UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

MARK MILLER, SCOTT COPELAND, LAURA PALMER, TOM KLEVEN, ANDY PRIOR, AMERICA'S PARTY OF TEXAS, CONSTITUTION PARTY OF TEXAS, GREEN PARTY OF TEXAS and LIBERTARIAN PARTY OF TEXAS, *Plaintiffs*, v. RUTH R. HUGHS, in her official capacity as the Secretary of State of the State of Texas, and JOSE A. "JOE" ESPARZA, in his official capacity as the Deputy Secretary of State of the State of Texas, *Defendants*.	)	Civil No. 1:19-cv-00700-RP

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

David P. Whittlesey (SBN 00791920)
Jacob Fields (SBN 24115134)
SHEARMAN & STERLING LLP
300 West 6th Street, Suite 2250
Austin, TX 78701
Email: david.whittlesey@shearman.com
jacob.fields@shearman.com
Tel: +1 (512) 647-1900
Fax: +1 (512) 647-1899

Christopher Ryan (Pro hac vice)
Michael P. Mitchell (Pro hac vice)
Anna Stockamore (Pro hac vice)
SHEARMAN & STERLING LLP
401 9th St. N.W., Suite 800
Washington, DC 20004
Email: cryan@shearman.com
michael.mitchell@shearman.com
anna.stockamore@shearman.com
Tel: +1 (202) 508-8000
Fax: +1 (202) 508-8001

Oliver Hall (Pro hac vice)
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, DC 20009
Email: oliverhall@competitivedemocracy.org
Tel: +1 (202) 248-9294

Attorneys for Plaintiffs

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Plaintiffs respectfully submit this Reply in further support of their Motion for Summary Judgment and Memorandum In Support, dated August 31, 2021 (ECF No. 58) ("**Pls' MSJ**") and in reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment, dated October 5, 2021 (ECF No. 79) ("**Defs' Resp.**").[1]

PRELIMINARY STATEMENT

Plaintiffs demonstrated in their motion for summary judgment that the Challenged Provisions cannot withstand *Anderson-Burdick* scrutiny because they impair Plaintiffs' rights to speak, associate, and cast their votes effectively, as guaranteed by the First and Fourteenth Amendments. *E.g.*, Pls' MSJ 13-30. More specifically, the undisputed facts show that the Challenged Provisions impose severe and unequal burdens on Plaintiffs – because they operate as a *de facto* financial barrier to non-wealthy Independents and NPPs gaining ballot access – and are not narrowly tailored to further compelling state interests. *E.g., id.* 14-35; Pls' SUMF ¶¶ 17-32, 61-124. Rather than address Plaintiffs' arguments and the factual record submitted in support, the Secretary in its opposition asks the Court to find (in the absence of any supporting evidence) that the Challenged Provisions impose no burden whatsoever on Plaintiffs, and seeks to mischaracterize Plaintiffs' claims as a "facial" attack on the constitutionality of the Challenged Provisions that is "foreclosed" by precedent. *See, e.g.*, Defs' Resp. 1-9. The Secretary's arguments should be rejected, and summary judgment should be granted in favor of Plaintiffs.

ARGUMENT

I. Plaintiffs Mount an As-Applied Attack to the Challenged Provisions

In both the Amended Complaint and their summary judgment papers, Plaintiffs make clear that they challenge the Challenged Provisions "as applied in combination with one another." Am.

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in Pls' MSJ and the Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment, dated August 31, 2021 (ECF No. 59) ("**Pls' SUMF**").

Compl. (ECF No. 14) ¶ 2; *see also id.* ¶¶ 89-90, 92-93; Pls' MSJ 12-13, 15. The Secretary nonetheless insists that Plaintiffs have in fact asserted a facial attack, and further, that their claims are "foreclosed" by precedent.[2] Defs' Resp. at 2-3. The Secretary is incorrect in both respects.

"[T]o categorize a challenge as facial or as-applied [courts] look to see whether the 'claim and the relief that would follow . . . reach beyond the particular circumstances of the [ ] plaintiffs.'" *Catholic Leadership Coalition of Texas v. Reisman*, 764 F. 3d 409, 426 (5th Cir. 2014) (citation and quotations omitted). Here, Plaintiffs assert that the Challenged Provisions "*as applied in combination with one another* . . . violate rights *guaranteed to Plaintiffs*…." Am. Compl. ¶¶ 90, 92 (emphasis added). Plaintiffs also seek a declaratory judgment that the Challenged Provisions are "unconstitutional *as applied to Plaintiffs*" and an "order enjoining the Secretary [] from enforcing the Challenged Provisions *as applied to Plaintiffs*." Am. Compl. ¶ 93 (emphasis added). That unquestionably is an as-applied challenge. *See Reisman*, 764 F. 3d at 426 (5th Cir. 2014) (finding claim was as-applied challenge where plaintiff did not seek relief for non-parties).

Nevertheless, the Secretary contends that Plaintiffs' claims should be construed as a "facial" attack, because Plaintiffs contest the Challenged Provisions "for both themselves and *other* non-primary parties." Defs' Resp. at 2 (citing *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013)). This argument misreads Plaintiffs' complaint, and the case on which the Secretary relies, *Steen*, is distinguishable because Plaintiffs do not seek relief for any non-party. By contrast, the plaintiffs in *Steen* "essentially assert[ed] the facial unconstitutionality" of the

[2] After recharacterizing Plaintiffs' claims as a facial attack on the Challenged Provisions, the Secretary contends that Plaintiffs' claims must be dismissed "if even one set of circumstances exists in which the State can constitutionally apply the [Challenged Provisions] to non-primary parties." Defs' Resp. at 2. But the Secretary fails to carry through by actually identifying circumstances in which the Challenged Provisions can be constitutionally applied to Plaintiffs.

provisions they challenged because they requested – and were granted – a blanket injunction against the provisions' enforcement against *anyone*. *See id*. at 385-86.

The Secretary's reliance on *In re Cao* is also misplaced. 619 F.3d 410 (5th Cir. 2010). In *Cao*, the Fifth Circuit rejected the plaintiffs' as-applied claims because they "rest[ed] not on a sufficiently developed factual record, but rather, on the same general principles" the Supreme Court had previously rejected. *In re Cao*, 619 F.3d at 430. A ruling for the *Cao* plaintiffs would effectively have required "overruling" a prior Supreme Court decision. *See id.* That is not the case here. Plaintiffs are not – and need not do so to prevail – asking this Court to overrule or ignore precedent. *Contra* Defs' Resp. 2-3. Instead, Plaintiffs rely on a comprehensive, decades-long evidentiary record demonstrating that the Challenged Provisions in combination impose severe burdens on Plaintiffs, which distinguishes this case from those cited by the Secretary, including *Nader v. Conner*, *Storer v. Brown*, *Texas Indep. Party v. Kirk*, or *Am. Party of Tex. v. White*. *See, e.g.*, Pls' MSJ 11-12, 16-17, 30 n.23; *see generally* Pls' SUMF. Therefore, those cases do not "foreclose" Plaintiffs' claims.

II. *American Party of Texas v. White* Is Not Controlling

The Secretary incorrectly argues that Plaintiffs are asking this Court to find that *American Party of Texas* "is no longer good law." Defs' Resp. at 3. Not true. Plaintiffs contend that *American Party of Texas* "is not controlling," because it did not address the factual and legal bases for Plaintiffs' claims. Pls' MSJ at 11-13. Further, the Secretary's observation that Texas's population had been growing in the years before *American Party of Texas* was decided does not negate or rebut Plaintiffs' grounds for distinguishing it. Defs' Resp. at 3-4. Indeed, the Secretary does not address Plaintiffs' claim – supported by the undisputed facts – that the ever-increasing number of signatures that Independents and NPPs must obtain in a *fixed* period has become

severely burdensome in the five decades since *American Party of Texas* was decided.[3] *American Party of Texas* did not (and could not have) addressed that claim.

Likewise, the Secretary's assertion that "what constitutes a modicum of support necessarily changes" as the electorate's size increases is unavailing. Defs' Resp. at 4. As discussed below, to demonstrate that the Challenged Provisions survive *Anderson-Burdick* scrutiny, the Secretary may not rely on generalities but must show that the Challenged Provisions are sufficiently tailored to further legitimate state interests. *See Pilcher v. Rains*, 853 F.2d 334, 337 (5th Cir. 1988) ("If the State has open to it a *less drastic way* of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.") (emphasis original) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983)). Yet the Secretary has not sought to rebut Plaintiffs' evidence showing Texas's requirements are far more restrictive than needed to avoid overcrowded ballots, *see e.g.*, Winger Report, ¶¶ 14-15, 19-21 & App. C, and that they operate as an absolute barrier to non-wealthy Independents and NPPs. Pls' SUMF ¶¶ 69,73.

III. The Challenged Provisions Cannot Withstand *Anderson-Burdick* Scrutiny

Plaintiffs have demonstrated that the Challenged Provisions are unconstitutional as applied *in combination* because they make it virtually impossible for non-wealthy Independents and NPPs to qualify for Texas's ballot. Pls' MSJ at 16-19; *see also Pilcher*, 853 F.2d at 336 (citing *Storer*, 415 U.S. at 737). In response, the Secretary disregards the factual record and baselessly asserts that the Challenged Provisions impose no burden at all. Defs' Resp. at 5, 6-9.[4] That misguided

[3] Unlike the record here, the record in *American Party of Texas* did not include historical evidence demonstrating the Challenged Provisions' exclusionary impact, or that they have become increasingly burdensome over time. That is easily explained: Texas allowed unfettered access to its ballot until 1968, when it first applied the one-percent signature requirement to NPPs. *See* TEX. ELEC. CODE ANN. art. 13.45 (2) (West Supp. 1968). Until 1968, therefore, an NPP could qualify for the ballot without submitting *any* signatures, and an Independent could too by forming an NPP.

[4] Tellingly, the Secretary does not even attempt to show that the Challenged Provisions can withstand anything but rational basis scrutiny, Defs' Resp. at 10-13, which the *Anderson-Burdick*

approach is insufficient to defeat summary judgment. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (when a party moving for summary judgment "demonstrate[s] the absence of a genuine issue of material fact," the non-movant cannot defeat the motion by relying on "conclusory allegations," "unsubstantiated assertions," or "only a 'scintilla' of evidence") (citations omitted); see Pls' MSJ at 25-31; see also Pls' SUMF ¶¶ 61-83, 125-28.

A. The Challenged Provisions Are Severely Burdensome As Applied in Combination

The Secretary's assertion that Plaintiffs fail to demonstrate that the Challenged Provisions impose "any burden" whatsoever contradicts the undisputed facts. *Compare* Defs' Resp. at 5 *with e.g.*, Pls' SUMF ¶¶ 62, 64 (Challenged Provisions as applied in combination are more severely burdensome than any other state's requirements); *id.* at ¶¶ 69-73 (Challenged Provisions interpose an insurmountable barrier to non-wealthy Independents and NPPs). It is also wrong as a matter of law:[5] contrary to the Secretary's assertion, *see* Defs' Resp. at 6, the test is not whether these particular Plaintiffs have successfully qualified for the ballot, but whether Independents and NPPs could reasonably be expected to comply with the Challenged Provisions as currently applied. *See Storer*, 415 U.S. at 742.

Signature Requirements. The inadequacy of the Secretary's defense of the Challenged Provisions is nowhere more evident than the Secretary's discussion of Texas's signature

framework makes clear does not apply where, as here, the Challenged Provisions impose severe and unequal burdens on a plaintiff's rights. Further, the unequal burdens imposed by certain of the Challenged Provisions – e.g., the "primary screenout" and § 181.0311 – cannot survive any standard of review because they serve no legitimate state interest.

[5] The Secretary contends that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot," Defs' Resp. at 4 (citing *Lubin v. Panish*, 415 U.S. 709, 719 (1974)), but *Lubin* says no such thing. *See Lubin*, 415 U.S. at 719-20 ("The point, of course, is that ballot access must be genuinely open to all, subject to reasonable requirements."). In any event, the undisputed facts demonstrate that the Challenged Provisions *do* operate to exclude non-wealthy Independents and NPPs, notwithstanding the circumstances of each Plaintiff's ballot status. Pls' SUMF ¶¶ 69-73.

requirements, which disregards Plaintiffs' argument that they are severely burdensome as applied in combination with the extreme time constraints that Texas unnecessarily imposes. Pls' MSJ 19-20. Nor does the Secretary address Plaintiffs' evidence that the signature requirements are severely burdensome compared to other state requirements. *Id.* at 15-16. Instead, the Secretary focuses exclusively on whether particular NPP Plaintiffs are ballot-qualified, which is not especially relevant, much less dispositive, of "the inevitable question for judgment" – whether Independents and NPPs can reasonably be expected to comply now.[6] *Storer*, 415 U.S. at 742.

The uncontested evidence shows that the Challenged Provisions are severely burdensome as applied to LPTX and GPTX because they cannot afford the massive expenditure of funds necessary to conduct a successful petition drive in Texas. Pls' SUMF ¶¶ 100, 103; Palmer Decl. ¶ 20. The fact that these parties are currently ballot-qualified does not diminish that burden, nor account for those dissuaded from running in the first instance. *E.g.*, Pls' SUMF ¶¶ 32, 90, 106-07, 112, 115-19; Hall Decl. ¶ 19. Should they fail to retain ballot access, they have no realistic chance of qualifying again. *Id.* The Challenged Provisions thus pose an existential threat to LPTX and GPTX, which compels them to alter their electoral strategy to the detriment of their ability to grow and develop as parties. Pls' SUMF ¶¶ 93, 101-02.

In addition, the Secretary's assertion that Plaintiffs provide "no evidence" to demonstrate that Texas's signature requirements are severely burdensome is plainly incorrect. Defs' Resp. at 6-7. The Secretary disregards or mischaracterizes the facts relating to LPTX's and GPTX's current status as ballot-qualified parties. For example, LPTX last conducted a successful petition drive in 2004, when the signature requirement was approximately half the current requirement and the cost

[6] The Secretary also disregards the undisputed evidence demonstrating that Independents are systematically excluded from Texas's ballot, Pls' SUMF ¶¶ 123-24; Hall Decl. ¶ 19 (ECF No. 72), which burdens the voter-Plaintiffs' right to cast their votes effectively. Pls' SUMF ¶¶ 125-28.

of conducting a petition drive was a fraction of the current cost. Pls' SUMF ¶ 99; Bilyeu Decl. ¶¶ 25-32 (ECF No. 61). Similarly, GPTX was not ballot-qualified when this action was filed and had no realistic chance of qualifying again until Texas – in 2019, seemingly in an attempt to influence this litigation – enacted a new law that re-qualified GPTX based on its 2016 electoral results. Palmer Decl. ¶ 18. Nor did GPTX collect nearly 92,000 signatures in 2010, as the Secretary asserts; Defs' Resp. at 6, instead, those were collected by a petitioning firm that was paid $525,000. Pls' SUMF ¶ 91. There are similar burdens for APTX and CPTX. Pls' SUMF ¶¶ 65-73, 106-110, 112.

The Necessary Cost of Conducting a Petition Drive. Contrary to the Secretary's assertion, Defs' Resp. at 7, there is ample evidence to demonstrate that volunteer petition drives cannot succeed in Texas, *e.g.*, Pls' SUMF ¶¶ 66-70, including evidence from declarants who have tried but failed, *e.g.*, Bilyeu Decl. ¶¶ 5-6, 10; Palmer Decl. ¶¶ 9,16, and from declarants who have personally petitioned as volunteers or managed volunteer petitioners. Pls' SUMF ¶ 70. The Secretary's assertion that it is Plaintiffs' "desire" or "choice" to hire professional petitioners contradicts the undisputed facts. Defs' Resp. at 7-8. Indeed, the record evidence – which the Secretary cannot dispute – shows that no statewide volunteer-led petition drive has succeeded in Texas in decades. Pls' SUMF ¶ 69.[7]

The Secretary attempts to distinguish the financial burdens invalidated in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) and *Bullock v. Carter*, 405 U.S. 134 (1972) on the basis that they involved "statutorily required fees," while this case involves Plaintiffs' "*choice* to

[7] To the extent that the Secretary insists, without evidence, that volunteer petition drives can succeed, the Secretary raises at most a disputed issue of fact that cannot be resolved on summary judgment. The same is true of the Secretary's unfounded speculation, contrary to the record evidence, *e.g.*, Pls' SUMF ¶¶ 72-73, 93, 103, 109, 112, that Plaintiffs could "obtain enough donations" to pay for a petition drive. Defs' Resp. at 8 & n.4. But these are not genuinely disputed facts, because the Secretary conspicuously fails to cite *any* evidence in support of these assertions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

hire petition circulators." Defs' Resp. at 8. Again, the Secretary's assertion that Plaintiffs have any choice contradicts the undisputed facts. The evidence shows that statewide Independents and NPPs *must* hire petition circulators or forego ballot access precisely because of the statutory requirements. Pls' SUMF ¶¶ 66-70.[8]

The Secretary suggests that the costs of complying with the Challenged Provisions are "not comparable" to statutorily mandated financial burdens, Defs' Resp. at 8 (citing *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016). But *Libertarian Party of Ky* is distinguishable as that case involved a requirement that a party "secure two percent of the actual votes cast in a presidential election" to become ballot-qualified statewide. *Libertarian Party of Ky.*, 835 F.3d at 575. The Court acknowledged that it "may require greater campaign efforts" to meet that threshold but declined to hold that the cost of doing so imposed a severe burden, primarily because "those costs certainly do not constitute exclusion or virtual exclusion from the ballot." *Id.* Here, by contrast, it is not genuinely disputed that the cost of complying with the Challenged Provisions operates to "constitute exclusion or virtual exclusion from the ballot" as an absolute barrier to non-wealthy Independents and NPPs. Pls' SUMF ¶¶ 68-73.

Texas's Burdensome Petitioning Procedures. In an attempt to minimize the heavy burdens imposed by Texas's obsolete petitioning procedures, Pls' SUMF ¶¶ 65-73, 80-83, the Secretary suggests that Plaintiffs object to Texas "verif[ying] that signatures are genuine and signers are eligible to sign." Defs' Resp. at 9. Not so. Plaintiffs object to Texas's failure to provide them with a means of demonstrating the requisite 'modicum of support' that is not cost-prohibitive. The uncontested evidence demonstrates that Texas could substantially reduce the burdens imposed by adopting modern procedures that would pay for themselves through administrative cost

[8] The Secretary asserts that Plaintiffs do not challenge the fees imposed by § 141.041. Defs' Resp. at 8. That is incorrect. *See* Pls' MSJ at 23-24, 26, 34.

reductions. Pls' SUMF ¶¶ 84-86; McReynolds Decl. ¶¶ 13-25 (ECF No. 59-4). Texas's failure to do so is particularly unjustified because it has adopted modern procedures to ease the burdens associated with the PPs' administration of their primary elections. Pls' SUMF ¶¶ 15, 36-38.

Texas's Unique Primary Screenout Provisions. The Secretary offers almost no defense against Plaintiffs' challenge to Texas's primary screenout provisions. Defs' Resp. at 9. The Secretary merely asserts that these provisions have been "upheld" and that Plaintiffs "fail to demonstrate any harm." *Id.* Here again, the Secretary simply disregards the extensive evidence demonstrating that harm. Pls' SUMF ¶¶ 74-77. Furthermore, the Secretary fails to address Plaintiffs' claim that no legitimate interest justifies the unequal burdens that the primary screenout imposes on Independents and NPPs. Pls' MSJ at 22-23, 26-27, 33.[9]

B. The Secretary Fails to Show That the Challenged Provisions Are Sufficiently Tailored to Further Compelling State Interests

Under the *Anderson-Burdick* framework, statutory provisions imposing severe and/or unequal burdens may not be upheld unless they are "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted) This requires the statutory scheme to be "narrowly tailored" when considered in its totality. *Pilcher*, 853 F.2d at 336; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (any burden no matter how slight must be justified by legitimate state interests). In this case, the Secretary does not attempt to make that showing but merely cites to a litany of cases for the simple proposition that states have legitimate interests in regulating ballot access. Defs' Resp. at 10-11.

[9] The Secretary seeks to impugn the credibility of Plaintiffs' expert Richard Winger and witness William Redpath by noting that they previously testified – *decades ago* -- that West Virginia's ballot access requirements were the most restrictive in the nation, Defs' Resp. at 9 n.5 (citing *Fishbeck v. Hechler*, 85 F.3d 162, 169 (4th Cir. 1996)). That testimony was true and accurate when *Fishbeck* arose 26 years ago. Since then, however, West Virginia substantially improved its requirements by repealing its primary screenout provision, *see* W. VA. CODE § 3-5-23(c)-(d) (1999), and by moving its filing deadlines for all offices from May to August. *Id.* § 3-5-24 (2009).

Plaintiffs, of course, do not disagree with that principle. The Challenged Provisions, however, are not sufficiently tailored to serve those interests, and they impose severe and unequal burdens on Independents and NPPs. Pls' MSJ at 14-30, 31-35; Pls' SUMF ¶¶ 61-83, 125-28; Hall Decl. ¶¶ 21-25; Winger Report ¶¶ 15, 17-18 & App. C.

The Secretary also argues that the Challenged Provisions are not "*per se* unconstitutional" because they establish "a different path to the ballot" for Independents and NPPs. Defs' Resp. at 11. That misses the point. Texas violates Equal Protection by guaranteeing PPs ballot access at taxpayer expense while requiring that Independents and NPPs bear the exorbitant costs of complying with the procedures they must follow. Further, the uncontested evidence shows that such costs impose an absolute barrier to non-wealthy Independents and NPPs.[10] That is a severe and unequal burden that cannot withstand *Anderson-Burdick* scrutiny.

Finally, the Secretary attempts to justify the heavier burdens the Challenged Provisions impose on presidential Independents by resorting to an argument the Supreme Court has expressly rejected. Defs' Resp. at 12; *Anderson*, 460 U.S. at 795 ("the State has a less important interest in regulating Presidential elections than statewide or local elections").

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' Motion for Summary Judgment, the Court should grant Plaintiffs summary judgment as to Counts I and II of the Amended Complaint.

[10] In a final footnote, the Secretary contends that Texas does not violate Equal Protection "by fund[ing] primary elections … when Plaintiffs do not get the same funding." Defs' Resp. at 13 n.6. Plaintiffs do not assert that they are entitled to state "funding," but only that Texas imposes a severe and unequal financial burden on them by compelling them to comply with antiquated procedures at a cost approaching $1 million or more. Pls' SUMF ¶ 73.

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Respectfully submitted,

David P. Whittlesey (SBN) 00791920
Jacob Field (SBN 24115134)
SHEARMAN & STERLING LLP
300 West 6th Street, Suite 2250
Austin, TX 78701
Email: david.whittlesey@shearman.com
jacob.fields@shearman.com
Tel: +1 (512) 647-1900
Fax: +1 (512) 647-1899

Christopher Ryan (Pro hac vice)
Michael P. Mitchell (Pro hac vice)
Anna Stockamore (Pro hac vice)
SHEARMAN & STERLING LLP
401 9th St. N.W., Suite 800
Washington, DC 20004
Email: cryan@shearman.com
michael.mitchell@shearman.com
anna.stockamore@shearman.com
Tel: +1 (202) 508-8000
Fax: +1 (202) 508-8001

/s/Oliver B. Hall
Oliver Hall
Pro hac vice
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, DC 20009
Email: oliverhall@competitivedemocracy.org
Tel: +1 (202) 248-9294

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Jacob Fields
Jacob Fields