

1 John A. Freedman\*  
 2 Jeremy Karpatkin\*  
 Erica McCabe\*  
 3 Leah Motzkin\*  
 Arnold & Porter Kaye Scholer LLP  
 4 601 Massachusetts Ave., N.W.  
 Washington, D.C. 20001  
 5 (202) 942-5000  
 John.Freedman@arnoldporter.com  
 6 Jeremy.Karpatkin@arnoldporter.com  
 7 Erica.McCabe@arnoldporter.com  
 8 Leah.Motzkin@arnoldporter.com

9 Daniel J. Adelman (011368)  
 10 Arizona Center for Law  
 in the Public Interest  
 11 352 E. Camelback Rd., #200  
 Phoenix, AZ 85012  
 12 (602) 258-8850  
 13 danny@aclpi.org

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

Jon Sherman\*  
 Michelle Kanter Cohen\*  
 Beauregard Patterson\*  
 Fair Elections Center  
 1825 K St. NW, Ste. 701  
 Washington, D.C. 20006  
 (202) 331-0114  
 jsherman@fairelectionscenter.org  
 mkantercohen@fairelectionscenter.org  
 bpatterson@fairelectionscenter.org

*\*Admitted pro hac vice*

*Counsel for Poder Latinx, Chicanos Por La Causa,  
and Chicanos Por La Causa Action Fund*

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

19 MI FAMILIA VOTA, et al.  
 20 Plaintiffs,  
 v.  
 21 ADRIAN FONTES, in his official  
 22 capacity as Arizona Secretary of  
 State, et al.,  
 23 Defendants,  
 24 and  
 25 Speaker of the House Ben Toma and  
 Senate President Warren Petersen,  
 26 Intervenor-Defendants.  
 27 AND CONSOLIDATED CASES.

Case No. 22-00509-PHX-SRB  
(Lead)

**PODER LATINX, CHICANOS POR LA  
CAUSA, AND CHICANOS POR LA  
CAUSA ACTION FUND'S TRIAL  
MEMORANDUM**

Consolidated Cases  
 No. CV-22-00519-PHX-SRB  
 No. CV-22-01003-PHX-SRB  
 No. CV-22-01124-PHX-SRB  
 No. CV-22-01369-PHX-SRB  
 No. CV-22-01381-PHX-SRB  
 No. CV-22-01602-PHX-SRB  
 No. CV-22-01901-PHX-SRB

**TABLE OF CONTENTS**

**Page**

1

2

3 INTRODUCTION ..... 1

4 ARGUMENT ..... 3

5 I. PLAINTIFFS HAVE STANDING TO CHALLENGE H.B. 2492 AND H.B. 2243..... 3

6 II. THE CIPS’ INDEFINITE STANDARDS AND RELIANCE ON DATABASES

7 CAUSE ARBITRARY, DISPARATE, AND NON-UNIFORM TREATMENT..... 3

8 III. THE CIPS’ LEGAL VIOLATIONS ..... 7

9 a. The CIPs’ Arbitrary and Disparate Treatment Violates Equal Protection..... 7

10 b. The CIPs’ Non-Uniform and Discriminatory Treatment Violates NVRA

11 Section 8(b)..... 9

12 c. A.R.S. § 16-165(I) Violates the Civil Rights Act’s Ban on Different

13 Standards, Practices, or Procedures in Determining Voter Qualifications. .... 10

14 d. A.R.S. § 16-165(I) Violates the Constitutional Prohibitions on Vesting

15 Registrars with Unfettered Discretion..... 13

16 IV. DEFENDANTS MAY NOT EVADE THIS FEDERAL LITIGATION BY

17 FAILING TO ISSUE GUIDANCE ON THE CIPS IN THE ELECTIONS

18 PROCEDURES MANUAL ..... 14

19

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Bush v. Gore*,  
531 U.S. 98 (2000) ..... 7, 8, 9, 15

*Carey v. Wisconsin Elections Commission*,  
624 F. Supp. 3d 1020 (W.D. Wis. 2022)..... 15

*Davis v. Schnell*,  
81 F. Supp. 872 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949)..... 13

*Frazier v. Callicutt*,  
383 F. Supp. 15 (N.D. Miss. 1974) ..... 11

*Hunter v. Hamilton Cnty. Bd. of Elections*,  
635 F.3d 219 (6th Cir. 2011) ..... 8

*Louisiana v. United States*,  
380 U.S. 145 (1965) ..... 13

*Pennhurst State Sch. & Hosp. v. Halderman*,  
465 U.S. 89 (1984) ..... 15

*Project Vote v. Blackwell*,  
455 F. Supp. 2d 694 (N.D. Ohio 2006) ..... 9

*Shivelhood v. Davis*,  
336 F. Supp. 1111 (D. Vt. 1971) ..... 11

*Spoklie v. Montana*,  
411 F.3d 1051 (9th Cir. 2005) ..... 15

*United States v. Florida*,  
870 F. Supp. 2d 1346 (N.D. Fla. 2012) ..... 9

*United States v. Louisiana*,  
225 F. Supp. 353 (E.D. La. 1963), *aff'd*, *Louisiana v. United States*, 380 U.S.  
145 (1965)..... 13

**Statutes**

A.R.S. § 16-121.01 ..... 1, 5

1 A.R.S. § 16-143..... 1  
2 A.R.S. § 16-165..... *passim*  
3 A.R.S. § 16-452..... 14  
4 52 U.S.C. § 10101 ..... 2, 11, 12  
5 52 U.S.C. § 20507 ..... 2, 9  
6 **Other Authorities**  
7  
8 110 CONG. REC. S 6..... 11  
9 Fourteenth Amendment ..... 2,13  
10 Fifteenth Amendment ..... 2, 13  
11 Arizona 2019 Election Procedures Manual ..... 8  
12 Proposed Arizona 2023 Election Procedures Manual..... 1, 8, 14  
13 Federal Rule of Civil Procedure 30(b)(6)..... 9  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

RETRIEVED FROM DEMOCRACYDOCKET.COM

## INTRODUCTION

1  
2 Plaintiffs Poder Latinx, Chicanos Por La Causa, and Chicanos Por La Causa Action Fund  
3 (collectively, “Plaintiffs”) have brought suit to invalidate Arizona’s poorly conceived, ill-  
4 designed scheme to scrutinize voter registration applicants and voters for a *lack* of U.S.  
5 citizenship. A series of “Citizenship Investigation Procedures” (CIPs) in H.B. 2492 and H.B.  
6 2243<sup>1</sup> require Arizona officials to investigate certain registration applicants and all registered  
7 voters by comparing their information to specified government and voter registration databases.  
8 Both laws place inordinate faith in using government databases for citizenship verification. And  
9 both impose a discriminatory presumption against naturalized voters’ eligibility.

10 The evidence shows the specified databases have serious limitations. Several do not  
11 contain citizenship data, and testimony established that database-matching fundamentally cannot  
12 be used to establish the negative: that a registration applicant or registered voter is not a citizen.  
13 *See, e.g.*, USCIS Dep. 152:24-153-1 (“SAVE doesn’t verify the absence of information.”).  
14 Citizenship status data is decentralized, inconsistent, and, for the foreign-born, in flux; it is not  
15 sufficiently reliable to assess whether someone is eligible to vote.

16 The inherent unreliability of the data is compounded by the CIPs’ failure to define key  
17 terms and standards, including what specific “information” demonstrates a lack of citizenship,  
18 or to enumerate the scenarios that would validly give a County Recorder’s office “reason to  
19 believe” a voter was not a U.S. citizen. While the CIPs conscript the Secretary of State, the  
20 Attorney General, and 15 County Recorders to engage in an endless, resource-intensive search  
21 for any indication of a lack of citizenship, the legislative failure to define the laws’ standards  
22 guarantees arbitrary, disparate, and non-uniform treatment of applicants and registered voters.

23 The Secretary of State has completely abdicated his responsibility to interpret and  
24 implement the CIPs. Notably, the proposed 2023 Elections Procedures Manual (EPM) that the  
25

---

26 <sup>1</sup> The CIPs are defined as A.R.S. §§ 16-121.01(D) and 16-121.01(E), as enacted by H.B. 2492 §  
27 4; A.R.S. § 16-143, as enacted by H.B. 2492 § 7; A.R.S. § 16-165(A)(10), as enacted by H.B.  
28 2492 § 8 and amended by H.B. 2243 § 2; and A.R.S. §§ 16-165(G), 16-165(H), 16-165(I), 16-  
165(J), and 16-165(K), as enacted by H.B. 2243 § 2.

1 Secretary has now submitted to the Governor and the Attorney General for approval contains no  
2 interpretations, definitions, rules, or guidance for the CIPs, leaving implementation to the  
3 discretion of County Recorders. But the County Recorders have significantly different  
4 understandings as to what the CIPs require of them. This means the CIPs will be implemented in  
5 a disparate manner resulting in non-uniform and discriminatory treatment of registration  
6 applicants and registered voters. Indeed, the CIPs' vague, subjective standards have already  
7 produced troubling results: County Recorders have adopted arbitrary, inconsistent understandings  
8 of key provisions, which cause arbitrary, inconsistent enforcement.

9 The CIPs violate the Equal Protection Clause, Section 8(b) of the National Voter  
10 Registration Act, the 1964 Civil Rights Act, and the Fourteenth and Fifteenth Amendments'  
11 prohibition on racial and national origin discrimination. The scheme relies on insufficiently  
12 reliable data and methods and causes a discriminatory and non-uniform effect on naturalized U.S.  
13 citizens. The Secretary of State has had ample time to try to ameliorate the CIP's impact; indeed,  
14 the Secretary's counsel promised in March that the Secretary was "prepar[ing] to implement" H.B.  
15 2492 and H.B. 2243. PX 320 (Case Management Conference ("CMC") Tr. 22:5). But the  
16 Secretary's strategic gambit to engage in administrative inaction is no defense. In the absence of  
17 clear, objective guidance (if the statutory language is even susceptible to that), the CIPs violate  
18 registration applicants' and registered voters' federal constitutional and statutory rights.

19 This Court should find for Plaintiffs and enter declaratory and injunctive relief against  
20 enforcement of the CIPs. In the alternative, this Court should grant declaratory relief and give the  
21 Secretary an opportunity to cure the federal law violations by issuing an injunction requiring the  
22 Secretary to adopt, issue, and communicate guidance to the County Recorders that complies with  
23 the federal requirements below and will ensure that the CIPs are administered in a non-arbitrary  
24 and uniform manner.<sup>2</sup>

---

27 <sup>2</sup> Plaintiffs incorporate by reference Equity Coalition's Trial Memorandum as to the NVRA  
28 Section 8(b) discussion and the DNC's Trial Memorandum as to its discussion of standing.

## ARGUMENT

### I. PLAINTIFFS HAVE STANDING TO CHALLENGE H.B. 2492 AND H.B. 2243.

At trial, Poder Latinx, CPLC, and CPLC Action Fund—social justice organizations that work closely with naturalized citizens in the Latinx and/or Mexican-American communities in Arizona—will demonstrate that they have Article III standing to challenge H.B. 2492 and H.B. 2243. Trial testimony will demonstrate that Plaintiffs engage in or support voter registration activity as a key part of their organizational missions to increase civic engagement among the members of the communities they serve. Trial testimony will further demonstrate that the CIPs will disproportionately impact and impose substantial burdens on the voting rights of the community members that Plaintiffs engage through civic participation, voter registration, and Get Out The Vote programs and activities. Trial testimony will further demonstrate that enforcement of the CIPs will require Plaintiffs to divert time, money, and other resources away from their core mission activities towards redeveloping materials to educate and register applicants, educating (and hiring additional) staff and volunteers to address the CIPs' impact, ensuring voters are not wrongfully purged from the rolls, and helping them re-register in the event they are erroneously removed. Trial testimony will also show that Plaintiffs will incur new costs to effectively conduct voter registration activity under the CIPs. Finally, trial testimony will demonstrate that enforcing H.B. 2492 and H.B. 2243 will cause severe reputational harm to Plaintiffs, as the organizations foresee a loss of trust and a chilling effect on voter participation in the communities they serve.

### II. THE CIPs' INDEFINITE STANDARDS AND RELIANCE ON DATABASES CAUSE ARBITRARY, DISPARATE, AND NON-UNIFORM TREATMENT.

Nine and a half months after the CIPs took effect, and in the absence of any guidance from the Secretary of State in the EPM or otherwise, Arizona's fifteen County Recorder offices have filled the void by adopting significantly different understandings of how to implement and enforce the CIPs. *See, e.g.*, Cochise Dep. 34:17-25; Yavapai Dep. 31:9-14; Mohave Dep. 66:2-7. The County Recorders' understandings of the CIPs govern enforcement within their jurisdiction, and there is remarkable diversity in implementation. These are some of the key factual divergences:

1           1. *County Recorders differ on what may constitute “information” that a voter registration*  
 2 *applicant or a registered voter is not a U.S. citizen under the CIPs.* County Recorders’ designated  
 3 testimony varied considerably as to whether or not the following sources or media constitute valid  
 4 “information” that a registration applicant or registered voter lacks citizenship: a phone call from  
 5 the applicant or registered voter; a letter from the applicant or registered voter; an email from the  
 6 applicant or registered voter; a phone call from someone claiming to be the applicant’s or  
 7 registered voter’s family member; a phone call from Arizona law enforcement; an email or letter  
 8 from Arizona law enforcement; a phone call from another state’s law enforcement; an email or  
 9 letter from another state’s law enforcement; an anonymous phone call; an anonymous email; and  
 10 lists provided by third-party organizations.<sup>3</sup>

11           2. *County Recorders differ in their understandings of how to enforce A.R.S. § 16-*  
 12 *165(A)(10)’s language “[w]hen the county recorder obtains information pursuant to this section*  
 13 *and confirms that the person registered is not a United States citizen.”* Designated County  
 14 Recorder testimony demonstrates that there is no consistent understanding of whether the  
 15 database-matching procedures in A.R.S. §§ 16-165(G)–(K) were for the purpose of “obtain[ing]”  
 16 or “confirm[ing]” information regarding a lack of U.S. citizenship.<sup>4</sup>

17           3. *County Recorders’ understandings differ on the proper implementation of A.R.S. § 16-*  
 18 *165(I)’s “reason to believe” language.* County Recorders’ designated testimony differs on  
 19 whether the following would give their staff a “reason to believe” a registered voter is not a U.S.  
 20 citizen: a phone call from the registered voter; an email from the registered voter; a letter from the  
 21 registered voter; a letter from the registered voter’s neighbor; a phone call from Arizona law  
 22

23 <sup>3</sup> See Apache Dep. 84:10-86:17; Cochise Dep. 40:6-41:14; Coconino Dep. (P. Hansen) 73:16-  
 24 75:5; Gila Dep. 57:8-12, 94:18-98:16; Graham Dep. 84:16-88:3; Greenlee Dep. 55:25-57:20; La  
 25 Paz Dep. 104:18-106:21; Mohave Dep. 142:11-144:3; Navajo Dep. 92:18-94:11; Pima Dep.  
 151:10-156:7; Pinal Dep. 33:3-34:9; Santa Cruz Dep. 61:14-62:20, 73:12-20; Yavapai Dep.  
 44:12-46:2; Yuma Dep. 112:25-115:14.

26 <sup>4</sup> See Apache Dep. 93:6-15, 93:17-21; Cochise Dep. 47:13-17, 48:18-22; Coconino Dep. (P.  
 27 Hansen) 82:7-13, 84:11-19; Graham Dep. 90:4-91:10; Greenlee Dep. 59:22-60:6; La Paz Dep.  
 109:15-20, 109:22-110:3; Pima Dep. 180:22-181:23; Pinal Dep. 41:4-42:19; Yavapai Dep. 50:3-  
 28 11, 50:15-19; Yuma Dep. 110:8-12, 110:15-21.

1 enforcement; a phone call from another state’s law enforcement; an email or letter from Arizona  
2 law enforcement; an email or letter from another state’s law enforcement; and a registered voter’s  
3 current possession of an F-type license.<sup>5</sup> This is particularly significant because the Secretary of  
4 State’s representative testified that what constitutes a “reason to believe” a registered voter is not  
5 a U.S. citizen is “a decision for the county recorders to make.” Connor Dep. 249:3–5, 8–9.

6       4. *County Recorders differ on cancellation cure procedures.* The CIPs require cancellation  
7 if there is “confirm[ed]” “information” of non-citizenship. A.R.S. § 16-165(A)(10). But Arizona  
8 has no law, rule, regulation, or guidance regarding how County Recorders can cure a registered  
9 voter’s erroneous removal from the rolls when that error is not discovered until after the  
10 registration deadline has passed. In the absence of guidance, County Recorders’ designated  
11 testimony reflects they widely differ on whether they can reinstate such a voter. Two County  
12 Recorders testified that they would not reinstate erroneously removed voters after the registration  
13 deadline passed. Cochise Dep. 78:2-20; Yuma Dep. 117:20-118:10. Four County Recorders  
14 testified that that they would reinstate the voter in such circumstances. *See* Coconino Dep. (P.  
15 Hansen) 91:13-18; Graham Dep. 61:4-12; Greenlee Dep. 69:7-15; Navajo Dep. 99:5-13. Two  
16 County Recorders testified that they would need guidance from legal counsel, La Paz Dep. 114:2-  
17 15; Pima Dep. 216:1-25, while two others testified that they were unsure, with one noting it would  
18 be determined by a “judgment call.” Mohave Dep. 164:22-165:3; Yavapai Dep. 94:23-96:8.

19       5. *County Recorders’ usage of USCIS’s SAVE system varies.* Under A.R.S. § 16-  
20 121.01(D)(3) and A.R.S. § 16-165(I), County Recorders are required to verify the citizenship of  
21 federal form applicants who do not provide DPOC and registered voters they suspect lack  
22 citizenship by checking USCIS’s Systematic Alien Verification for Entitlements (“SAVE”)  
23 Program. Because of this, the importance of SAVE’s accuracy, the uniformity of its use, and full  
24

---

25 <sup>5</sup> *See* Apache Dep. 96:7-98:17; Cochise Dep. 52:20-54:19; Coconino Dep. (P. Hansen) 87:22-  
26 90:5; Gila Dep. 97:18-99:8; Graham Dep. 92:12-94:1; Greenlee Dep. 65:3-67:4; La Paz Dep.  
27 110:23-111:23; Maricopa Dep. 235:16-236:1; Mohave Dep. 88:8-12; Navajo Dep. 97:10-13;  
28 Pima Dep. 185:15-191:2; Pinal Dep. 45:14-48:14; Santa Cruz Dep. 72:15-22; Yavapai Dep.  
44:12-45:2, 62:10-63:14; Yuma Dep. 112:25-116:11.

1 compliance with all required steps in the SAVE verification process are paramount. Though the  
2 SAVE Memorandum of Agreement entered into by the Secretary of State and the SAVE Program  
3 Guide mandate that Arizona's County Recorders initiate additional verification when the  
4 applicant cannot be successfully matched upon initial verification,<sup>6</sup> compliance with this  
5 requirement varies dramatically from county to county.<sup>7</sup> For example, according to USCIS data,  
6 in 2020 and 2021, the Maricopa County Recorder's office initiated additional verification for just  
7 8 of the 1,477 individuals who could not be verified as naturalized or derived citizens upon initial  
8 verification.<sup>8</sup> This is a small fraction of the rate of additional verifications conducted in Pima  
9 County, where additional verification procedures were initiated for 111 of 248 individuals over  
10 the same period.<sup>9</sup> Moreover, a number of County Recorders testified that they are not familiar  
11 with and regularly do not perform these mandatory additional verification procedures – indeed,  
12 of the 2,892 times since USCIS requested that County Recorders provide more information  
13 following a failed search, the County Recorders collectively submitted the case for additional  
14 verification just 162 times.<sup>10</sup> And neither the Secretary nor USCIS monitors, regulates, or enforces  
15 this requirement.<sup>11</sup>

16 This lack of uniformity in implementation is compounded by certain fundamental  
17 deficiencies in the CIPs. For starters, there are issues with all of the prescribed databases as used  
18 for this purpose. For example, SAVE has serious limitations as a citizenship verification tool  
19

20 <sup>6</sup> See PX 266, at USCIS SAVE 000004; PX 271, at USCIS SAVE 000087-88; *see also* PX 274,  
at USCIS SAVE 000013-14; USCIS Dep. 91:23-92:3, 93:3-6, 98:11-23, 98:24-99:6.

21 <sup>7</sup> See PX 268, 269 (demonstrating county-by-county variance in initiating additional verification  
22 procedures when initial verification in SAVE system fails and variance in compliance with USCIS  
23 requests for additional information); USCIS Dep. 48:10-49:15, 175:7-25, 176:14-177:3; Pima  
24 Dep. 209:4-9; Pinal Dep. 71:24-72:3; Gila Dep. 92:15-22; Santa Cruz Dep. 49:21-50:6; Coconino  
25 Dep. (D. Casner) 18:20-23; Greenlee Dep. 35:8-10; La Paz Dep. 62:11-16; Maricopa Dep. 112:5-  
13; Mohave Dep. 157:19-21; Yavapai Dep. 88:23-89:1; Apache Dep. 100:12-19; Cochise Dep.  
71:24-73:1.

26 <sup>8</sup> See PX 268; USCIS Dep. 48:10-49:1, 175:7-25, 176:14-177:3.

27 <sup>9</sup> *Id.*

28 <sup>10</sup> See Greenlee Dep. 35:8-10; La Paz Dep. 62:11-16; Pinal Dep. 71:24-72:3; Yavapai Dep. 88:23-  
89:5; PX 269 at USCIS SAVE 001743; USCIS Dep. 49:3-15, 175:7-25, 176:14-22.

<sup>11</sup> See USCIS Dep. 172:12-173:14, 181:2-5, 182:8-11, 182:13-14, 182:20-22, 183:1-9.

1 governing the right to vote, including data integrity and discrepancy issues, data entry issues,  
2 name discrepancies such as with maiden names, and data-matching issues due to typos, truncated  
3 names from older records, or hyphenated names. USCIS Dep. 36:17-38:4, 38:8-18, 112:5-114:12,  
4 115:24-116:12, 117:20-118:4, 118:12-18. SAVE also contains no information on U.S.-born  
5 citizens and is not a comprehensive database of U.S. citizens. *Id.* at 27:22, 28:8-14. The Secretary  
6 of State has admitted that “SAVE is not a universal or exhaustive list of U.S. citizens and may  
7 contain outdated or inaccurate data on citizenship status.” ECF No. 189 ¶¶ 52, 93, 111.

8 Plaintiffs’ Expert Dr. Michael P. McDonald will testify to the administrative difficulties  
9 and non-uniformity arising from the CIPs. As he concludes, absent guidance from the SOS, the  
10 County Recorders are left with no uniform direction as to what databases to use, and counties’  
11 implementation will likely differ from one another based on their own interpretation, access, and  
12 resources. This conclusion is informed by Dr. McDonald’s review of current election  
13 administration practices, as well as his familiarity with and assessment of the specified databases  
14 and County Recorders’ designated testimony about their understandings of the CIPs’  
15 implementation. And Dr. McDonald will testify that differing understandings of the CIPs have  
16 real-world consequences in causing materially different treatment among registration applicants  
17 and registered voters depending on where they live because the counties also do not all have equal  
18 resources and access to the databases contemplated by the CIPs.

19 All told, this evidence demonstrates that the CIPs cause arbitrary, disparate, and non-  
20 uniform enforcement as to registration applicants and registered voters.

### 21 **III. THE CIPs’ LEGAL VIOLATIONS**

#### 22 **a. The CIPs’ Arbitrary and Disparate Treatment Violates Equal Protection.**

23 The CIPs cause the arbitrary and disparate treatment of voter registration applicants and  
24 registered voters. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court reaffirmed that  
25 “arbitrary and disparate treatment” in both the “allocation of the franchise” and “the manner of its  
26 exercise” are equally prohibited. *Id.* at 104. *Bush v. Gore* concerned the “absence of specific  
27 standards” to implement Florida’s vague “intent of the voter” standard, and it was applying a  
28

1 familiar equal protection guarantee that has been recognized where a lack of concrete, objective  
2 rules necessarily causes “arbitrary and disparate treatment.” *Id.* at 104–09. *See, e.g., Hunter v.*  
3 *Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235, 239–42 (6th Cir. 2011) (applying *Bush v.*  
4 *Gore* to conclude “lack of specific standards for reviewing provisional ballots” resulted in  
5 unconstitutionally “arbitrary and uneven exercise of discretion”).

6 The CIPs contain similarly imprecise language and lack rules and criteria to enable the  
7 ascertainment of what constitutes “information” or a “reason to believe” an applicant or voter is  
8 not a citizen. Plaintiffs’ evidence above establishes that the CIPs, separately or in combination,  
9 cause arbitrary and disparate treatment of both voter registration applicants and registered voters  
10 in Arizona. The principle animating *Bush v. Gore* is that arbitrary and disparate treatment flows  
11 inexorably from an “absence of specific standards.” 531 U.S. at 106.

12 While the 2019 EPM sets forth substantive and procedural aspects of the preexisting DPOC  
13 requirement, PX 6 at 3-11, the CIPs and the proposed 2023 EPM lack operational guidance that  
14 would inform an election official as to how to enforce the vague, subjective standards at the heart  
15 of this scheme. The significant variance in the County Recorders’ understandings and  
16 implementation of the CIPs highlighted in Section II is constitutionally intolerable. The Equal  
17 Protection Clause protects voters from the vagaries of County Recorders guessing as to the  
18 intended statutory meaning, with varying determinations resulting in quite different enforcement  
19 of the CIPs depending on which county the applicant or voter happens to live in.

20 Notably, the Secretary of State has conceded that the CIPs enable arbitrary and disparate  
21 treatment by admitting, among other things, that:

- 22 • “H.B. 2492 and H.B. 2243 *do not specify what information suffices* to determine that a voter  
23 registration applicant or registered voter is not a U.S. citizen and that some United States  
24 citizens may be erroneously flagged as non-citizens based on potentially outdated and  
25 inaccurate data,” ECF No. 189 ¶ 9 (emphasis added);
- 26 • the Secretary is “not aware of any database that has current, up-to-date citizenship status  
27 information for all residences [*sic*] of the United States or Arizona and that existing databases  
28 that she is aware of may contain outdated or inaccurate citizenship status information,” *id.* ¶  
127;
- “H.B. 2492 and H.B. 2243 authorize the county recorders to reject registration forms, cancel  
existing registered voters’ records, and subject those individuals to investigation and

1 prosecution based on certain citizenship information derived from potentially outdated and  
2 unreliable sources.” *id.* ¶ 5; and

- 3 • “certain of the databases listed in H.B. 2492 and H.B. 2243 may include potentially outdated  
4 and unreliable information.” *Id.* ¶ 51.

5 The Secretary of State’s office also took the position before passage and reaffirmed during its  
6 Rule 30(b)(6) deposition that H.B. 2492 “sets arbitrary rules that will lead to voter confusion” and  
7 that there is no guidance on what constitutes a “reason to believe” a person is not a citizen. PX  
8 45; PX 52; Connor Dep. 98:18-99:9, 101:16-102:6. Each of these admissions is essentially  
9 dispositive as to the *Bush v. Gore* claim.

10 **b. The CIPs’ Non-Uniform and Discriminatory Treatment Violates NVRA  
11 Section 8(b).**

12 The CIPs cause the non-uniform and discriminatory treatment of registered Arizona voters  
13 generally and the non-uniform treatment of naturalized registered voters in particular. A voter list  
14 maintenance program or activity violates Section 8(b) of the NVRA if it is either non-uniform or  
15 discriminatory. 52 U.S.C. § 20507(b)(1). The CIPs violate Section 8(b) in three different ways.  
16 *First*, the evidence will establish that the CIPs result in the use of a non-uniform program or  
17 activity in the maintenance of Arizona’s voter list. *See Project Vote v. Blackwell*, 455 F. Supp. 2d  
18 694, 703 (N.D. Ohio 2006) (finding violation of Section 8(b) based on law that treated different  
19 classes of registration drive participants differently). The evidence relevant to this NVRA claim  
20 is a subset of Plaintiffs’ evidence as to the *Bush v. Gore* claim above. As discussed in Section  
21 III.a, the CIPs cause the non-uniform treatment of voters based on their county of residence and  
22 even within a county due to the absence of specific rules and criteria.

23 *Second*, Plaintiffs’ evidence will also prove a Section 8(b) violation by showing that the  
24 CIPs have a non-uniform impact on naturalized citizens as compared with other citizens. *See*  
25 *United States v. Florida*, 870 F. Supp. 2d 1346, 1350-51 (N.D. Fla. 2012) (state purge program  
26 “probably ran afoul of [NVRA Section 8(b)]” because its “methodology made it likely that the  
27 properly registered citizens who would be required to respond and provide documentation would  
28 be primarily newly naturalized citizens”). At trial, Dr. McDonald will present his analysis of

1 demographic and Arizona voter data, including likely affected voters, as well as his assessment  
2 of Arizona’s current procedures for citizenship checks and the database-matching required by the  
3 CIPs. Dr. McDonald’s testimony will cover his conclusion that the database-matching required  
4 by the CIPs will systematically erect additional and unique barriers for naturalized citizens to  
5 remain registered to vote and expose them to potential criminal liability. One key to his analysis  
6 is the staleness of the data, because none of the databases specified by the CIPs accurately reflects  
7 up-to-date citizenship data. Naturalized citizens could be non-citizens at the time they are entered  
8 into a database, and then subsequently naturalize and register to vote. For example, the Arizona  
9 Department of Transportation’s (“ADOT”) data is unreliable for citizenship verification because  
10 it reflects a person’s citizenship status only at the time of their ADOT transaction. Accordingly,  
11 ADOT data may not accurately reflect the citizenship status of thousands of citizens who  
12 naturalize each year. Moreover, the CIPs further cause disparate treatment by subjecting any  
13 person whose county recorder has a “reason to believe” they are not a citizen, but not others, to a  
14 SAVE system check. As a result, as the Secretary admitted and as Dr. McDonald will testify, the  
15 CIPs threaten to allow investigation based on a list of alleged non-citizens submitted by a member  
16 of the public, with no safeguards. PX 52, at 2.

17 *Third*, Plaintiffs may establish a violation by proving the CIPs have a discriminatory effect  
18 on a group of registered voters: here, naturalized registered voters. For the reasons discussed  
19 above, the burdens of the CIPs will fall most heavily on naturalized citizens. As Dr. McDonald  
20 will testify, these naturalized citizens are predominantly people of color, particularly Hispanic and  
21 Asian-American/Pacific Islanders. These groups will therefore bear a disproportionate share of  
22 increased voting costs and resultant harm.

23 **c. A.R.S. § 16-165(I) Violates the Civil Rights Act’s Ban on Different Standards,**  
24 **Practices, or Procedures in Determining Voter Qualifications.**

25 One of the CIPs—A.R.S. § 16-165(I) (the “reason to believe” provision)—causes County  
26 Recorders to apply standards, practices, and procedures in determining the voter qualifications of  
27 registered voters they suspect lack U.S. citizenship that are different from the standards, practices,  
28

1 and procedures applied to other registered voters within the same county. To establish a violation  
2 of 52 U.S.C. § 10101(a)(2)(A), a plaintiff must prove that (a) a person “acting under color of law”;  
3 (b) “in determining whether any individual is qualified under State law or laws to vote in any  
4 election”; (c) has applied a “standard, practice, or procedure”; that is (d) “different from the  
5 standards, practices, or procedures applied under such law or laws to other individuals within the  
6 same county, parish, or similar political subdivision who have been found by State officials to be  
7 qualified to vote.” 52 U.S.C. § 10101(a)(2)(A). The legislative history of Section 10101(a)(2)(A)  
8 confirms the statute is intended to preclude registrars from acting on standardless suspicions or  
9 with unbridled discretion. *See, e.g.*, 110 CONG. REC. S 6,740 (April 1, 1964) (Congress sought to  
10 prohibit “arbitrary exercises of discretion on the part of” registrars). Courts have likewise  
11 construed Section 10101(a)(2)(A) to prohibit registrars from arbitrarily requiring particular  
12 classes of registrants to provide more proof of eligibility than others based on mere suspicion. *See*  
13 *Shivelhood v. Davis*, 336 F. Supp. 1111, 1114–15 (D. Vt. 1971) (holding registrars could not  
14 require college students to provide more proof of residence than non-students merely because they  
15 suspected college students were not in fact residents of town); *Frazier v. Callicutt*, 383 F. Supp.  
16 15, 17–20 (N.D. Miss. 1974) (finding Section 10101(a)(2)(A) violation by application of  
17 “obviously different standard[s]” for students and non-students).

18 A.R.S. § 16-165(I) requires the County Recorders to do what Section 10101(a)(2)(A)  
19 forbids: it commands a wholly subjective evaluation of registered voters’ eligibility and imposes  
20 differential standards, practices, and procedures based on nothing more than the arbitrary and  
21 subjective impressions, guesses, and suspicions of County Recorders’ staff, not evidence of  
22 ineligibility. Based on that subjective assessment, Section 16-165(I) subjects voters whom a  
23 recorder has “reason to believe” are not U.S. citizens—and *only* those voters—to an extra  
24 investigation and potential cancellation. Section 16-165(I) is the only CIP that invokes this  
25 inherently subjective “reason to believe” standard to command the application of different  
26 “standard[s], practice[s], or procedure[s]” than those used for other registrants.

1           The Secretary of State has admitted that A.R.S. § 16-165(I) “requires a different ‘standard,  
2 practice, or procedure’ for determining a voter’s qualifications for voters who a county recorder  
3 ‘has reason to believe are not United States citizens’ than for voters who a county recorder does  
4 not have reason to believe are not United States citizens.” ECF No. 189 ¶ 102. The Secretary has  
5 further admitted that A.R.S. § 16-165(I) directs county recorders to sort voters into two categories:  
6 those who will be subjected to an extra SAVE search and those who “are not suspected of lacking  
7 U.S. citizenship [and] will not be subjected to the investigation and potential cancellations [*sic*]  
8 provisions set forth in HB 2243.” *Id.* ¶ 103. And instead of trying to reduce the A.R.S. § 16-165(I)  
9 standard to concrete, uniform guidance, the Secretary of State’s office has taken the position that  
10 what constitutes a “reason to believe” a voter is not a U.S. citizen is “a decision for the county  
11 recorders to make.” *See* Connor Dep. 249:3-5, 8-9.

12           The consequences of that abdication of responsibility for interpreting Arizona election laws  
13 are self-evident in the wildly varying understandings the County Recorders have of the phrase  
14 “reason to believe are not United States citizens.” A.R.S. § 16-165(I). *See supra* Section II.3. The  
15 sorting of voters will be premised on the County Recorders’ subjective belief that a registered  
16 voter is not a citizen. Not only is this standard impermissibly subjective on its face, but it has  
17 demonstrably resulted in varying “standards, practices, [and] procedures,” 52 U.S.C. §  
18 10101(a)(2)(A). Section 16-165(I) requires applying different standards, practices, and procedures  
19 to eligible voters within the same county, because whenever County Recorders’ staff suspect a  
20 voter is not a citizen, even without concrete evidence, that voter will be subjected to an extra  
21 citizenship check and potential cancellation. Because Section 16-165(I) directs County Recorders  
22 to subject some—but not *all*—registered voters to additional procedures based on a subjective  
23 standard, *any* enforcement of this section will cause the application of different “standards,  
24 practices, [and] procedures” to determine their voting qualifications. This is prohibited by Section  
25 10101(a)(2)(A).

1                   **d. A.R.S. § 16-165(I) Violates the Constitutional Prohibitions on Vesting**  
2                   **Registrars with Unfettered Discretion.**

3                   A.R.S. § 16-165(I) also violates the Fourteenth and Fifteenth Amendments’ prohibitions  
4                   on racial and national origin discrimination. Unlike claims brought by some other Plaintiffs  
5                   seeking to prove an intent to discriminate on the basis of race or national origin, this claim applies  
6                   a specific doctrine invoked to address Jim Crow voter registration restrictions, which *per se* bars  
7                   laws that confer unfettered discretion on registrars. *See, e.g., Davis v. Schnell*, 81 F. Supp. 872,  
8                   874, 877 (S.D. Ala. 1949), *aff’d*, 336 U.S. 933 (1949) (holding that local registrars’ “arbitrary  
9                   power” and “unlimited discretion” in administering constitutional understanding test amounted to  
10                  a denial of equal protection of the law under Fourteenth Amendment). The same doctrine has been  
11                  applied in Fifteenth Amendment cases. *Louisiana v. United States*, 380 U.S. 145, 153 (1965)  
12                  (striking down arbitrary constitutional understanding test for voter registration because laws that  
13                  are “completely devoid of standards and restraints” and thereby confer unfettered discretion upon  
14                  registrars *enable* racial discrimination). Where a state statute withdraws all constraints on official  
15                  discretion in the voter registration context, undetectable discrimination is enabled. Such  
16                  discrimination “is the *inescapable* effect of a *subjective requirement* . . . barren of standards and  
17                  safeguards, the administration of which rests in the *uncontrolled discretion* of a registrar.” *United*  
18                  *States v. Louisiana*, 225 F. Supp. 353, 381 (E.D. La. 1963) (emphases added), *aff’d*, *Louisiana v.*  
19                  *United States*, 380 U.S. 145 (1965).

20                  As the evidence of County Recorders’ markedly different understandings of the phrase  
21                  “reason to believe” demonstrates, *see supra* Section II.3, A.R.S. § 16-165(I) has vested County  
22                  Recorders with unbridled discretion to scrutinize registered voters for a lack of citizenship.  
23                  Further, the Secretary of State’s office has confirmed that no EPM guidance on this provision is  
24                  forthcoming, and that what constitutes a “reason to believe” a voter lacks citizenship is “a decision  
25                  for the county recorders to make.” Connor Dep. 249:3-5, 8-9. Section 16-165(I)’s nakedly  
26                  arbitrary standard enables—and masks—discriminatory treatment.

1       **IV. DEFENDANTS MAY NOT EVADE THIS FEDERAL LITIGATION BY**  
2       **FAILING TO ISSUE GUIDANCE ON THE CIPS IN THE ELECTIONS**  
3       **PROCEDURES MANUAL.**

4       On September 30, 2023, Secretary of State Fontes submitted a final proposed 2023 EPM  
5 that fails to include any guidance on the CIPs. PX 11. The Governor and the Attorney General  
6 may approve the proposed EPM at any time no later than December 31, 2023. A.R.S. § 16-452(B).  
7 The Secretary’s failure to update the EPM with guidance on how to interpret and implement the  
8 challenged CIPs is a reason to grant the requested declaratory and injunctive relief.

9       To revisit the history here, the Secretary of State’s counsel office told this Court on March  
10 23, 2023 that his client was “prepar[ing] to implement” H.B. 2492 and H.B. 2243. Plaintiff’s Ex.  
11 320 (CMC Tr. 22:5; *id.* at 21:15-18) (“In the meantime, my client, and I think the counties, they  
12 need to continue to prepare as though this whole thing gets implemented.”). Yet, nearly seven  
13 months later, that has not happened for the CIPs. Even though County Recorders look to the  
14 Secretary of State for guidance on implementing election laws, these laws took effect January 1  
15 of this year, and no court order has enjoined the CIPs, the Secretary of State has not issued  
16 guidance on the CIPs. The Secretary appears to be waiting for this litigation to conclude before  
17 issuing guidance. But that inaction cannot serve as a defense to Plaintiffs’ action.

18       *First*, enforcement of the CIPs is imminent, and the Secretary has left County Recorders in  
19 the lurch. Notwithstanding the Secretary’s desire to conclude this litigation prior to enforcement,  
20 this case will not be final through all appeals by the EPM deadline on December 31; nor is it likely  
21 that all appeals in this case will be resolved by the March 12, 2024 presidential primary. Once the  
22 EPM is approved, it is locked in for two years – until the 2025 update. A.R.S. § 16-452(B).  
23 Moreover, the approved EPM is the sole vehicle under Arizona law by which the Secretary can  
24 compel County Recorders to comply with state and federal law.<sup>12</sup> There is no other way to issue  
25 legally binding guidance attempting to ensure uniform, non-arbitrary application of the CIPs.

26 \_\_\_\_\_  
27 <sup>12</sup> ECF No. 189 ¶ 21; Coconino Dep. (P. Hansen) 41:10-18; La Paz Dep. 25:22-26:11; Maricopa  
28 Dep. 32:8-25; Mohave Dep. 34:24-35:11; Pima Dep. 124:21-126:5; Pinal Dep. 22:12-15; Yavapai  
Dep. 27:8-18.

1           *Second*, given the CIPs’ “absence of specific standards,” *Bush*, 531 U.S. at 106, the absence  
2 of any EPM guidance on these statutory provisions also reflects the impossibility of reducing these  
3 subjective terms to workable, objective rules and procedures. This litigation cannot and will not,  
4 however, shed any light on that *state-law* conundrum. This Court may invalidate provisions based  
5 on federal law only. It cannot declare the meaning of state statutes or issue injunctions to enforce  
6 them. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“[I]t is difficult to  
7 think of a greater intrusion on state sovereignty than when a federal court instructs state officials  
8 on how to conform their conduct to state law.”); *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th  
9 Cir. 2005) (“To the extent that he seeks declaratory and injunctive relief . . . [and] seeks to  
10 vindicate an asserted right under state rather than federal law, *Pennhurst* dictates that this claim  
11 must be dismissed.”). If the Secretary’s office is waiting for this Court to illuminate the meaning  
12 of the CIPs’ murky terms and standards or how to operationalize them, it waits in vain.

13           *Third*, the time to advance an affirmative defense to Plaintiffs’ claims was during the course  
14 of this litigation. The Secretary’s failure to offer *any* interpretation of or guidance on how to  
15 implement the CIPs, as well as the Secretary’s admissions that these are inherently subjective and  
16 vest arbitrary power in County Recorders, all reflect that the CIPs cannot be reduced to clear,  
17 objective guidance that will ensure uniform treatment statewide.

18           *Finally*, if the Secretary’s administrative silence is an effort to frustrate this litigation,  
19 courts have rejected such gambits to defeat federal claims by taking no position or action on a  
20 challenged law. *See, e.g., Carey v. Wis. Elections Comm’n*, 624 F. Supp. 3d 1020, 1024-30 (W.D.  
21 Wis. 2022) (rejecting officials’ attempt to bootstrap failure to issue guidance consistent with their  
22 litigation position and abdication of responsibility to protect voters’ federal statutory rights into  
23 shield against federal litigation alleging violation of the same). Given the Secretary’s abdication  
24 of its responsibility has left the CIPs to the varying understandings, implementation, and  
25 enforcement of the County Recorders, Plaintiffs’ claims are all ripe for adjudication. Neither the  
26 Secretary’s administrative silence nor his implicit promise of future standardization in the EPM  
27 constitutes a valid defense.

1 RESPECTFULLY SUBMITTED this 19th day of October, 2023.

2 /s/ Jon Sherman

3 Jon Sherman\*  
4 Michelle Kanter Cohen\*  
5 Beaugard Patterson\*  
6 Fair Elections Center  
7 1825 K St. NW, Ste. 701  
8 Washington, D.C. 20006  
9 jsherman@fairelectionscenter.org  
10 mkantercohen@fairelectionscenter.org  
11 bpatterson@fairelectionscenter.org  
12 (202) 331-0114

13 John A. Freedman\*  
14 Jeremy Karpatkin\*  
15 Erica McCabe\*  
16 Leah Motzkin\*  
17 Arnold & Porter Kaye Scholer LLP  
18 601 Massachusetts Ave., N.W.  
19 Washington, D.C. 20001  
20 Jeremy.Karpatkin@arnoldporter.com  
21 John.Freedman@arnoldporter.com  
22 Erica.McCabe@arnoldporter.com  
23 Leah.Motzkin@arnoldporter.com  
24 (202) 942-5000

25 Leah R. Novak\*  
26 Andrew Hirschel\*  
27 Arnold & Porter Kaye Scholer LLP  
28 250 West 55th Street  
New York, NY 10019  
Leah.Novak@arnoldporter.com  
Andrew.Hirschel@arnoldporter.com  
(212) 836-8000

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Counsel for Plaintiffs Poder Latinx, Chicanos Por La Causa, and Chicanos Por La Causa Action Fund*

\*Admitted pro hac vice

RETRIEVED FROM DEMOCRACYDOCKET.COM