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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

MONTANA DEMOCRATIC PARTY, as an )  
organization and representative of its members, )  
JOSEPH BREITENBACH, and CYNTHIA )  
ANNE GREEN, )

Plaintiffs, )

v. )

JACOB EATON, MAX HUNSAKER, )  
MONTANA REPUBLICAN PARTY, and )  
BRAD JOHNSON in his official capacity as )  
Montana Secretary of State, )

Defendants. )

Cause No.: CV-08-141-M-DWM

BRIEF OF PRIVATE DEFENDANTS  
IN COMPLIANCE WITH COURT'S  
ORDER DENYING EX PARTE  
MOTION FOR TRO

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COME NOW the private defendants, Jacob Eaton, Max Hunsaker and the Montana Republican Party, and submit this brief in compliance with the Court's October 8, 2008, order denying the plaintiffs' ex parte motion.

All of the results that the plaintiffs seek to bring about by federal intervention in the Montana electoral process were either in process at the time the ex parte application was filed, or have now been achieved. The Montana Secretary of State instructed county elections administrators not to communicate with challenged electors and then certified the voter rolls without regard to the challenges. Jake Eaton and Max Hunsaker have withdrawn all of their elector challenges and stated that they will not bring any more mass challenges. In short, Montana's laws worked, there is no continuing threat of irreparable harm, the plaintiffs claims are moot and it would be inappropriate for this Court to attempt to enter order to command that which has already been done without federal intervention.

#### **RELIEF SOUGHT**

Plaintiffs seek a temporary restraining order and preliminary injunction stopping the Montana Secretary of State from certifying the official roll of registered voters for the November 4, 2008, General Election,. *Complaint, Prayer for Relief Paragraph D.*

Plaintiffs also seek a temporary restraining order and preliminary injunction preventing the Secretary of State from "allowing any change in legally registered Montana electors' status" as a result of the challenges filed by Mssrs. Eaton and Hunsaker, and ordering county election administrators (who are not parties to this suit) to refrain from contacting challenged electors. *Id., Prayer for Relief first sequential Paragraph C).*

Plaintiffs also seek an injunction ordering Mr. Eaton (and Mr. Hunsaker) to withdraw their challenges, refrain from further such challenges and declaring them illegal. *Id. Prayer for Relief Paragraphs A and B*).

### **STATEMENT OF FACTS**

Jacob Eaton and Max Hunsaker checked U.S. Postal Service records and challenged 6,000 electors' eligibility on the basis of apparent change in residency. Shortly thereafter, county attorneys and the Secretary of State issued written opinions and instructions to the effect that the challenges involving intra-county address changes should be resolved in favor of the challenged electors. Investigation revealed that the majority of the challenges were intra-county changes.

On October 6, 2008 – the same day the instant ex parte application was filed by plaintiffs – the Secretary of State issued a directive instructing county elections administrators that they should refrain from contacting challenged electors pending an order to the contrary from this Court. *Exh. 1 Secretary of State No Contact Notification*.

Later the same day, the Secretary of State's office informed Mr. Eaton that the Secretary intended to certify the voter roles at the earliest opportunity, including all of the electors challenged by Mssrs. Eaton and Hunsaker. *Exh. 3 Eaton Hunsaker Withdrawal Letters*. At that point, Eaton assured the Secretary that he would not sue the Counties for failing to continue contacting challenged electors. *Exh. 2 Secretary Notification Eaton Not Suing*.

Based on that action by the Secretary of State, on October 7, 2008, Mssrs. Eaton and Hunsaker withdrew all of their elector challenges and informed election administrators that they would file no additional elector challenges. *Exh. 3., Exh. 5 Missoulian Article*.

On October 7, 2008, the Secretary of State electronically confirmed to the county election administrators that the challenges had been withdrawn. *Exh. 4 Secretary Notification of*

*Withdrawals.* On October 10, 2008, the Secretary of State certified the voter rolls with the challenged electors included. *Exh. 6 Secretary Certification of Voter Rolls.*

## **ARGUMENT**

### **I. The Court should not order defendants to do what has already been done.**

As a result of the foregoing, there is no possibility that county elections administrators will initiate future contact with the challenged electors, or that the Secretary of State will exclude the challenged electors. There is also no reasonable threat that anyone will file more mass challenges and no conceivable threat that election officials would act on them.

#### A. Plaintiffs Have Failed to Establish Irreparable Injury.

The irreparable injury requirement is a high standard. The moving party “‘must demonstrate that it will be exposed to some **significant** risk of irreparable injury’ that is **immediately** threatened.” *Lovaas v. Osen*, No. C-06-66-BU-RFC, 2007 WL 686689, at \*4 (D. Mont. Mar. 5, 2007) (emphasis added) (quoting *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991)).

The evidence is overwhelming and conclusive that these challenges were rejected, then withdrawn. The final voter rolls have now been certified with those electors included. The Secretary of State also firmly instructed county officials that the challenges were “‘insufficient” and that Counties should not contact electors about them. With this clear statement of Montana law on this topic by its top election official, Mssrs. Eaton and Hunsacker have committed not to bring further such challenges, nor would it benefit them to do so. Thus, there is no significant or immediate threat that any elector is going to lose his or her right to vote or even be confused or discouraged about that right.

#### B. The Secretary’s Actions Have Rendered this Case Moot

A claim is moot if it has lost its character as a present, live controversy such as when an event occurs that prevents the court from granting effective relief. *American Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9<sup>th</sup> Cir. 1997). The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted. *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9<sup>th</sup> Cir. 1988). Courts are not empowered to decide moot questions or abstract propositions; mootness is a jurisdictional question. *North Carolina v. Rice*, 92 S. Ct. 402, 404 (1971).

For the reasons set out above, there can be no effective relief concerning these challenges which has not already been provided by the State of Montana's election officials.

## **II. The Secretary of State's Actions Demonstrate that Montana Law Complies with the NVRA**

Based on the *ex parte* motion, the Court questions whether the Secretary of State's guidance allows a county official to accept Eaton's challenges. The fact, however, is that he did not accept those challenges, but instead certified the rolls and instructed the counties that the challenges were insufficient. Clearly on the facts of this case, the guidance worked. However, the Court points to potential ambiguity in the Secretary of State's guidance. The Secretary of State should have an opportunity to address those issues in an orderly fashion. If he fails to do so and harm results, that could be the basis for another lawsuit at another time. In this case, however, he has already applied his guidance in a way that promptly resolved the matter in accordance with the NVRA.

## **III. Eaton and Hunsaker Did Not Violate Federal Law**

Plaintiffs allege that the actions of the Defendants violate several Federal laws and protections under the United States Constitution. Each of these claims is unsupported.

The National Voter Registration Act prohibits states from executing a purge of voter rolls within 90 days of an election, 42 U.S.C. §§ 1973gg-6(c)(2)(A). But Eaton and Hunsaker are not the State of Montana, they are private citizens, and thus did not violate this law. Likewise, Eaton and Hunsaker did not violate 42 U.S.C. § 1983's prohibition on state action infringing upon an elector's Constitutional right because the State did not delegate its obligations or authority to these private actors. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4<sup>th</sup> Cir. 2000).

Eaton and Hunsaker did not violate § 1985(3)'s prohibition on depriving a protected class of persons of equal protection under the law. As this Court noted, this section's protection does not extend beyond race without a governmental determination, *CV 08-141 Order* at 18; *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9<sup>th</sup> Cir. 1992). There is no such designation recognizing likely Democratic voters as a protected class, *Order* at 18. Finally, challenging voters pursuant to a state statute, even when insufficient, does not constitute a scheme to threaten, coerce, or intimidate persons from voting under 42 U.S.C. § 1971. In any event, such a challenge is moot because the challenges have been withdrawn and the State's and media's response prevented confusion.

### **CONCLUSION**

For the reasons stated herein, the Montana Republican Party respectfully requests that Plaintiffs' Motion be denied.

Dated this 10<sup>th</sup> day of October, 2008.

Anderson and Baker

/s/ Cory J. Swanson

Cory J. Swanson

Attorney for Defendant Montana Republic Party

## **LIST OF EXHIBITS AND WITNESSES**

### **Exhibits**

- 1. Secretary of State No Contact Notification**
- 2. Secretary Notification Eaton Not Suing**
- 3. Eaton and Hunsaker Challenge Withdrawal Letters**
- 4. Secretary Notification of Withdrawals**
- 5. Missoulian Article**
- 6. Secretary Certification of Voter Rolls**

### **Witnesses**

**Defendants Jacob Eaton, Max Hunsaker and Montana Republican Party do not anticipate calling any witnesses.**

## **CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2008, a copy of the foregoing document was served by

CM/ECF on the following persons:

1. Clerk, U.S. District Court
2. Peter Michael Meloy  
John J. Mudd  
James H. Goetz  
J. Devlin Geddes  
Josh Van de Wetering  
David R. Paoli  
Attorneys for Plaintiffs

/s/ Cory J. Swanson

Cory J. Swanson

Attorney for Defendant Montana Republic Party