

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

October 5, 2008

delivered by fax and email

Mr. Brad Johnson
Secretary of State
Montana Office of the Secretary of State
1236 E. 6th Avenue
Helena, MT 59620-2801

Executive Director:
Michael Waldman

Board of Directors:
James E. Johnson, *Chair*
Patricia Bauman
Nancy Brennan
Zachary W. Carter
John Ferejohn
Peter M. Fishbein
Gail Furman
Susan Sachs Goldman
Helen Hershkoff
Thomas M. Jorde
Ruth Lazarus
Paul Lightfoot
Burt Neuborne
Lawrence B. Pedowitz
Steven A. Reiss
Richard Revesz
Cristina Rodríguez
Stephen Schulhofer
John Sexton
Rev. Walter J. Smith, S.J.
Sung-Hee Suh
Clyde A. Szych
Adam Winkler

Re: Large Scale Challenges Made in Six Montana Counties

Dear Secretary Johnson:

We write to urge the rejection of challenges made to 6,000 registered voters in Missoula, Butte-Silver Bow, Lewis and Clark, Deerlodge, Glacier, and Hill counties and ask that you take immediate steps to ensure that those voters who have already been sent challenge letters are not discouraged from voting.

Based on the affidavits filed, we understand that the challenges at issue are based on name searches in the National Change of Address Database, and that the challengers requested that election officials cancel the registrations of the challenged voters. Challenges of this nature are both unreliable and unsupported under federal and state law.

First, purported discrepancies between the statewide voter registration database and the National Change of Address Database are an insufficient basis for concluding that a voter has moved or is not eligible to vote at her registration address, and for depriving an eligible voter of the right to cast a ballot which will count. Such a search may turn up family members of individuals who have moved who still reside at their registration address, individuals who are voting residents of their registration address but who are temporarily stationed elsewhere (including soldiers and students), and individuals with the same or similar names as those residing at other addresses. As an example of the kinds of errors endemic to such a process, former

Montana State Representative Kevin Furey, a First Lieutenant in the Army Reserves who is still eligible to vote at his registration address in Montana, is included on the challenge list simply because he is currently in New Jersey preparing to deploy to Iraq.

Second, recognizing the significant potential for error in determining which voters have moved from a jurisdiction, Congress protected against these kinds of purges in the National Voter Registration Act of 1993 (“NVRA”). The NVRA prohibits removing a voter from the voter rolls on the basis of a change of address unless the voter either confirms in writing a change of address outside the jurisdiction, or has failed to respond to a notice sent by the appropriate election office confirming the voter’s address and fails to vote in two federal elections, even, states the NVRA, “if it appears from information provided by the Postal Service that ... a registrant has moved.” Further, the NVRA prohibits the systematic removal of voters from official lists of eligible voters within ninety days of an election. A challenge to 6,000 voters, a month before the presidential election, where the result could be the cancellation of the elector’s registration, would run afoul of NVRA. Montana’s challenge laws cannot be interpreted to circumvent protections afforded to voters under federal law.

Third, there is little, if anything, in Montana’s election laws approving challenges of this nature. Montana’s challenge laws do not support unsubstantiated challenges. Instead Montana’s challenge laws limit the challenges to certain grounds, and require an affidavit and evidence of support.

Accordingly, we ask that you issue a directive or instructions to Montana’s county election officials clarifying that challenges based solely on discrepancies between the statewide voter registration database and information from the National Change of Address database are to be rejected without imposing burdens on the challenged voters. We further ask that you instruct county officials to cease sending challenge letters to voters targeted for challenges for this reason. To avoid discouraging turnout, voters who have already been sent such challenge letters should be sent an additional letter clearly indicating that the challenge to their registration has been rejected. County officials should have educational materials on hand, such as posters and fliers, providing the same message.

As noted on the Secretary of State’s website, the right to vote is one of the most important rights citizens enjoy. We would very much like to work with you to ensure that all Montana voters are able to participate in the upcoming election. Please call us at (212) 992-8648 if you have any questions or if we can provide further assistance.

Sincerely,



James J. Sample, *Montana bar no. 7890*



Myrna Pérez
Counsel
Brennan Center for Justice

cc:

Vickie Zeier
Mary McMahon
Paulette DeHart
Marie Hatcher
Glenda Hall
Diane E Mellem