

NATURE OF ACTION

2. This complaint seeks declaratory relief and temporary and permanent injunctive relief pursuant to Fed. R. Civ. P. 65 to deem void and compel the withdrawal of the meritless, unprecedented and illegal challenges to the voter registrations of more than 6,000 Montana voters in advance of the November 4, 2008 elections, to further enjoin issuance or effectuation of additional such challenges and to direct the Montana Secretary of State to comply with federal law.

PARTIES

3. The Montana Democratic Party is a political party based in Helena, Montana and organized under the laws of Montana.

4. Joseph Breitenbach is a legally registered Montana elector residing in Missoula County, Montana.

5. Cynthia Anne Green is a legally registered Montana elector residing in Missoula County, Montana.

6. Defendant Jacob Eaton is the Executive Director of the Montana Republican party. Upon information and belief, Defendant Eaton is, and at all relevant times was, a citizen of the state of Montana.

7. Defendant Max Hunsaker is the Legislative Director of the Montana Republican party. Upon information and belief, Defendant Hunsaker is, and at all relevant times was, a citizen of the state of Montana.

8. Upon information and belief, the Montana Republican Party is a political party based in Helena, Montana and organized under the laws of Montana. Defendants Eaton,

Hunsaker and the Montana Republican Party are hereinafter referred to collectively as the “Republican Defendants.”

9. Defendant Brad Johnson is the Secretary of State of the State of Montana and is, and at all relevant times was, a citizen of the state of Montana acting in his official capacity as chief election officer of the State. § 13-1-201, MCA.

JURISDICTION AND VENUE

10. This case is brought under 42 U.S.C. §1983 and §1985 and the First and Fourteenth Amendments to the U.S. Constitution. This Court has jurisdiction to hear this action under 28 U.S.C. §1331 and §1343. Plaintiffs’ actions for declaratory and injunctive relief are authorized pursuant to 28 U.S.C. § 2201 and § 2202.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

FACTUAL BACKGROUND

12. On or about September 29, 2008, just 35 days prior to the November 4, 2008 general election, including that for the federal offices of President, United States Senator and United States Representative, the Republican Defendants filed unprecedented and unlawful mass challenges against more than 6,000 registered Montana voters, including to Plaintiffs Breitenbach and Green, and many of the Montana Democratic Party’s members and supporters.

13. The challenges were filed in traditionally Democratically leaning areas, including Missoula, Lewis & Clark, Dear Lodge, Silver Bow, Glacier, Hill, and Roosevelt counties.

14. The Republican Defendants have stated publicly in news accounts that more challenges are planned. Absent action by this court, thousands of legitimately registered Montana voters will imminently be informed that their voting rights have been placed in jeopardy, injecting chaos into Montana’s upcoming elections.

15. The challenges were lodged in the form of affidavits claiming that these legally registered electors, over 6,000 of them, no longer resided at the address on their current registration forms. The challenge affidavits were sworn to and signed by Defendants Eaton and Hunsaker. The affidavits were notarized by Adam Jespersen and Karli Hill. On information and belief, Jespersen is the so-called “Special Projects” Director and Hill the so-called “Grass Roots” Director of the Montana Republican Party.

16. These challenges were made after the Republican Defendants hired a third party, Integram, to check the U.S Postal Service National Change of Address (“NCOA”) database against the Montana’s statewide voter registration database of legally registered electors.

17. NCOA records are collected for the purpose of recording a change of mailing preference. They are not intended to reflect, and do not reflect, a change in residence, for purposes of Montana statutory law or otherwise. Conversely, Montana law lists a variety of statutory criteria to determine the residency of an eligible elector; the location at which an individual prefers to receive mail is not one of the statutory criteria. *See* § 13-1-112, MCA. Accordingly, NCOA records may not alone serve as sufficient evidence of a change of residence to support or sustain a challenge under Montana or federal law.

18. A challenge only lies under Montana law if made on certain enumerated and exclusive grounds. § 13-13-301, MCA. The challenge affidavits to more than 6,000 registered electors here allege, based solely on the NCOA records, that each voter no longer resides at the address shown on his or her voter registration, and that the voter therefore no longer meets the requirements of a registered elector under § 13-1-111(1), MCA.

19. Although the challenges were generated by comparing NCOA information to the voter registration rolls, each challenge was issued formally under §13-13-301 (2)(d), MCA on

grounds that the challenged elector is "not registered." They do not allege that the challenged electors are no longer residents of the county where they are offering to vote, per §13-13-301 (2)(f), MCA.

20. Joseph Brietenbach and Cynthia Anne Green were and are lawfully registered Montana electors who are entitled to vote in the upcoming general election.

21. Under Montana law, if a challenge is made to an elector prior to the close of regular registration, "the election administrator shall question the challenger and the challenged elector and may question other persons to determine whether the challenge is sufficient or insufficient to cancel the electors registration." § 13-13-301(3)(a), MCA. For challenges made after the close of registration, or on election day, the statute provides that the challenged elector may "cast a provisional paper ballot." § 13-13-301(3)(b), MCA. In either case, county election officials have five (5) days from the date of a challenge not made in the presence of an elector to contact that challenged elector to provide a copy of the challenge and explain what may be done to rebut it. § 13-13-301(b), MCA.

22. Defendant Johnson, as Montana Secretary of State, is statutorily required to adopt rules to implement the provisions of the challenge statutes and to provide form affidavits. § 13-13-301(5), MCA. As chief election officer, it is further his responsibility to "maintain uniformity in the application, operation and interpretation of the election laws" §13-1-201, MCA .

23. Defendant Johnson's guidance with respect to the Republican Defendants' mass challenges has been slow and incomplete, and insufficient to protect Plaintiffs' voting rights in the face of county election administrators' varied response to the mass challenges.

24. Some counties have made their own determination that some of the challenges are void *ab initio*, but have nevertheless already sent confusing and chilling notices under Montana’s challenge statute. For example, Hill County, which includes the Rocky Boys Indian Reservation, has already sent chilling letters to each voter challenged under this process voters stating in large type: **“YOUR VOTER REGISTRATION WAS CHALLENGED – A COPY OF THE CHALLENGE IS ENCLOSED.”** *See* Ex. A. The Hill County letter further states in bold type: **“Please address this challenge attempt immediately in order to keep from having voting problems in the upcoming election”** and encloses a portion of the Montana Code Annotated. *Id.* (using threatening language despite noting that the challenge would be rejected).

25. Other counties, such as Missoula, have not yet sent letters, upon a similar determination that many of the challenges are void. *See* Ex. B. Missoula has remained silent on the merit of challenges not specifically addressed in its public guidance.

26. Upon information and belief, still other counties have made no determination as to the merit of the challenges, and plan to issue letters without any assurance that the challenges are void.

27. Federal law prohibits *all* of these challenges. In order to avoid last-minute widespread purges of eligible citizens, within 90 days of a primary or general election for Federal office, the National Voter Registration Act of 1993 (“NVRA”), codified at 42 U.S.C. § 1973gg *et seq.*, prohibits states from systematically reviewing the registration rolls for ineligible voters, except at the request for the registrant, or by reason of disenfranchising criminal conviction, mental incapacity, or death of the registrant. 42 U.S.C. § 1973gg-6(c)(2). Montana has codified certain provisions of the NVRA, including the 90-day prohibition on systematic review of voters’ registration status, at § 13-2-220(3), MCA.

28. The NVRA also prohibits states from removing the name of a registrant from the official list of eligible voters on the ground that the registrant has changed residence, unless the registrant confirms the change of residence in writing, or fails to vote for two general election cycles *after* receiving a specifically delineated forwardable federal notice. 42 U.S.C. § 1973gg-6(d). The NVRA carefully regulates the use of NCOA data in this context, permitting the data to be used only in the context of the procedure above. 42 U.S.C. § 1973gg-6(c). The Montana Secretary of State has promulgated rules to the same effect, prohibiting county election officials from using the NCOA data for purposes of evaluating the registration status of a voter within 90 days of a primary or general election for federal office. § ARM 44.3.2014.

29. Despite the mandate of federal law, absent action by this court, thousands of unlawfully challenged electors will soon receive letters threatening the loss of their voting rights. On information and belief, Missoula County intends to send notices to thousands of electors after 12:00 noon on Monday, October 6, 2008, Lewis and Clark County intends to send their letters on Monday afternoon, and the remaining counties intend to send their letters sometime Monday or Tuesday.

30. On the afternoon of Friday, October 3, 2008, two days after Hill County started sending letters to challenged voters, Defendant Johnson finally provided formal guidance to the counties “that may help you to process any challenge to a voter’s registration.” *See* Ex. C. Nowhere in this guidance does Defendant Johnson provide any means to resolve challenges that are unlawful when issued, without causing undue confusion among the electors unlawfully challenged.

31. Regular registration for the November 4, 2008 general election will close at 5:00 p.m. on October 6, 2008, thirty days prior to the election in accordance with § 13-2-301, MCA.

“Immediately” upon the close of registration, Defendant Johnson “shall certify the official statewide voter registration list.” § 13-2-115(1), MCA. County election officials are to provide to Defendant Johnson information for each elector, including “whether the elector is a legally registered elector or a provisionally registered elector.” § 13-2-123, MCA.

32. The Republican Defendants’ scheme to threaten voters’ registration status using the challenge procedure provided by state law, and Defendant Johnson’s failure to instruct county election officials that they are prohibited from undertaking a last-minute mass review of the rolls of voters, has called into question the status of the 6,000 plus challenged voters on the eve of the election. This is precisely what the NVRA seeks to prevent.

33. On Monday October 6, 2008, the so-called “early vote” also will begin, with individuals appearing to vote at early vote locations, many of them younger voters and students. There is a substantial likelihood that many of those who appear to vote will be included in the 6,000 plus challenged registrations.

34. When these voters appear in counties across Montana to exercise their franchise, the Republicans Defendants’ unlawful challenges will force them to present additional verification of their status as legally registered voters under Montana law. Some challenged voters will be required to take significant steps—such as drafting, notarizing (paying the associated costs) and submitting a sworn affidavit—or forgo their ability to cast a regular ballot. There is a substantial likelihood that the consequent confusion will cause unnecessary lines at the polls, deterring some electors entirely, including members and supporters of Plaintiff Montana Democratic Party.

35. The Republican Defendants’ scheme seeks to depress the vote of those challenged electors by co-opting county officials, such as those in Hill County, to prepare and send official

letters to thousands of voters describing a challenge to elector's ability to vote and creating additional burdens and obstacles for legally registered voters.

36. This massive voter suppression scheme relies in many cases upon affidavits falsely asserting that legitimate voters do not reside where they reside.

37. On information and belief, these affidavits were signed and submitted with the improper purpose to suppress the vote and interfere with the orderly administration of the November 4, 2008 general election.

38. Members of the Montana Democratic Party, Plaintiffs Breitenbach and Green, and other legitimately registered electors, reasonably fear the loss of their voting rights and face increased and unjustified burdens to voting. Moreover, the Montana Democratic Party will be forced to divert otherwise-allocated organizational resources to educating these voters and assisting them in overcoming the frivolous attacks on their registration status.

COUNT I

(VIOLATION OF THE NATIONAL VOTER REGISTRATION ACT, 42 USC § 1973gg *et seq.*)

39. Plaintiffs reallege every allegation of preceding paragraphs as though fully set forth herein.

40. The National Voter Registration Act of 1993 ("NRVA") prohibits states from executing, later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters, except at the request for the registrant, or by reason of disenfranchising criminal conviction, mental incapacity, or death of the registrant.

41. The procedures enumerated in the NVRA also provide the exclusive means to challenge a voter's registration on the basis of residency, absent direct personal knowledge of

ineligibility, and the Republican Defendants, acting under color of state law, may not challenge voters' registrations on the basis of residence or effectuate such challenges unless and until the procedures outlined in the NVRA are carried out and implemented.

42. Upon information and belief, the Republican Defendants have not complied with the procedures required under the NVRA to confirm that the challenged voters have in fact changed their respective residences.

43. Moreover, Defendant Johnson has failed to instruct county election officials regarding the means by which they are to proceed when faced with direct violations of the NVRA.

44. The mass challenges to the registrations of more than 6,000 Montana voters just one month prior to the November 4, 2008 general election, and further threatened impending challenges, are in violation of and conflict with the NVRA, and, unless enjoined, will cause irreparable harm to the fundamental rights of the Montana Democratic Party, its members, Plaintiffs Breitenbach and Green, the Montana voting public and the integrity of the voting process on November 4th.

COUNT II

(VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT)

45. Plaintiffs reallege each and every allegation of the preceding paragraphs as if set forth fully herein.

46. The Equal Protection clause of the Fourteenth Amendment to the United States Constitution guarantees qualified voters a substantive right to participate equally with other qualified voters in the electoral process. The right to vote is protected in more than the initial

allocation of the franchise. Equal Protection applies to the manner of its exercise as well. Thus, a state may not value one person's vote over that of another.

47. On information and belief, Montana counties are responding in a disparate and arbitrary manner to the Republican Defendants' mass challenges, with some counties placing additional burdens on voters to exercise their franchise, other counties rejecting certain challenges but not others as void *ab initio*, and each county determining without any guidance when to inform legitimate voters that their rights have been challenged, and in what form.

48. Defendant Johnson, is responsible for certifying the statewide voter registration list "immediately after regular registration is closed." MCA § 13-2-115.

49. In the face of the Republican Defendants' scheme, well over 6,000 voters' registrations are now in jeopardy, precisely when the statewide voter registration list to be used in the November 4, 2008 general election is to be certified. Absent relief from this Court, these legitimate voters reasonably fear that they may be dropped from the rolls on the eve of the election.

50. The Republican Defendants' voter suppression scheme, absent sufficient uniform instruction from Defendant Johnson, threatens to accord disparate treatment of certain voters in certain counties over voters in other counties, in violation of the Equal Protection clause of the 14th Amendment. Moreover, it threatens to force an entire class of thousands of legally registered voters, overwhelmingly Democratic voters, from their legally registered status.

51. This scheme, unless enjoined from further execution, will cause irreparable harm to the fundamental rights of the Montana Democratic Party, its members, Plaintiffs Breitenbach and Green, the Montana voting public, and the integrity of the voting process on November 4th.

COUNT III

(VIOLATION OF 42 U.S.C. § 1983 AND THE FIRST AND FOURTEENTH AMENDMENTS)

52. Plaintiffs reallege each allegation contained in each of the paragraphs above as if fully set forth herein.

53. By filing baseless and discriminatory challenges against Montana voters, the Republican Defendants have acted under color of state law to deprive Montana voters, including members and supporters of the Montana Democratic Party and Plaintiffs Breitenbach and Green, of their Constitutional rights.

54. In exercising powers specifically conferred by Montana statute, through a process specifically delineated by Montana statute, the Republican Defendants and/or their agents act under color of state law when challenging a voter's eligibility to vote in advance of the general election in Montana on November 4, 2008.

55. The Republican Defendants have jeopardized the voters' eligibility to vote based on unlawful challenges of voter registrations, including those of members of the Montana Democratic Party and Plaintiffs Breitenbach and Green.

56. The Republican Defendants' challenge of the Montana voters' eligibility on the basis of unlawful challenges of voter registrations will place an undue burden on the fundamental rights of Plaintiffs in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Absent injunctive relief, Plaintiffs are likely to suffer both the particularized injury of the loss of their vote in the November 4, 2008 election and the concrete harms that go with it and the Plaintiffs are substantially likely to suffer impairment of their fundamental rights as a consequence.

COUNT IV

(VIOLATION OF 42 U.S.C. § 1985(3))

57. Plaintiffs reallege each allegation contained in each of the paragraphs above as if fully set forth herein.

58. Section 1985(3) of Title 42 prohibits private parties from conspiring to deprive a class of voters of the equal protection of the laws and from conspiring to intimidate citizens who are lawfully entitled to vote from giving their support or advocacy in a legal manner in any election for Federal office.

59. On information and belief, the Republican Defendants knowingly filed affidavits asserting that legitimate voters no longer resided at the address where they were registered, with knowledge that they had no evidence to indicate that such voters no longer resided at the address where they were registered.

60. On information and belief, the Republican Defendants intended by these mass challenges to intimidate lawfully registered citizens and to deprive such citizens of their right to vote in the November 4, 2008 General Election.

61. On information and belief, Defendant Eaton and Defendant Hunsaker, with or without the separate agreement of Defendant Montana Republican Party, entered into an agreement to intimidate and deny voters whose registrations have been unlawfully challenged their right to vote in the November 4, 2008 General Election. These Defendants then undertook to act on that agreement by filing mass challenges to lawfully registered voters.

62. The Republican Defendants singled out the class of voters whose registrations are being challenged, because they know that the voters residing in those counties, predominantly college students and Native Americans, generally and historically do not support Republican

candidates. The Republican Defendants then filed challenges against those voters in furtherance of the conspiracy, depriving them of having and exercising a right or privilege of a citizen of the United States.

63. The Republican Defendants have spoken publicly about their plans, with the intent of both creating a false impression that voters who receive notice of the challenge to their registration are not eligible to vote and of intimidating voters from showing up to vote.

64. Those actions, just as Republican Defendants intended, have intimidated voters, including members of the Montana Democratic Party and Plaintiffs Breitenbach and Green and threaten to discourage them from performing their constitutionally protected rights.

65. Section 1985(3) provides its own right of action.

COUNT V

(VIOLATION OF 42 U.S.C. § 1971)

66. Plaintiffs reallege each and every allegation of the preceding paragraphs as if set forth fully herein.

67. 42 USC § 1971, provides that “No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.”

68. Upon information and belief, the defendants, acting under color of state law, have threatened and intimidated, and have stated their intention to further threaten and intimidate, Montana voters, including members of the Montana Democratic Party and Plaintiffs Breitenbach and Green for the purpose of interfering with the voter's right to vote, in violation of 42 USC § 1971 (b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all Montana voters, request of this Court the following equitable relief:

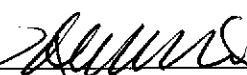
- A. A temporary, preliminary, and/or permanent order, prohibiting the Republican Defendants, their respective agents, servants, employees, attorneys, successors, and all persons acting in concert with each or any of them, from challenging the registrations of Montana voters in an manner conflicting with the terms of the federal National Voter Registration Act, or from effectuating such challenges; and order the existing challenges be withdrawn.
- B. An order declaring that the Republican Defendants' plan to challenge the registrations of Montana voters on the basis of a match of registered voters against the US Postal Service National Change of Address database is not valid under and conflicts with the NVRA, is in violation of the Equal Protection clause of the 14th Amendment, and is in violation of 42 USC § 1983, 1985 and 1971;
- C. A Temporary Restraining Order and Preliminary Injunction enjoining Defendant Brad Johnson in his official capacity as Montana Secretary of State, his respective agents, servants, employees, attorneys, successors, and all persons acting in concert with him from allowing any change in legally registered Montana

electors' status as a result of Defendant Republicans' scheme, ordering that the challenge scheme violates the NVRA and that the Secretary instruct county election officials that such challenges are illegal and are to be rejected, directing and restraining any and all county and state officials relying upon his guidance as chief election officer from contacting challenged voters during the pendency of this case;

- D. A Temporary Restraining Order and Preliminary Injunction enjoining and restraining Defendant Johnson from certifying the official roll of registered voters for the November 4, 2008 General Election during until such time as this Court's rules upon the legality of the Republican Defendants' en masse challenges.
- C. Attorney fees and costs of this litigation pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 1973gg-9(c) or any other valid basis; and
- D. Such other and further relief as this Court may deem necessary or proper.

Dated this 6th day of October 2008.

By:



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