IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CITIZENS PROJECT, COLORADO LATINOS VOTE, LEAGUE OF WOMEN VOTERS OF THE PIKES PEAK REGION, BLACK/LATINO LEADERSHIP COALITION,

Plaintiffs,

v.

No. 1:22-cv-1365-CNS-MDB

CITY OF COLORADO SPRINGS, and SARAH BALL JOHNSON, in her official capacity as City Clerk,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"The essence of a § 2 claim," the Supreme Court recently confirmed, "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (internal quotation marks omitted). The timing of the City of Colorado Springs's ("City") municipal elections causes a large racial disparity in precisely this way. The City's motion for summary judgment ("MSJ"), ECF No. 60, never mentions the legal test that governs § 2 racial vote denial claims. For years, lower courts have used a two-part test requiring (1) a racial disparity caused by a practice (2) through interaction with discriminatory conditions. In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2338 (2021), the Supreme Court provided additional guidance, identifying "several important circumstances" that should be considered as part of the statutory "totality of circumstances," 52 U.S.C. § 10301(b).

Under this operative legal standard, there is—at the very least—a genuine factual dispute as to whether the unusual timing of the City's municipal elections is valid under § 2. This odd schedule causes a significant racial disparity in voting: an electorate whose racial makeup diverges sharply from that of the City's pool of registered voters. The City's April odd-year elections cause this disparate impact through their interaction with social and historical conditions of discrimination. Because of these conditions, the City's minority residents are poorer and less educated than their white peers, and individuals of lower socioeconomic status are less likely to vote in elections held at atypical times. Moreover, voting is harder for everybody in the City's April odd-year elections, because of not just the calendar but also the City's elimination of early and in-person voting. April odd-year elections are highly anomalous in Colorado, too, both historically and today. And the City fails to identify a single legitimate interest served by its eccentric election schedule.

In addition to ignoring the operative legal standard, the City argues that Plaintiffs—groups dedicated to serving voters—lack organizational standing. If this Court were to endorse this argument, it would be the first court, anywhere, to do so. The City also asserts that claims about election timing are not "cognizable" under § 2. But § 2 contains no "cognizability" exception to its broad scope, and in any event, each branch of government has recognized the viability of election timing claims for decades. The Court should deny the City's motion.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Undisputed. According to the 2020 Census, 69% of the City's population is non-Hispanic white, 18% is Hispanic, and 7% is Black. Complaint ("Compl."), ECF No. 1, ¶ 62.

2. Undisputed, not material.

3. Undisputed. In the 1980s, nearly half of surveyed cities held their municipal elections in November. Ex. N (ECF No. 60-14) at 2. Today, a supermajority of cities hold their municipal elections in November. *Id.*

4. Undisputed, not material.

5. Disputed. Plaintiffs Citizens Project and League of Women Voters of the Pikes Peak Region (LWVPPR), and other civic engagement groups, have undertaken advocacy efforts to change the timing of the City's municipal elections from April to November, including draft charter amendments, outreach to the City, and community meetings. Ex. P (Citizens Project Dep.) at 167:1-168:7, 169:25-172:16, 195:5-197:7; Ex. Q (Ex. 18 to Citizens Project Dep.); Ex. R (LWVPPR Dep.) at 156:17-158:6, 159:21-167:11; Ex. S (Ex. 16 to LWVPPR Dep.).

6. Undisputed as to first two sentences. Disputed as to third sentence. *Supra* ¶ 5.

7. Undisputed, not material.

8. Undisputed.

9. Undisputed, not material.

10. Undisputed.

11. Undisputed.

12. Undisputed, not material.

13. Undisputed as to first sentence. Disputed as incomplete as to second sentence. The extension of the expert report deadline did not seek to alter the permissible contents of what are "rebuttal reports." ECF No. 43 at 2. The report of Plaintiffs' expert Dr. Zoltan Hajnal included data on turnout by race in both the April 2023 municipal election and the May 2023 runoff election. Ex. T (Hajnal Rebuttal Report) at 20-24, 47.

14. Disputed. The record includes evidence of the differential racial impact of elections held in April of odd-numbered years as opposed to November of even-numbered years. Ex. L (ECF No. 60-12) at 6-24; Ex. U (Hajnal Appendices) at 38-42; Ex. T at 4-11, 20-24; Ex. P at 189:21-190:10; 249:24-250:10; Ex. V (BLLC Dep.) at 93:11-94:6. Likewise, the record shows that Black and Hispanic residents of the City face higher informational burdens, are less likely to be mailed a ballot, and are more likely to prefer to vote in person which is not an option in the City's municipal elections. Ex. T at 34-38; Ex. P at 29:8-30:15; 116:15-20. Black and Hispanic residents of the City are also socioeconomically disadvantaged relative to the City's white residents, including in areas that make it more difficult to vote. Ex. L at 32-35; Ex. T at 39-40; Ex. P at 114:16-116:25. These continuing effects of discrimination interact with the City's election timing to make the City's municipal elections less open to Black and Hispanic residents.

15. Disputed as incomplete. Dr. Hajnal relies on multiple methods to calculate racial disparities. He computes ratios of minority turnout to white turnout in different elections. Ex. T at 4-7, 20-24; Ex. L at 6-16. Using the City's preferred technique, he also compares the minority share of the electorate to the minority share of registered voters in different elections. Ex. T at 7-

11; Ex. L at 16-18. And he confirms that his results hold no matter how individuals' race is estimated. Ex. T at 24-34; Ex. L at 18-27.

16. Disputed. The salience of elections is merely one factor that interacts with the effects of discrimination to lead to the differential racial impact of the City's April odd-year elections. Ex. L at 32-35; Ex. T at 36-40; Ex. P at 29:8-30:15; 114:16-116:25; 189:21-190:10.

STATEMENT OF ADDITIONAL MATERIAL FACTS

17. Citizens Project's mission is to be "a fearless, bold advocate and an engaging voice that empowers and challenges our entire community to embrace equity, inclusion, and justice." Ex. W (Ex. 3 to Citizens Project Dep.). Citizens Project works "in the frame of equity, inclusion and justice" to do "civic engagement" work, "making sure that today people have access and are aware of ways to be civically engaged." Ex. P at 25:10-13.

18. Colorado Latinos Vote (CLV) "want[s] Latinos to get engaged in their communities and vote." Ex. X (CLV Dep.) at 34:13-14. CLV's mission "is dedicated to expanding Latino/a/x voter engagement in Colorado. [It] work[s] to educate and empower members of our community to participate more fully in the democratic process." *Id*. at 34:16-25.

19. LWVPPR's "ultimate mission is empower voters and defend democracy." Ex. R at 19:24-25. LWVPPR "want[s] to improve our system of government and impact public policies through education, voter services and education." *Id.* at 20:1-3.

20. The Black/Latino Leadership Coalition (BLLC) was formed to address the "lack of representation in civic decision making and access to information about matters vital to raising the quality of life for people of color in our local communities." Ex. Y (Ex. 2 to BLLC Dep.). BLLC's mission is "promoting and advocating positive change through bringing awareness to marginalized people on a variety of issues, policies and programs available to them and addressing their needs in the Pikes Peak Region, Colorado, and the nation." Ex. V at 22:9-17.

21. All of the Plaintiffs carry out their missions by working in their community to ensure access to the right to vote, including through voter education, voter registration, and get-out-the-vote activities. *See, e.g.*, Ex. P at 18:4-20, 36:13-20, 79:25-80:20, 109:22-110:19; Ex. X at 44:2-45:22, 48:5-49:16, 51:24-52:14, 70:14-71:17; Ex. R at 29:4-14, 41:19-44:22, 49:10-23; Ex. V at 26:13-27:7, 32:6-33:10, 41:6-43:12.

22. Turnout in April odd-year elections is about 50 percentage points lower than in November of even years. Ex. L at 7-8; Ex. Z (Johnson Dep.) at 66:11-68:20, 70:4-8, 71:12-25.

23. In April municipal elections, Black and Hispanic individuals in Colorado Springs constitute about 7% of the electorate compared to roughly 13% of the pool of registered voters. Ex. A (ECF No. 60-1) at 28; Ex. T at 8.

24. In November even-year elections, Black and Hispanic individuals in Colorado Springs comprise 9% to 11% of the electorate. Ex. A at 28; Ex. T at 8.

25. Black and Hispanic turnout in the City's April elections is always less than 20%. White turnout always exceeds 25% and sometimes approaches 40%. Ex. L at 15; Ex. T at 21.

26. Colorado Springs has a history of both public and private racial discrimination. Ex. AA (Romero Report) at 1-35; Ex. BB (Mayberry Dep.) at 117:21-25; 131:13-18; 186:1-192:21; Ex. CC (Ex. 14 to Mayberry Dep.).

27. Widespread private discrimination cannot exist without government complacence. Ex. BB at 119:18-20.

28. Black and Hispanic residents of Colorado Springs face disparities in income, poverty, education, home ownership, employment, access to vehicles, and policing as compared to non-Hispanic white residents of the City. Ex. L at 32-35; Ex. T at 40; Ex. A at 35-40; Ex. DD (Ex. 68 to Koch Dep.).

29. The City is unresponsive to concerns of the minority community, Ex. P at 56:18-25, 217:16-221:3; Ex. R at 179:5-21; 180:10-24; Ex. X at 110:24-113:5, including by not having programs aimed at addressing these racial disparities, Ex. EE (Posey Dep.) at 14:11-16, 14:23-15:2, 15:12-15, 15:22-25.

30. The City's own expert recognizes that these disparities make it less likely that these residents will vote in April municipal elections. Ex. FF (Ex. 44 to Anzia Dep.) at 1.

31. Few Black and Hispanic people have been elected to City office. Ex. L at 30-31.

32. Non-November local elections are not the norm in Colorado or nationwide. Ex. GG (Payson Report) at 3-4; Ex. N at 2.

33. Today, just 3 of the 25 biggest Colorado cities hold April odd-year local elections, while 20 hold November local elections. Ex. HH (Attachment to Barber Report titled "Colorado Cities Timing").

34. In the 1980s, 20 of the 25 largest cities in Colorado held their elections in November, Ex. GG at 3, as did a majority of Colorado cities surveyed, Ex. N at 2.

35. About 34% of U.S. municipalities currently hold non-November local elections, while roughly 66% hold November local elections. *Id*.

36. In Colorado, November odd-year local elections are held concurrently with statewide elections for ballot measures. Ex. II (Ex. 13 to Anzia Dep.); Ex. JJ (Ex. 14 to Anzia Dep.); Ex. KK (Ex. 15 to Anzia Dep.); Ex. LL (Ex. 16 to Anzia Dep.).

37. Because they are held at the same time as statewide elections, November odd-year elections in Colorado are generally considered on-cycle, while April elections are considered off-cycle. Ex. MM (Anzia Dep.) at 57:3-24; Ex. NN (Ex. 11 to Anzia Dep.) at 412.

38. The City does not have early voting or in-person voting in its April municipal

elections. Ex. OO (Ex. 14 to Barber Dep.) at 7; Ex. Z at 115:17-22.

39. The City only mails ballots to active registered voters. Ex. Z at 78:12-17.

40. Mailing ballots only to active registered voters has a disparate racial impact, as Black and Hispanic registered voters are more likely to be marked as inactive than are non-Hispanic white registered voters. Ex. T at 36-38.

41. The City's April election timing does not increase voter knowledge about local issues, promote media coverage of local issues, or foster democratic values such as congruence, responsiveness, or accountability. Ex. N at 4-5; Ex. GG at 5-17; Ex. MM at 198:23-201:10; Ex. PP (Barber Dep.) at 226:13-227:3.

42. Most political efforts to change election dates fail as "[t]he groups that benefit from low turnout lobby hard to keep off-cycle elections in place" and "legislators charged with setting election schedules listen to those groups." Ex. QQ (Ex. 29 to Anzia Dep.) at 2.

LEGAL STANDARD

Summary judgment is appropriate only where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 "contemplates that the court will sometimes deny the motion because the facts are genuinely in dispute and other times because the law does not support the movant's position." *Dupree v. Younger*, 143 S. Ct. 1382, 1390 (2023). When reviewing a motion for summary judgment, a court "draw[s] all reasonable inferences and resolve[s] all factual disputes for the non-moving party." *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1213 (10th Cir. 2022). Because of "the complex evaluation of the totality of circumstances required by Section 2" of the Voting Rights Act (VRA), "Section 2 claim[s] [are] not readily amenable to summary resolution." *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 281 F. Supp. 3d 1136, 1163, 1166 (D. Utah 2017).

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claim.

Many federal courts have determined that voter and civic engagement organizations have standing to pursue claims under § 2 of the VRA on their own behalf. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1164-66 (11th Cir. 2008); *La Union del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509, 527-31 (W.D. Tex. 2022); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1269 (N.D. Ga. 2021); *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 981-82 (N.D. Fla. 2021); *see also Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, No. 22-CV-00581-PAB, 2022 WL 1266612, at *4-7 (D. Colo. Apr. 28, 2022) (organizations have standing to pursue claims under § 11(b) of the VRA on their own behalf); *Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, No. 1:22-CV-00581-CNS, 2023 WL 1338676, at *5 (D. Colo. Jan. 31, 2023) ("When an [organization] meets the constitutional test of standing . . . prudential considerations should not prohibit [them from] asserting that defendants, on racial grounds, are frustrating specific acts of the sort which the [organization] was founded to accomplish." (internal quotation marks omitted)). Notably, the City cites *no* case in which a court has held that a voter engagement or civil rights organization lacks standing under the VRA. Instead, the City relies on an out-of-Circuit decision finding that a losing candidate did not have statutory standing and a handful of cases based on that same outlier decision. MSJ at 8.

Plaintiffs have both Article III and statutory standing to pursue their claim.[1] Once treated

[1] Plaintiffs have both Article III and statutory standing to bring their claim under § 2 of the VRA. It appears that the City concedes that Plaintiffs have Article III standing and limits its argument on standing to the contention that Plaintiffs lack statutory standing. It is long established that an

as part of prudential standing, the "zone of interests" test "determine[s], using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 127 (2014). Under this test, litigants can bring suit where they "fall[] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [their] complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (internal quotation marks omitted) (considering similar language in Title VII of the Civil Rights Act). Critically, in *Thompson*, the Supreme Court held that this does *not* limit standing to only individuals directly subject to discriminatory action. *Id.* Rather, the test denies a right to sue only where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 178.

Here, Plaintiffs' interests are in ensuring that the communities they serve, which include Black and Hispanic residents of the City, have equal access to the franchise. Statement of Material Facts ("SMF") ¶¶ 17-21. Plaintiffs' interests are tightly intertwined with the rights protected by the VRA and fall squarely within the zone of interests contemplated by the law. *Thompson*'s reasoning precludes the City's contention that only individual voters who are denied equal access may sue under § 2. *See* 562 U.S. at 177 (holding that if Congress intended to limit suit to those directly subject to discrimination, "it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved'").

As the City notes, the VRA allows "an aggrieved person" to sue under the Act. 52 U.S.C.

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organization has standing in its own right where there is "demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Numerous courts have recognized this diversion-of-resources injury for the purpose of standing for voter engagement organizations like Plaintiffs here. *See Common Cause Ind. v. Lawson*, 937 F.3d 944, 952-55 (7th Cir. 2019) (collecting cases).

§ 10302(a). The Supreme Court has held that "the word 'aggrieved'" is associated "with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998); *see also Ozonoff v. Berzak*, 744 F.2d 224, 228 (1st Cir. 1984) (Breyer, J.) (what was then called prudential standing was not an additional limitation "where Congress has enacted a special 'person aggrieved' statute, allowing a plaintiff to act as a 'private attorney general'"). Congress's use of this phrase supports an expansive reading of who may sue under the VRA.

"Person" is not defined by the VRA itself, but the use of the word in a federal statute is presumed to include organizations and other entities. *See* 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). "Person" is thus not limited to individuals. The legislative history of other voting laws makes this distinction clear. *See, e.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 364 (5th Cir. 1999) (documenting an amendment to the NVRA changing "individual" to "person" so that "the modification will permit organizations as well as individuals, and the Attorney General to bring suits under the act").

Plaintiffs' harms flow directly from the fact that April odd-year elections are not equally open to Black and Hispanic residents of the City. Because of this lack of openness, Plaintiffs have to expend additional resources to overcome the informational gap faced by these residents. SMF ¶¶ 14, 21. Moreover, there is no divergence of interest between Plaintiffs, who work to ensure that voters are able to access the franchise, and voters themselves. That one elected official objects to Plaintiffs seeking to ensure that *all* voters of color may access the franchise does not suggest a divergence. The interest of both Plaintiffs and Black and Hispanic voters in this context is that

these voters have an equal opportunity to vote. An elected official, whose success relies on who does or does not vote, is much more likely to have interests that diverge from both voter engagement organizations like Plaintiffs and voters themselves.[2]

II. Plaintiffs' Claim Is Legally Cognizable.

A. *The Operative Legal Standard*. On the merits, lower courts have embraced a two-part test for adjudicating § 2 racial vote denial claims.[3] The first element asks whether an electoral practice "creates a [racially] disparate effect." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc). The second element "provides the requisite causal link" between the challenged practice and the racial disparity by asking if the practice "interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." *Id.* at 245. These conditions are illuminated by the factors identified in the Senate report that accompanied § 2's 1982 revision. *See* S. Rep. No. 97-417, at 28-29 (1982); *see also, e.g.*, *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 376-80 (9th Cir. 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238-41 (4th Cir. 2014).

In its first § 2 racial vote denial case, *Brnovich*, the Supreme Court "decline[d] . . . to announce a test" for these claims. 141 S. Ct. at 2336. Instead, the Court listed "several important circumstances," *id.* at 2338, that lower courts should consider as part of the statutory "totality of circumstances," 52 U.S.C. § 10301(b). These factors are "the size of the burden imposed by a challenged voting rule"; "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982"; "[t]he size of any disparities in a rule's impact on members of

[2] The City rests only on the out-of-Circuit *Roberts v. Wasmer* for the proposition that this is an additional factor to be met beyond the zone-of-interests test that the Supreme Court has indicated should be used to assess statutory standing. MSJ at 10. This proposition has no legal basis.

[3] There are two doctrinal lines within § 2: racial vote dilution, which includes redistricting, and racial vote denial, which includes the time, place, and manner of elections and is at issue in this case. *See Brnovich*, 141 S. Ct. at 2333.

different racial . . . groups"; "the opportunities provided by a State's entire system of voting"; and "the strength of the state interests served by a challenged voting rule." 141 S. Ct. at 2338-39.

"Th[ere] is a lot of law to apply in a Section 2 case." *Id.* at 2360 (Kagan, J., dissenting). "A strange thing, to hear about it all only" here. *Id.* In its motion, the City fails to mention the lower courts' two-part test for § 2 racial vote denial claims. Nor does the City cite (let alone apply) the Senate or *Brnovich* factors. These omissions are fatal. Summary judgment cannot be entered in its favor when the City has not even attempted to perform the relevant legal analysis. "An entire lack of evidence on these factors precludes summary judgment." *Allen v. Waller Cnty.*, 472 F. Supp. 3d 351, 360 (S.D. Tex. 2020).

B. *The Statutory Text*. In lieu of addressing the operative legal standard, the City fixates on a misunderstanding of the statutory text. In its opinion, the City's municipal elections are "equally open to participation by [minority] members," and do not provide minority members with "less opportunity . . . to participate in the political process." 52 U.S.C. § 10301(b); *see* MSJ at 11-14. But the City ignores the whole of the text, which directs courts to examine "the totality of circumstances." 52 U.S.C. § 10301(b). The case law implementing § 2 details how this totality must be assessed. This precedent is invaluable because it translates § 2's strikingly "broad language," *Allen*, 143 S. Ct. at 1516, into factors that are more concrete and simpler to apply.

The City's construction of the statutory text is also wrong. Elections are *not* "equally open to participation by [minority] members" when participation is tightly linked to socioeconomic status and, because of past and present discrimination, minority members tend to be socioeconomically disadvantaged. Under these circumstances, minority members *do* have "less opportunity . . . to participate in the political process." They *do* have less "ability to *use* the means" that the electoral system makes available to them. *Brnovich*, 141 S. Ct. at 2337-38. To know that

the City's reading is wrong, one need only ask if any facially neutral policy could be unlawful under the City's view of § 2. The answer is no because no such policy would impose an "obstacle to voting" that, by its terms, "appl[ies] unequally to Black and Hispanic voters." MSJ at 11. But that answer is untenable because everyone agrees that § 2 *can* reach "the equal application of a facially neutral rule specifying the time, place, or manner of voting." *Brnovich*, 141 S. Ct. at 2333.

At multiple points, the City seeks to defend its crabbed interpretation of § 2 by invoking Justice Kagan's dissent in *Brnovich*. MSJ at 13-15. But Justice Kagan could not have been clearer that in her judgment, unlike the City's, § 2 "tells courts . . . to eliminate facially neutral (as well as targeted) electoral rules that unnecessarily create inequalities of access to the political process." 141 S. Ct. at 2361 (Kagan, J., dissenting). Indeed, "[t]hat is the very project of the statute." *Id.* Justice Kagan also endorsed the two-part test that the City ignored, "requir[ing] courts to explore how ordinary-seeming laws can interact with local conditions . . . to produce race-based voting inequalities." *Id.* at 2362.

C. *The Two-Part Test*. Under the operative legal standard, there is (at least) a genuine factual dispute with respect to each element. So even had the City addressed this standard, the result would be the same: the denial of the City's motion. Start with the lower courts' two-part test. Under the first part, the City's April odd-year municipal elections "create[] a [racially] disparate effect." *Veasey*, 830 F.3d at 244. According to the City's own expert, Black and Hispanic individuals constitute about 7% of the electorate in municipal elections compared to roughly 13% of the pool of registered voters. SMF ¶ 23. This stark racial disparity—an underrepresentation of around 6 percentage points (or close to 50%)—shrinks significantly in November even-year elections. In these elections, Black and Hispanic individuals comprise *9%* to *11%* of the electorate, so their underrepresentation falls to *2* to *4* percentage points (or as low as *15%*). SMF ¶¶ 23-24.

The City complains that this is a "Byzantine" method of calculating disparate impacts. MSJ at 12. It is not. It is standard in litigation and scholarship, and it is endorsed by both of the City's empirical experts. *See* Ex. MM at 156:19-157:9; Ex. M (ECF No. 60-14) at 4; Ex. PP at 132:24-133:25; Ex. A at 27-28. The City also objects that this method requires "dividing one percentage by another." MSJ at 12 n.3 (internal quotation marks omitted). Dividing percentages can sometimes be more probative than subtracting them. *See* Ex. T at 11-12. But in any case, the results reported above come from subtracting, not dividing, the minority share of the electorate from the minority share of the registered voter pool. The City's preferred technique therefore confirms the gaping racial disparity created by its April odd-year elections.

Proceeding to part two of the lower courts' test, the timing of the City's municipal elections causes this large disparate impact through its "interact[ion] with social and historical conditions that have produced discrimination against minorities." *Veasey*, 830 F.3d at 245. The City has a long record of public and private discrimination against minority members. SMF ¶¶ 26-27. Because of this discrimination, the City's minority residents are poorer and less educated than their white peers. SMF ¶ 28. Because of their lower socioeconomic status, the City's minority residents are less likely to participate in elections held at unusual times, such as April of odd years. SMF ¶¶ 14, 30. In the words of the City's expert, "Who are these people who both know the local election is happening and make the effort to vote in it? . . . [R]esidents with enough . . . resources to follow local politics and incur the costs of voting." Ex. FF at 1.

The City has nothing to say about the interaction of the City's odd election schedule with social and historical conditions of discrimination—even though this is the mechanism that causes the stark racial disparity at the heart of this case. But the City does give some examples of election timing policies that, it concedes, may violate § 2. *See* MSJ at 14-15 (holding elections when

migrant Hispanic farmworkers are away, limiting voting hours to times when minority members are less able to leave work). Crucially, these policies are potentially unlawful *for the same reason* as the City's April odd-year municipal elections. Namely, these policies cause significant disparate impacts *through their interaction with historical and ongoing discrimination*. After all, why are Hispanic individuals more likely to be migrant farmworkers? Because of discrimination that consigns them to that difficult job. And why are minority members less able to leave work? Again, because of discrimination that relegates them to workplaces with reduced employee flexibility. The City's examples thus fail to distinguish—in fact, they condemn—its own election calendar.

D. *The Totality of Circumstances*. Moving on to the totality of circumstances, and starting with the *Brnovich* factors, the first of these is the size of the voting burden imposed by the challenged practice: the extent to which it hinders voting by all (not just minority) individuals. One way to assess the size of this burden is to determine how the challenged practice affects overall turnout. *See, e.g.*, *Frank v. Walker*, 768 F.3d 744, 747 (7th Cir. 2014) (emphasizing "what has happened to voter turnout"). Here, overall turnout is about *50* percentage points lower in the City's April odd-year municipal elections than in November even-year elections. SMF ¶ 22. Even the City concedes that "turnout patterns of all racial and language groups differ between April odd-year and November even-year races." MSJ at 12.

The second *Brnovich* factor is the rarity of the challenged practice, both when § 2 was amended in 1982 and at present. The City's choice to hold April odd-year municipal elections is indeed anomalous, both historically and today. As of 1986, according to a survey of local governments, only 5 of the 25 largest cities in Colorado held local elections at a time other than November. SMF ¶ 34. The current situation is almost identical. Just 3 of the 25 biggest Colorado cities hold April odd-year local elections, while 20 hold November local elections. SMF ¶ 33.

Outside Colorado, too, non-November local elections are the exception and November local elections are the rule. About 34% of U.S. municipalities hold non-November local elections, while roughly 66% hold November local elections. SMF ¶ 35.

The City responds that November *odd-year* local elections are quite common, both in Colorado and nationwide. *See* MSJ at 17. This is true but doubly irrelevant. First, Plaintiffs are not challenging the holding of November odd-year local elections. They are challenging the City's choice to hold April odd-year municipal elections, and under *Brnovich*, it is the prevalence of the "*challenged* rule" that is probative. 141 S. Ct. at 2338 (emphasis added). Second, in Colorado, April odd-year and November odd-year local elections cannot be conflated because the latter are held concurrently with statewide elections for ballot measures. SMF ¶ 36. Under the categorization scheme of the City's expert, April odd-year elections are thus off-cycle while November odd-year elections are on-cycle. SMF ¶ 37.

The third *Brnovich* factor is the size of the racial disparity caused by the challenged practice. To grasp the enormity of the disparate impact here, it is helpful to compare it to the one in *Brnovich* itself. In that case, "roughly 99% of Hispanic voters . . . and 99% of [other minority] voters" cast valid votes notwithstanding the disputed policy, "while roughly 99.5% of non-minority voters did so." 141 S. Ct. at 2345. Here, in contrast, Black and Hispanic turnout in the City's April odd-year municipal elections is always less than 20% while white turnout always exceeds 25% and sometimes approaches 40%. SMF ¶ 25. This racial disparity of up to 20 percentage points dwarfs the half-percentage-point racial gap in *Brnovich*. In fact, it exceeds the disparate impact of just about any other contemporary electoral rule.

The fourth *Brnovich* factor is the jurisdiction's entire electoral system, taking into account "other available means" of voting not burdened by the challenged practice. 141 S. Ct. at 2339.

There are no such means here. Individuals who do not vote in the City's April odd-year municipal elections because of the elections' atypical schedule have no opportunity to vote at any other time. The elections' schedule imposes an across-the-board burden on all modes of voting. And the City compounds this burden by eliminating early voting and in-person voting in its municipal elections. SMF ¶ 38. The City further restricts the pool of individuals to whom it sends mail ballots to *active* registered voters. SMF ¶ 39. This policy exacerbates the racial disparity caused by the elections' timing because inactive registered voters are disproportionately Black and Hispanic. SMF ¶ 40.

The City replies that mail ballots are easy to use. *See* MSJ at 15 n.4. This is nonresponsive to any of the above points. It also fails to appreciate that minority voters are less likely to vote by mail and more likely to have their mail ballots rejected. *See* Ex. T at 37. This disparity is tolerable when mail voting is one option among several but becomes troubling when the *only* way to vote is by mail. The City further notes that Plaintiffs have not proved that other aspects of the City's electoral system—its reliance on at-large elections, its majority-vote requirement, and its lack of party labels on ballots—have racially discriminatory impacts. *See* MSJ at 18-20. This observation misunderstands the applicable law. One of the Senate factors is "the extent to which [a jurisdiction] has used . . . voting practices or procedures that may enhance the opportunity for discrimination." S. Rep. No. 97-417, at 29. To show that this factor cuts in their favor, Plaintiffs need only establish that a jurisdiction operates policies whose discriminatory potential is well-known. Plaintiffs do *not* have to demonstrate the policies' illegality since those measures are not the target of the suit.

The last *Brnovich* factor asks what state interests are furthered by the challenged practice, and to what extent. The City does not offer even a single rationale for its choice to hold municipal elections on a schedule that disparately harms minority members. This could be because the City's experts systematically foreswore just about every justification the City might have given. They

conceded that the City's oddly timed elections do not increase voter knowledge about local issues, nor promote media coverage of local issues, nor foster democratic values such as congruence, responsiveness, or accountability. SMF ¶ 41.

The record is rife with evidence, too, showing that the Senate factors weigh in Plaintiffs' favor. For example, both Plaintiffs' and the City's historical experts have identified a history of public and private discrimination, SMF ¶¶ 26-27, which continues to echo today.[4] Black and Hispanic residents of the City fare worse on every socioeconomic factor than do white residents. SMF ¶¶ 14, 28. Across time, Black and Hispanic individuals have been elected to City office infrequently, at numbers dwarfed by white elected officials. SMF ¶ 31. And the City has proven unresponsive to the needs of the minority community. SMF ¶ 29.

E. *Prior Recognition*. The City next tries to alarm the Court by claiming that Plaintiffs' challenge pushes the legal envelope. *See, e.g.*, MSJ at 1. In fact, there is little that is novel about this suit. Each branch of the government has recognized for decades that the timing of elections can violate the VRA. Start with the courts. "[T]he date of an election is covered by the Act," the Supreme Court explicitly held in *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 174 (1985). The Court added that a local election's lack of concurrence with another election—its lack of "salience"—is precisely why it might cause a disparate impact. "[A]n election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November." *Id.* at 178; *see also, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1303, 1305 (1988) (opinion of Kennedy, J.) (a changed election date may violate the VRA where the original

[4] For example, the historical redlining maps track with residential segregation today, where the Southeast portion of the City is home to a much higher population of Black and Hispanic residents than the City as a whole. *See* Ex. RR (Romero Rebuttal Report) at 7; Ex. L at 22-23; Ex. P at 177:19-23; Ex. SS (Wysocki Dep.) at 72:3-19.

date was "abandoned because the turnout of black voters was expected to be high on that date"); *Garcia v. Guerra*, 744 F.2d 1159, 1165 (5th Cir. 1984) (a new election date "deprived substantial numbers of Hispanic registered voters of the right to vote"); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 444 (S.D.N.Y. 2010) ("holding local elections 'off-cycle' in March . . . enhance[d] the opportunity for discrimination against the Hispanic voting population").

Next, take Congress. A subcommittee analysis included in the critical 1982 Senate report stated that "'off-year' elections tend to result in disproportionately low voter turnout among minorities." S. Rep. No. 97-417, at 144 n.405. "[O]ff-year elections" were also identified as an "objective factor" of discrimination relied on by "the courts and the Justice Department." *Id.* at 143-44. And "off-year elections" were cited as an example of a practice "which might serve as a basis for court-ordered changes of systems for electing members" of legislative bodies. *Id.* at 153-54. These passages devastate the City's argument that Congress never intended for § 2 to apply to the timing of elections. *See* MSJ at 17. At the very moment that Congress enacted § 2 in its current form, its members knew that § 2 would reach these regulations.

The executive branch, too, repeatedly indicated that election schedules can transgress the VRA. The Department of Justice objected many times to changes to election dates that risked disparately harming minority voters. *See, e.g.*, Legality of Augusta, Ga. Date for Mun. Election, Op. Att'y Gen. (2012); Legality of Lee Cnty., S.C. Date for Special Election, Op. Att'y Gen. (1994); Legality of Cumberland Cnty. Sch. Dist., N.C. Election Schedule, Op. Att'y Gen. (1985).

F. *Remaining Arguments*. The City warns that sweeping consequences will follow if it loses this case—"a national election day . . . [for] most or all jurisdictions for most or all elections." MSJ at 16. This is an absurd prediction. Each § 2 suit requires "an intensely local appraisal of the electoral mechanism at issue." *Allen*, 143 S. Ct. at 1503 (internal quotation marks omitted). How

this election timing case is resolved therefore has limited implications for any future challenge to any other jurisdiction's election date. Another jurisdiction's off-cycle elections might not lead to a racial disparity in turnout. *See, e.g.*, Katherine Levine Einstein & Maxwell Palmer, *Racial Disparities in Local Elections* 13 (2019) (finding no racial disparity in turnout in off-cycle elections in two of four cities). Or the Senate and *Brnovich* factors might point in different directions in another case.[5]

Swinging even more wildly, the City asserts that, if § 2 reaches the timing of elections, § 2 is unconstitutional. *See* MSJ at 16. But the ink is barely dry on the Supreme Court's holding that "§ 2 as applied to redistricting is []constitutional." *Allen*, 143 S. Ct. at 1516. If § 2 is valid in the more controversial redistricting context, it cannot be invalid in this setting. The Court also recently discussed at length the application of § 2 to "rules," like the one here, "that specify the *time*, place, or manner for casting ballots." *Brnovich*, 141 S. Ct. at 2336 (emphasis added). No Justice so much as hinted that this application posed any constitutional problem.

Finally, says the City, "democratic processes" are the "right forum" for moving its election date, not litigation. MSJ at 1. But when a party has a legal right to a remedy, it is no answer that the same relief could, in theory, be obtained politically. The City's expert has also explained why, in practice, most political efforts to change election dates fail. SMF ¶ 42. "The groups that benefit from low turnout lobby hard to keep off-cycle elections in place . . . ." *Id.* "And legislators charged with setting election schedules listen to those groups . . . ." *Id.*

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

[5] Notably, while certain at-large electoral systems have been found to violate § 2, their use is far from forbidden, as countless municipalities continue to conduct their elections at large.

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Respectfully submitted,

/s/ Theresa J. Lee

Theresa J. Lee
Daniel Hessel*
Nicholas Stephanopoulos
ELECTION LAW CLINIC
HARVARD LAW SCHOOL
6 Everett Street, Suite 4105
Cambridge, MA 02138
(617) 496-0370
thlee@law.harvard.edu
dhessel@law.harvard.edu
nstephanopoulos@law.harvard.edu

Attorneys for Plaintiffs

*federal practice only