

INTRODUCTION

Montana is facing a brazen and unprecedented effort by the Montana Republican Party to disenfranchise thousands of registered voters in violation of federal law and their constitutional rights. That effort will reach a critical juncture today. Plaintiffs seek immediate relief under F.R.Civ.P 65 to prevent irreparable harm to our democracy, harm that the Montana Republican Party has promised to continue. *See GOP Promises More Voter Challenges*, Missoulian, October 4, 2008, page A1 (Ex. A).

BACKGROUND

Defendants Jacob Eaton and Max Hunsaker are, respectively, Executive Director and Legislative Director of Defendant Montana Republican Party, (hereinafter all referred to collectively as the “Republican Defendants.”) On or about September 29, 2008, Eaton and Hunsaker, acting in concert with and on behalf of the Montana Republican Party, filed challenges against more than 6,000 voters in various Montana counties, including Missoula, Lewis & Clark, Dear Lodge, Silver Bow, Glacier, Hill, and Roosevelt counties. *See e.g.* Aff. Challenger Eaton (Ex. B -1 and B – 2). The challenges claim these voters are not eligible to vote because their voter registrations do not meet the requirements of a registered elector under Mont. Ann. Code § 13-2-208(1). *See Id.* Specifically, the challenges claim the voters no longer reside at the address on their current registration forms, based on changes of mailing addresses registered with the U.S. Postal Service. *Id.*

Many of these challenges were made on alleged factual grounds that are patently false. *See e.g.*, Aff. Plaintiff Breitenbach (Ex. C); Aff. Plaintiff Greene; (Ex. D); Aff. Sharon Pettit (Ex. E); Aff. Kevin Furey (Ex. F); Aff. of Stephan Johnson (Ex. G). In each of the above cases, there is no basis for the claim that the voter is not properly registered under Montana law.

Underscoring the fallacious nature of many of the affidavits, following press reports that Army 1st. Lt. Furey's registration was being challenged on his way to serve in Iraq, Defendant Eaton attempted to "withdraw" the challenge, telling the Great Falls Tribune he didn't know Furey was on the list. *See GOP Registration Challenge Frustrates Voters, Officials*, Great Falls Tribune, October 4, 2008 (Ex. H), *see also*, Ex. A. In reality, Defendant Eaton personally signed the Challenge Affidavit against Furey, stating: "I, Jacob Eaton, do swear (or affirm) that the following individual, Kevin Furey, is not eligible to vote" Ex. B-2.¹

At least one county, Missoula, has determined that, with respect to certain of the challenges and contrary to the sworn statements of Eaton and Hunsaker, "nothing in the affidavit[s] establishes that the challenged elector is not registered as required by law, the challenge must be rejected." Mem. of Michael Sehestedt, Esq., Deputy Missoula County Attorney at p. 3 (Ex. I). However, at least one other county, Hill, has made no determination as to the *prima facie* validity of the challenge affidavits and is contacting all challenged voters, potentially discouraging their participation and that of other county voters, in the upcoming general election. *See* Ltr. Hill Cnty (Ex. G).

Not coincidentally, these challenges target areas of high Democratic concentration in the state of Montana, including Missoula and its student populations at the University of Montana. *See* Ex. A. The challenges also target areas of high Native American population such as in Hill. Put bluntly, the Republican Defendants are engaging in an orchestrated effort to suppress the Democratic vote for the November 2008 election; there can be no other conclusion. The more than 6,000 votes challenged so far represent almost 1.5% of the total votes cast in the 2004

¹ The Affidavit was notarized by Adam Jepsen, the "Special Projects" coordinator of the Montana Republican Party.

presidential election in Montana. In a tight presidential race, such illegal tactics could sway the election toward the Republicans, not to mention the potential damage in races down the ticket.

REQUEST FOR WAIVER OF BOND

This is a matter of great public concern. In the interest of justice, Plaintiffs request that the bond requirement under F.R.Civ. P 65(c) be waived. *See Powelton Civic Home Owners Ass'n v. Dep't of Housing & Urban Dev*, 284 F.Supp. 809, 841 (D.C.Pa. 1968) (“We cannot accept the proposition that [the bond requirement] was intended to raise virtually insuperable financial barriers [to] judicial scrutiny.”).

STANDING

Plaintiffs have standing when they can demonstrate injury in fact that is caused by the challenged conduct. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 664 (1993). Injury in fact is defined as harm to a legally protected interest that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). (internal notations omitted). Membership organizations demonstrate injury in fact standing when one of their members would be injured in fact. *Id.* at 563. Furthermore, there must be a likelihood that the injury will be redressed by a favorable decision, such that the “prospect of obtaining relief from the injury as a result of a favorable ruling” is not “too speculative.” *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Plaintiffs meet the standing requirements here. Voters like Mr. Breitenbach and Ms. Greene will be directly injured if the challenge is allowed to stand, which this restraining order seeks to prevent. *See Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (denial of the right to vote

constitutes a compensable injury). The Montana Democratic Party enjoys standing because thousands of its members have been similarly challenged and have suffered injury in fact.

LEGAL STANDARD

A temporary restraining order must be granted when a party demonstrates (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) in certain cases, advancement of the public interest. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). The Ninth Circuit also employs an alternative test, in which the plaintiff must demonstrate either: (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor. *Id.; Lovaas v. Osen*, 2007 WL 686689, * 4 (D. Mont. 2007).

ARGUMENT

The Republicans Defendants' vote suppression scheme is illegal, violating numerous federal laws and the United States Constitution. Plaintiffs have a strong likelihood of success on the merits and the potential for irreparable harm in this matter is grave. This Court should issue a temporary restraining order and preliminary injunction against the Republican Defendants requiring them to withdraw the challenges made to date and to refrain from filing further specious challenges in an effort to suppress the vote. As explained below, the temporary restraining order and preliminary injunction should further enjoin Montana Secretary of State Brad Johnson from allowing any challenges to "cancel" the registration of any Montana voter, as such challenges have been made in violation of federal law, and should further enjoin Defendant Johnson from certifying the rolls of electors for the November 4th general election, pending this Court's ruling on the legality of the challenges.

I. Plaintiffs Have a Strong Likelihood of Success on the Merits.

Plaintiffs have a high likelihood of prevailing on each of their claims. First, they can show that the Defendants' interpretation of Montana law—which would allow Montana to remove voters from the registration rolls and prevent them from voting based solely on change-of-address information from the Postal Service—is pre-empted by federal law. Second, Plaintiffs can demonstrate the Defendants' challenge violates the Equal Protection Clause by causing disparate treatment of voters depending on their county of residence. Third, the Republican Defendants have acted under color of state law to deprive the Plaintiffs of their Constitutional rights, in the process violating 42 U.S.C. § 1983. Fourth, the Plaintiffs will succeed in showing that the Republican Defendants conspired under 42 U.S.C. § 1985(3). Finally, Plaintiff will demonstrate that the Republican Defendants violated 42 U.S.C. § 1971, which bars intimidation or coercion in suppressing the vote.

a) Plaintiffs Will Demonstrate that the Challenges Violate the National Voter Registration Act, Which Preempts Montana Law.

Under Article VI clause 2 of the Constitution, “the Laws of the United States...shall be the supreme Law of the land;...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Under the Supremacy Clause, “state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)). Even in an area of traditional state regulation such as voting, Congress may preempt state law, *see Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000), either by expressly stating that state law is preempted, by occupying a regulatory field, or through so-called “conflict preemption” — “where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress.” *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000) (quotation omitted). A state law runs afoul of the Supremacy Clause and is preempted where it “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (9th Cir. 2004). Thus, as is the case here, “an aberrant or hostile state rule is preempted to the extent it actually interferes with the methods by which the federal statute was designed to reach [its] goal.” *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003) (quotation marks and citation omitted).

Here, Montana law conflicts with federal law by permitting the State—in response to a challenge from an elector—to remove registrants from the registration rolls based on information from the U.S. Postal Service’s National Change of Address Database using a different procedure from that authorized under federal law. The National Voter Registration Act (“NVRA”) already provides a detailed procedure for States to follow in culling registration rolls using this information. To the extent State law conflicts with these procedures and prevents Congress from fulfilling its objectives, it is pre-empted. *California ex rel. Lockyer*, 375 F.3d at 849.

The NVRA is intended to “increase the number of eligible citizens who register to vote in elections for Federal office” and to ensure that States may “enhance[] the participation of eligible citizens as voters.” 42 U.S.C. § 1973gg(b)(1)-(2). It also seeks to “protect the integrity of the electoral process” and “ensure that accurate and current voter registration rolls are maintained.” *Id.* § 1973gg(b)(3)-(4). It does so by specifying the means by which States may cull ineligible voters from their registration rolls. The law requires that any State program to maintain the accuracy of its registration lists must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act.” *Id.* § 1973gg-6(b)(1).

The Act allows States to use the change-of-address information maintained by the USPS, **but it sets explicit requirements on its use.** *Id.* § 1973gg-6(c)(1). A State may only use the USPS's change-of-address database if it follows the procedures established under § 1973gg-6(c)(1). First, a state must identify registered voters whose addresses may have changed. *Id.* § 1973gg-6(c)(1)(A). Second, if it appears the registrant has moved within the same jurisdiction, then the state may simply change the address and send the registrant “a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information.” *Id.* § 1973gg-6(c)(1)(B)(i). If it appears the registrant has moved to a different jurisdiction, then the state must send this same notice, but if the registrant has not indeed changed residence to outside the jurisdiction, he or she should return the notice within 30 days. Only if the registrant does not respond, **and** if the registrant thereafter fails to vote ***in the next two federal elections***, may the State remove the registrant from the registration rolls. *Id.* § 1973gg-6(c)(1)(B)(ii), (d)(2)(A).

In other words, only at the end of this four-year, complicated procedure—which lasts at minimum two federal election cycles—may the State remove the name of a voter from its registration rolls based on information received from the USPS's change-of-address database. The law outlines this lengthy procedure because it recognizes that the USPS's change-of-address database is not necessarily a reliable gauge of whether individuals are changing their primary residences for voting purposes. This database information only indicates where individuals wish to receive their mail, not necessarily where they live. Voters may have dozens of reasons for changing the address at which they wish to receive their mail, even if they do not change their residence. Moreover, students tend to change their temporary addresses frequently, even if they maintain their primary residence for voting purposes at their parents' house. Workers or military

personnel, such as 1st Lt. Furey, whose jobs temporarily take them outside their precinct or even outside the State may change their mailing address but not their primary residence. The NVRA reflects this uncertainty by discussing registrants “whose addresses *may have changed*” based on the change-of-address database and allowing the State to begin the process of adjusting the rolls “if it *appears*” that the registrants’ address has changed. 42 U.S.C § 1973gg-6(c)(1)(A)-(B) (emphasis added).

Under the Defendants’ interpretation of Montana law, however, election officials may cancel the registration of electors based solely on a change of mailing address, regardless of whether this signals a change in primary residence. *See* Ex. B -1 and B-2. If the Defendants’ interpretation of the law is correct, then the law is preempted. Montana law also conflicts to the extent that challengers can prevent voters from voting based solely on an apparent change of address. As the NVRA makes clear, electors may vote despite a change of address, even if it entails a change of primary residence. Under § 1973gg-6(e)(1), election officials must permit electors to vote “upon oral or written affirmation” if the elector has moved within the same precinct, even if the elector failed to notify the election registrar of voters. Even if the elector has moved to a different precinct, he or she “shall be permitted” to correct the records and vote at the former polling place “upon oral or written affirmation”. *Id.* § 1973gg-6(e)(2)(i). Again, to the extent that the state law allows election officials to prevent voters from voting despite their change of address—as Defendants assert—the law is pre-empted by federal law.

b) Plaintiffs Will Succeed in Showing that the County-by-County Approach to these Challenges Violates the Equal Protection Clause.

Section 13-13-201(b), MCA, is an ambiguous and ill-defined mandatory voter notification provision whose implementation violates the Equal Protection Clause of the Fourteenth Amendment. The statute requires the election administrator to notify voters whose

registration has been challenged. But, neither the statute nor ARM § 44.3.2109, which implements the notification provision, protect voters from arbitrary treatment. In fact, under § 13-13-301(b), each county clerk, serving as the election administrator, is allowed to decide: 1) whether to send a notice to voters whose registration has been challenged; 2) what type of notice to send; and 3) what procedures challenged voters will have to follow to retain their right to vote.

The ambiguity of § 13-13-301(b) opens the door to voters being treated differently based on where they live or at least where they receive mail. Allowing such discrimination based on the vagaries of geography is a clear violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”); *see also Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

In *Bush v. Gore*, the Court asked “whether the recount procedures the Florida Supreme Court has adopted are consistent with its *obligations to avoid arbitrary and disparate treatment of the members of its electorate.*” *Bush*, 531 U.S. at 105 (emphasis added). The same question must be asked about Montana’s procedures governing the voter challenge process.

This concern about arbitrary and disparate treatment is well founded. So far, on information and belief, seven counties have received voter challenges, and each county may be

taking a different approach to notifying affected voters. Missoula has decided that some of the claimed challenges are invalid. *See* Ex. I. As a result, it is not sending any letters to voters whose postal addresses suggest that they have moved within the county. *Id.* But other counties, such as Hill, have decided that moves within a county do require at least a letter of notification. *See* Ex. G. Hill County is recommending that voters who have moved within the county complete and return an enclosed card that lists their current address. *Id.* As a result of these disparities, a voter who moved within Missoula County will not be affected by the challenges in any way and will likely not even learn that a challenge was filed. A voter Hill County, on the other hand, will be instructed to take additional action. The result is that similarly situated voters will face very different hurdles as they try to exercise their right to vote. In other words, Montana, like Florida, has not met its “obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Id.*

c) Plaintiffs Will Succeed in Showing that the Challenges Violate 42 U.S.C. § 1983.

As required under § 1983, Plaintiffs will be able to show “depriv[ation] of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999).

1. The Republican Defendants’ Challenges Impermissibly Burden Plaintiffs’ Constitutional Rights.

First, Plaintiffs will be deprived of a vital Constitutional right if these challenges are permitted to stand. “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government.” *Reynolds*, 377 U.S. at 555. That is because the right to vote is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17

(1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). For this reason, the Supreme Court has made clear that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds*, 377 U.S. at 561-62.

The Republican Defendants’ mass challenges impinge on the exercise of this fundamental right in a number of ways. First, the challenges interfere with the right to vote even if no voters are actually removed as a result. Just by publicly challenging voters based on their change of mailing address, the Republican Defendants have sown mass confusion about the eligibility of voters who have recently moved or who have changed their mailing address since they last registered to vote. This tactic is clearly designed to deter voters from going to the polls, leaving them uncertain about whether it is even worth it to show up on Election Day. *See* Aff. Johnson, Ex. G. Absent a temporary restraining order by this Court barring these challenges, there is a significant chance that some voters will not go to the polls out of the belief that they have lost the right to vote or out of fear that they will be subjected to public questioning.

Second, on Election Day, the mass challenge program will burden the right to vote. Election practices that threaten to humiliate and discourage voters can constitute constitutional violations. *U.S. v. Charleston County*, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003) (treating “public and hostile questioning” that “upset and humiliated” select voters as part of pattern of constitutional violations); *Harris v. Graddick*, 593 F. Supp. 128, 131 (D. Ala. 1984) (same). The Republican Defendants’ plan will subject those who have filed changes of address to inordinate delays. Responding to a challenge is far more time consuming than simply casting a ballot, requiring the challenged voter to answer to questions from the election officials and to fill out an affidavit. § 13-13-301(4)(a), MCA. Other voters will be required to cast provisional ballots, then return with additional identification, causing them significant delays. § 13-15-107(1),

MCA. And once a challenge is taken up, even the most meritless challenges may cause additional delay as pollworkers are required to verify the electors' eligibility. § 13-15-107(3), MCA. This burden infringes on the right to vote. *See, e.g., Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 552 (6th Cir. 2004) (Ryan, J., concurring) (recognizing that “inordinate delay” at polls could constitute unconstitutional burden); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (finding constitutional defect where inadequate voting facilities caused long lines, because “United States citizens do have a right guaranteed by the Constitution to a reasonable opportunity to vote in local elections, that is, ... to be able to vote within a reasonable time”).

2. *The Republicans Defendants' Act Under Color of State Law.*

The Plaintiffs will also be able to demonstrate that the challenges are being made “under the color of state law.” The Republican Defendants cannot attempt to excuse their voter suppression tactics by arguing that they are not state actors and thus not bound to comply with the Constitution. When they levy challenges to prevent voters from exercising a fundamental right pursuant to authority granted to them by state law, they are state actors for purposes of the Fourteenth Amendment.

The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights “fairly attributable to the State?” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Under § 1983, private entities and individuals are subject to suit when the “conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (U.S. 1982). A private person or entity's acts are attributable to the State in cases where that person or entity assumes a public

function, *e.g. Marsh v. Alabama*, 326 U.S. 501 (1946), or acts in concert with public authorities, *e.g. Lugar*, 457 U.S. at 941. The Supreme Court has long recognized that when an election-related practice gives significant authority to political parties, those entities are converted to state actors. *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (concluding that party-operated primary in a single-party state constituted state action).

In this case, the deprivation of the right to vote will be “fairly attributable to the state.” Because of the Republican Defendants’ actions, thousands of voters from across Montana may soon receive notification *from the State* that their voter registration is in doubt and that they must take corrective action. The Montana election code makes specific provision for partisan challengers, making them part of the election process. *See* § 13-13-301, MCA; *see also* § 13-13-120, MCA.

Under Montana law, challengers may challenge the right to vote of a person whom they believe meets one of seven criteria, including that the voter “is not registered as required by law.” The statute does not define how election officials should treat meritless challenges, but only provides that voters who are challenged at the polls should fill out provisional ballots that may or may not be counted later. § 13-13-301, MCA. Therefore, the elections official is unlikely to reject a challenge, even one based on such unreliable information as that derived from the USPS’s change-of-address database.

Thus, the partisan challengers have enormous ability to interfere with the electoral process. That power is granted to them by the state, relates to the quintessential public function (administration of voting in a general election), and is intertwined with the functions of government election officials. By delegating authority to partisan challengers to challenge eligible voters, thus triggering an elaborate state process, the Montana statutes make partisan

challengers state actors. As the court recognized in *Tiryak v. Jordan*, “[a]lthough the state is ultimately responsible for the conduct and organization of elections, the statutory scheme in certain instances delegates aspects of that responsibility to the political parties. This delegation is a legislative recognition of ‘the critical role played by political parties in the process of selecting and electing candidates for state and national office.’” 472 F. Supp. 822, 823-24 (E.D. Pa. 1979) (quoting *Marchioro v. Chaney*, 442 U. S. 191 (1979)). As a result of this critical role, the court recognized that election observers are state actors for the purposes of § 1983 claims. *Id.*

Where such challengers are involved in a scheme to intimidate or otherwise suppress the vote that is “made possible only because [the challengers] are clothed with the authority of state law,” such activities violate the Constitution and can be remedied by § 1983. *Id.* at 825. As a result, the Plaintiffs has a strong likelihood of demonstrating that the Republican Defendants violated Plaintiffs’ constitutional rights while acting under the color of state law.

d) Plaintiffs Will Succeed in Demonstrating that the Republican Defendants Violated 42 U.S.C. § 1985(3).

Even if the statutory challengers are not considered state actors, Plaintiffs still have a likelihood of success for their claims under the two prongs of § 1985(3). First, the statute’s Equal Protection provision provides a cause of action against the Republican Defendants’ viewpoint-motivated conspiracy to deprive the Plaintiffs of their right to vote. Second, the statute’s “support and advocacy” provision provides a cause of action against the Republican Defendants’ conspiring to intimidate Plaintiffs from exercising that constitutional right.

1. Republican Defendants’ Conduct Violates the Equal Protection Provision of Section 1985(3).

There can be no dispute that this scheme to challenge legitimate voters was designed to prevent voters whom Republicans believe are not likely to support their candidates from voting.

The activity thus falls within the scope of Section 1985(3)'s Equal Protection provision, which provides a cause of action against anyone who "conspire[s]...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." 42 U.S.C. § 1985(3). Both Defendants Eaton and Hunsaker took affirmative actions in furtherance of the conspiracy that "deprived [Plaintiffs] of having and exercising [a] right or privilege of a citizen of the United States." *Griffin v. Breckenridge*, 403 U.S. 88 (1971). That they did it in order to deprive the Democratic voters of the equal protection of the laws and deprive them of their rights should not be in serious question.

As shown above, in discussion of the § 1983 claim, the challenges impose an impermissible burden on voting. In addition, the plan is clearly targeted at voters whom Defendants believe will not support their candidates – students, Native Americans and Democrats. Approximately 5,600 of the more than 6,000 voters challenged were in only two counties Missoula County and Lewis and Clark County, counties with historically high Democratic voting patterns.

It is well-established that viewpoint-motivated efforts to deprive eligible citizens of a constitutional right fall within the purview of Section 1985(3). In *Cameron v. Brock*, the supporter of a challenger candidate for sheriff brought suit under § 1985(3) after he was arrested for distributing pamphlets critical of the incumbent sheriff. 473 F.2d 608 (6th Cir. 1973). The Sixth Circuit affirmed the jury verdict in favor of the supporter, holding that "§ 1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate." *Id.* at 610. In *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975), similarly, the Sixth Circuit held in favor of protesters whose signs criticizing President Nixon had been destroyed by police officers, because "[a] more invidious classification than that between persons who support government

officials and their policies and those who are critical of them is difficult to imagine.” *Id.* at 912; *see also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (explaining that “[i]t is especially difficult” to justify a burden on “political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status”).

In targeting voters whom they believe are unlikely to vote for Republican candidates, the Republican Defendants have targeted Montana residents on the basis of their views. The conspiracy to deprive them of their vote is thus actionable under Section 1985(3)’s Equal Protection Provision.

2. *The Republican Defendants’ Conduct Separately Violates Section 1985(3)’s Support and Advocacy Provision.*

Section 1985(3)’s “support and advocacy” provision provides an entirely separate basis on which Plaintiffs will succeed on the merits. *See Federer v. Gephardt*, 363 F.3d 754, 760 & n.5 (8th Cir. 2004) (recognizing that Support and Advocacy provision does not require class-based discrimination). That provision provides a cause of action against those who “conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner.” 42 U.S.C. § 1985(3).

The Republican Defendants’ strategy, including significant press coverage, impermissibly attempts to intimidate voters from exercising their right to vote. Montana law forces challenged voters to fill out affidavits and provisional ballots in the hope that their votes will be counted. Rather than facing such challenges, many voters will simply stay home.

Courts have recognized that attempts to suppress turnout through misinformation campaigns are actionable. *See, e.g., Miller v. Blackwell*, 348 F. Supp. 2d 916, 918 (S.D. Ohio 2004) (granting injunction, in case brought under § 1983, when “the timing and manner in which

Defendants intend to send notice may discourage Plaintiff Voters from exercising that fundamental right by leading them to believe they are not eligible to vote”). More to the point, parallel criminal voter intimidation statutes are interpreted to cover any kind of improper efforts to interfere with voter turnout, not just threats of physical violence. *See, e.g., United States v. Tobin*, 2005 WL 3199672 (D.N.H. Nov. 30, 2005) (holding that 18 U.S.C. § 241, which criminalizes efforts “to injure, oppress, threaten, or intimidate” voters, covers jamming of voter transportation phone bank). Thus, threatening that voters who show up will be forced to answer questions about their eligibility to vote based on nothing more than a change-of-address database entry similarly violates the prohibition against voter intimidation in Section 1985(3).

e) Plaintiffs Will Succeed in Showing that the Challenges Violate 42 U.S.C. § 1971.

Plaintiffs will show, as required by 42 U.S.C. § 1971, that the Republican Defendants intimidated, threatened or coerced voters of Montana in an attempt to interfere with those voters’ right to vote. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).

1. The Republican Defendants Intimidated, Threatened, or Coerced Montana Voters By Filing Baseless Challenges to Voter Registrations.

Last week, the Republican Defendants instigated challenges to the voter registrations of more than 6,000 Montana citizens. These challenges were not broad geographical challenges attempting to fairly clear the roles of voters, Republicans and Democrats alike. Instead, they specifically targeted Democratic groups to try to suppress the opposition group.

The challenges will confuse voters as to their eligibility and the requirements to exercise their right to vote. Because the challenges cloud the requirements to vote, many voters will be left questioning whether they will even be allowed to vote if they make the effort to show up at polls. Those voters will likely be coerced into staying home on November 4th. The ultimate “effect of such acts and conduct is to severely discourage, intimidate, threaten and coerce those

citizens who are seeking or might otherwise seek to exercise the rights involved.” *United States v. Clark*, 249 F.Supp. 720, 728 (D.C.Ala. 1965).

Even if the intimidation, threats, and coercion are unsuccessful, the Republican Defendants’ actions are still illegal. Section 1971 bars any *attempts* to intimidate voters. *Clark*, 249 F. Supp. at 728 (“The success or failure of intimidation, threats or coercion, is immaterial, since ‘attempts’ are equally proscribed.”)

2. *The Republican Defendants’ Actions Are Intended To Interfere With Voters’ Right To Vote.*

The Republican Defendants have not explicitly stated that their coercive purpose is to deny the right to vote, and like most similar cases, the coercive purpose cannot be proven through direct evidence. Instead, the court must look to circumstantial evidence. *McLeod*, 385 F.2d at 741. For example, college students move often, sometimes twice a year in the summer and fall. Moreover, students almost invariably move in August or September, only two to three months before an election. By challenging the registrations of college students based on recent moves, Defendants targeted a group known for frequent and recent moves who are also commonly Democratic voters. Defendants blatant disregard for the proper procedure under the NVRA for culling the registration rolls of ineligible voters serves as further confirmation of their intent to intimidate. *See supra* at § I(a). Defendants’ disregard of proper procedure and Federal law belies their underlying intention to interfere with the voters’ right to vote.

II. Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted.

The Defendants seek simply to deprive the Plaintiffs of their votes. They also seek to disenfranchise at least 6,000 other Montana electors. Plaintiffs in this case wish to protect their right to vote, a right that ranks among the most fundamental in our society. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). As a matter of law, impairment of that right is irreparable

harm. See, e.g., *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). In the absence of a restraining order, thousands of Montana voters may be deterred from exercising this basic right. Some will believe they lost their right or will not go to the polls. Even those who do show up to the polls may face irreparable harm. See *United Food & Comm. Workers Union, Local 1099*, 163 F.3d at 363 (“the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future”) (internal quotations omitted).

III. The Balance of Hardships Favors the Plaintiffs, and the Public Interest Will Be Advanced.

Finally, the balance of hardships weighs in favor of Plaintiffs. According to the Supreme Court, “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Republican Defendants face absolutely no hardship if the restraining order is granted and Defendant Johnson is only being asked to comply with federal law.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant their Motion, issue a Temporary Restraining Order and Order to Show Cause why the same should not be continued as a Preliminary Injunction. .

Dated this 6th day of October 2008.

MUDD NELSON, P.C.

By: /s/ John J. Mudd
John J. Mudd
Attorney for Plaintiff

AND

James H. Goetz
J. Devlin Geddes
GOETZ, GALLIK & BALDWIN
P.O. Box 6580
Bozeman, MT 59771-6580
Phone: (406) 587-0618
Fax: (406) 587-5144
Jim@goetzlawfirm.com
Devlan@goetzlawfirm.com

Josh Van de Wetering
VAN de WETERING LAW OFFICES, P.C.
P.O. Box 7575
Missoula, MT 59807-7575
Phone: (406) 543-5677
Fax: (406) 543-1620
vdlaw@qwestoffice.com

David R. Paoli
PAOLI, LATINO & KUTZMAN, P.C.
P.O. Box 8131
Missoula, MT 59802
Phone: (406) 542-3330
Fax: (406) 542-3332
davidrp@aol.com