BARTON MENDEZ SOTO PLLC
James E. Barton II, AZ Bar No. 023888
401 W. Baseline Rd. Suite 205
Tempe, AZ 85283
(480) 418-0668
james@bartonmendezsoto.com

CAMPAIGN LEGAL CENTER
Danielle Lang*
Jonathan Diaz*
Molly Danahy*
Hayden Johnson*
Brent Ferguson*
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
jdiaz@campaignlegalcenter.org
mdanahy@campaignlegelcenter.org
hjohnson@campaignlegalcenter.org
bferguson@campaignlegalcenter.org

MAYER BROWN LLP
Lee H. Rubin* (CA# 141331)
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
(650) 331-2000
lrubin@mayerbrown.com

Gary A. Isaac* (IL# 6192407)
Daniel T. Fenske* (IL# 6296360)
William J. McElhaney, III* (IL #6336357)
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
dfenske@mayerbrown.com
gisaac@mayerbrown.com
jglickstein@mayerbrown.com

Rachel J. Lamorte* (NY# 5380019)
1999 K Street NW
Washington, DC 20006
(202) 362-3000
rlamorte@mayerbrown.com

DEPARTMENT OF JUSTICE
SAN CARLOS APACHE TRIBE
Alexander B. Ritchie
AZ Bar No. 019579
Attorney General
Chase A. Velasquez*

NM Bar No. 019148
Assistant Attorney General
Post Office Box 40
16 San Carlos Ave.
San Carlos, AZ 85550
Alex.Ritchie@scat-nsn.gov
Chase.Velasquez@scat-nsn.gov

FREE SPEECH FOR PEOPLE
Courtney Hostetler* (MA# 683307)
John Bonifaz* (MA# 562478)
Ben Clements* (MA# 555082)
Ronald Fein* (MA# 657930)
1320 Centre Street, Suite 405
Newton, MA 02459
(617) 249-3015
chostetler@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org
rfein@freespeechforpeople.org

Attorneys for LUCHA Plaintiffs

* *Admitted* pro hac vice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Mi Familia Vota, et al.,
Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State, et al.,
Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,
Intervenor-Defendants.

AND CONSOLIDATED CASES

Case No. 2:22-cv-00509-SRB (Lead)

LUCHA PLAINTIFFS' TRIAL BRIEF

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

Pursuant to the Court's Order, ECF No. 562, Plaintiffs Living United for Change in Arizona ("LUCHA"), League of United Latin American Citizens ("LULAC"), Arizona Students Association ("ASA"), ADRC Action ("ADRC"), Inter Tribal Council of Arizona ("ITCA"), and the San Carlos Apache Tribe ("San Carlos") (collectively "LUCHA Plaintiffs"), hereby submit their pretrial brief.

I. Introduction

LUCHA Plaintiffs challenge certain provisions of Arizona House Bill 2492 ("HB 2492") and Arizona House Bill 2243 ("HB 2243") (collectively, the "Challenged Laws"), *see* JPTO at 7-9, EFC No. 571, that impose discriminatory and arbitrary voter registration requirements, voter list maintenance procedures, and other aspects of voter registration and voting in Arizona. LUCHA Plaintiffs' claims arise under the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983, the National Voter Registration Act of 1993 ("NVRA"), Section 101 of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. LUCHA Plaintiffs' trial brief focuses on LUCHA Plaintiffs' standing, as well as their Section 2 claims, their claims under Section 7 of the NVRA, and their claims for arbitrary treatment under the Equal Protection Clause of the Fourteenth Amendment. LUCHA Plaintiffs join and incorporate by reference the arguments made in the trial briefs filed by the other Consolidated Plaintiffs insofar as they pertain to LUCHA Plaintiffs' other claims, which together with this brief, as well as Consolidated Plaintiffs' forthcoming proposed findings of fact and conclusions of law, address the questions of law and fact that LUCHA Plaintiffs expect to present at trial.

II. LUCHA Plaintiffs' Standing

LUCHA Plaintiffs have Article III standing to challenge HB 2492 and HB 2243. "[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that

frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Moreover, LUCHA Plaintiffs will demonstrate at trial that it is "relatively clear," and not "merely speculative, that one or more" of the Plaintiffs' members "will be adversely affected," by the enforcement of HB 2492 and HB 2243. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

LUCHA Plaintiffs are three Arizona-based nonprofit, nonpartisan membership organizations (LUCHA, LULAC, and ASA) ("Membership Orgs"), two Arizona-based nonprofit, nonpartisan civic organizations (ADRC Action and AZC4C) ("Civic Orgs"), the Inter Tribal Council of Arizona ("ITCA"), and the San Carlos Apache Tribe ("San Carlos"). The members of LUCHA Plaintiffs' Membership Orgs include eligible Latino voters, eligible student voters, naturalized U.S. citizens, and low-income voters. ITCA is a nonpartisan, nonprofit inter-tribal consortium of 21 federally recognized Indian Tribes with lands located across the State of Arizona and whose lands extend into the States of California, New Mexico, and Utah. The San Carlos Apache Tribe is a federally recognized Indian Tribe with approximately 17,000 enrolled members.

Trial testimony will demonstrate that the LUCHA Plaintiffs' Membership and Civic Orgs each engage in or support voter registration activity as a key part of their organizational missions to increase civic participation among their members, community members, and among Arizonans generally. Trial testimony will moreover demonstrate that ITCA and San Carlos work to address historical and modern barriers to voting imposed on the members of ITCA's Member Tribes and the members of the San Carlos Tribe, many of whom are eligible voters.

Trial testimony will demonstrate that the Challenged Laws will disproportionately affect and impose substantial burdens on the right to vote of the LUCHA Plaintiffs' members and the community members they engage in civic participation, voter registration, and get out the vote activity. Trial testimony will also demonstrate that enforcement of the Challenged Laws will require LUCHA Plaintiffs to divert resources

away from other mission critical activities towards assisting members and community members in registering to vote, ensuring their registrations are not wrongfully rejected, and ensuring they are not wrongfully purged from the voter registration rolls. Finally, trial testimony will demonstrate that many of the LUCHA Plaintiffs will be required to incur new costs to effectively conduct voter registration activity under the Challenged Laws.

III. The Challenged Laws Violate Section 2 of the Voting Rights Act

A voting rule violates Section 2 of the Voting Rights Act if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or language-minority status. 52 U.S.C. § 10301(a). Courts reviewing a Section 2 claim consider "the totality of circumstances" in each case and whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a protected class "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. § 10301(b).

In *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321 (2021), the Supreme Court "decline[d] . . . to announce a test" applicable to all Section 2 vote denial claims. *Id*. at 2336. It did identify five "guideposts" helpful in analyzing such claims: the size of the burden imposed by the rule in question; "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982;" the disparate impact on members of different racial and ethnic groups; "opportunities provided by a State's entire system of voting;" and the strength of the State's interests in imposing the rule. *Id*. at 2338-40.

However, the Court emphasized that those guideposts are not exclusive and that Section 2 "requires consideration of 'the totality of circumstances.'" *Id*. at 2340. Thus, the "Senate factors" identified in *Thornburg v. Gingles*, 478 U.S. 30, 36 (1986), should not "be

disregarded." *Brnovich*, 141 S. Ct. at 2340;[1] *see also Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1240-41 (N.D. Ga. 2022) (applying "the relevant *Brnovich* guideposts and *Gingles* Senate factors"); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1277 (N.D. Ga. 2021) (concluding that *Brnovich*'s list of guideposts "is neither exhaustive nor prescriptive"). This is especially true because *Brnovich* concerned rules about casting votes that were different in nature than the registration laws at issue here. *See Fair Fight Action*, 634 F. Supp. 3d at 1241. And both before and after *Brnovich*, "given that section 2 requires courts to consider 'the totality of circumstances,' it is axiomatic that no one factor controls." *Fla. State Conf. of NAACP v. Lee*, 566 F. Supp. 3d 1262, 1290 (N.D. Fla. 2021).

The evidence will show that the Challenged Laws fail Section 2's totality of circumstances test. All of the provisions at issue create immense burdens that do not just make voting more difficult, but completely prevent some eligible people from voting. The impact of that burden will fall much harder on Latino and naturalized citizens, creating a sizeable disparate impact. Further, none of the Challenged Laws were typical in 1982 when the amended Section 2 was enacted, and Arizona's election laws as a whole do not provide voters affected by HB 2492 and HB 2243 with any way to vote. The State has put forth no strong or even legitimate justification supporting the laws. Finally, there is no question that Arizona has a long history of official discrimination that still affects Latino and naturalized citizens today, that Arizona has underserved its Latino and naturalized citizens, that those citizens are still underrepresented in elected office, or that racial appeals in campaigning are present in Arizona.

[1] Some of the applicable Senate factors are: the extent of historical official discrimination that affected voting or the democratic process; whether members of the group in question "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;" "whether political campaigns have been characterized by overt or subtle racial appeals;" "the extent to which members of the minority group have been elected to public office in the jurisdiction;" and whether elected officials are unresponsive to the needs of the minority group. *Gingles*, 478 U.S. at 37.

A. The Size of the Burden

The Challenged Laws will create a large and often insurmountable burden for Latino and naturalized citizens. As testimony from Dr. Michael P. McDonald will show, the provisions that require election officials to reject registration applications or remove voters from the rolls based on reference to faulty and outdated databases will, without question, lead to rejections and removals of eligible citizens. *See* Petty Depo. at 64-65; Shreeve Depo. at 71-72; Jorgensen Depo. at 190-91. Many of those affected will be turned away on Election Day, with no opportunity to cast a ballot. Moreover, the laws' additional DPOC requirements, the requirement that applicants list place of birth on registration forms, and the provisions threatening naturalized citizens with criminal investigation create fear and unusual burdens for Latino and naturalized citizens, as testimony from Dr. McDonald and Dr. Traci Burch will explain. Dr. Burch is also expected to testify about research showing that socioeconomic disparities can interact with administrative requirements such as DPOC to make the costs of registering to vote and voting difficult for many voters to overcome. These burdens go well beyond those at issue in *Brnovich*, where the Court emphasized that the laws simply required voters to go to the correct precinct or to a nearby mailbox to send an absentee ballot. *Brnovich*, 141 S. Ct. at 2344, 2346.

B. The Disparate Impact

The Challenged Laws will also burden Latino and naturalized citizens much more than white citizens. In other words, the "size of [the] disparity" is large. *Brnovich*, 141 S. Ct. at 2339. Most importantly, the unreliable database checks required by the Challenged Laws will *only* affect naturalized citizens. That is because, as Dr. McDonald will testify, U.S.-born citizens almost always have a static citizenship status, while naturalized citizens could be noncitizens at the time they are entered into a database but citizens when they register to vote.[2] Thus, for example, the Systematic Alien Verification for Entitlements (SAVE) database that must be used pursuant to the Challenged Laws is not used to verify

[2] Nor are the database errors negligible. To take just one example, a representative of the Arizona Department of Transportation testified that weekly error checks show that certain records are correct only 85 to 89 percent of the time. *See* Jorgensen Depo. at 190-91.

U.S. birth certificates, because birth certificates are presented by "natural-born citizen[s];" SAVE is intended for "foreign national[s] coming in." Jorgensen Depo. at 42-43; *see also* Petty Depo. at 105. The database checks will likewise have a large disparate impact on Latinos, who are much more likely than others to be naturalized citizens, as Dr. Burch and Dr. Orville Vernon Burton will explain. Dr. Burch is also expected to testify about how the remaining provisions, such as the DPOC and birthplace requirements and the threat of criminal investigation, impose significantly greater financial and other costs on naturalized citizens and Latinos than they do on other voters.

C. The Absence of Laws Similar to the Challenged Laws in 1982

Without question, the Challenged Laws "depart[] from what was standard practice when § 2 was amended in 1982." *Brnovich*, 141 S. Ct. at 2338. Dr. Burton's testimony will demonstrate that the Challenged Laws' requirements, including the mandate to present DPOC to register or remain registered, were not in place as of 1982 in Arizona or elsewhere. His testimony will also show that providing DPOC to vote did not become a topic of sustained political debate until the late 1990s and that as late as 2004, when Arizona adopted its DPOC requirement, no other state in the nation required DPOC for registering to vote.

D. The Opportunities Provided by Arizona's Voting System

Further, "the opportunities provided by [Arizona's] entire system of voting" in no way ameliorate the burden caused by the Challenged Laws. *Brnovich*, 141 S. Ct. at 2339. In *Brnovich*, the Court highlighted that although the state required in-person voters to vote in the correct precinct, it also allowed any voter to request an early ballot without excuse and mail that ballot or drop it at any polling place. *Brnovich*, 141 S. Ct. at 2345. Here, however, the Challenged Laws create barriers to registration, not limitations on where or how someone can cast a ballot. And those barriers are sometimes insurmountable—voters who are improperly rejected or removed from the rolls have no other options. And the laws provide no way around the obstacles created by the DPOC and birthplace requirements or

the threat of criminal investigation. *See Fair Fight Action*, 634 F. Supp. 3d at 1244 (noting that unlike in *Brnovich*, challenged law did "not affect only one method of voting among several; there [were] no alternative means of registering to vote").

E. The State's Interest

Critically, there are simply no "strong state interests" supporting the Challenged Laws. *Brnovich*, 141 S. Ct. at 2340. Though Arizona claims it seeks to "secur[e] its elections and maintain[] voter confidence," Def. Mot. to Dismiss, ECF No. 127 at 16, voter fraud attributable to non-citizens in Arizona is essentially non-existent, as Dr. Lorraine C. Minnite will testify at trial. Thus, unsurprisingly, the Arizona Attorney General has not convicted anyone for registering to vote or voting as a noncitizen since 2010, *see* ECF No. 571, Ex. 1 (Stip. 157), and county recorders have confirmed that they are unaware of noncitizens voting in their counties. *See* Petty Depo. at 190-92; Asrarynezami Depo. at 75; Hiser Depo. at 239-40. Dr. Minnite will also testify as to why the laws are more likely to *decrease* confidence in the voting system than increase it: doubt in the reliability of the electoral process is directly linked to the increase in baseless claims of fraud and stolen elections. And despite the State's arguments, the Attorney General's office has acknowledged that its prediction that the laws will promote voter confidence is nothing more than "a speculative statement." Lawson Depo. at 264.

F. Arizona's History of Discrimination

Arizona cannot plausibly dispute that Latino and naturalized citizens have "suffered discrimination in the past," *Brnovich*, 141 S. Ct. at 2340, or that such discrimination was widespread and devastating. As the Ninth Circuit has recognized, "[f]or over a century, Arizona has repeatedly targeted its American Indian, Hispanic, and African American citizens, limiting or eliminating their ability to vote and to participate in the political process." *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020), *rev'd on other grounds sub nom. Brnovich*, 141 S. Ct. 2321. And as Dr. Burton will testify at trial, government policies have continued to discriminate against people of color even into the

late twentieth century and early twenty-first century, manifesting in tragic events such as the Chandler Roundup.

G. Lasting Effects of Arizona's Discrimination

The discrimination that Latino and naturalized citizens have faced has led to inequality in education, income, health, employment, and overall wellbeing that persists today. *See Brnovich*, 141 S. Ct. at 2340. As Dr. Burch will explain, Latino Arizonans are much less likely to graduate from high school than white Arizonans and are almost twice as likely to live in poverty. These inequalities and others are directly related to economic and social disadvantage driven by past structural and intentional racism, which magnifies the impact of the Challenged Laws.

H. Other Relevant Factors

At least three other Senate factors demonstrate that Plaintiffs have satisfied Section 2's totality of circumstances test here. First, as Dr. Burton will testify, racial appeals in political campaigns continue to today and are often tied to the claims of voter fraud that are pervasive in Arizona but lack legitimacy. Second, as the Ninth Circuit concluded in 2020, "it is undisputed that American Indian, Hispanic, and African American citizens are underrepresented in public office in Arizona." *Democratic Nat'l Comm.*, 948 F.3d at 1029. And third, there is "extensive undisputed evidence showing that Arizona has significantly underserved its minority population." *Democratic Nat'l Comm.*, 948 F.3d at 1030.

* * *

Together, this evidence demonstrates unequivocally that, considering the totality of the circumstances, the Challenged Laws "result[] in a denial or abridgement" of Latino and naturalized Arizonans' right to vote. 52 U.S.C. § 10301(a).

IV. HB 2492 Results in the Arbitrary and Discriminatory Treatment of Similarly Situated Voters in Violation of the Equal Protection Clause

The Supreme Court held in *Bush v. Gore* that "arbitrary and disparate treatment" in either the "allocation of the franchise" or "the manner of its exercise" is unlawful. 531 U.S.

98, 104-09 (2000) (holding that recount procedures violated the Equal Protection Clause). Likewise, the Ninth Circuit has held that "[r]estrictions on voting can burden equal protection rights as well as 'interwoven strands of 'liberty'' protected by the First and Fourteenth Amendments.'" *Dudum v. Arntz*, 640 F.3d 1098, 1105–06 (9th Cir. 2011). And while Defendants argue that *Bush v. Gore* "does not supply an independent or freestanding claim or applicable doctrinal rubric," ECF No. 571 at 17, they do not explain why the principles of *Bush v. Gore* would not apply. In any event, the *Anderson-Burdick* framework results in the same analysis. Under that framework, only "reasonable, *nondiscriminatory* restrictions" are subject to a more relaxed standard of review. *Burdick v. Takushi*, 504 U.S. 428, 434 (1994). Moreover, *Anderson-Burdick* imposes a "means-end fit framework," *Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016), that necessarily requires states to justify decisions to treat similarly situated voters differently. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (holding a voting restriction unlawful because it differentiated among groups of voters where "there [wa]s no relevant distinction between the two groups").

A. HB 2492 Results in the Unlawful Disparate Treatment of Voter Registration Applicants Depending on Whether They Use the State or Federal Form

As this Court recognized in its order granting Plaintiffs partial summary judgment, ECF No. 534, HB 2492 "provides different DPOC requirements for applicants using the Federal or State Form," *id.* at 3. It requires the outright rejection of State Form applicants if their applications do not include DPOC while providing that Federal Form applicants are registered as Federal-only voters if their applications do not include DPOC.[3] *See* A.R.S. § 16-121.01(C)-(E). Moreover, HB 2492 instructs county recorders to utilize the MVD database to verify citizenship status for Federal Form applications—and, if verified,

[3] The same unlawful dynamic is at play in the application of HB 2492's birthplace requirement. It is undisputed that the Federal Form does not require birthplace and Federal Forms will be accepted without birthplace information, yet State Forms will not be processed absent birthplace information. There is no rational reason for such disparate treatment of voters as to birthplace information.

register them as full ballot voters—even where the applicants do not themselves provide DPOC. Trial testimony will demonstrate that the Secretary of State and county recorders believe that HB 2492 prohibits them from utilizing the MVD database to verify citizenship status of State Form applicants who do not themselves provide DPOC.

These challenged provisions of HB 2492 sought to roll back the explicit provisions of the existing LULAC consent decree and return to the DPOC practices in place prior to that consent decree. ECF No. 534 at 21-22. This Court has properly held that the LULAC consent decree bars these practices, was never set aside,[4] and therefore controls. *Id.* This Court also correctly held that such disparate treatment of State Form and Federal Form voter registration applicants would violate the NVRA. *See* ECF No. 534 at 22 n. 13.

But even if the LULAC consent decree did not control (it does), and even if the NVRA did not bar HB 2492's discriminatory practices (it does), HB 2492's arbitrary disparate treatment of voters based solely on which piece of paper they use to register to vote would violate the Equal Protection Clause.

The evidence at trial will show that (1) there is no relevant distinction between State Form and Federal Form voter registration applicants; (2) the differential treatment of these groups of voters will have serious adverse effects on State Form applicants; and (3) the State cannot establish any legitimate purpose for the differential treatment. In particular, the evidence at trial will demonstrate:

(1) Lack of Relevant Distinction

- The State Form elicits the same information for Federal-only voters as the Federal Form, and the Forms are "substantively indistinguishable." ECF No. 534 at 22 n. 13.
- Election officials do not treat State Form and Federal Form applications differently for any other purpose.

(2) Adverse Effects on Voter Registration Applicants

[4] No Defendant ever sought relief from the consent decree following the passage of HB 2492.

- Most Arizonans that register using a paper form use the State Form, not the Federal Form.
- The public assistance agencies that provide voter registration services use the State Form.
- Arizona election officials, and most third-party voter registration drives, provide prospective voters with the State Form.
- Prior to the implementation of the LULAC consent decree, tens of thousands of voters were disenfranchised due to the disparate treatment of State Form and Federal Form applicants.
- The practice of "acquiring" DPOC from the MVD database for applicants that fail to include DPOC with their applications relieves voters of the burden of taking additional voter registration steps while still serving any purported purpose behind requiring DPOC. This process adds no burden to election administration since it is conducted simultaneously with the federally mandated "HAVA check."

(3) No Legitimate Purpose

- Election officials, both at the county and state level, cannot identify any rational election administration reason for treating State Form and Federal Form applicants differently.

Given the foregoing, LUCHA Plaintiffs will satisfy their burden at trial to demonstrate that HB 2492 mandates arbitrary and discriminatory treatment among similarly situated voters without justification and thus violates the Equal Protection Clause.

B. The State Must Treat State Form and Federal Form Applicants Lacking DPOR Equally

In its partial summary judgment order, this Court held that "Section 6 [of the NVRA] preempts HB 2492's DPOR requirement." ECF No. 534 at 9. No party opposed Plaintiffs' motion for summary judgment on this issue. But just as the ruling in *Inter Tribal*

Council of Arizona v. Arizona holding that Section 6 of the NVRA preempts Arizona's DPOC requirement led to the disparate treatment of State and Federal Form applicants as to DPOC, and subsequently to the LULAC consent decree, a similar danger arises here. And since this Court's ruling reaffirming the LULAC consent decree, ECF No. 534 at 22, necessarily only addresses the DPOC requirement (because no DPOR requirement existed at the time of the LULAC consent decree), Defendants have advised that they do not interpret this Court's order to require equal treatment of State Form and Federal Form applicants with respect to DPOR. In other words, while Federal Form applicants who do not submit DPOR will be registered as Federal-only voters, State Form applicants who do not submit DPOR will not be registered at all until they provide DPOR.

Such unequal treatment of similarly situated voters violates the Equal Protection Clause for exactly the same reasons stated above as to DPOC.[5] Indeed, it would be nonsensical to treat State Form and Federal Form applicants equally as to one documentary proof requirement (DPOC) and not the other (DPOR).

C. HB 2492's Mail Voting and Presidential Voting Restrictions Violate the Equal Protection Clause

HB 2492 restricts "Federal-only" voters (those voters who have not provided DPOC with their voter registration applications) from voting in presidential elections or by mail while permitting them to vote in-person and for congressional elections. This Court has already correctly held that these restrictions are preempted by the NVRA. ECF No. 534 at 10-15. These restrictions also violate the Equal Protection Clause.

As this Court has already found, and the evidence will show, voting by mail is the primary and preferred method by which Arizonans cast their ballots. ECF No. 534 at 14.

[5] For the same reasons that this Court stated in its partial summary judgment order, and explained in LUCHA's motion for partial summary judgment, this disparate treatment of State Form applicants also violates the NVRA. *See* ECF No. 534 at 22; ECF No. 394 at 13-15. The evidence at trial will establish that DPOR—which has never previously been required and is not required for registration using the Federal Form—is not "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 52 U.S.C. § 20508(b)(1).

As such, and as the evidence will show, the restriction on mail voting imposes a substantial burden on voters who have not provided DPOC with their voter registration applications. *Id.* Indeed, the evidence will show that many Federal-only voters are currently on the Active Early Voting List (AEVL) and therefore are automatically sent a mail ballot for every federal election. Further, the evidence will show that there is no rational reason for this restriction. There are no additional citizenship verification procedures that occur when a person votes in-person rather than by mail. Thus, there is "no relevant distinction" between voters who have provided DPOC and have not with respect to access to mail voting. *Husted*, 697 F.3d at 435; *see American Party of Texas v. White*, 415 U.S. 767, 795 (1974) ("permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause").

The same reasoning applies to the presidential election restriction. The evidence will show that top-of-the ticket races such as the presidential election drive the greatest turnout and level of voter interest. Moreover, the qualifications to vote as to presidential and congressional elections are identical. There is no relevant distinction between voters who have provided DPOC and who have not provided DPOC with respect to access to presidential versus congressional elections.

V. The Challenged Laws Violate Section 7 of the NVRA

Plaintiffs can establish a violation of Section 7 of the NVRA by demonstrating that a State's practices result in public assistance agencies mandated to provide voter registration services failing to distribute either the Federal Form or a voter registration form that is the "equivalent" of the Federal Form. 52 U.S.C. § 20506(a)(6)(A). As discussed above, HB 2492 mandates that State Form applicants be treated differently (and less favorably) than Federal Form applicants by requiring that State Form applications be

rejected if they lack DPOC, DPOR, or birthplace information. The evidence will show that the public assistance agencies in Arizona mandated to provide voter registration services under the NVRA use the State Form to provide voter registration services; the Secretary of State distributes those Forms to the agencies with pre-marked source codes for tracking purposes; and the Secretary of State provides guidance to the agencies on their voter registration services. As such, under H.B. 2492's new restrictions on State Forms, Section 7 agencies' services fail to use a form "equivalent" to the Federal Form.

VI. Conclusion

At trial, LUCHA Plaintiffs will show that HB 2492 and HB 2243, separately and collectively, violate the First and Fourteenth Amendments, the Civil Rights Act, the National Voter Registration Act, and the Voting Rights Act. Defendants will be unable to show any meaningful or tailored justification for the challenged provisions. After the close of evidence, LUCHA Plaintiffs request the Court enter final judgment in LUCHA Plaintiffs' favor on all claims and grant all relief requested.

Dated: October 19, 2023 Respectfully submitted,

/s/ *Danielle Lang*
CAMPAIGN LEGAL CENTER
Danielle Lang*
Jonathan Diaz*
Molly E. Danahy*
Hayden Johnson*
Brent Ferguson*
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
jdiaz@campaignlegalcenter.org
mdanahy@campaignlegelcenter.org
hjohnson@campaignlegalcenter.org
bferguson@campaignlegalcenter.org

MAYER BROWN LLP
Lee H. Rubin* (CA# 141331)
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
(650) 331-2000
lrubin@mayerbrown.com

Gary A. Isaac* (IL# 6192407)
Daniel T. Fenske* (IL# 6296360)
Jed W. Glickstein* (IL# 6315387)
William J. McElhaney, III* (IL #6336357)
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
dfenske@mayerbrown.com
gisaac@mayerbrown.com
jglickstein@mayerbrown.com

Rachel J. Lamorte* (NY# 5380019)
1999 K Street NW
Washington, DC 20006
(202) 362-3000
rlamorte@mayerbrown.com

BARTON MENDEZ SOTO PLLC
James E. Barton II, AZ Bar No. 023888
401 W. Baseline Rd. Suite 205
Tempe, AZ 85283
(480) 418-0668
james@bartonmendezsoto.com

DEPARTMENT OF JUSTICE
SAN CARLOS APACHE TRIBE
Alexander B. Ritchie
AZ Bar No. 019579
Attorney General
Chase A. Velasquez*
NM Bar No. 019148
Assistant Attorney General
Post Office Box 40
16 San Carlos Ave.
San Carlos, AZ 85550
Alex.Ritchie@scat-nsn.gov
Chase.Velasquez@scat-nsn.gov

FREE SPEECH FOR PEOPLE
Courtney Hostetler* (MA# 683307)
John Bonifaz* (MA# 562478)
Ben Clements* (MA# 555082)
Ronald Fein* (MA# 657930)
1320 Centre Street, Suite 405
Newton, MA 02459
(617) 249-3015
chostetler@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org
rfein@freespeechforpeople.org

Attorneys for Plaintiffs

* *Admitted* pro hac vice