. Flanagan Supp. Decl. ¶ 48; Declaration of Andrew Supe, July 14, 2009 (“Supe Decl.”), ¶ 3, 6.

SEIU compared the Purge Lists with SEIU’s own databases to identify any voters who both (a) were purged by the 20-day rule or within 90 days of a federal election and (b) were members of SEIU, state employees represented by SEIU, or registered to vote through any of SEIU’s voter registration drives. Supe Decl. ¶¶ 4, 6. This analysis showed that 11 members of SEIU, 20 state employees represented by SEIU, and 15 individuals registered by SEIU during its voter registration drive were removed from the lists of eligible voters within 90 days of the 2008 federal primary or general election. *Id.* ¶¶ 5, 7-8. Common Cause also compared its membership lists and the Purge Lists, and determined that 67 of the cancelled records listed a name and address that matched the name and address of a Common Cause member, and of those, eleven listed a matching phone number. *See* Flanagan Supp. Decl. ¶¶ 49-56. Common Cause has subsequently begun contacting these members to confirm these matches correspond to the same individual, and to further determine the nature and extent of the burden that having their registration record cancelled placed on them. *Id.* ¶ 52. These efforts, like discovery in this matter, are ongoing, but to date, Common Cause can confirm that at least 6 Common Cause members have had their registration records cancelled. *Id.*

Most of Defendant’s unlawful purge practices began well before the period covered by the Purge Lists, and have continued since that period ended, and so it is likely that even

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<sup>4</sup> These dates encompass the 90 day periods preceding Colorado’s August 12, 2008 general primary election and November 4, 2008 Presidential Election.

more SEIU and Common Cause members have been unlawfully purged from the rolls than have so far been identified. The Amended Complaint asserts claims related to the purges conducted outside the period covered by the Purge Lists as well those carried out within it, but Plaintiffs do not yet have data regarding these purges.

**B. *Plaintiffs' Allegations Establish Standing To Seek The Relief Requested In The Amended Complaint.***

The Amended Complaint alleges that the Secretary's unlawful actions have injured Plaintiffs and their members by making their voter registration efforts less effective and more expensive, by causing them to divert resources from other activities to addressing and counteracting Defendant's unlawful purges, and by cancelling SEIU's and Common Cause's members' voter registration records from the Colorado voter registration database. These allegations show a sufficiently concrete injury to Plaintiff organizations themselves and to their members to meet Plaintiffs' burden to establish standing under the liberal standard applicable at this stage of the proceedings.

Moreover, Plaintiffs have already produced significant evidence to Defendant demonstrating their standing, including declarations from each plaintiff organization filed in October 2008 in support of the Motion for Temporary Restraining Order, as well as a declaration from SEIU identifying specific members and persons SEIU registered to vote whose registrations were cancelled pursuant to the challenged policies. *See* Ury Decl.; Lopez Decl.; Declaration of Laurel Rose Webb, Dec. 3, 2008 ("Webb Decl."), Ex. A to Declaration of Jessie Allen, July 14, 2009 ("Allen Decl."); Declaration of Jennifer Flanagan, Oct. 24, 2008 ("Flanagan Decl."), Ex. A to Dick Decl.; Allen Decl. ¶¶ 3-5. This information goes beyond the allegations in the Amended Complaint, and, along with the affidavits filed in

support of this Opposition, establishes Plaintiffs' standing to assert each of the causes of action in this case.

In order to establish standing to sue, a plaintiff must show (i) that it has suffered "injury in fact;" (ii) that the injury is traceable to the actions of the defendant; and (iii) that the requested relief will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "[E]ach element [of the standing inquiry] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Thus, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (internal quotations marks and citation omitted); *accord Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 254 n.3 (10th Cir. 1982) ("In cases reviewing the grant or denial of a motion to dismiss for lack of standing, it is sufficient for standing purposes that the plaintiff merely allege a concrete injury.").

All three plaintiff organizations have alleged, and have provided evidence to show, that they have diverted some of their limited resources to counteracting the challenged practices. In addition, SEIU and Mi Familia Vota have alleged and offered evidence establishing that their voter registration efforts have been harmed and that persons they have registered to vote have been and/or may in the future be unlawfully purged from Colorado's voter registration rolls, while SEIU and Common Cause have alleged and submitted evidence showing that their members have been harmed by being subjected to Defendant's unlawful policies and by being purged from the voting rolls. As explained below, these allegations and evidence are sufficient to establish all three organizations' standing to assert the claims in

the Amended Complaint in their own right and for Common Cause and SEIU to assert the claims as associations on behalf of their members.<sup>5</sup>

Accordingly, Defendant's 12(b)(1) motion to dismiss on standing grounds must be denied.

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

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

There are two ways an organization can demonstrate a concrete injury to its activities for standing purposes. First, it can show that the defendant's conduct has made it more burdensome for the organization to carry out its activities. See *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 265 (1991) (“CAAN”) (organization has standing where challenged statute makes it more difficult for it to achieve its goal of reducing noise at National Airport in Washington). Second, it can show that it “devotes resources to counteract a defendant's allegedly unlawful practices.” *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (citing *Havens*). Plaintiffs have sufficiently alleged both forms of injury.

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<sup>5</sup> Plaintiff Mi Familia Vota is not a membership organization and does not assert associational standing on behalf of its members.

a. *Defendant's Voter Purges Frustrated Mi Familia Vota And SEIU's Voter Registration Drives, Inflicting Concrete Injury.*

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

Plaintiffs' Amended Complaint plainly alleges a sufficient injury of this sort. Plaintiffs allege that Defendant's actions have injured SEIU and Mi Familia Vota by causing voters they registered to be improperly purged from the rolls. Amended Complaint ("Am. Compl.") ¶¶ 11, 13. Plaintiffs further allege that Defendant's ongoing purge of eligible voters will continue to impair SEIU's and Mi Familia Vota's voter registration efforts. *Id.*<sup>6</sup> SEIU also has submitted (and long ago provided to Defendant) evidence of fifteen individual voters registered by SEIU whose registrations were cancelled pursuant to the challenged

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<sup>6</sup> These allegations are amplified in the declarations of Steven K. Ury and Grace Lopez filed in support of Plaintiffs' Application for Temporary Restraining Order in October 2008, which Defendant neglects to mention in his motion to dismiss. *See* Lopez Decl. ¶¶ 7; Ury Decl. ¶¶ 8.

policies. *See* Webb Decl. ¶¶ 5-6.<sup>7</sup> Such a “concrete and demonstrable injury to [their] activities” is sufficient to establish SEIU’s and Mi Familia Vota’s standing to assert the claims in this case. *Havens*, 455 U.S. at 379.

b. *Defendant’s Purges Forced All Three Plaintiffs To Divert Resources To Counteract Them, Conferring Concrete Injury.*

“[A]n organization has standing to sue on its own behalf if the defendant’s illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.” *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009), *cert. denied*, 174 L. Ed. 2d 271 (June 8, 2009) (internal citations and quotations marks omitted). The plaintiff in *Common Cause/Georgia* had standing where it would have had to divert resources to assist voters in complying with the challenged voting requirements. *Id.* Similarly, in *Crawford v. Marion County Election Board*, the Supreme Court affirmed the Seventh Circuit’s standing analysis, which held that the Democratic Party would sustain injury in fact by being compelled “to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the [challenged] law from bothering to vote.” 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610, 1615 n.7 (2008).<sup>8</sup> This rule has been embraced by every circuit to address the issue, including the Fifth Circuit in the case on which Defendant relies most heavily. *See Fowler*, 178 F.3d at 360 (organization has

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<sup>7</sup> Mi Familia Vota does not maintain complete records of the persons it registered, and therefore these records, which are kept by Defendant, must be obtained through the discovery process. *See* Ulibarri Decl. ¶ 2. Once Defendant provides this information, Mi Familia Vota will be able to carry out the detailed matching necessary to identify the specific voters it registered who were purged from the voting rolls.

<sup>8</sup> Both the lead opinion in *Crawford*, signed by a three justice plurality, and Justice Souter’s dissent, signed by two justices, or a total of five justices, expressly affirm the court of appeals’ standing analysis. 128 S. Ct. at 1615 n.7, 1627 n.2. In addition, insofar as Justice Scalia’s concurrence and Justice Breyer’s dissent address the claims on the merits, they implicitly affirm the Seventh Circuit’s holding that standing existed.

standing in its own right if it can show “a ‘drain on its resources’ resulting from counteracting the effects of the purportedly” unlawful conduct); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (organization had standing where it devoted resources to investigating the defendants’ allegedly unlawful practices); *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (“The allegation that the EOIR’s policy . . . requires the [plaintiff] organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing.”); *Spann*, 899 F.2d at 27-29 (organization had standing where it devoted resources to educate black home buyers and renters who were steered away from real estate opportunities); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (“[T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency’s time and money from counseling to legal efforts directed against discrimination.”); *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1224 (4th Cir. 1981) (organization alleged sufficient injury due to increased time and expense necessary for it to monitor FDA activities under new agency regulation).

All three Plaintiffs in this case have alleged that they have diverted and continue to divert limited resources to counteracting Defendant’s unlawful purges, resources which would otherwise have been used for other purposes. Am. Compl. ¶¶ 8, 11, 13. Plaintiffs also have submitted affidavits describing the activities to which they have been forced to divert resources, as described above. These allegations and the evidence submitted with this opposition go well beyond asserting simple harm to Plaintiffs’ abstract organizational interests and goals; they establish a concrete impairment of Plaintiffs’ ability to carry out specific activities and show harm to the organizations themselves, and are sufficient to overcome Defendant’s motion to dismiss on standing grounds.

c. *Defendant Misapplies ACORN v. Fowler.*

Defendant relies on the Fifth Circuit's *Fowler* decision to argue that the diversions of resources suffered by Plaintiffs are "exclusively and directly related to this litigation" and as such are insufficient to support standing. Def. Br. at 15-16. However, Defendant misconstrues *Fowler* and misreads the Amended Complaint.

*Fowler* arose on a summary judgment motion, not a motion to dismiss, a fact the *Fowler* court expressly noted distinguished the case from *Havens*. 178 F.3d at 357. The court specifically noted that at the pleading stage, in contrast to the summary judgment stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" and courts must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (citations and internal quotation marks omitted).<sup>9</sup> Defendant wholly ignores this standard of review, and instead asks the Court to draw inferences in its favor, based on unspecified and irrelevant "appearances at the preliminary injunction hearing," that the Plaintiffs' efforts in opposing his unlawful practices relate exclusively to this litigation.

When viewed under the proper standard, Plaintiffs' allegations satisfy the organizational standing test set forth in *Fowler*. Unlike in *Fowler*, the Amended Complaint

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<sup>9</sup> Furthermore, Plaintiffs have not yet had access to significant information they have requested in discovery that is pertinent to determining the extent of their injuries, notwithstanding Defendant's contrary insinuation in his portrayal of the limited data he has provided thus far. While the parties have engaged in an informal exchange of information that has been very useful, this process has focused solely on Defendant's procedures. It has not addressed in the least the actual effect of these procedures on voters and their rights. Under the current stipulated schedule, the parties will not respond to formal discovery on these issues until August 4, 2009. Plaintiffs, therefore, have insufficient information available to determine the nature and extent of the injuries sustained by Plaintiffs and their members as a result of the unlawful cancellations, and it would be premature at this stage in the proceedings for the Court to evaluate those injuries.

here does not allege, and no evidence establishes, that the resources Plaintiffs dedicated to countering Defendant's unlawful practices were diverted exclusively into this litigation. Under the Fifth Circuit's own reasoning, this alone distinguishes this case from the very different burdens and evidentiary record upon which *Fowler* was based. In addition, the evidence submitted by Plaintiffs makes clear that they were forced to expend resources on non-litigation activities in response to Defendant's unlawful conduct. *See* Flanagan Supp. Decl. ¶ 39-42; Webb Supp. Decl. ¶¶ 3-8; Ury Supp. Decl. ¶ 4-5; Lopez Supp. Decl. ¶ 4-5; Lopez Decl. ¶ 9. The Amended Complaint also specifically alleges, and the evidence in record shows that the resources devoted to counteracting the Secretary's purges would otherwise have been used for other organizational purposes. Am. Compl. ¶¶ 8, 11, 13; Flanagan Supp. Decl. ¶ 39-43; Webb Supp. Decl. ¶¶ 3-8; Ury Supp. Decl. ¶ 4-5. These allegations and evidence are sufficient to establish standing under *Fowler*'s reasoning.

Defendant asserts that these diversions of resources are not "state[d] with any specificity." Def. Br. at 14-15. At the pleading stage, however, no such specificity is required. Fed. R. Civ. P. 8(a)(2). Likewise, the Secretary's argument that "Plaintiffs fail to allege that such actions [to which resources were diverted] were unrelated to . . . this lawsuit" (Def. Br. at 14-15), cannot serve as the basis for a motion to dismiss. *See Vincent v. City Colleges of Chicago*, 485 F.3d 919, 923 (7th Cir. 2007) ("Any decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b)." (internal quotation marks omitted)).

Accordingly, all three plaintiff organizations have standing in their own right to bring the claims asserted in this case and to seek the requested relief.

2. Plaintiffs Common Cause And SEIU Have Associational Standing To Bring The Claims On Behalf Of Their Members.<sup>10</sup>

An association has standing to bring suit on behalf of its members when (i) “its members would otherwise have standing to sue in their own right,” (ii) the interests it seeks to protect are “germane to the organization’s purposes,” and (iii) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” See *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 342-43 (1977), *abrogated by statute*, The Worker Adjustment and Retraining Notification Act, 102 Stat. 890, 29 U.S.C. § 2101 *et seq.*

Plaintiffs SEIU and Common Cause meet all three of these requirements. Both associations have alleged that some of their members have been unlawfully purged from the voting rolls or otherwise adversely impacted by Defendant’s violations of HAVA and the NVRA, and that their members continue to be subjected to these unlawful policies and face an imminent threat that they will be purged from the voter registration list prior to the next federal election. Second, both SEIU and Common Cause have alleged that they have an organizational purpose involving voter registration, election monitoring, and increasing political participation. Finally, the individual participation of an organization’s members is “not normally necessary when an association seeks prospective . . . relief for its members.” *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

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<sup>10</sup> Plaintiffs do not assert third-party standing in this case, and Defendant’s argument on this point is therefore misplaced.

a. *Plaintiffs' Allegations And Evidence Of Injury To Their Members Are Sufficient To Establish Standing.*

Defendant contends that Plaintiffs should have used the Purge Lists to make more specific allegations identifying by name those members whose registration records have been cancelled. This argument is founded on a gravely incomplete recitation of the factual exchanges between the parties in this case and is wholly unsupported by any legal authority.

Defendant has identified not a single case holding that merely because more specific facts are available, Plaintiffs are required to plead them. *Twombly* and *Iqbal*, cited by Defendant, do not fundamentally alter the notice pleading standard of the Federal Rules of Civil Procedure and do not impose a heightened pleading requirement that would require the detailed factual allegations Defendant demands. SEIU's and Common Cause's allegations that their members have been unlawfully purged from Colorado's voter registration list by Defendant and that their members continue to be subject to Defendant's unlawful ongoing violations of the NVRA and HAVA are factual assertions, and even if they are general and stated on information and belief, as Rule 8 allows, they are not legal conclusions as Defendant contends.

Moreover, insofar as Plaintiffs seek to prevent imminent future harm to their members by the ongoing application of the challenged provisions of Colorado law, they need not, indeed cannot, identify in the complaint specific members who will be harmed. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). Nor must Plaintiffs wait until an identified member has been struck from the voting rolls before filing suit. "In order to satisfy the 'injury in fact' requirement of standing, a plaintiff need not wait for an injury to occur. An allegation of future injury satisfies this prong of standing so long as the alleged injury is 'imminent' or 'real and immediate.'" *31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (internal citations omitted). A future injury is imminent

“when the threatened acts that will cause injury are authorized or part of [a governmental] policy,” because “it is significantly more likely that the injury will occur.” *Id.* at 1266. Here, as in *Sandusky*, it cannot be known in advance which voters will be impacted by Colorado’s ongoing voter registration and list maintenance procedures. *Sandusky*, 387 F.3d at 574 (“[A] voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker . . . . It is inevitable, however, that there will be such mistakes.”).

*Summers v. Earth Island Institute* does not assist Defendant. *Summers* dealt with a challenge to U.S. Forest Service regulations exempting certain Forest Service projects from the notice and comment procedures required under federal statute. Observing that members of the plaintiff organizations were “not [themselves] the object of the government action or inaction,” the Court held that plaintiffs must identify a member threatened with concrete harm by the failure to provide notice and comment. 129 S. Ct. 1142, 1149 (2009) (quoting *Defenders of Wildlife*, 504 U.S. at 562). The Court then concluded that because the plaintiffs had “identified no other application of the [challenged] regulations that threatens imminent and concrete harm to the interests of their members,” they lacked standing. 129 S. Ct. at 1150. *Summers* is inapplicable to the present litigation for three reasons. First, in contrast to *Summers*, here, Plaintiffs’ members are directly impacted by the challenged provisions of Colorado’s voter registration law. For example, every member of SEIU or Common Cause who registers to vote in Colorado will be sent a non-forwardable registration card under the 20-day rule in violation of the NVRA, and any member could have her registration improperly identified as a duplicate. Second, here, unlike in *Summers*, Defendant acknowledges that it continues to apply some of the challenged regulations on a daily basis, such as the 20-day rule, and that it has every intention of applying others, such as the 90-day

cancellations, during the next federal election cycle. Finally, there can be no question here that Defendant's actions have impacted identifiable members of SEIU and Common Cause. As explained below, SEIU long ago provided Defendant with a list of members whose voter registration records were in fact improperly cancelled under the challenged regulations, and Common Cause has submitted with this Opposition a list of members identified to date whose registrations were cancelled prior to the November 2008 election. Discovery as to voters purged since the election will likely allow Plaintiffs to identify additional members who have been injured by the ongoing NVRA violations. Thus, the uncertainty that the challenged regulations will be applied in a way that may impact an identifiable member of one of Plaintiff organizations does not exist here as it did in *Summers*.

Moreover, Defendant's argument rests on unsupported factual assertions that would be inadequate on summary judgment, much less a motion to dismiss where Plaintiffs' allegations are what matters. Not only are Defendant's contentions unsupported, they are based on a highly misleading and incomplete description of the information exchanged by the parties and available to Plaintiffs. Indeed, as explained below, Defendant's claims of factual deficiency only serve to highlight the need for discovery in this case.

*First*, Plaintiffs have provided evidence identifying specific members who were purged from Colorado's voting roles as a result of Defendant's unlawful practices. Although Defendant makes much of the assertion that Plaintiffs have had access to the Purge Lists since November 2008, he neglects to mention that SEIU, on December 3, 2008, provided him with a declaration identifying eleven SEIU members and fifteen persons registered by SEIU who were on the list of purged voters provided by Defendant. *See* Webb Decl. ¶¶ 2-7; Allen Decl. ¶¶ 3-5; *see also* Supe Decl. ¶¶ 4-8. Plaintiff Common Cause similarly confirms that members of Common Cause have had their registration records unlawfully cancelled under

the 20-day rule, as alleged duplicates, or within 90 days of a federal election. *See* Flanagan Supp. Decl. ¶¶ 52.

*Second*, the limited information provided by Defendant to date is not sufficient to allow Plaintiffs to allege additional facts with the specificity Defendant (wrongly) demands. For example, the Purge Lists only contain the names of voters whose records were unlawfully cancelled within 90 days of the 2008 federal elections and under the 20-day rule. They do not include the names of most voters cancelled before the 90-day periods related to the 2008 elections, or of any names associated with records cancelled since the November election, including the many thousands of names subject to the merge process. The Amended Complaint alleges that these purges, as well as those documented in the Purge Lists, violate the NVRA, and until Plaintiffs gain access to the names of the affected voters, they cannot determine whether their members were among them.

*Third*, the limited information provided by Defendant does not allow Plaintiffs to determine the nature and extent of the injuries sustained even by individuals whose names appear on the Purge Lists. According to Defendant, of the 46,069 voters whose names appeared on the Purge Lists, 8,470 cast ballots in the 2008 Presidential Election, and of those, 570 were forced to vote a provisional ballot while 7,633 voted a regular ballot.<sup>11</sup> Defendant further asserts that 108 of the 570 provisional ballots were rejected by the county clerks, that Defendant reversed all but 45 of those rejections under the procedures established by the Preliminary Injunction, and that Plaintiffs agreed with all but three of those rejections. Defendant contends that these numbers show that there has been no real injury here. These unsupported factual assertions have no place in this motion to dismiss. Moreover, and no

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<sup>11</sup> Defendant offers no account of the other 267 voters whose names appeared on the Purge Lists and whom it contends successfully cast a ballot.

discovery has been conducted regarding these voters. Plaintiffs thus cannot yet determine if any of their members or any persons they registered to vote were among these voters or whether these voters experienced any difficulties in casting their ballots as a result of being purged, regardless of whether they were ultimately able to cast a ballot.

Moreover, Defendant makes the unwarranted inference that all 37,599 voters who appeared on the purge list and did not cast a ballot merely chose not to vote or were properly removed from the rolls rather than having been effectively disenfranchised by Defendant's conduct. This factual inference in Defendant's favor must be rejected on a motion to dismiss, or, at the very least, the court must permit jurisdictional discovery to determine whether these individuals attempted to vote, what their voting experiences were, and whether any of Plaintiffs' members were among them.

Thus, even if Defendant had bothered to submit evidence to support his factual claims, a complete record would show that, as Plaintiffs alleged in their Amended Complaint, identifiable individual members have been subjected to Defendant's unlawful policies and have been purged from the registration list as a result.

b. *The Alleged Burden On The Right To Vote Is Sufficient Injury To Establish Standing.*

Defendant next asserts that only where an individual is actually prevented from voting has she incurred a cognizable injury sufficient to establish standing. Defendant cites no law in support of this assertion, and similar arguments have been rejected in other courts. For example, in *Common Cause/Georgia*, the Eleventh Circuit found that the alleged burden on the right to vote posed by the requirement that an individual plaintiff secure or even produce at the polls an acceptable form of identification was sufficient for standing purposes. 554 F.3d at 1351-1352; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (poll tax infringes voting rights "whether the citizen . . . has \$1.50 in his pocket or nothing at

all, pays the fee or fails to pay it”); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (noting “a plaintiff need not have the franchise wholly denied to suffer injury” for standing purposes). “The slightness of their burden also is not dispositive . . . a small injury, ‘an identifiable trifle,’ is sufficient to confer standing.” *Common Cause/Georgia*, 554 F.3d at 1352 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). “Moreover, where an alleged injury is to a statutory right, standing exists ‘even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.’” *Cox*, 408 F.3d at 1352 (quoting *Warth*, 422 U.S. at 514).

In this case, Plaintiffs have alleged that Defendant unlawfully purged voters, including members of SEIU and Common Cause, from Colorado’s voting rolls and that it continues to carry out such purges in violation of the NVRA and HAVA. Am. Compl. ¶¶ 76, 79-81, 86-89, 92-94, 101. These purges burden these members’ right to vote even if they do not ultimately result in disenfranchisement. Once a voter’s registration record has been unlawfully purged, her name no longer appears on any poll list either for voting on Election Day at her precinct or voter center or for early voting, and she will no longer receive her mail-in ballot. *See* 8 COLO. CODE REGS. § 1505-1, Rule 2.20.2(b) (“Cancelled status or cancelled record voters’ . . . names will not appear on the poll book, they will not be sent a ballot in a mail ballot election and they will not be sent election notice mailings.”).

Individuals in these circumstances often have no choice but to vote a provisional ballot. Voting a provisional ballot is a burden on a voter: it takes time and effort, even after which the voter’s ballot may not be counted. A voter typically will have to spend considerably more time to cast a provisional ballot than a regular ballot. Voters do not learn that they must cast a provisional ballot until after they have waited in line to cast a regular

ballot; once they discover they have been removed from the registration list and will not be allowed to cast a regular ballot, they must often wait in an additional line if they wish to cast a provisional ballot. Flanagan Supp. Decl. ¶ 25. In addition, provisional voters must fill out an extensive form before being allowed to cast a provisional ballot, while regular voters needed only to show identification and sign their name. *Compare* COLO. REV. STAT. § 1-8.5-103, 1-7-110; 8 COLO. CODE REGS. § 1505-1, Rules 26.5.1 and 26.5.2, *with* COLO. REV. STAT. § 1-7-110. Moreover, if a provisional voter does not fill out the provisional ballot affidavit properly, his or her vote will not be counted, an issue not faced by those voting a regular ballot. Finally, the provisional voter is not provided with any assurance that her vote will be counted, and in many instances, provisional ballots are in fact not counted. 8 COLO. CODE REGS. § 1505-1, Rule 26.5.4.

In some circumstances, a voter whose registration record is cancelled may be able to vote a regular ballot through emergency registration at the County Clerk's office on Election Day. *See* COLO. REV. STAT. § 1-2-217.5. While this option does allow certain voters to avoid voting a provisional ballot, it creates its own burdens. To take advantage of this option a voter must travel to the County Clerk's office after having already waited in line to vote at the polling place where she would have been able to vote had she not been purged from the voter rolls. Beyond the travel time itself, the voter may have to wait in line to register and vote at the County Clerk's office. On Election Day in 2008, for example, most County Clerk's offices had considerable lines throughout the day. Flanagan Supp. Decl. ¶ 26.

Thus, the mere fact that members have had or may have their voter registration records cancelled creates a considerable risk that these individuals will have more difficulty voting or may be dissuaded altogether from voting, and thus sustain an injury. The allegations that members of the Plaintiff organizations had their registration records cancelled

as a result of Defendant's unlawful activity and were injured thereby are sufficient at this stage to establish standing as the Court must accept all factual allegations pled in the Amended Complaint as true.<sup>12</sup> Even if more were required at this stage of the proceedings, the evidence submitted by Plaintiffs in support of this Opposition establishes injury in fact to members of SEIU and Common Cause.

c. *Plaintiffs' Success In Securing Relief Under The Preliminary Injunction Supports A Finding Of Standing.*

Defendant next contends that because the procedures established by the Preliminary Injunction resulted in most, but not all, of the voters who were wrongfully purged as a result of the challenged registration and list maintenance procedures ultimately having their votes counted, no members of Plaintiff organizations could have suffered a cognizable injury. This argument, at best described as disingenuous, is flawed for several reasons.

While the Secretary of State did eventually count 53 out of the 108 provisional ballots cast by purged voters and rejected by the county clerks, these ballots were only counted because the Secretary conducted a second review of these ballots pursuant to the Preliminary Injunction. Moreover, the Preliminary Injunction required the county clerks themselves to review the provisional ballots under a heightened standard, presumably resulting in more votes being counted. In the future, no such heightened standard will apply and no second review of provisional ballots will be conducted and, therefore, there is a threat of harm to

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<sup>12</sup> Even if Defendant were correct that Plaintiffs had to show actual disenfranchisement of voters to establish standing, this motion to dismiss should be denied. As noted, Defendant has conceded that 37,599 voters who appeared on the purge lists provided to Plaintiffs did not vote, and dismissal on standing grounds would be inappropriate before the factual question of whether these individuals were disenfranchised or failed to vote for some other reason (for example, because they could not come to the polls in person and they were unable to vote early or by mail because of their purge, or they were unable to take the additional time to vote at the County Clerks office or by provisional ballot) has been resolved.

individuals purged pursuant to the challenged procedures, including members of SEIU and Common Cause.<sup>13</sup>

That step forward did not remedy the harm caused by Defendant's policies does not deprive Plaintiffs of standing. Indeed, similar reasoning was rejected by the Eleventh Circuit in *Cox*, 408 F.3d at 1352 n.3. There, the defendant Secretary of State of Georgia had refused to accept voter registrations submitted by mail by plaintiff organization. A preliminary injunction issued ordering the registrations to be accepted and processed. On appeal, the Eleventh Circuit explained that its standing analysis was not affected by the fact that, as a result of the injunction, the plaintiff's registration form had been processed for purposes of the prior election, stating, "Standing . . . is not altered by events unfolding during litigation." *Id.* (citing *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003)). Here, too, the fact that the Preliminary Injunction resulted in some of the wrongfully purged voters having their provisional ballots counted in an "election[] occurring during this suit's pendency," *Cox*, 408 F.3d at 1352 n.3, does not affect Plaintiffs' standing to challenge the ongoing practices that lead to those wrongful purges in the first instance.

In fact, that the Preliminary Injunction secured by Plaintiffs in this case resulted in nearly every contested vote being counted only heightens, rather than diminishes, the case for standing here. Indeed, in pressing this argument, Defendant has effectively conceded that a large number of the voters purged from voter registration list as a result of the challenged policies were in fact entitled to vote. In addition, Defendant's argument presupposes that

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<sup>13</sup> Additionally, Defendant's argument ignores the considerable efforts Plaintiffs put into restoring purged voters to the rolls prior to the election. *See* Flanagan Supp. Decl. ¶¶ 18-22; Lopez Supp. Decl. ¶¶ 4-5. In addition to showing that Plaintiffs diverted resources to correct Defendant's unlawful purges, these efforts likely reduced the number of provisional ballots cast, further undermining Defendant's assertion that "the system worked."

Plaintiffs satisfy the redressibility prong of the standing analysis: Insofar as he argues that the Preliminary Injunction procedures averted the disenfranchisement of many erroneously purged voters, Defendant acknowledges that the harm threatened by the purges can be redressed by the relief sought in this case, namely restoring those voters to the voting rolls and enjoining further application of the unlawful policies.

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

Finally, Defendant contends that voting rights are insufficiently germane to SEIU's and Common Cause's organizational purposes to satisfy the second prong of the *Hunt* test. Defendant's unreasonably stringent reading of the "germaneness" prong of the associational standing test has been rejected by every court to address the issue. Thus, in *National Lime Association v. EPA*, the D.C. Circuit held that the "requirement of germaneness is 'undemanding'; 'mere pertinence between litigation subject and organizational purpose' is sufficient." 233 F.3d 625, 636 (D.C. Cir. 2000) (quoting *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)).

More recently, the Second Circuit, in *Building & Construction Trades Council of Buffalo v. Downtown Development, Inc.*, held with respect to the germaneness test that "[t]he proper inquiry at the pleading stage is . . . a limited one." 448 F.3d 138, 149 (2d Cir. 2006). Finding it "significant that the *Hunt* Court used the word 'germane,' rather than the phrase 'at the core of,' or 'central to,' or some word or phrase indicating the need for a closer nexus between the interests sought to be protected by the suit in question and the organization's dominant purpose," the court rejected the defendant's argument that the organization must be established "for the purpose of" vindicating the rights at issue. *Id.* at 148. The court concluded, "[a] court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in

joining the association.” *Id.* at 149 (citing *Humane Society*, 840 F.2d at 56). On the basis of this rule, the court found that the plaintiff trade union had standing to pursue claims under a number of federal environmental statutes.<sup>14</sup> *Id.* at 150.

Here, the allegations in the Amended Complaint easily satisfy this test. The Amended Complaint alleges that SEIU is committed to ensuring that “every eligible SEIU member . . . has the right to vote and the opportunity to exercise that right” and cites SEIU’s 2008 Constitution and Bylaws, which establish that one of SEIU’s purposes is to “build political power” to ensure its members interests are represented “at every level of government.” Am. Compl. ¶ 12. Ensuring that its members voting rights are not infringed is “germane” to this purpose. Likewise, the Amended Complaint alleges that Common Cause has as its purpose “to strengthen public participation . . . in our institutions of self-government” and “to promote fair elections,” purposes to which protecting the voting rights of its members are much more than merely germane. Beyond the allegations of the Amended Complaint, the declarations submitted by SEIU and Common Cause further explain how the rights at issue in this case are germane to their organizational purposes. *See* Ury Decl. ¶¶ 2-6; Flanagan Decl. ¶¶ 2-4.

For the foregoing reasons, this Court should find that all three Plaintiffs have standing in their own right to bring the claims asserted in this case and that SEIU and Common Cause have associational standing on behalf of their members.<sup>15</sup>

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<sup>14</sup> *Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), the sole case relied on by Defendant, provides no support for the argument that Plaintiffs’ organizational purposes must “specifically” encompass “voter registration activities.” Def. Br. at 12-13. Contrary to Defendant’s suggestion, *Blackwell* required no such exact overlap between an organization’s purpose and the interests at stake in the litigation. Rather, *Blackwell* held that the plaintiff organizations could not establish associational standing because they had not alleged any injury to their members. 467 F.3d at 1010. Its passing suggestion that there were “substantial questions” about whether the plaintiffs had satisfied the germaneness prong of the standing test was based on the vagueness of the plaintiffs’ allegations regarding their organizational purposes. *Id.*

### III. **THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF SUFFICIENT TO WITHSTAND THE MOTION TO DISMISS.**

Plaintiffs' Amended Complaint alleges causes of action arising under the Help America Vote Act ("HAVA") and the National Voter Registration Act ("NVRA"). HAVA and the NVRA operate in tandem to ensure that all state programs aimed at maintaining accurate and current voter registration lists include adequate safeguards against erroneous disenfranchisement of eligible registered voters. Defendants argue that the NVRA and HAVA require all of the laws and procedures challenged in this action. Def. Br. at 17-18. As argued more fully below, far from permitting each of the challenged procedures, the NVRA and HAVA squarely prohibit all of them. As a general matter, Defendant's effort to portray the NVRA and HAVA as a series of permissions and mandates for purging the voter rolls is fundamentally wrong. The NVRA was enacted in recognition of the fact that the franchise is a fundamental right; that "the duty of the Federal, State and local governments is to promote the exercise of that right"; and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect" on that right. 42 U.S.C. § 1973gg(a). To be sure, the statute requires list maintenance and allows states to remove the names of voters who are ineligible or who have changed residences. But these provisions are specific and carefully circumscribed by the NVRA's unambiguous prohibitions on certain practices, including those challenged in this action.

HAVA explicitly leaves the NVRA's protections in place. It is true that HAVA requires states to create computerized voter databases and to conduct certain list maintenance procedures relating to those databases. *See* 42 U.S.C. § 15483(a). But HAVA explicitly

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<sup>15</sup> Of course, the Court need only find that one Plaintiff has standing for the case to proceed. "Only injunctive relief is sought, and for that only one plaintiff with standing is required." *Crawford*, 472 F.3d at 951.

provides that removal of any names from the rolls “shall be in accordance with the provisions of the [NVRA].” 42 U.S.C. § 15483(a)(2)(A)(i). Far from weakening the NVRA’s restrictions or giving states additional latitude to cancel the eligibility status of registered voters, HAVA reiterates the NVRA’s overriding mandate for voter protection. In addition, HAVA imposes a new requirement of its own, requiring states to impose safeguards “to ensure that eligible voters are not removed in error from the official list of eligible voters.” *Id.* § 15483(a)(4)(B). In sum, HAVA and the NVRA in no way contradict one another; instead, they are mutually reinforcing.

A. ***20-Day Rule: Plaintiff’s Amended Complaint States A Viable Claim That Colorado’s “20-Day Rule” Violates The NVRA.***

Count I of the Amended Complaint alleges that Colorado’s statutory 20-day rule violates Section 8 of the NVRA. *See* 42 U.S.C. § 1973gg-6; Am. Compl. ¶¶ 15-22, 72-76. The 20-day rule requires election officials to cancel a voter’s registration if a disposition notice, which is sent to the voter after his or her registration application is deemed valid and complete, is returned as undeliverable within 20 days after being mailed. *See* COLO. REV. STAT. § 1-2-509(3) (2008). The Rule violates Section 8 of the NVRA, which prohibits states from removing registrants from the rolls based on return mail except under very limited conditions, none of which the Rule satisfies.

The only argument offered by Defendant in support of its motion to dismiss this claim is that those affected by the 20-day rule are not “registrants” under Colorado law and are therefore not protected by the NVRA. This argument is both irrelevant and wrong. *First*, the question of who qualifies as a “registrant” protected by the NVRA is a question of federal law, not state law. *Second*, The Amended Complaint alleges, and Colorado law makes clear, that prospective voters are registered and eligible to vote—and therefore that NVRA

protection is triggered—even before the notification letter is mailed pursuant to the challenged statute. Colorado’s 20-day rule, which causes eligible and registered voters to lose their eligibility status, thus violates the NVRA’s explicit protections.

1. Colorado’s 20-Day Rule Violates The NVRA.

Section 8 of the NVRA sets forth the basic framework for state voter registration for federal office. Am. Compl. ¶¶ 15-22, 72-76. Subsection (a) requires states to “insure that any eligible applicant is registered to vote” if a “valid voter registration form” is timely submitted and to send notice to the applicant of the disposition of the application. 42 U.S.C. § 1973gg-6(a)(1)-(2). Once a valid and timely registration application is received and the disposition notice is sent, the NVRA treats the prospective voter as a “registrant” and explicitly prohibits states from removing the “registrant . . . from the official list of eligible voters” except for narrowly defined reasons and pursuant to specific procedures. *Id.* § 1973gg-6(a)(3).

Specifically, the NVRA carefully limits the circumstances under which states may change a voter’s eligibility status should the state believe the voter does not reside at the address listed in the voter registration application. In particular, the NVRA prohibits states from removing a registrant from the list of eligible voters based on a change of address unless the registrant (A) has confirmed in writing his or her change of address to a place outside the prior jurisdiction; or (B) has both (1) failed to respond to a forwardable notice and (2) has not appeared to vote in two consecutive general federal elections following that notice. 42 U.S.C. §§ 1973gg-6(d)(1). This notice and waiting procedure is the only mechanism contemplated by the NVRA for changing a registrant’s eligibility status on the basis of returned mail.

Plaintiffs allege that Colorado’s 20-day rule violates these provisions of the NVRA by cancelling registrants believed to have changed addresses without affording them the required

statutory protections of the notice and-waiting period provisions. Colorado law requires county clerks and recorders, upon receipt of a voter registration application, to “verify that the application is complete and accurate.” COLO. REV. STAT. § 1-2-509(2). Once the clerk and recorder finds that the application was timely submitted and that the applicant meets the eligibility criteria set by Colorado law (*i.e.*, being 18 years of age, a citizen of the United States, and a resident of the jurisdiction for 30 days, *see* COLO. REV. STAT. § 1-2-101), the clerk “notif[ies] the applicant of the registration” by sending a nonforwardable notification letter. COLO. REV. STAT. § 1-2-509(2). The clerk also enters the voter’s information into the SCORE database and designates the registration record as “Active—20-day.” Am. Compl. ¶ 17. At that point, a voter is eligible to cast a regular ballot in any election and, therefore, is a “registrant” within the meaning of the NVRA. Am. Compl. ¶ 16, 19. The NVRA thereafter prohibits Colorado officials from removing the registrant from the “list of eligible voters” except under specific and narrow circumstances.

Colorado law, however, requires the purging of registrants in violation of the NVRA. Specifically, if the non-forwardable notification letter mailed to a new registrant is returned as undeliverable within 20 days, COLO. REV. STAT. § 1-2-509 provides that the voter “shall not be registered” and the voter’s SCORE designation is changed to “C-Canceled” on the grounds of “failed 20-day.” Am. Compl. ¶ 18. No forwardable notice is sent to the voter, and the voter is purged without waiting two federal elections, in clear violation of Section 8 of the NVRA.

As set forth in the Amended Complaint, at least 1,136 voters were purged from the rolls by operation of the 20-day rule in the months preceding the November 2008 general election. Am. Compl. ¶ 21. The practice began long before that period and has continued since then.

2. Colorado Law Cannot And Does Not Define “Registrant” To Circumvent The NVRA’s Protections.

Defendant offers only one argument in response to Plaintiffs’ 20-day claim. In rather circular fashion, Defendant argues that under Colorado’s 20-day rule, a voter registration applicant does not become a “registrant” for purposes of state law until the applicant’s address is actually confirmed by the registrant. Def. Br. 27-30. Defendant’s interpretation of the NVRA and the term “registrant” must be rejected because it would effectively allow the state to circumvent the NVRA’s protections and would lead to the absurd result of effectively allowing unregistered people to cast ballots.

a. *The Meaning Of “Registrant” Is Governed By Federal Law, Not State Law.*

The unstated premise of Defendant’s argument is that the State of Colorado is entitled to define the meaning of “registrant” by way of state law and that only when a person becomes a “registrant” under state law is he or she entitled to the protections accorded to a “registrant” under the NVRA. Defendant cites no authority for his argument—and with good reason, because this exact argument was recently rejected and repudiated by the only federal appellate court to have considered the issue thus far. *See Land*, 546 F.3d at 381-83 (finding that “state law cannot control the definition of ‘registrant,’ and holding that Michigan law providing for cancellation of a voter’s registration whenever the voter’s original disposition notice is returned as undeliverable likely violates the NVRA”).

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

Defendants contend that, because the NVRA does not define “registrant,” state law must provide the definition. Defendants also assert that, under

Michigan law, an individual is registered to vote only after he or she has received an original voter ID card. Defendants argue that an individual whose original voter ID card was returned as undeliverable was never a registrant in Michigan such that the protections of the NVRA apply.

*Id.* at 382.

In rejecting Michigan’s argument, the Sixth Circuit concluded that “making the question of who is a ‘registrant’ a matter of state law would frustrate the NVRA’s purpose of regulating state conduct of elections by essentially permitting states to decide when they will be bound by the NVRA’s requirements.” *Id.* (citations and internal quotation marks omitted). Rather, whether someone is a “registrant” for purpose of the NVRA is a question of federal law. *Id.* at 383. And under federal law, a person becomes a “registrant,” entitled to the protections of the NVRA “from the first moment that he or she is actually able to go to the polls and cast a regular ballot . . . regardless of what label state law may attach to that individual.” *Id.* at 383. A notice of disposition, the court said, merely alerts the individual that the state has made an eligibility determination; it is not an eligibility criterion. *Id.* at 384.

b. *The 20-Day Rule Impacts “Registrants” Who Are Fully Entitled To NVRA Protection.*

In this case, Plaintiffs have alleged that, as a practical matter, in Colorado, an individual is able to “appear at the polls and cast a regular ballot” as soon as the non-forwardable notification letter is sent and the registration record is entered into the SCORE database and designated as “Active—20-day.” Am. Compl. ¶¶16-17, 19. Individuals to whom the notice is mailed are also registered because, before mailing the notification, election officials confirm that the eligibility requirements are met and the application is complete. Accordingly, under federal law, these individuals are “registrants” whose removal based on the return of their notification letters as undeliverable is prohibited by the NVRA. As was the case in Michigan, the disposition notice that Colorado county officials send

pursuant to COLO. REV. STAT. § 1-2-509(2) merely serves to notify applicants of the eligibility determination that has already been made; such notices are not a part of the eligibility determination.

These allegations must be accepted as true at this stage of the case, and they are fatal to Defendant's motion to dismiss.<sup>16</sup> If prospective voters are eligible to cast a regular ballot when county officials designate their records as "Active—20-day" and mail the notification letters, they are at that point "registrants" under federal law and, as such, cannot be stricken from the list of eligible voters unless certain conditions are met. The 20-day rule does not fit within those narrow conditions; it fails to grant the voter the applicable notice and waiting period protections, and Defendant cannot assert otherwise.

Defendant's contention that individuals remain "'applicants' . . . during the 20-day window in which the State awaits confirmation of that applicant's address" (Def. Br. at 30) is inconsistent with their eligibility to vote during that time period. Under Colorado law, there is functionally no difference, in terms of eligibility to cast a ballot, between voters who are designated as "Active—20-Day" and voters who have already "passed" the 20-day rule or are otherwise fully active and eligible to vote.<sup>17</sup> Most importantly for purposes of the *Land*

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<sup>16</sup> Defendant does not and cannot dispute these allegations. In fact, Hilary Rudy, a legal analyst for the Secretary of State called by Defendant as a witness at the Preliminary Injunction hearing, testified that a person classified in SCORE as "Active—20-Day can cast a regular ballot either on Election Day or in early voting. Prelim. Inj. Hr'g Tr. 75:12-76:12, Oct. 29, 2008. Defendant's representatives confirmed this during informal discovery meetings with Plaintiffs' counsel. In the event that Defendant is unwilling to stipulate to these facts, Plaintiffs will obtain these admissions through formal discovery in due course.

<sup>17</sup> Colorado's administrative rules explicitly provide that where a voter's status designation is "Active," there are "no conditions or restrictions on the voter's eligibility." 8 COLO. CODE REGS. § 1505-1, Rule 2.20.1(a). The rule regarding "Active" designation was adopted on May 21, 2009, after other revised rules that expressly address aspects of the 20-day rule, yet draws no distinction between categories of "Active" voters. See Colo. Dep't of State, Notice of Adoption (May 21, 2009) available at

analysis, as Plaintiffs allege in the Amended Complaint, all such voters may vote by mail-in ballot, in early voting, or by appearing at the polls on Election Day. Am. Compl. ¶¶ 16, 19.

Defendant’s assertion that such voters are merely “applicants” and do not become “registrants” until they confirm the validity of their address—either by the passage of 20 days without the return of their notification letter or by casting an in person or mail-in ballot—is unsupported by any logic and inconsistent with Colorado elections practices. Under Colorado law, all eligible voters must, prior to voting, reconfirm their address, whether they cast mail-in ballots or appear to vote in person. *See* COLO. REV. STAT. § 1-8-114(1) (affirmation required on mail-in ballots); § 1-7-110(1) (affirmation required at the polling place). There is no exception for prospective voters who have “passed” the 20-day rule, that is, whose notification letters have not been returned as undeliverable within 20 days of mailing. Contrary to Defendant’s contention, therefore, the non-return of the disposition notice under the 20-day rule does not divide mere “applicants” from fully eligible “registrants” who no longer need to confirm their addresses.

Defendant’s contrary reading would lead to absurd results. Defendant asserts persons who “fail” the 20-day rule “never become registered voters,” (Def. Br. at 29), but nonetheless, under Colorado law, they may cast ballots and have their votes counted before the 20 day period has passed. The only reading of the Colorado statute that makes sense is one that is consistent with actual practice and the remainder of the statutory and regulatory

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[http://www.elections.colorado.gov/WWW/default/Rule%20Making/2009/notice\\_adoption\\_election\\_rules\\_05\\_21\\_09.pdf](http://www.elections.colorado.gov/WWW/default/Rule%20Making/2009/notice_adoption_election_rules_05_21_09.pdf); Colo. Dep’t of State, Notice of Adoption (March 20, 2009) (Am. Compl., Ex. 1). By contrast, the same sets of rules require varying treatment of different categories of “Inactive” records (e.g., “Inactive—failed to vote,” “Inactive – NCOA,” and “Inactive – returned mail”). *See* 8 COLO. CODE REGS. § 1505-1, Rule 2.20.

scheme: A person becomes a registrant when her application is complete, verified, and entered into SCORE.

**B. *Plaintiffs Have Stated A Claim That Colorado’s Systematic Purges Within 90 Days Of A Federal Election Violate The NVRA.***

Count II of the Amended Complaint alleges that Defendant violated and will continue to violate the NVRA by systematically removing voters from the rolls during the 90-day period preceding federal elections. As described throughout this brief, the NVRA and HAVA impose a number of limitations upon states’ list maintenance processes. The limitation at issue in this claim is the NVRA rule, often called the “90-day rule,” which prohibits states from systematically purging certain voters within 90 days of a federal primary or general election. See 42 U.S.C. § 1973gg-6(c)(2).

Defendant concedes that tens of thousands of voters were removed from the State’s rolls during the 90-day periods prior to the 2008 federal primary and general elections. Def. Br. at 3. Defendant defends these cancellations on grounds that are wholly without merit and, in any event, inappropriate at this motion to dismiss stage.

**1. The NVRA Limits Defendant’s Removal of Voters In The 90 Days Before A Federal Election.**

The 90-day rule prohibits states from systematically removing certain voters within 90 days of a federal primary or general election. The rule ensures that states complete specific list maintenance efforts well in advance of any federal election so that a voter has ample opportunity to correct errors made during such efforts before it is too late for the voter to cast a regular ballot. Specifically, Section 8(c)(2) of the NVRA provides:

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to

systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude -

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

42 U.S.C. 1973gg-6(c)(2). The narrowing clause of Paragraph 3(B)(i) refers to removals “at the request of the registrant,” removals based on criminal conviction or mental incapacity, and removals by reason of death of the registrant. *Id.* §§ 1973gg-6(a)(3)(A)-(B), -6(a)(4)(A). Conspicuously absent from the 90-day rule’s narrowing clauses is any mention of removals based on changes of address. Indeed, change of residence is the only removal category recognized by Section 8(a) of the NVRA but not mentioned in the clauses that narrow the 90-day rule. *Compare* 42 U.S.C. 1973gg-6(c)(2)(B). The Amended Complaint alleges, and Colorado statutes make clear, that removals based on change of address are part of a systematic removal program. Colorado’s purge program consists of, among other things, identifying (through computerized matching programs and other means) records belonging to voters who might have changed residence; reviewing those records according to various criteria; cancelling some records and, for others, sending out confirmation cards and tracking which ones are returned and whether voters cast ballots in subsequent elections. Because that procedure is by its nature systematic, states are barred wholesale from cancelling registrations on the grounds that a voter has moved within 90 days of a federal election.<sup>18</sup>

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<sup>18</sup> Of course, when an individual voter expressly tells the election office that she has moved, such a removal is not part of the systemic process for removing voters on account of changes of address because such an event is a “confirmation in writing” addressed in an entirely different provision of the NVRA, namely Section 8(d)(1)(A). 42 U.S.C. § 1973gg-6((d)(1)(A). .

The narrowing provisions to the 90-day rule do permit removal of individuals who requested removal; these provisions also permit the removal of individuals who became ineligible on account of a criminal conviction, mental incapacity or death of the registrant, but only when those events occurred within the 90 days of a federal election. This reading of the statute only makes sense because, when the disqualifying event occurs within 90 days of a federal election, an election official's only opportunity to remove the individual from the rolls occurs within 90 days of an election.

2. Defendant Has Admitted That Thousands Of Voter Records Were Removed During The 90 Days Prior To The 2008 Federal Elections.

The allegations in the Amended Complaint amply establish a claim that Defendant violated this provision of the NVRA. As a starting point, Defendant admitted on October 9, 2008, that more than 14,000 voter records had been cancelled since July 21, 2008—removals that fell within 90 days of the 2008 federal primary and general elections. *See* Am. Compl. ¶ 30. Defendant further admitted (and admits again in his motion to dismiss) that more than 38,000 voters were removed between May 13, 2008 and September 25, 2008, also within 90 days of a federal election. *Id.* ¶ 29; Def. Br. at 2. The removals disclosed by Defendant fell into several categories, including “Moved,” “Duplicated,” “Deceased,” “Failed 20-Day,” “Felon,” and “Inactive.”

3. Defendant's Purges Included “Systematic” Removals.

Defendant broadly asserts that each of these tens of thousands of cancellations was not “systematic” because they purportedly “involve hands-on, *individualized* review by a human being examining specific voter records in the SCORE system to determine whether a particular record should be cancelled.” Def. Br. at 25. (emphasis in original). Defendant does not define “systematic” but apparently interprets the term to mean “without human

involvement.” These mere assertion finds no support in the NVRA. In the absence of a statutory definition, “systematic” must be given its ordinary meaning:<sup>19</sup> “methodical in procedure or plan.” Merriam-Webster’s Collegiate Dictionary 1269 (11th ed. 2003)). To be “systematic,” a removal program need not be fully automated: it merely needs to be routinized, planned, and methodical, as these removals clearly were.

The Amended Complaint alleges, and Colorado law makes clear, that Colorado’s voter cancellation procedures are based on computer database matching programs that periodically and systematically generate lists of records for review and potential removal. *See* Am. Compl. ¶¶ 37a, 37b; COLO. REV. STAT. §§ 1-2-604. In fact, the Colorado statute in effect during the 2008 election cycles not only called for ongoing, systematic removal programs, but specifically *initiated* additional such programs immediately before elections. COLO. REV. STAT. §§ 1-2-604(2). Even if “individualized review” were the feature that divided “systematic” from other purges, Defendants’ contention that each of the more than 38,000 records removed in the hectic period leading up to the federal elections received individualized review by an election worker is an unsubstantiated (and unlikely) assertion that is not relevant on a motion to dismiss. At a minimum, discovery is needed to determine what procedures were followed with respect to these voters (and the unknown number of other voters impacted by Defendant’s practices before and after the removal of those 38,000 records).

4. Defendant’s Other Defenses Of The 90-Day Removals Are Wholly Without Merit.

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<sup>19</sup> *See Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 569 (10th Cir. 1996) (“[a] term not defined in a statute must be construed in accordance with its ordinary and natural meaning”).

Defendant contends that all removals he admitted conducting within the 90 day period fell within one of the narrowing provisions set forth in section 8(c)(2)(B). His argument lumps together broad but distinct classes of voters, assumes without basis that certain categories of removal are permitted, and is inconsistent with incontrovertible facts.

“Moved,” “Duplicate,” and “Withdrawn” Removals: Defendant first asserts that “all ‘moved,’ ‘duplicate’ and ‘withdrawn’ cancellations fall within the ‘request of the registrant’ exception noted in § 1973gg-6(c)(2)(B)(i).” Def. Br. at 26. Elsewhere in his brief, Defendant argues that all voters who change residence and re-register at their new address have thereby “requested” that their old registration record be removed. As discussed below in Section II.C.2.C, this argument flatly misinterprets the “request of the registrant” exception. Only one of these categories on its face falls into the “request of the registrant” provision, namely “withdrawn.” *See infra* at pp. 52-54. *Compare* COLO. REV. STAT. 1-2-601.

In addition, as noted, the removals that most evidently do not fall within the exceptions to the 90-day rule are those based on change of address. The 90-day rule and the NVRA’s other restrictions on removal of voters based on change in residence are two sides of the same coin: a forceful and extensive set of protections against the erroneous removal of voters, including voters who states believe (but have not confirmed) may have moved and re-registered at a new address. Under Defendant’s view, however, states are free to do away with those protections precisely when the potential for erroneous or unfair removals is most acute. Defendant’s central defense thus defies logic.

The same arguments apply to ostensibly “duplicate” records removed within the 90-day period. Defendant elsewhere asserts that all “duplicates” belong to voters who have moved and re-registered, and by that logic their removal – for change of residence – is prohibited under the 90-day rule for the reasons set forth above. Moreover, as noted,

Colorado statutory provisions in effect during the 2008 election cycle included a specific program for systematic removal of purportedly “duplicate” records within the 90-day period during which the NVRA prohibits such removals. And as explained in Section C below, the old statutory and regulatory regime lacked adequate safeguards to ensure that purportedly “duplicate” records in fact belonged to the same voter. In addition to violating HAVA’s requirement that states ensure accurate rolls and create safeguards to avoid erroneous removals, removals under that scheme violated the NVRA’s 90-day rule.

“Inactive” Removals: The Secretary defends the purge of “inactive” voters as being in compliance with the NVRA’s notice and waiting requirements. Def. Br. at 26. The NVRA prohibition at issue in this claim is the 90-day rule, not the notice and-waiting requirements. In addition, having observed those requirements is not a defense to violating the 90-day rule: removal based on the notice and waiting period process is the very exemplar of a systematic purge under the NVRA. Another class of voters classified as “Inactive” (and presumably included in the cancellations under that category within the 90-day period) are infrequent voters, as described in Section D below. Defendant freely admits that such voters are cancelled as part of a “‘systematic’ cancellation ‘program,’” Def. Br. at 25, and cannot plausibly justify their removal within the 90-day period.

“Failed 20-Day” Removals: Plaintiffs have stated a claim that cancellation of records pursuant to the procedures in Colorado’s 20-day rule is impermissible at any time. See supra Part II.

“Deceased” and “Felon” Removals: Finally, Defendant’s claim that the “deceased” and “felon” cancellations were authorized by §1973gg-6(c)(2)(B) is mistaken, because that provision authorizes individual removals only if the disqualifying events occurred within 90

days of a federal election.<sup>20</sup> As discussed, the 90-day rule ensures that states will complete routine and systematic list maintenance efforts at a time when their resources and attention are not fully devoted to managing federal elections. Although the statute places a categorical prohibition on such systematic removals during the 90-day period, it provides that the prohibition “shall not be construed” to prevent the removal of individual “names” from the rolls for certain specified reasons. The narrowing clause does not permit the systematic removal of names for these limited purposes. The blanket prohibition of such systematic removals remains in place, so that states may not leave list maintenance work – including systematic removal of names of persons who request removal, are convicted of felonies, or die – until the critical pre-election period. Instead, states are permitted to act on ensure that voters who become ineligible to vote during the 90-day period are removed from the rolls. To read the statute as permitting wholesale removal of names pursuant to systematic list maintenance procedures during the 90-day period subverts the meaning and purpose of the provision.

*Allegation of Actual Injury:* The assertion that Plaintiffs have not shown any actual disenfranchisement is addressed in Part II of this brief.

C. ***Plaintiffs Have Stated A Claim That Colorado’s Procedures For Removing Duplicates Violate HAVA And The NVRA.***

Count III of the Amended Complaint alleges that Colorado’s procedures for cancelling voter registration records identified as “duplicates” violate HAVA and the NVRA.

To be sure, HAVA mandates that states perform list maintenance on the statewide

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<sup>20</sup> Defendant has offered “conversion” as an explanation for the removal of thousands of voters during the 90 day periods of the 2008 election cycle. Defendant claims that conversion cancellations fall outside of the 90-day window entirely because they were conducted prior to April 2008. Additional discovery is needed to determine whether those earlier removals were conducted in violation of the 90 day rule.

computerized list of registered voters “on a regular basis,” 42 U.S.C. § 15483(a)(2)(A), and that, as part of that regular list maintenance, states must ensure that “duplicate names are eliminated from the computerized list,” 42 U.S.C. § 15483(a)(2)(B)(iii). Equally as important, however, HAVA also cautions that list maintenance is to be performed in a manner that complies with the NVRA and that ensures that “(i) the name of each registered voter appears in the computerized list; [and] (ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list.” 42 U.S.C. § 15483(a)(2)(B). Further, HAVA requires states to implement “minimum standards of accuracy,” including “safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” 42 U.S.C. § 15483(a)(4)(B).

Plaintiffs allege in their Amended Complaint that Colorado’s procedures for removing duplicates are unclear, inconsistent, and vulnerable to error and abuse; that the matching criteria used to identify purported “duplicates” is not sufficient to ensure that the registrations actually relate to the same person and that there is a lack of appropriate supervision of the duplicate removal process by state election officials; and that these unlawful duplicate removal procedures have caused harm and disenfranchisement to Plaintiffs, their members, and constituents in the past, and threaten to cause continued harm and disenfranchisement to them in the future. (Am. Compl. ¶¶ 35-44, 51-54, 83-89.) Put another way, Plaintiffs have alleged that the State of Colorado has failed to establish the requisite minimum standards of accuracy and safeguards in their list maintenance programs and procedures to ensure that purportedly “duplicate” registration records actually relate to the same person (in violation of 42 U.S.C. § 15483(a)(4)(B)) and that, as a result, eligible voters (including Plaintiffs’ members and constituents) are being removed from the rolls, in violation of 42 U.S.C. § 15483(a)(2)(B).

Accepting these allegations as true, as the Court must on a motion to dismiss, Plaintiffs have clearly stated a claim upon which relief can be granted. Of course, the extent of past harm, nature and adequacy of Defendant's match criteria and procedures, and risk of future harm are all currently disputed issues of fact that will need to be developed during the course of discovery and are wholly inappropriate to resolve on a motion to dismiss.

Plaintiffs have also argued that Defendant is prohibited from removing purportedly "duplicate" registrations without following the notice-and-waiting provisions of Section 8(d) of the NVRA, since Defendant's duplicate removals are actually removals on the basis of a change in residence. Contrary to Defendant's assertions, not all of these purported "duplicate" removals relate to the same voter, and not all of them are justified under one of two narrow exceptions that the NVRA allows (i.e., "request of the registrant" and "confirmation in writing"). Accordingly, Defendant's motion to dismiss Count III under Fed. R. Civ. P. 12(b)(6) should be denied.

1. Colorado's Practices For Removing Records Do Not Establish Minimum Standards Of Accuracy And Lack Sufficient Procedural Safeguards, In Violation Of Section 303(a)(4) Of HAVA.

Colorado's duplicate removal procedures are set forth in two separate sections of the Colorado election code, Sections 1-2-603 and 1-2-604. These provisions were amended after Plaintiffs filed the Amended Complaint, and the revised versions will take effect on August 5, 2009 (*see* Def. Br., Attachment 4, at p. 6).

- Colo. Rev. Stat. § 1-2-603 governs cancellation and/or transfer of records from one county to another where a voter has purportedly moved to a different county and submitted a new voter registration application. The existing version allows the clerk in the voter's prior county of residence to cancel the voter's registration in that county if there is a match with the new registrant's name and date of birth, or name and Social Security Number. In the amended version, the clerk in the voter's new county of residence may transfer the voter's SCORE record from the voter's prior county if there is a match of (1) name, date of birth, and prior residence address, or (2) name, date of birth, and driver's license or Social

Security Number.<sup>21</sup> In existing and amended versions, the statute requires election officials in the county of prior residence to cancel the existing registration if they believe there is a match in certain information in the two records – without observing the notice-and-waiting requirements required by the NVRA. *See* Colo. Rev. Stat. § 1-2-604 and Attachment 4 to Def. Br.; Am. Compl. ¶¶ 36, 37, 47-48, 50.

- Colo. Rev. Stat. § 1-2-604 governs cancellation of “multiple” registration records relating to the same voter. Similar to § 1-2-603, the existing version allows of § 1-2-604 county clerks to cancel purportedly “multiple” registration records whenever there is a match with the name and date of birth, or name and Social Security Number. In the amended version of § 1-2-604, the clerk may cancel purportedly “multiple” registrations if there is a match of (1) name, date of birth, and prior residence address, or (2) name, date of birth, and driver’s license or Social Security Number. The existing and amended versions each require counties to generate automated lists of records that appear to correspond to the same or similar names, and, if they believe there is a match in certain information in the records, to cancel all but the most recent record – again without observing the notice-and-waiting requirements. *See* Colo. Rev. Stat. § 1-2-604 and Attachment 4 to Def. Br.; Am. Compl. ¶¶ 36, 37, 47-48, 50.

As currently enacted, Colorado law allows for two or more different voter registration records to be declared “duplicates,” and the older record cancelled, whenever there is a match between the name and date of birth, or name and Social Security number. The process is handled entirely by local county clerks and is unsupervised by state election officials, and there is little written guidance from the state. The current versions of the governing statutes were enacted at a time when Colorado’s 64 county clerks and recorders maintained separate voter registration databases and generally acted more autonomously.

Recent regulatory and statutory amendments and written procedures — implemented after the filing of this lawsuit and the Amended Complaint herein — add additional search criteria and include increased supervision of the process by state election officials. The parties have discussed these recent amendments during the course of their informal discovery sessions, and will likely continue to do so. Defendants have provided certain documents and

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<sup>21</sup> The Secretary of State’s Election Rule 2.15, which is currently in effect, also incorporates these match criteria.

demonstrations of the SCORE database. This informal process has been cordial and informative, but certain questions remain. In addition, the parties will likely engage in some formal discovery, including depositions, with respect to these new procedures, to determine whether and to what extent there may exist an ongoing risk of harm related to these procedures.

The so-called “merge” or “voter information consolidation effort” (“VOICE”) process has now been underway for more than a month. The process was planned to result in the removal of millions of purportedly duplicate records. *See* Am. Compl. ¶¶ 43-44. Although Defendants have represented in informal discovery that this process will be governed by the matching criteria provided in the new statutes’ versions of Colo. Rev. Stat. § 1-2-603 and 604, even though these new provisions do not take effect until August 2009, Plaintiffs cannot be sure of that fact at this stage of the case, nor is there any enforceable requirement mandating the state to do so.

To summarize, the existing versions of COLO. REV. STAT. §§ 1-2-603 and 1-2-604 clearly do not include these safeguards and minimum standards of accuracy required by Section 303(a)(4) of HAVA. Defendant’s earlier guidance and oversight of the cancellation procedures pursuant to these provisions was wholly insufficient and likely led to thousands of unlawful purges, including purges of Plaintiffs’ members and constituents. Likewise, the amended versions of §§ 1-2-603 and 1-2-604 and the Defendant’s new procedures do not, in and of themselves, necessarily include sufficient safeguards under Section 303(a)(4) of HAVA. Thus, Plaintiffs have alleged claims for relief relating both to the current, pre-amendment practices, as well as to the new, post-amendment practices.

Defendant’s motion to dismiss is based solely on the sufficiency of the pleadings; thus, the information exchanged by the parties during informal discovery, in addition to being

preliminary and incomplete, is not properly before the Court or ripe for consideration. Suffice it to say at this stage that there still remain factual disputes to be resolved by the parties as to the adequacy of Defendant's duplicate removal safeguards and accuracy standards pursuant to Section 303(a)(4) of HAVA.

2. Colorado's "Duplicate" Removal Process Violates the NVRA.
  - a. *The NVRA Carefully Limits When And How States May Cancel Registrations Of Voters Who May Have Moved.*

The NVRA was enacted in large part to combat "discriminatory and unfair registration laws and procedures that can have a direct and damaging effect on voter participation in elections for Federal office." 42 U.S.C. § 1976gg(a). The first listed purpose of the NVRA is "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1).

Consistent with these findings and purposes, the NVRA carefully limits the circumstances under which states may remove voters from the registration rolls. *Id.* § 1976gg-6. States "may not" remove names from the rolls except on narrow grounds and following the specific procedures. *Id.* § 1976gg-6(a)(3).

States are permitted to remove the names of voters who have changed residence, including as part of a general list maintenance program. *Id.* § 1976gg-g(a)(3) and -6(a)(4). But as to this grounds for removal, the NVRA's restrictions are especially stringent: a state "shall not" cancel a registration on this ground unless the voter either (A) "confirms in writing" that he or she has moved outside the registrar's jurisdiction, or (B) both (i) fails to respond to a notice mailed by election officials and (ii) does not vote in two general elections after the notice is sent. *Id.* § 1976gg-6(d).

Colorado’s procedures for cancelling registration records because election officials believe the voter has moved to another county or appears to have multiple registrations bypass and undermine the safeguards create by the NVRA. Specifically, Sections 1-2-603 and 1-2-604 do not give the statutorily required notice-and-waiting-period protections to certain voters the state believes have moved. Its legislative predecessors did not either.

Defendant attempts to justify all of its cancellation of records under §§ 1-2-603 and 1-2-604 as “duplicates” — that is, records belonging to a voter who has moved and re-registered in a different location. Defendant argues that cancellation of such “duplicates” is justified under two exceptions to the NVRA notice-and-waiting requirement: one for situations where a registrant “requests” that his name be removed; the other where the voter “confirms in writing” that he or she has moved to a new address. 42 U.S.C. § 1976gg-6(a)(3)(A), (a)(4)(A). As discussed below, however, neither of these contentions finds support in the plain text of the NVRA.

b. *Not All Of the Cancellations Can Be Justified Under The “Confirmation In Writing” Exception To The Notice-And-Waiting Requirement.*

The only exception to the notice-and-waiting period requirement for cancellation based on change in residence does not apply here, at least not in the blanket fashion urged by Defendant. The NVRA allows states to remove a voter’s name from the rolls on the ground of change of address if the voter “confirms in writing” that he or she has moved outside the county of prior registration. 42 U.S.C. § 1976gg-6(d)(1)(A). Defendant argues that the mere act of registering to vote at a new address constitutes “confirmation in writing” for purposes of this provision.

The NVRA does not define such “confirmation in writing.” However, under Defendant’s view, a voter has confirmed in writing that he or she has moved simply because

the SCORE database contains two or more records associated with similar names at two different addresses. This reading of the statutory language is overly broad, especially in the context of the clear intent of the NVRA and HAVA to prevent erroneous purging of voters who may have moved.

A voter who re-registers after moving residence can specify his or her prior address on the registration application. In doing so, the voter clearly communicates, in writing, that she has moved from one jurisdiction to another. By contrast, a voter who includes only his or her current address in a registration form has only confirmed in writing that he currently resides at that address; the voter has *not* confirmed in writing that he or she has “changed residence.”<sup>22</sup> In these circumstances, officials can only *infer* that any two records belong to the same person and the voter has moved based on the new address. Such an inference simply cannot constitute written confirmation under 8(d)(1)(A). Moreover, to the extent that Defendant is merging intra-county movants, he must seek statutory permission elsewhere because Section 8(d)(1)(A), on its face, only applies to moves outside the jurisdiction. 42 U.S.C. § 1973gg-6(d)(1)(A).

There is no way to determine on this motion how many of the ostensibly “duplicate” records cancelled pursuant to the challenged procedures belong to voters who confirmed their change of address in writing by providing their prior address in their new registration form, and whose prior records election officials could therefore cancel without going through the

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<sup>22</sup> Colorado’s “Combination Voter Registration & Mail-In Ballot Application” includes a section entitled “Previous Residence,” with the instruction: “Complete only if you are registered to vote at a different legal residential address.” Available at <http://www.elections.colorado.gov/DDefault.aspx?tid=547>. Under Defendant’s interpretation, even registrants who do not complete that portion of the form are deemed to have “confirmed in writing” that they have moved, are registering at a new address, and wish to have their old registrations cancelled. That is plainly an unsupportable result.

notice-and waiting process. Defendant's motion to dismiss on this basis must therefore be rejected.

c. *Not All Of The Cancellations Can Be Justified As Being At The "Request Of The Registrant."*

Defendant also maintain that its procedures for cancelling purportedly "duplicate" registrations fall within the NVRA provision that allows cancellation "at the request of the registrant," 42 U.S.C. § 1976gg-6(a)(3)(A), and are therefore exempt from the notice-and-waiting requirements applicable to cancellations based on change in residence. (Def. Br. at 21-22.) A "request of the registrant" is those instances where a registrant affirmatively asks that that his or her name be withdrawn from the rolls. Colorado law specifically contemplates such a practice. *See* Colo. Rev. Stat. § 1-2-601 (allowing a "self-affirmation of withdrawal of registration" filed by a registrant to serve as "the record of evidence to cancel the elector's registration record."). Indeed, the Secretary himself recognizes these particular categories of requests as a category on its own, consistent with the NVRA's text. In the press release regarding voter purges issued before the November election, and in the lists of cancelled voters provided to Plaintiffs, the Secretary lists "duplicates," "moved" and "withdrawn" as separate categories.

At this stage of the case, Plaintiffs simply do not know how many of Defendant's purported "duplicate" removals would potentially fall into one of the permitted exceptions under the NVRA. It is reasonable to presume, however, that all of them will not. Further discovery into the issue will be necessary. But at the motion to dismiss stage, Plaintiffs' allegation, on information and belief, that some of the Defendant's purported duplicate removals constitute improper removals on the ground of suspected change of residence without adhering to Section 8(d) of the NVRA, must be accepted as true. Conversely, Defendant's self-serving contention that all duplicate removals fall within the "request of the

registrant” or “confirmation in writing” exception to the NVRA must be rejected, and Defendant’s motion to dismiss should be denied.

d. *Defendant’s Administrative Concerns Of Double Voting And Election Management Are Unsubstantiated And Irrelevant.*

Defendant raises the spectre of “fraud” to defend its practices, but offers no evidence that a single person has used registration records in different counties to vote more than once time in a single election. Similarly, Defendant provides no concrete basis, in the pleadings or otherwise, for its stated concern that complying with the NVRA’s safeguards against erroneous purging would the “clog state’s election management system.” Weighed against the very real risk (and Plaintiffs’ factual allegations) of mistaken cancellation of ostensibly “duplicate” records, Defendant’s contentions have no merit.

Plaintiffs are confident the factual issues regarding Count III of the Amended Complaint can soon be identified and narrowed, and that this claim can properly be submitted summary judgment or fact finding. However, Defendants’ present motion is based solely on the pleadings, and the information exchanged in informal discovery, in addition to being incomplete, is not properly before the court at this stage or ripe for consideration. Plaintiffs submit that the Amended Complaint clearly states a claim for relief, and that the motion to dismiss should therefore be rejected.

D. *Plaintiffs’ Amended Complaint States A Viable Claim That Colorado’s Purging Of Infrequent Or Sporadic Voters Violates The NVRA.*

Count IV of the Amended Complaint alleges that certain provisions of Colorado law violate the prohibition, contained in Section 8(b)(2) of the NVRA and Section 303(a)(4)(A) of HAVA, on removing voters from the rolls based on their failure to vote. Am. Compl. ¶¶ 55-65, 90-96. Pursuant to COLO. REV. STAT. § 1-2-605(2), a voter who is classified as “Active” in the SCORE system but fails to vote in a general election is reclassified as

“Inactive” for failure to vote. COLO. REV. STAT. § 1-2-605(2) (2008). Such “Inactive” voters are then mailed forwardable residency confirmation notices not later than 90 days after the general election, initiating a procedure that can result in removal of the voter from the voter rolls. COLO. REV. STAT. § 1-2-605(6)-(7). If a voter fails to respond to the residency confirmation notice and also fails to vote in two succeeding federal general elections, the voter’s registration is cancelled and the voter is removed from the rolls, pursuant to COLO. REV. STAT. § 1-2-605(7), without regard to whether the residency confirmation notice was returned by the post office as undeliverable or whether any other evidence exists (such as National Change of Address (“NCOA”) data) to indicate that the registered voter has changed residences.

Section 8(b)(2) of the NVRA provides, however, that states may not use a person’s failure to vote as the basis for removal from the official list of registered voters. 42 U.S.C. § 1973gg-6. Similarly, Section 303(a)(4)(A) of HAVA expressly provides that that states may not use NVRA residency confirmation procedures to remove voters from the rolls solely because of their failure to vote. 42 U.S.C. § 15483(a)(4)(A). Nevertheless, Colorado law currently requires exactly what the NVRA and HAVA prohibit: the commencement of a statutory removal process against voters solely because of their failure to vote, and not based on any permissible indication of those voters’ change in residence.

Defendant recognizes that Colorado’s current statutory scheme violates the NVRA because it allows for the commencement of removal proceedings against voters solely because of their failure to vote.. After receiving Plaintiffs’ NVRA violation notice in February 2009, Defendant proposed regulatory changes to address the issue and adopted new election rules. *See* Colo. Dep’t. of State, Notice of Adoption (May 21, 2009); 8 COLO. CODE REGS. § 1505-1, Rules 2.18, 2.19, 2.20 (effective June 30, 2009).

Defendant contends that Count IV should now be dismissed for failure to state a claim “because the Secretary’s Rule 2.18.3 now clarifies that a voter designated as ‘inactive—failed to vote’ will not be cancelled under [COLO. REV. STAT.] § 1-2-605(7).” Def. Br. at 30. Without the interpretation of § 1-2-605(6)-(7) offered by the rule, the statutory provision would violate the NVRA.<sup>23</sup>

Even with the rule in place, however, Colorado’s practices violate the NVRA, and Plaintiffs are still entitled to relief for prior and future unlawful conduct.

*First*, the revised rules (which took effect on June 30, 2009) are of no help to infrequent voters improperly purged pursuant to § 1-2-605(7) before the rules were adopted. *See* Am. Compl. ¶¶ 61-62, 92-93. Those cancellations violated the NVRA for the reasons set forth in the Amended Complaint and above, and Defendant has offered no argument to the contrary. The motion to dismiss this claim must be rejected on that basis alone.

*Second*, even under the revised regulations, the Colorado statute at issue will still result in the disenfranchisement of certain eligible voters because they did not vote in a federal election, in violation of the NVRA. The new regulation requires county election officials to periodically compare the list of voters designated in SCORE as “Inactive—Failed To Vote” with the NCOA database. 8 COLO. CODE REGS. § 1505-1, Rule 2.18.2 (2009). According to the rule, if the NCOA data reflects a change of address (whether inside or outside of the jurisdiction), the voter’s record is redesignated as “Inactive—NCOA,” and the voter is sent a residency confirmation notice. *Id.* These actions trigger the federal election

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<sup>23</sup> Plaintiffs do not here challenge the validity of the new rule, but note that the rule is valid only insofar as it is consistent with the existing statute. *See, e.g., Miller Int’l, Inc. v. State, Dep’t of Revenue*, 646 P.2d 341, 344 (Colo. 1982) (“[A]ny regulation which is inconsistent with or contrary to a statute is void and of no effect.”); *accord McCool v. Sears*, 186 P.3d 147, 151 (Colo. App. 2008).

countdown clock that could lead to the voter's cancellation under COLO. REV. STAT. § 1-2-605(7).

The revised regulation does not fully comply with the NVRA provisions governing use of NCOA data to cancel registrations on the basis of change of address. Specifically, the NVRA requires registrars who receive change-of-address information reflecting a change *within* the same jurisdiction to correct the voter's records and send the voter a notice of the change or correction—not to commence the removal process against them. *See* 42 U.S.C. § 1973gg-6(c)(1)(B)(i). In addition, those voters designated as “Inactive—NCOA,” while remaining eligible to vote, will not be sent mail-in ballots or election notice mailings.<sup>24</sup>

In sum, the Defendant's new rule, by ensuring that a voter's failure to vote is not used as a basis for cancelling a voter's registration, is necessary to avoid a direct conflict with the NVRA. However, in permitting certain voters to be designated “Inactive—NCOA” even if they have moved within a county and remain eligible to vote, the rule nonetheless conflicts with the NVRA's procedures for use of the NCOA database, and its prohibition on cancelling voters for inactivity.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss Amended Complaint.

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<sup>24</sup> This NVRA violation only arose upon Defendant's adoption of new rules governing “inactive” voters on May 21, 2009, and Plaintiffs notified Defendant of this ongoing NVRA violation shortly thereafter, on June 10, 2009. Plaintiffs are hopeful the parties will be able to resolve this claim, partially or in its entirety, through negotiations with Defendant. Plaintiffs offered to engage in such negotiations prior to the deadline for responding to the Secretary's motion to dismiss; however, Defendant declined to engage in such discussions at least until after the filing of this brief.

Dated: July 15, 2009

Respectfully submitted by:

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

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

Penda D. Hair  
Elizabeth S. Westfall  
Bradley 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](mailto:bheard@advancementproject.org)

Wendy Weiser  
Myrna Pérez  
BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW  
161 Avenue of the Americas  
12th Floor  
New York, New York 10013  
Tel: 212-998-6284  
Fax: 212-995-4550

wendy.weiser@nyu.edu  
myrna.perez@nyu.edu

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

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

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

**CERTIFICATE OF SERVICE**

I, S. Gale Dick, of the law firm of Debevoise & Plimpton LLP, herein certify that on July 15, 2009, I caused Plaintiffs' Opposition to Defendant's Motion to Dismiss Amended Complaint to be served by CM/ECF upon:

Maurice G. Knaizer  
Colorado Attorney General's Office-State Services  
1525 Sherman Street  
Denver, CO 80203  
303-866-5380  
Email: [maurie.knaizer@state.co.us](mailto:maurie.knaizer@state.co.us)

Monica M. Márquez  
Assistant Solicitor General  
Public Officials Unit  
Office of the Attorney General  
1525 Sherman St., 5th Fl.  
Denver, CO 80203  
303-866-5163  
Email: [monica.marquez@state.co.us](mailto:monica.marquez@state.co.us)

Melody Mirbaba  
Colorado Attorney General's Office  
1525 Sherman Street  
7th Floor  
Denver, CO 80203  
303-866-4224  
Email: [melody.mirbaba@state.co.us](mailto:melody.mirbaba@state.co.us)

/s/ S. Gale Dick

*[Remainder of this page intentionally left blank]*

UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO

-----X

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, : Civil No. 08-cv-02321-JLK

vs. :

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

Defendant. :

-----X

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**SUPPLEMENTAL DECLARATION OF JENNIFER ROSE FLANAGAN**

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1. I am currently Director Common Cause of Colorado, herein after Common Cause. I have been Director from August 2006 to the present.

**Common Cause:**

2. Common Cause is a non-profit membership organization with approximately 2,000 dues-paying members and 4,122 online members within the state of Colorado, many of whom are registered Colorado voters and who regularly vote in Colorado elections.

3. While Common Cause has a large membership, its staff is very small. During the fall of 2008 Common Cause employed five full-time staff individuals and two interns.

Currently, Common Cause employs only two full-time staff and one legal intern, who works part-time for academic credit.

**Common Cause Organizational Purposes and Goals:**

4. Common Cause’s mission statement states that its purpose is “[t]o strengthen public participation and faith in our institutions of self-government; ... to promote fair elections and high ethical standards for government officials; and to protect the civil rights and civil liberties of all Americans.”

5. As part of its goal to promote open, honest and accountable government, Common Cause is committed to ensuring that every eligible American, and every eligible Common Cause member, has the right to vote and the opportunity to exercise that right. Seventy-one percent of Common Cause’s 501c3 budget in 2008 were funds raised for the purpose of election administration work aimed at achieving this goal.

6. Common Cause works actively on a variety of election reform issues, including “the development of fair and effective voter database management protocols so that voters are not inadvertently purged from the rolls.” *See* Colorado Common Cause website “Our Issues”, at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4848119>.

7. Common Cause conducts a variety of voter education activities, including holding voter education for the public, identifying problems that may adversely affect Coloradans’ ability to vote, addressing those problems with election officials and organizations, and providing assistance to voter registration drives.

8. As stated on Common Cause’s website, our agenda for 2009 includes working to address key problems identified during the 2008 election cycle. This includes devoting time and resources toward resolving the problems with Colorado’s voter purge practices. *See* Colorado

Common Cause website, at

<http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4848119>; *see also* January 1, 2009 Agenda, attached hereto as Exhibit A, and February 3, 2009 e-mail from Jenny Flanagan, attached hereto as Exhibit B.

9. Our agenda for 2009 included working with the Colorado Election Reform Commission to develop effective policies to improve our overall elections administration, and this effort also involves devoting time and resources toward resolving the problems with Colorado's voter purge practices. *See* Common Cause's initial prepared statements to the Election Reform Commission submitted to the Commission in November 2008, attached hereto F. This statement, including the section addressing voter purge issues, took considerable time to prepare, which was a strain on the part of Common Cause's limited resources. Further, as director of Common Cause, I was required to testify before the Election Reform Commission on several occasions. This testimony, in part, addressed concerns regarding Colorado's voter purge practices.

**Common Cause 2008 Election Administration Work:**

10. The State of Colorado started testing the electronic database, SCORE, in 2007 and first relied on it for a general election in 2008. Common Cause was concerned about the introduction of a new system that would be in place for the first time during a federal presidential election. Our main concern in 2008 was the technical operation of SCORE, and the potential impact on eligible voters' ability to vote.

11. In early 2008, I was aware of a potential problem with the voter registration cancellation policies of the State of Colorado. It was not the main focus of our efforts, but

through-out 2008 we evaluated these practices, along with other issues, as best we could as part of our on-going work to evaluate the implementation of SCORE.

12. During the 2008 general election cycle, Common Cause implemented a program called “Just Vote Colorado.” The Just Vote Colorado (established in 2004 as Fair Vote Colorado) coalition supervises election protection efforts in Colorado in coordination with and on behalf of numerous organizations. One of the tasks of the Just Vote Colorado coalition is operating the Voter Protection Hotline that is available to the general public and provides assistance to individuals with questions or concerns about voting. Initially, the Common Cause office number was available on the Just Vote Colorado website, and then a 1-800 hotline number was available during early vote in the fall of 2008, and on 2008 Election Day. Our coordinating steering committee includes The Colorado Lawyers Committee, the Legal Center for People with Disabilities and Older People, the Latina Initiative and the Colorado League of Women Voters. Organizations who utilize the Just Vote Colorado program include (but are not limited to) The Colorado Progressive Coalition, ACLU of Colorado, New Era Colorado, and Colorado’s C3 Roundtable.

13. I was responsible for running and supervising Just Vote Colorado and the Voter Protection Hotline as part of my duties as director of Common Cause.

14. On October 9, 2008, the *New York Times* published an article stating that significant numbers of voters had been purged from Colorado’s voter registration rolls. After this new article publicized the widespread cancellation of voter registrations in the state of Colorado, my staff and I were required to devote considerable time to investigate Colorado’s voter registration cancellation policies.

15. Our offices in Denver were flooded with calls from our members. In addition, I personally received a considerable number of phone calls from members of the Just Vote Colorado coalition. My staff and I were required to devote resources to responding to these calls. Our efforts to respond to these calls and provide information to the Just Vote Coalition members was not done in anticipation of litigation.

16. My staff and I, in addition to Common Cause's national Vice President of Research, Tova Wang, and Derek Cressman, Common Cause's Regional Director of State Operations for Western States, researched the allegations in the article. This involved an effort to follow-up directly with the *New York Times* to determine the source of the information found in the article. See October 9, 2008 e-mail from Derek Cressman, attached hereto as Exhibit C.

17. This research was done so that we could assess the nature and extent of the potentially illegal voter purging and it was necessary so that we could respond to inquires from our members, coalition partners, and media. See October 10, 2008 e-mail from Derek Cressman, attached hereto Exhibit D.

18. Just Vote Colorado had weekly steering committee meetings in the fall of 2008 before the election. The agendas of these meetings were typically very packed. On several occasions in October 2008, I was required to devote time during these meetings to convey information about Colorado's illegal purge activities and the effect of these practices on voters.

19. These briefings were necessary so that the coalition could understand the potential effects the illegal purge practices were having on the election protections efforts. And, these briefings were particularly important to the Colorado Progressive Coalition, Latina Initiative, and New Era Colorado, members of the coalition that also conducted voter registration and relied on

me in my capacity as Director of Common Cause for advice related to their voter registration activities.

20. Most of the other members of Just Vote Colorado coalition were not involved in the litigation, and therefore, my work related to the illegal purge practices done on behalf of the coalition was separate and apart from any resources Common Cause expended in pursuing this litigation.

21. Some of the calls received while Common Cause, its staff, volunteers and partners were answering the Voter Protection Hotline came from individuals whose current voter registration record might have been cancelled due to the Defendant's illegally purging activities.

22. Common Cause devoted time and resources to help these individuals determine why their names had been removed from the voter registration lists and to determine if there were any means available to fix their cancelled records and allow them to vote.

23. I was responsible for drafting the training materials for volunteers answering the Voter Protection Hotline. These training materials were drafted before I was aware of the nature and extent of the problem of illegally purging voters and I was required to supplement the training materials with a discussion of the voter purge problems during the training.

24. On Election Day, as director of Common Cause and leader of the Just Vote Colorado coalition, I was in the call command center for the Voter Protection Hotline. Throughout the day, I provided instruction and guidance to volunteers answering the phones regarding Colorado's illegal purge activities and assisted callers who might be effected by these purges.

25. As a result of being at the Command Center on Election Day in 2008, I am aware that in Colorado, voters do not learn that they need to vote provisionally until after they have already stood in line to reach the initial checking station. In many instances, these voters must

then stand in a second line to cast a provisional ballot. Additionally, all voters must fill-out further paper work to vote provisionally.

26. I am also aware that on Election Day in 2008 voters had to wait in considerable lines to receive assistance at many County Clerk's offices.

**Common Cause 2009 Election Administration Work:**

27. In January 2009, the Secretary of State introduced House Bill 1018 into the Colorado legislature. This bill addressed criteria and steps for removing voter registration records for individuals who have moved and for cancelling voter registration records that are allegedly duplicates.

28. Common Cause opposed the passage of the Secretary of State's version of this bill because the criteria and guidelines in the bill were inadequate to protect eligible voters.

29. I devoted a considerable amount of time working against passage of the Secretary of State's version of this bill, and working for the passage of a comparable bill and amendments that put forth certain steps and matching criteria before voter registration records are cancelled that would adequately protect eligible voters and comply with federal law.

30. My staff and I drafted a letter to the Colorado legislature in support of this amendment and explaining why Common Cause opposed the Secretary of State's version of the bill. A copy of that letter is attached here as Exhibit E.

31. I meet with Pamela Campos counsel to Colorado Governor Bill Ritter on February 26, 2009 for the purpose of discussing House Bill 1018, and in the hopes of obtaining the Governor's support in opposition to the Secretary of State's version of this bill. I devoted considerable time to preparing for this meeting.

32. Despite shared concerns among coalition partners and state legislators, Common Cause's efforts were not successful and the Secretary of State's version of House Bill 1018 was passed into law during the 2009 legislative session.

33. As part of my duties as director of Common Cause, I am an active member of the Colorado Lawyer's Committee Election Task Force. This Committee has monthly meetings, and in March 2009 the meeting addressed the voter merge process – the process by which the County Clerks and Secretary of State in Colorado are going to “merge” millions of allegedly duplicate voter registration records, which will effectively cancelling millions of records.

34. I was required to research and investigate the proposed process for this merge, and then I presented information about that merge process during the Lawyer's Committee meeting in March 2009. During that meeting, I helped to facilitate a discussion to identify areas of concern related to the merge process.

35. Members of the Lawyer's Committee met with officials from the Secretary of State office in late March 2009 solely for the purpose of discussing concerns about whether the merge process would result in the cancellation of valid voter registration records. I attended this meeting.

36. In February of 2009, the Secretary of State introduced election Rule 2.17, which relates to Colorado's 20 Day Rule. The rule addressed the notices and follow-up election officials must undertake when a newly registered voter's notice card is returned as undeliverable. The Secretary of State conducted a hearing on this rule on March 3, 2009. Common Cause sent a staff person to this hearing.

37. In May of 2009, the Secretary of State enacted Rules 2.18 and 2.20, addressing, in part, inactive voters. Before this regulation was put into effect, Common Cause devoted

resources to working with the legislature and the Secretary of State to ensure that this issue was properly addressed and to cure the illegal practice of purging voter registration records solely for a failure to vote. Common Cause testified at the public hearing related to these Rules.

38. Common Cause is also currently engaged an effort to contact the Common Cause membership to provide them with information about Colorado's illegal purge activity, to determine if their voter registration records might have been purged, and if so, to inquire about how having a purged voter registration record burdened their right to vote. For example, we aim to learn whether purged voters were required to vote provisionally at their polling place or if they were required to vote at the county clerk's office. Finally, we are providing our members with information and assistance to ensure that they are still registered to vote.

**Burden on Common Cause:**

39. The ongoing, improper purge of eligible voters from Colorado's election rolls directly impacts Common Cause, its ability to fulfill its mission, and its expenditure of time, energy, and resources.

40. Common Cause's resources are limited, and the amount of time the organization's staff is required to spend investigating and taking measures to counteract the State's unlawful practices forces the diversion of necessary resources from Common Cause's other voter protection and education activities.

41. One priority of Common Cause's election reform agenda for 2008 was the technical operation of SCORE. Because Common Cause was required to devote significant resources to address the State's unlawful purge practices, we were not able to devote resources to addressing the operation of SCORE after October of 2008.

42. Additionally, during the 2008 election, there was a significant confusion in Colorado as where voters could drop off mail-in ballots on Election Day. But because Common Cause devoted its resources to the more pressing problem of illegally purging, we were not able to provide sufficient education and follow-up to address this confusion.

43. Just Vote Colorado has very limited resources and a huge burden. The Voter Protection Hotline received at least 1,800 recorded calls during the 2008 election cycle. Common Cause was forced to divert resources toward investigating the state's purging activities away from other work that the could have been preformed to make Just Vote Colorado and the Voter Protection Hotline more effective and useful to voters.

44. The lobbying work for Common Cause's 2009 agenda is performed by me, with the assistance of my one full-time staff person.

45. As a result of the lobbying efforts that Common Cause was required to devote toward trying to defeat the passage of House Bill 1018, I was not able to devote as much time lobbying for other vital election administration reforms, which were originally on Common Cause's agenda for 2009, such as Election Day Registration and improving the rights of inactive voters in all-mail-ballot elections.

46. Common Cause's current project to contact the Common Cause membership to provide them with information about Colorado's illegal purge activity and obtain information about the effects of Colorado's illegal purge practices is mostly being performed by one legal intern working for Common Causes this summer. This intern is working for credit and his hours are limited by parameters set by his law school. Common Cause has been required to devote this very limited resource to investigating the effects of the Defendant's illegal purging activities. But for the concerns about Colorado's illegal voter purge practices impacting the ability of its

members to vote, this intern would have spent this summer working on some of Common Cause's other policy initiatives, including drafting a bill related to election day registration and a report on its value; and research related to municipal codes in Colorado.

**Common Cause Members Effected by the Illegally Cancellation Practices:**

47. Individual Common Cause members have been unlawfully purged from the voter rolls in the past, and other individual members are subjected to the concrete and imminent risk that they will be unlawfully purged from the rolls and/or be subjected to burdens or hardship when voting in upcoming elections.

48. On or around November 13, 2008, Common Cause received several lists made available by the Colorado Secretary of State's office. The first two lists provide the names of all individuals whose voter registration records were cancelled from SCORE as a result of the 20 Day Rule since August of 2007, and all individuals whose voter registration records were cancelled from May 14, 2008 through November 4, 2008. Another list was obtained in response to a Colorado Open Records Act request made by the Advancement Project. This list contains the names of all persons whose records were cancelled from the Colorado voter registration database from August of 2007 through September of 2008.

49. I worked with a paralegal at the Advancement Project and a legal intern here at Common Cause's Denver office. I requested that all of the lists mentioned above be compared with Common Cause's own membership lists, asking for the identity of any members of Common Cause whose records were canceled.

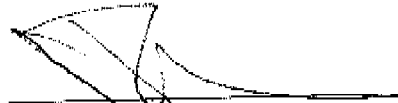
50. This comparison found 3517 potential matches, where the first and last name listed in cancelled registration records matched the first and last name of members of Common Cause.

51. Of these potential matches, Common Cause has identified a total of 67 individuals, who are members of Common Cause with first and last name and address that correspond with a voter registration record that Plaintiffs allege was cancelled illegally.

52. To date, Common Cause has been able to speak to six of its members to confirm that they are individuals who had a registration record cancelled for a reason that the Plaintiffs allege is illegal. Additionally, Common Cause has identified five other Common Cause members whose telephone number, as well as name and address correspond with a voter registration record that Plaintiffs allege was cancelled illegally. Per the reasons provided by the Secretary of State, the registration records of these eleven individuals were cancelled for violation of the 20 Day Rule, and because the records were allegedly duplicates. Moreover, several of these records were cancelled within 90 days of a federal election. The individuals are: Dolores Adams, Stanley Brown, Linda Chambers, Gail Dubas, Emily Gamm, Tanya, Heidrich, Dixie Hufford, John Kosmalski, Bonnie Mandell-Rice, Raymundo Ribota and Peter Simon.

I affirm under the penalties of perjury under the laws for the United States that the foregoing representations are true.

Executed this 15 day of July in Denver, Colorado.

  
Jennifer Flanagan

# **EXHIBIT A**

**Colorado Common Cause  
Issues Committee Agenda  
1/8/09 5:30- 7:00 PM**

**I. Legislative Priorities**

- a. Elections:
  - i. Defense:
    - 1. Vote by Mail push
    - 2. Photo ID/ Proof of Citizenship
  - ii. Clean up:
    - 1. Check box
    - 2. Purge
    - 3. Drop-off locations for mail ballots
    - 4. Inactive Voters
    - 5. Machine Certification
    - 6. Election Reform Commission/ SOS/ Clerks Omnibus bill
  - iii. Proactive:
    - 1. Election Day registration
    - 2. Online voter registration
    - 3. Nonpartisan election administration
    - 4. Parolee voting
  
- b. I&R
  - i. Signature integrity
  - ii. Next generation Ref. O

**II. Other legislative issues**

- a. Economic Justice
  - i. Poverty task force
  - ii. Payday lending
  - iii. Earned income tax credit
  - iv. Parental leave
  - v. Watchdogging the budget process/ defending against budget cuts
- b. Civil Rights:
  - i. Sunset review of Office of Civil Rights
  - ii. Designated beneficiary for domestic partnership
  - iii. Immigration- HEAA (Higher Ed Access Alliance; companion to DREAM act)
- c. Health care
- d. Environment

**III. Non-legislative program updates**

- a. Media Reform
  - i. Digital transition
  - ii. Universal broadband
  - iii. Federal campaigns
- b. Independent Ethics Commission
- c. Money in Politics

# **EXHIBIT B**

**From:** Elena Nunez  
**Sent:** Wednesday, February 04, 2009 12:21 PM  
**To:** Katie Fleming  
**Subject:** FW: election check in call tomorrow morning 9am

Elena Nunez  
 Colorado Common Cause  
 (303) 292-2163

---

**From:** Jenny Flanagan  
**Sent:** Wednesday, February 04, 2009 8:05 AM  
**To:** Jenny Flanagan; 'fgross@thelegalcenter.org'; cjtone@yahoo.com; 'Rachel Chaparro'; 'Dusti Gurule'; 'Connie Talmage'; 'Dan Sweetser'  
**Cc:** Elena Nunez  
**Subject:** RE: election check in call tomorrow morning 9am

Folks, here are our notes on VBM and the safeguards needed for Colorado if we are to move to an exclusive VBM election in the future. We'd like to get your feedback to ensure we are addressing all concerns.

Thanks and talk to you soon!

---

**From:** Jenny Flanagan  
**Sent:** Tuesday, February 03, 2009 1:37 PM  
**To:** Jenny Flanagan; fgross@thelegalcenter.org; cjtone@yahoo.com; Rachel Chaparro; Dusti Gurule; Connie Talmage; Dan Sweetser  
**Cc:** Elena Nunez  
**Subject:** RE: election check in call tomorrow morning 9am

Hi, We'd like to meet by phone tomorrow morning at 9:00a (folks are welcome to come to the CCC office if preferred) to discuss election issues happening this session.

Call in info:  
 1 (906) 481-2100  
 access code 808691

Ideally this becomes a weekly call to check in briefly on current events ☺

Hope all are well,

Jenny

Draft agenda:

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<!--[if !supportLists]-->1) <!--[endif]-->Election legislation introduced/calendared this session
  <!--[if !supportLists]-->a. <!--[endif]-->Vote By Mail for Primaries; List Maintenance, Online Voter Reg., etc
<!--[if !supportLists]-->2) <!--[endif]-->Election Reform Commission
  <!--[if !supportLists]-->a. <!--[endif]-->Voting machine certification; uniform practices; registration issues
<!--[if !supportLists]-->3) <!--[endif]-->Other
  
```

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**From:** Jenny Flanagan  
**Sent:** Tuesday, January 27, 2009 5:41 PM  
**To:** fgross@thelegalcenter.org; cjtone@yahoo.com; 'Rachel Chaparro'; 'Dusti Gurule'; 'Connie Talmage'; 'Dan Sweetser'  
**Cc:** Elena Nunez

**Subject:** election check in call tomorrow morning

Hi all,

Sorry for the late notice. Faith and I have been talking about setting up a regular call during the legislative session to check in on election issues. We would like to meet Wednesdays at 9am.

We will start tomorrow morning for those who can join. Please mark your calendars for future calls if you can participate.

1 (906) 481-2100  
access code 808691

Jenny

# **EXHIBIT C**

**From:** Derek Cressman

**Sent:** Thursday, October 09, 2008 6:14 PM

**To:** Jenny Flanagan; Elena Nunez; Tova Wang

**Subject:** trying to figure out one NYT Colorado factoid

Times says: **"In Colorado, some 37,000 people were removed from the rolls in the three weeks after July 21. During that time, about 5,100 people moved out of the state and about 2,400 died, according to postal data and death records."**

**Derek wonders: election officials may have taken postcards or other election mailings done earlier this year (so over a much longer time period than the three weeks after July 21) and flagged them all as inactive voters during this time-window, rather than completely purging them.**

Derek Cressman

Regional Director of State Operations for Western States

916-760-1534

[DCressman@commoncause.org](mailto:DCressman@commoncause.org)

# **EXHIBIT D**

**From:** Derek Cressman  
**Sent:** Friday, October 10, 2008 1:14 PM  
**To:** Prog Ops; All State Organizations  
**Subject:** response to NYT story

As I mentioned on the call this morning, please check with me before we put out any reaction to the NYT story. I'll paste below the statement we sent out on CO, and a press clip that picked it up.

Thanks,  
Derek

<http://www.rockymountainnews.com/news/2008/oct/09/democratic-official-questions-report-voter-purges/?partner=RSS>

**For Immediate Release:**

October 9, 2008

**Contact:**

Elena Nunez, (720) 339-3273 cell  
Jenny Flanagan, (303) 842-1515 cell  
Derek Cressman, (916) 760-1534

*Common Cause statement regarding New York Times story on Voter Purging*

Colorado Common Cause is concerned about recent reports that there has been an overall decline in Colorado voter registrations.

Our election officials must immediately investigate if any legitimately registered voters were wrongfully removed from the rolls and re-evaluate Colorado's policy, more stringent than many other states, of declaring voters 'inactive' after missing a single federal election.

Voter registration problems are looming as the hanging chad of the 2008 election, and Colorado could well be this year's Florida.

We urge voters to confirm their registrations by calling 1-866-OUR-VOTE or visiting [www.JustVoteColorado.org](http://www.JustVoteColorado.org).

###

Derek Cressman  
Regional Director of State Operations for Western States  
916-760-1534  
[DCressman@commoncause.org](mailto:DCressman@commoncause.org)

# **EXHIBIT E**



February 20, 2009

Dear Members:

I am writing to encourage the House State, Veterans, and Military Affairs Committee to support Rep. Todd's proposed amendment to House Bill 1018. The amendment is needed to institute best practices for Colorado's voter registration list maintenance and ensure that Colorado complies with federal law. While the bill in its current form is being characterized as a technical clean up, the language goes beyond that. The provisions codify a substantive policy choice and the legislature has the opportunity now to consider what the best proposal is for Colorado moving forward.

**Because of the fundamental importance of voting and the right to vote, all list maintenance must be accomplished by methods that err on the side of protecting the voters and catching all mistakes before any eligible individual is mistakenly prevented from voting.**

The proposed amendment requires that every time a voter registration record is cancelled there is a notice sent and a waiting period in place so that any mistakes can be caught and corrected before a voter is incorrectly removed from the registration rolls. **The proposed amendment will increase the level of scrutiny involved in database matching activities before a voter's registration is cancelled.**

The proposed amendment does allow for list maintenance and does allow election officials to clean-up registration lists to remove duplicate records and remove records of ineligible voters, so they do not interfere with the goal of having accurate voter registration lists. These amendments merely expand the circumstances in which a notice and waiting periods must be utilized during the process.

Imagine a household where Michael Patrick Flanagan Sr. and Michael Patrick Flanagan Jr. both live. They have the same mailing address and are both born in the month of May. With minor errors in a database, you can see how easy it might be to confuse these two separate registrations. The amendment provides a much needed safeguard to our voter list procedures.

**Colorado must improve its guidelines for voter registration list to ensure that all eligible voters are able to participate.** Without Rep. Todd's amendment, House Bill 1018 will codify the state's current list maintenance practices, which are inadequate to protect voters.

Please let me know if you have any questions about this amendment.

Jenny Flanagan  
Colorado Common Cause

# **EXHIBIT F**



November 12, 2008

Testimony to Election Reform Commission:

Good afternoon and thank you for the opportunity to speak with you today. My name is Jenny Flanagan and I am the executive director of Colorado Common Cause. We work for open, honest, and accountable government, and to increase public participation in the political process. Nothing is more sacred in a democracy than a citizen's right to vote. We are the lead organization of Just Vote Colorado, a nonpartisan election protection program designed to assist voters and collect information about Colorado's elections. Over the years we have made recommendations about the voting process, many of which have been adopted by our state legislature. We will issue a post election report in mid-December based on the 2008 elections.

Before I continue my comments, I want to commend Colorado's county clerks on a great election this year. With limited time to plan for this election, and under enormous scrutiny, Colorado's election went very well. Of course there are always areas for improvement, and though we did not see the incredible lines of 2006, this election revealed a number of critical areas where we can improve our elections to ensure all eligible Colorado voters can cast their ballots and have them counted.

Today, I will focus my comments on several broad areas that we recommend the panel address over the course of the next several months. Because there are so many issues, we also encourage the commission to hear public testimony at each of its meetings, to solicit input from outside groups.

The scope defined by legislation provides a wide range for you to consider what works and what doesn't work about our state elections. I have provided you all with our list of priority areas for election reform and will highlight three key areas in need of reform.

#### Colorado Election Reform Issues

- 1) Voter registration: All of Colorado's eligible voters should be able to participate in our state's elections. Registration should not be a barrier to voting, and the Commission should advance reforms that encourage participation.
  - a. Election Day Voter Registration: Colorado should join the eight other states (ME, MN, WI, ID, IA, MT, NH, WY) that allow eligible citizens to register and vote on Election Day. North Carolina allows for Same Day Registration at early voting sites. EDR states typically boast voter turnout rates that are generally 10-12 percent higher than states without EDR, and report few problems with fraud, costs or administrative complexity. EDR significantly increases the opportunity to cast a vote and participate in American democracy.
  - b. Voter purges: The National Voter Registration Act (NVRA) exists to protect voters from systematic removal from the rolls before an election. In light of recent court intervention, Colorado must review and change its procedures for cancelling voter registrations. 44,000 voters were improperly removed from the voter rolls within the prohibited 90 day period this year.

- c. Check box issue – Colorado’s onerous requirement that voters affirmatively state that they do not have a state-issued ID unnecessarily excludes legitimate voters from registering to vote. Several thousands of voters had their voter registrations deemed incomplete for failure to check the box on Colorado’s state registration form. The use of the new form demonstrates the negative impact the law had on voters’ ability to register. We must revise these requirements.
  - d. SCORE: As the 2008 election was the first test of the statewide voter database, we recommend a review and analysis on how SCORE performed.
  - e. Inactive voters: Colorado’s law making voters inactive after missing just one general election is too aggressive. Few states have similar procedures. In the state’s effort to maintain ‘clean’ voter lists, many Coloradans are being pushed out of the voting process. The Legislature took temporary steps to address this issue, but have not resolved it for the long term.
- 2) Non partisan election administration
- a. Coloradans should not have to wonder whether or not the chief election administrator of the state is biased in his or her approach to overseeing our elections. On too many occasions partisanship was thrust into Colorado’s election administration in 2008.
  - b. We should require the Secretary of State to follow clear guidelines for conducting themselves in a nonpartisan manner. Partisan activities of election officials should be restricted; the Secretary should not actively participate in political organizations including fundraising or campaigning.
- 3) Maintain voting options
- a. Colorado should maintain its voting options, including vote by mail, early voting and Election Day polling places, to provide for the greatest flexibility and ensure that all Colorado voters can participate.
  - b. We support vote by mail as an option for voters. Vote by mail can increase voter turnout in low interest elections, and provides an alternative for voters who cannot make it to the polls on Election Day. However, vote by mail is not a panacea for our election challenges. We heard from many voters who never received their mail ballots, had questions about how to return their ballots, and had other concerns.

Other Issues for the Election Reform Commission:

- 1) Election planning: Colorado should incorporate formulas to calculate how many back up ballots, provisional ballots, and other materials should be at the polls. We also recommend incorporating community input into key election decisions such as the location of polling places during early voting and on Election Day.
- 2) County Oversight: The Commission should discuss whether or not Colorado’s county watch list is an effective means for accountability when issues arise regarding how counties interpret and implement federal and state laws and rules.

- 3) Training for Election Judges: Election workers are the front line on Election Day. Training for election workers is inconsistent statewide, and often inadequate. In some counties there were mistakes over polling place identification requirements and over use of provisional ballots.
- 4) Funding for elections: To hold fair elections we must adequately fund them. Colorado must make a commitment to ensure our counties have the resources they need to conduct our elections.
- 5) Voting machines: Voting systems must hold the confidence of the electorate. Last years decertification and subsequent recertification called into question the process by which we introduce voting equipment in our state. The Commission should review the certification process with an eye toward transparency, integrity, accessibility, auditability and accountability.
- 6) Identification requirements
  - a. Increasing identification requirements only serve to further burden access to the voting process. Photo ID requirements disproportionately impact people of color, low income, elderly, individuals with disabilities, and rural voters. Significantly, there is no evidence that the type of fraud often cited in support of ID and proof of citizenship requirements actually exists.
  - b. Colorado should not increase the burden on voters by requiring a photo ID at the polls. Colorado should not require proof of citizenship for registration or polling place voting.
- 7) Minority language materials: Colorado should evaluate whether counties should be required to provide election materials in Spanish (or other minority languages) even if not required by the Voting Rights Act. Given the fast growing population of Spanish speakers in Colorado counties and the slowness of the census process, the state should pass a law requiring counties to do more in the way of providing language assistance to voters than is required under federal law.
- 8) Deceptive Practices: In this election, misinformation from partisan operatives confused Colorado voters. The text messages and robo calls that were distributed to voters throughout the country, giving misinformation about voting dates and locations, also reached some Colorado voters. Reports include text messages directing Democrats to vote on Wednesday as well as robo calls aimed at suppressing voter turnout among Republican voters. Colorado should strengthen the law about deceptive practices to discourage these bad acts.

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO**

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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. :

Civil No. 08-CV-0231-JLK

**DECLARATION OF S. GALE DICK**

I, S. Gale Dick, declare as follows:

1. I am an associate at Debevoise & Plimpton LLP, counsel to Plaintiffs Common Cause of Colorado, Mi Familia Vota Education Fund, and Service Employees International Union.

2. I submit this declaration in support of Plaintiffs' Reply to Defendant's Motion to Dismiss Amended Complaint.

3. Attached as Exhibit A is the Declaration of Jennifer Flanagan, Executive Director of Colorado Common Cause, dated October 24, 2008, which I previously submitted to this Court as Exhibit 1 to our Motion for Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction on October 24, 2008.

4. Attached as Exhibit B is the Declaration of Steven K. Ury, Associate General Counsel of Service Employees International Union, dated October 23, 2008, which I previously submitted to this Court as Exhibit 2 to our Motion for Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction on October 24, 2008.

5. Attached as Exhibit C is the Declaration of Grace Lopez, the Colorado State Director for Mi Familia Vota Education Fund, dated October 23, 2008, which I previously submitted to this Court as Exhibit 3 to our Motion for Temporary Restraining Order and Order to Show Cause for a Preliminary Injunction on October 24, 2008.

I declare under penalty for perjury that the foregoing is true and correct.

Executed at New York, New York, this 15<sup>th</sup> day of July 2009.

/s/ S. Gale Dick

# **EXHIBIT A**

## **Declaration of Jennifer Flanagan**

I, Jennifer Flanagan, hereby declare as follows:

1. I am Executive Director of Colorado Common Cause, and a resident of the state of Colorado. I have personal knowledge of the matters set forth in this declaration, and if called to do so, could and would competently testify thereto.

2. Colorado Common Cause is a non-profit organization fighting for open, honest and accountable government. A central mission of Common Cause is to ensure that every American, including every Common Cause member, has the right to vote and the opportunity to exercise that right. Additionally, Common Cause is committed to strengthening public participation and ensuring that government and the political process serve the public interest. Colorado Common Cause's mission statement stresses that it strives to "promote fair and honest elections;" and protect the civil rights of all Americans."

3. My responsibilities as Executive Director include supervision of many of Common Cause's activities in Colorado, including a number of election-related programs, like the Just Vote Colorado program, a voter protection program. The goal of Just Vote Colorado is to "monitor the 2008 general election, identify the impact that current laws have on Coloradan's right to vote and present findings in a post-election report so that the process can be verified or challenged." I also conduct advocacy throughout the year in conjunction with other organizations related to election administration, and work directly with election officials and elected officials to resolve voting issues and promote sound election administration. Additionally, I oversee Colorado Common Cause's effort to educate and train members on election-related issues.

4. Colorado Common Cause has 4,000 dues-paying members and 8,000 online members within the State of Colorado, many of whom are registered Colorado voters who actively participate in the political process and regularly vote in Colorado elections.

5. Colorado Common Cause has learned from recent news reports and a recent press release from the Secretary of State that large numbers of registered voters have been purged from the voter rolls.

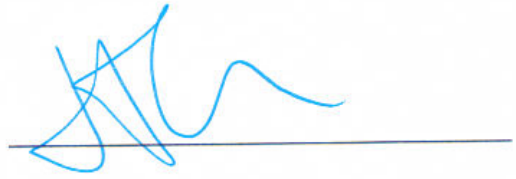
6. These purges injure Colorado Common Cause by unlawfully purging Colorado Common Cause's members from the rolls or subjecting them to imminent risk that they will be purged unlawfully from the rolls and not permitted to vote in the upcoming November 4, 2008 general election or subsequent elections.

7. Colorado Common Cause is conducting voter protection and education activities around Colorado in advance of the upcoming general election. Colorado Common Cause has limited resources and, to the extent Colorado Common Cause is required to spend staff time and resources on investigating and taking measures to counteract the State's unlawful purging practices, it will need to divert resources from its planned voter protection and education efforts.

8. Colorado Common Cause will further be harmed after the November 4, 2008 general election if these purging practices are not discontinued because our members may be unlawfully purged in the future.

I declare under penalty of perjury under the laws of the state of Colorado that the foregoing is true and correct to the best of my knowledge.

DATED this 24th day of October 2008 in Denver, Colorado.

A handwritten signature in blue ink is written over a solid horizontal black line. The signature is stylized and cursive, starting with a large loop on the left and ending with a wavy line on the right.

Jennifer Flanagan

# **EXHIBIT B**

## DECLARATION OF STEVEN K. URY

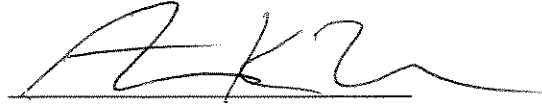
I, Steven K. Ury, declare as follows:

1. I am Associate General Counsel of Service Employees International Union (“SEIU”) and Counsel to SEIU’s South/Southwest Region. I am a member in good standing of the State Bar of California. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
2. My responsibilities as Associate General Counsel include advising SEIU on its activities in Colorado. As part of my responsibilities, I am familiar with SEIU’s activities and membership in Colorado. I am also familiar with SEIU’s voter education and voter registration activities in Colorado.
3. SEIU is a labor union representing employees working in the fields of healthcare, property services and the public sector. SEIU is committed to ensuring that every American, including every SEIU member, has the right to vote and the opportunity to exercise that right. SEIU’s Mission Statement in the 2008 Constitution and Bylaws states: “We must build political power to ensure that workers’ voices are heard at every level of government to create economic opportunity and foster social justice.”
4. At our 2008 Convention, SEIU adopted a comprehensive political program that included a commitment set forth in Convention Resolution #201 to “promote civic participation of communities of color and immigrant members and families, including encouraging citizenship and voter registration[.]”
5. SEIU has several Locals in Colorado and has approximately 10,000 members across the state. SEIU has many members in Colorado who are registered to vote or who have sought to register to vote.
6. Over the course of the last year, SEIU has devoted significant time, energy and resources to registering voters in Colorado. These efforts have required the expenditure of staff time and financial resources on voter registration drives, educational activities, and voter protection activities. SEIU staff have assisted in registering substantial numbers of new voters in Colorado during this past year.
7. SEIU recently learned from news reports and from public statements by the Colorado Secretary of State, that large numbers of registered voters were purged from the voter rolls both before and after August 5, 2008. These reports and public statements cast a cloud of uncertainty over SEIU’s registration efforts, and will likely adversely affect SEIU’s ability to engage newly registered voters in the political process and SEIU’s future efforts to register new voters.
8. The purging of large numbers of registered voters from the voter rolls despite the express prohibition on such purges set forth in the National Voter Registration Act, harms SEIU because it undermines SEIU’s efforts to register eligible voters and to conduct voter education activities. It further harms SEIU and its members because there is a possibility

that some eligible voters who are SEIU members or who were registered by SEIU staff will be or have already been purged unlawfully from the rolls and not permitted to vote in the upcoming November 4, 2008 general election.

9. Since learning of the purges of large numbers of Colorado voters from the polls, SEIU has devoted significant time and resources to investigating the purges, identifying voters affected by the purges, and undertaking efforts to counteract the unlawful purges.
10. As the November 4 general election nears, SEIU intends to educate voters in Colorado about election procedures and their federal voting rights. However, SEIU has limited resources, and to the extent that SEIU has been and is required to spend its resources and time investigating the unlawful purges of registered voters, identifying affected voters, and taking measures to address the unlawful purges, SEIU has had to divert and will need to continue diverting resources from its planned voter education efforts.

I affirm, under the penalties for perjury, that the foregoing representations are true.



Steven K. Ury

10/23/08  
Date

# **EXHIBIT C**

## **DECLARATION OF GRACE LOPEZ**

I, Grace Lopez, declare as follows:

1. I am the Colorado State Director for Mi Familia Vota Education Fund (“Mi Familia Vota”). I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
2. My responsibilities as Colorado State Director include development and management of civic participation campaigns including the voter registration drive, directing all voter education work, conducting on-going community outreach, and serving as Colorado’s Mi Familia Vota spokesperson. As part of my responsibilities, I am familiar with Mi Familia Vota’s activities in Colorado, including the organization’s voter education and voter registration activities.
3. Mi Familia Vota is a non-partisan civic engagement campaign working with the Latino and immigrant families to bring positive change to their communities and improve their lives. We believe every family should have quality healthcare, education and housing. We are working for a future in which the electorate is energized and empowered, and reflective of the growing diversity in Colorado and other states. We work with grassroots organizations, labor unions, churches, and other organizations that want to empower Latinos and their families.
4. Part of Mi Familia Vota’s mission is to empower members of the Latino and immigrant communities by registering eligible citizens to vote and encouraging registered voters to participate in the electoral system.
5. Mi Familia Vota has expended significant resources and staff time on voter registration activities in advance of the November 4, 2008 general election. These activities have included outreach through churches and community organizations, outreach to newly sworn-in citizens, and door-to-door canvassing. In the past six months, Mi Familia Vota has registered approximately 2,300 persons to vote.
6. Mi Familia Vota has learned from news reports, as well as from public statements by the Colorado Secretary of State, that large numbers of registered voters were purged from the voter rolls both before and after August 5, 2008.
7. The purging of large numbers of registered voters from the voter rolls despite the express prohibition on such purges set forth in the National Voter Registration Act, harms Mi Familia Vota because it undermines the organization’s efforts to register eligible voters and to conduct voter education activities. Mi Familia Vota is extremely concerned that these purges will make it more difficult for the organization to fulfill its mission because newly registered voters will be worried about the status of their registrations and uncertain about the entire registration process. These purges also create an uncertainty about the lawfulness of the entire registration process that will likely affect Mi Familia Vota’s ability to register new voters in the future.

8. The unlawful purges of registered voters further harms Mi Familia Vota because there is a possibility that some eligible voters who were registered by Mi Familia Vota staff or volunteers will be or have already been purged unlawfully from the rolls, and will not be permitted to vote in the upcoming November 4, 2008 general election.
9. As the November 4 general election nears, Mi Familia Vota intends to educate voters in Colorado about election procedures and their federal voting rights. However, Mi Familia Vota has limited resources, and to the extent the organization is required to spend resources and time taking measures to address the unlawful purges, it will need to divert resources from its planned voter education efforts.

I affirm, under the penalties for perjury, that the foregoing representations are true.



Grace Lopez

10/23/08  
Date

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

Civil No. 08-CV-0231-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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**SUPPLEMENTAL DECLARATION OF LAUREL ROSE WEBB**

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## SUPPLEMENTAL DECLARATION OF LAUREL ROSE WEBB

I, Laurel Rose Webb, declare as follows:

1. I am employed as a law fellow for the Service Employees International Union ("SEIU"). I have been employed in this position since September 2008. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
2. In December, 2008, I signed a declaration regarding the results of SEIU's comparison of lists of individuals removed from the Colorado voter rolls and SEIU's membership lists, as well as lists of individuals who SEIU registered to vote. I am providing this Supplemental Declaration in support of SEIU's opposition to the Secretary of State's motion to dismiss.
3. From approximately October 10, 2008 to November 4, 2008, I worked for SEIU in Colorado. My assignment was to work on voter protection and education efforts.
4. One of the projects on which I worked during my time in Colorado was the establishment of a voter protection hotline, which received calls from individuals and voters who had questions about the election process. At the time I began working on the hotline, I did not anticipate that the hotline would be instrumental in fielding calls regarding removal of voters from the Colorado voter rolls.
5. In early October 2008, a newspaper article in the New York Times reported that eligible voters had been removed from the rolls in Colorado in a manner that appeared to violate federal law. Following the publication of that article, and prior to October 24, 2008, when SEIU filed suit about the violations of voting rights laws, I received numerous telephone calls on the voter hotline from individuals who were concerned about the news reports that voters had been purged from Colorado's rolls. The callers generally were concerned about the status of their voter registrations. In particular, I received numerous calls from individuals who said that they had contacted their county clerks and learned that they were not registered to vote. In these instances, I often assisted the callers in contacting the county clerks to discuss the status of their voter registrations and to attempt to ensure that callers who were eligible to vote could do so. I also received numerous calls from individuals who were concerned about the news reports of purges and therefore wanted to verify that their registrations had not been purged. In these instances, my practice was to review the caller's information in a database and then, if the caller's registration did not appear in the database, take further necessary action to assist the caller, including by contacting appropriate county officials.
6. If I had not needed to spend significant time answering calls from individuals who were concerned that their voter registrations had been purged, I would have had

additional time to work on other voter protection and education efforts. For example, during this same time period shortly before the November general election, there was a significant need to work with voters who were not receiving mail ballots in a timely fashion from the counties, and to address confusion regarding mail ballots because some counties permitted delivery of mail ballots at polling places on the day of the election and others did not. If I had not been spending so much time fielding calls from people where were concerned that their registrations had been purged, I likely would not have spent so much time working with the hotline and would have worked on these issues surrounding mail ballot voting. I also would have had more time to focus on organizing SEIU's election-day voter protection efforts, such as creating routes for our teams of travelling monitors, who visited polling places throughout the state on election day.

7. After the complaint was filed in this action on October 24, 2008, SEIU worked voters and with county clerks to address issues raised by the voter purges. For example, Miles Granderson, another SEIU staff member, and I continued to work on the hotline through the close of the general election, and during that time continued to receive and respond to phone calls from individuals who were concerned about the status of their voter registration. I also continued to assist people in determining whether their voter registrations had been cancelled.

I declare, under the penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

This declaration is executed on July 14, 2009 in Oakland, California.

  
Laurel Rose Webb

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

Civil No. 08-CV-0231-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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**SUPPLEMENTAL DECLARATION OF STEVEN K. URY**

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SUPPLEMENTAL DECLARATION OF STEVEN K. URY

I, Steven K. Ury, declare as follows:

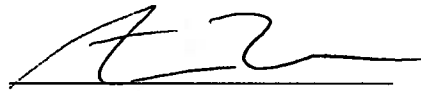
1. I am Associate General Counsel of Service Employees International Union (“SEIU”) and Counsel to SEIU’s South/Southwest Region. I am a member in good standing of the State Bar of California. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
2. In late October 2008, I signed a declaration regarding the SEIU’s activities to protect voting rights in Colorado. I am providing this Supplemental Declaration in support of SEIU’s opposition to the Secretary of State’s motion to dismiss.
3. My responsibilities as Associate General Counsel include advising SEIU on its activities in Colorado. As part of my responsibilities, I am familiar with SEIU’s voter education and voter registration activities in Colorado.
4. Part of my responsibilities include supervising the SEIU law fellow. In October 2008, law fellow Laurel Webb traveled to Colorado to assist in voter protection efforts. It was SEIU’s intent in sending Ms. Webb to Colorado that she participate in voter protection activities. I am aware that, after the *New York Times* reported that voters were being removed from the Colorado voter rolls in apparent violation of federal law, SEIU’s law fellow spent a significant amount of time answering calls about the Secretary of State’s voter rolls and assisting individuals in contacting appropriate county officials. This meant that Ms. Webb was not available to assist with other voter-protection efforts that SEIU otherwise would have pursued.
5. Ms. Webb’s work in fielding and responding to calls from voters was not undertaken in connection with or with the goal of supporting litigation on the issue of Colorado’s purge of its voter rolls.

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///  
///

6. SEIU has an ongoing goal of registering its members to vote and intends to conduct voter registration efforts in connection with future federal elections, including the upcoming 2010 federal election. As part of those efforts, SEIU will work to ensure that every SEIU member in Colorado who is eligible to vote has the opportunity to register to vote and to vote. SEIU will also continue its efforts to increase voter registration and voter turn-out among the general public.

I declare, under the penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

This declaration is executed on July 14, 2009 in Los Angeles, California.



Steven K. Ury

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

Civil No. 08-CV-0231-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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**SUPPLEMENTAL DECLARATION OF GRACE LOPEZ IN SUPPORT OF  
STANDING OF MI FAMILIA VOTA**

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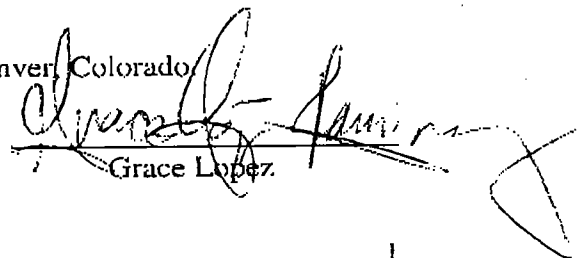
DECLARATION OF GRACE LOPEZ

I, Grace Lopez, declare as follows:

1. During the period July 2007 to June 2009, I was the Colorado State Director for Mi Familia Vota Education Fund ("Mi Familia Vota"). I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
2. As I stated in my October 23, 2008 declaration in this case, part of Mi Familia Vota's mission while I was Colorado State Director was to empower members of the Latino and immigrant communities by registering eligible citizens to vote and encouraging registered voters to participate in the electoral system.
3. Mi Familia Vota expended significant resources and staff time on voter registration activities in advance of the November 4, 2008 election. During that period, Mi Familia Vota registered approximately 2,500 persons to vote.
4. In the Fall of 2008, during the time period between October 8, 2008, when the New York Times ran an article discussing voter purges by the Secretary of State of Colorado, and October 24, 2008, the date on which Mi Familia Vota filed suit about violations of voting rights laws, Mi Familia Vota devoted resources to addressing questions that arose as a result of the Colorado Secretary of State's purges. In particular, Mi Familia Vota staff members spoke with several persons who were concerned about the voter purges and had questions about what to do in order to ensure that their votes would count. The resources Mi Familia Vota expended speaking with persons about the voter purges were in addition to any resources the organization expended in pursuing this litigation. Calls from individuals, and staff conversations with individuals about purges of the voter rolls continued after the complaint was filed in this action.
5. After the complaint in this action was filed on October 24, 2008, Mi Familia Vota worked with the Secretary of State's office, and with county clerks, to address issues raised by the voter purges.
6. Since the 2008 election, Mi Familia Vota has continued to be engaged in voter registration efforts. It has obtained a voter registration drive number from the Secretary of State this year. Since the November 4, 2008 election, Mi Familia Vota has registered approximately 10 persons.

I declare, under the penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

This declaration is executed on July 13, 2009 in Denver, Colorado

  
Grace Lopez.

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

Civil No. 08-CV-0231-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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**DECLARATION OF JESSIE ULIBARRI IN SUPPORT OF  
STANDING OF MI FAMILIA VOTA**

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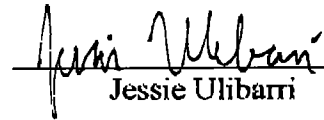
DECLARATION OF JESSIE ULIBARRI

I, Jessie Ulibarri, declare as follows:

- 1. I have been the Colorado State Director for Mi Familia Vota Education Fund ("Mi Familia Vota") since June 16, 2009. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
- 2. Mi Familia Vota does not maintain a database of the individuals who were registered as part of its 2008 voter registration drive. Mi Familia Vota also does not have paper copies of all of the voter registration forms that it submitted as part of that voter registration drive.
- 3. Mi Familia Vota intends to conduct voter registration efforts in connection with future federal elections including the 2010 federal election.

I declare, under the penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

This declaration is executed on July 13, 2009 in Denver, Colorado.

  
 \_\_\_\_\_  
 Jessie Ulibarri

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

Civil No. 08-CV-0231-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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**DECLARATION OF ANDREW SUPE**

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## DECLARATION OF ANDREW SUPE

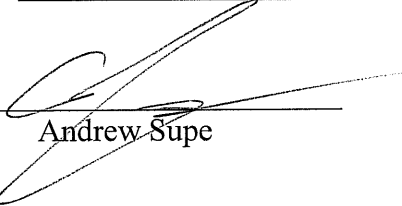
I, Andrew Supe, declare as follows:

1. I am the Database Specialist for Service Employees International Union ("SEIU"), Colorado State Council. I maintain the database for SEIU Local 105 and assist the staff in charge of the state employee database when needed.
2. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.
3. On October 28, 2008, I obtained a database containing the voter registration records of voters who appeared in the Colorado voter registration database before August 2007 but who no longer appeared in that database on October 13th, 2008. This database also shows the purported reason why the voter registration record was removed.
4. On October 28 and October 29, 2008, I compared the database described in paragraph 3 with SEIU's own databases to try to identify any individuals whose records were removed from the Colorado voter registration database between August 2007 and October 13, 2008 and who were SEIU Local 105 members, state employees represented by SEIU's affiliate organization Colorado WINS, and/or individuals registered to vote through SEIU's voter registration drive. I made a preliminary identification of matches only where the name, available birth date information, and address all matched.
5. Through this preliminary matching, it appeared that 3 individuals who were registered by SEIU as part of its voter registration drive and 1 SEIU Local 105 member were removed from the rolls between August 2007 and October 13, 2008 based on a failed 20-day notice. The name of the SEIU Local 105 member who was removed is Rudy Puente.
6. On October 29, 2008, I obtained a list of individuals who were removed from the Colorado voter registration database after May 13, 2008. I subsequently obtained a list representing all individuals removed from the registration database as a result of "failed 20-day period," beginning August 10, 2007. I matched the information in these lists against the names generated by the process described in paragraph 4 of this declaration.
7. Based on this comparison, it appears that 15 individuals who were registered by SEIU as part of its voter registration drive, 20 state employees represented by SEIU's affiliate organization Colorado WINS, and 11 Local 105 members were removed from the Colorado voter registration database after May 13, 2008. The reasons for these individuals' removals provided in the list described in paragraph 6 included: "moved," "duplicate," "conversion," and "inactive to cancelled."
8. Based on my review of SEIU's information regarding its voter registration activities in Colorado, SEIU registered more than 1650 people to vote in Colorado in advance of the 2008 general election.

9. Based on my review of SEIU's database regarding our members and their voting information, it is my understanding that there are SEIU members in Colorado who were registered to vote in the 2008 general election, but who did not vote.

I affirm, under the penalties for perjury under the laws of the United States of America, that the foregoing representations are true.

Executed this 14<sup>th</sup> day of July, 2009, in Denver, Colorado.

  
\_\_\_\_\_  
Andrew Supe

UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO

-----X  
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, :

Civil No. 08-cv-02321-JLK

vs. :

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

-----X  
**DECLARATION OF JESSIE ALLEN**  
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1. During the period \_\_\_July 1, 2008\_\_ to \_\_\_January 31, 2009\_\_\_, I was a Senior Attorney at Advancement Project. I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would competently testify thereto in a court of law.

2. From \_\_\_October 24, 2008 to \_\_\_January 31, 2009\_\_\_, I served as counsel for plaintiffs in the above captioned case.

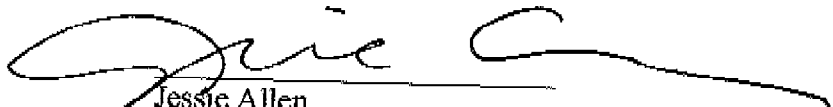
3. In that capacity, on December 3, 2008, I sent an email to Maurie Knaizer, Monica Marquez, and Melody Mirbaba, counsel for the Secretary of State for the State of Colorado, the defendant in this matter.

4. Attached to that email was a copy of the Declaration of Laurel Rose Webb, a law fellow with the Service Employees International Union (SEIU), one of the plaintiffs in this case. Attached hereto as Exhibit A is a true and correct copy of the Declaration of Laurel Rose Webb transmitted to the defendant in my December 3, 2008 email.

5. Also attached to the email was a list of voters registered through SEIU's voter registration drives who matched voters appearing on lists provided by the defendant or obtained through public records requests of voters whose voter registration records had been cancelled pursuant to several Colorado law which are challenged in this case. Attached hereto as Exhibit B is a true and correct copy of the list of cancelled voters I provided to the defendant in my December 3, 2008 email.

I declare, under the penalty of perjury under the laws of the United States of America,  
that the foregoing is true and correct.

Executed this 14th day of July 2009 in Brooklyn, NY

  
\_\_\_\_\_  
Jessie Allen

# **EXHIBIT A**



## DECLARATION OF LAUREL ROSE WEBB

I, Laurel Rose Webb, declare as follows:

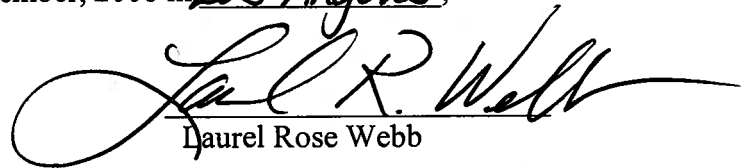
1. I am employed as a law fellow for the Service Employees International Union (“SEIU”).
2. SEIU Local 105 is a Colorado-based local union of SEIU. SEIU Local 105 is an organization of over 5,000 workers in Colorado, working primarily in the fields of health care and property services. Local 105 works with its members to strengthen not only working conditions in specific workplaces, but also politically, to improve the climate and conditions for workers in the state of Colorado. Members of SEIU Local 105 are also members of SEIU.
3. SEIU conducted voter registration drives in Colorado during the months of June through September 2008. Employees of the International Union received the training from the Secretary of State’s office as required by Colorado law, and were registered to perform voter registration drives. SEIU’s efforts focused on encouraging the frequently disenfranchised to register to vote, including elderly people, young people, people of color and people living in poverty.
4. On or around November 13, 2008, SEIU received access to two lists made available by the Colorado Secretary of State’s office in connection with *Common Cause of Colorado, et al. v. Coffman*, Civil Action No. 08-CV-2321-WPD. The first was a list of all individuals who were removed from the voter registration database between May 14, 2008 and November 4, 2008. The second list represents all individuals removed from the registration database as a result of “failed 20-day period,” beginning August 10, 2007.
5. Upon receiving access to the Secretary of State’s lists of removed voters, I worked with Andrew Supe, the database specialist for the SEIU Colorado State Council, to review the lists. I requested that Mr. Supe compare the lists provided by the Secretary of State’s office with SEIU’s own databases, and identify any individuals whose records were removed from the Colorado voter registration database between May 13, 2008 and November 4, 2008 or who removed from the registration database as a result of “failed 20-day period” after August 10, 2007, and who were either members of SEIU Local 105 and/or individuals registered to vote through SEIU’s voter registration drives.
6. Mr. Supe prepared a list of matches that included only instances in which the name, available birth information, and address of an individual reflected on the lists provided by the Secretary of State’s office matched the same information for members of SEIU Local 105 and/or individuals registered to vote through SEIU’s voter registration drives. This comparison resulted in a finding that eleven (11) members of SEIU Local 105 and fifteen (15) individuals who were registered by SEIU as part of its voter registration drive had been removed from the voter

registration database after May 13, 2008. One (1) member of SEIU Local 105 and six (6) individuals who were registered by SEIU as part of its voter registration drives were identified in the Secretary of State's documents as having been removed from the voter registration database because of a "failed 20-day period."

7. The names of the SEIU Local 105 members described in paragraph 6 are: Jessica Baca, Brenda Forshee, Todd Franklin, Eddie Holmes, Nova Keefover, Melanie Mchale, Marianne Motyka, Emily Potter, Joshua Pfluger, Rudy Puente, and Alicia Torres. Rudy Puente was identified in the Secretary of State's documents as having been removed from the voter registration database because of a "failed 20-day period."

I affirm, under the penalties for perjury under the laws of the United States of America, that the foregoing representations are true.

Executed this 3<sup>rd</sup> day of December, 2008 in Los Angeles,  
California.

  
Laurel Rose Webb

# **EXHIBIT B**

**INDIVIDUALS WITH CANCELLED REGISTRATIONS  
WHO REGISTERED THROUGH SEIU VOTER REGISTRATION DRIVES**

<b>Last Name</b>	<b>First Name</b>	<b>Middle Name</b>	<b>Reason Cancelled</b>	<b>County</b>
BAKER	Andrew	T	Duplicate	Denver
BAKER	Jessica	Anne	Moved	Denver
BLAYLOCK	Jean		Failed 20-Day	Arapahoe
CARPENTER	Theo	M	Duplicate	Denver
CEDILLO	Angelique	Jolene	Duplicate	Denver
GOMEZ	Aura	M	Failed 20-Day	Arapahoe
HARE	Rosalind	Mishal	Duplicate	Arapahoe
HENSLEY	Megan	C	Duplicate	Jefferson
IMO	Kristin	L	Failed 20-Day	Arapahoe
LITTLE	Vonray	S	Failed 20-Day	Arapahoe
MATTHEWS	Daniel		Duplicate	Denver
MORGAN	John	V	Duplicate	Denver
SMITH	Grover	N	Duplicate	Denver
TAYLOR	Johnita	K	Failed 20-Day	Arapahoe
THOMPSON	Tameka	Shontae	Failed 20-Day	Arapahoe