

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil No. 08-CV-02321-JLK

COMMON CAUSE OF COLORADO, on behalf of itself and its members;  
MI FAMILIA VOTA EDUCATION FUND; and  
SERVICE EMPLOYEES INTERNATIONAL UNION, on behalf of itself and its  
members,

Plaintiffs,

vs.

BERNIE BUESCHER, in his official capacity as Secretary of State for the State of  
Colorado,

Defendant.

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**PLAINTIFFS' MOTION FOR INTERIM RELIEF AND MEMORANDUM OF  
LAW IN SUPPORT THEREOF**

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**PLAINTIFFS' MOTION FOR INTERIM RELIEF**

Plaintiffs, pursuant to Fed. R. Civ. P. 65, respectfully move for interim injunctive relief requiring that Defendant Bernie Buescher: (A) make “active” all registration records cancelled from the SCORE database pursuant to Colorado’s “20-Day Rule,” Colo. Rev. Stat. § 1-2-509(3), that remain in “Failed 20 day” status; (B) send mail-in ballots to all such voters who requested mail-in ballots; (C) preclude any state or local election official from cancelling any voter registration record in advance of the November 2, 2010 federal election pursuant to the 20-Day Rule; and (D) such other and further relief as the Court may deem just and proper. Because Colorado can begin to send mail-in ballots to voters on October 12 and early voting begins on October 18, Plaintiffs ask that the briefing on this motion be expedited to permit this Court to resolve the motion for interim relief as quickly as possible.<sup>1</sup> Plaintiffs accompany this motion with the parties’ joint request for a status conference at which the Court can determine the appropriate briefing schedule for this motion.

**MEMORANDUM OF LAW**

**INTRODUCTION**

In October 2008, Plaintiffs filed the present lawsuit challenging, *inter alia*, Colorado’s “20-Day Rule,” Colo. Rev. Stat. § 1-2-509(3), pursuant to which otherwise eligible voters are removed from Colorado’s eligible voter list if their voter information cards are returned as undeliverable within 20 days of their registration. Plaintiffs assert

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<sup>1</sup> The deadline for sending ballots to overseas voters is different and not at issue in this case.

that this 20-Day Rule is inconsistent with the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg, which establishes the specific procedures that a state must follow in removing any voter from its voter list due to the voter’s purported change of residence. *See* 42 U.S.C. § 1973gg-6(d)(1).

Shortly after the filing of this action, the Court approved a stipulated preliminary injunction designed, among other things, to protect the rights of Colorado voters who sought to vote in the November 2008 election but whose registrations had been cancelled pursuant to the 20-Day Rule. *See* Oct. 29, 2008 Order Approving Parties’ Stipulated Preliminary Injunction (Dkt. No. 14) (“Stip. Prelim. Inj.”). It is undisputed that this post-election procedure was directly responsible for eligible Coloradans having their votes counted. *See* Brief in Support of Plaintiffs’ Motion for Partial Summary Judgment, Statement of Undisputed Material Facts (Dkt. No. 118) (“Ps’ Undisputed Facts”) ¶¶53-59 (noting 54 provisional ballots rejected at the county level but eventually accepted under the procedures established by the Stipulated Preliminary Injunction); Secretary’s Response in Opposition to Plaintiffs’ Motion for Partial Summary Judgment (Dkt. No. 144) (“Secretary’s Opposition to Partial Summary Judgment”) at 21 ¶ 59.

Nonetheless, since the 2008 election, Defendant has continued to enforce the 20-Day Rule to remove the names of Colorado voters from the state’s eligible voter list. According to informal discovery provided by the Defendant, more than 2,000 Colorado voters have been so removed since the 2008 election, and at present a total of 5,938 Colorado voters remain in “Failed 20 day” status, meaning that that their registrations have been canceled pursuant to the 20-Day Rule. Finberg Decl. ¶ 4. Defendant’s

enforcement of the 20-Day Rule will prevent a significant number of otherwise eligible Colorado voters from participating in the upcoming federal election, unless this Court issues an order securing the rights of these voters. For that reason, Plaintiffs seek an interim order requiring that all voters currently in “Failed 20 Day” status be restored to active status for purposes of the November 2010 federal election, that any such voters who requested a mail-in ballot be sent mail-in ballots, and that Defendant be enjoined from enforcing the 20-Day Rule.<sup>2</sup>

### FACTS

1. On October 29, 2008, the Court approved a stipulated preliminary injunction establishing, among other things, certain procedures and standards for the state to use in reviewing provisional ballots cast by individuals who had failed the 20-Day Rule but thereafter attempted to vote in the 2008 election. Stip. Prelim. Inj. ¶¶ 1-4. There is no dispute that 54 votes would not have been counted but for the stipulated preliminary injunction. Ps’ Undisputed Facts ¶ 59; Secretary’s Response in Opposition to Plaintiffs’ Motion for Partial Summary Judgment (Dkt. No. 144) (“Secretary’s Opposition to Partial Summary Judgment”) at 21 ¶ 59.

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<sup>2</sup> Many of the facts and legal arguments relevant to the Court’s disposition of this motion have been exhaustively briefed in connection with the parties’ motions for summary judgment. Plaintiffs focus herein on the new matters relevant to this motion, such as the immediate need for injunctive relief requiring that Defendant restore to “active” status all voters currently affected by the 20-Day Rule, and only briefly summarize the facts and arguments contained in Plaintiffs’ summary judgment papers, which Plaintiffs incorporate by reference.

2. On December 10, 2009, the parties' filed cross-motions for summary judgment. *See* Dkt. Nos. 115, 117. Plaintiffs, through their motion, sought a ruling that the 20-Day Rule violates federal law, and "all appropriate relief." Brief in Support of Plaintiffs' Motion for Partial Summary Judgment at 72. Defendant sought a ruling that the 20-Day Rule is consistent with federal law. Dkt. No. 2. Briefing on the parties' cross-motions was completed on February 4, 2010. *See* Dkt. Nos. 154, 158.

3. As of October 5, 2010, 5,938 otherwise eligible Colorado voters are identified in the Secretary of State's database as having a "Failed 20 day" status; their voter registrations were canceled pursuant to the 20-Day Rule. Finberg Decl. ¶ 4. Of these 5,938 persons who filled out voter registration applications but who will not be able to vote at their polling places on election day in the ordinary course or able to receive mail-in ballots, 2,006 were canceled in the period from November 4, 2008 to the present. *Id.*

4. The next federal election is scheduled for November 2, 2010, less than one month from now. *Id.* Exh. A at 7.

5. Colorado election officials can begin distributing mail-in ballots for the November 2 election on October 12. *Id.* ¶ 3, Exh. A at 6. Voters whose registrations have been canceled pursuant to the 20-Day Rule will not receive mail-in ballots, even if they attempted to register for a mail-in ballot when completing their voter registration application.

6. Early voting for the November 2 election begins on October 18. *Id.* ¶ 3, Exh. A at 6.

7. If voters whose registrations were canceled pursuant to the 20-Day Rule attempt to vote in person either through early voting beginning October 18 or at the polls on November 2, they will not be allowed to cast a regular ballot, but will instead be required to go through the more time-consuming and inconvenient process of either voting using emergency registration procedures at the office of the county clerk and recorder or at a branch location (assuming they fall into one of the categories of persons statutorily eligible to do so) or casting a provisional ballot. Ps' Undisputed Facts ¶¶ 33-49. Because provisional ballots are processed after regular and mail-in ballots are counted, and only counted on a "provisional" basis, there is no guarantee that these ballots will be counted. As noted above, in the 2008 election at least 54 provisional ballots cast by voters affected by the 20-Day Rule were rejected at the county level and subsequently counted due to the additional review mandated by the parties' stipulated preliminary injunction. *Supra* ¶ 1.

8. Defendant will neither agree to implement procedures comparable to those established by the stipulated preliminary injunction during the upcoming federal election nor agree to restore to "active" status those voters whose registrations have been canceled pursuant to the 20-Day Rule absent an Order from the Court. *See* Finberg Decl. ¶ 8. Counsel for Defendant has stated, however, that if the Court agrees with Plaintiffs, the Secretary will order the counties to activate all the "Failed 20-day records" and to mail any ballots that were requested by those persons. *Id.* ¶¶ 9-10.

9. Plaintiff Mi Familia Vota operates voter registration drives at various community events, conducts voter education about the mechanics of voting and issues in

upcoming elections, devotes its resources to voter registration and outreach efforts, and collects and delivers absentee ballots for voters unable to do so themselves. Ps' Undisputed Facts ¶¶ 63-67. Plaintiff SEIU engages in voter registration to ensure that historically marginalized working people participate in the political process and elect their government, and operates an election protection program in federal election years to ensure that individual voters are able to vote. Ps' Undisputed Facts ¶¶ 68-71. Plaintiff Common Cause works on a variety of election reform issues, including the development of fair and effective voter database management protocols so that voters are not inadvertently purged from the rolls, and devotes its resources to this purpose, including by providing most of the budget for Just Vote Colorado, a coalition that supervises election protection efforts in Colorado. Ps' Undisputed Facts ¶¶ 72-80. Plaintiffs have implemented these programs in connection with the 2010 federal election. Supplemental Declaration of Jennifer Flanagan ¶¶ 5-14; Declaration of Jessie Ulibarri ¶¶ 2-4; Declaration of Steven Ury ¶ 3.

10. Defendant's continued enforcement of the 20-Day Rule, and his refusal to restore to "active" status those voters whose registrations have been canceled pursuant to the 20-Day Rule, will cause significant harm to Plaintiffs and their members. In 2008, Defendant's cancellation of voter registrations pursuant to the 20-Day Rule resulted in a significant diversion of Plaintiffs' resources away from their intended purposes and forced Plaintiffs instead to respond to Defendant's voter purges and to assist Colorado voters affected by the 20-Day Rule. Ps' Undisputed Facts ¶¶ 97-145. In addition, Defendant's cancellation of voter registrations pursuant to the 20-Day Rule in 2008

harm the activities of Mi Familia Vota and SEIU by casting doubt on whether those who were registered would appear on the voting rolls and be permitted to vote and by leading potential voters in historically marginalized communities to believe that their votes would never be counted. Ps' Undisputed Facts ¶¶ 147-49, 150-162. It is undisputed that voters registered through Mi Familia Vota and SEIU's registration drives before the 2008 election had their registrations canceled pursuant to the 20-Day Rule before the November 2008 election. Ps' Undisputed Facts ¶¶ 147-48, 157-58; Secretary's Opposition to Partial Summary Judgment at 38-39 ¶¶ 147-48, 40-41 ¶¶ 157-58, 46-56. All of these consequences are likely to be repeated during the 2010 federal election absent interim injunctive relief.

11. Moreover, the voter registrations of some SEIU and Common Cause members have been canceled pursuant to the 20-Day Rule. *Id.* ¶¶ 164, 169; Secretary's Opposition to Partial Summary Judgment at 44 ¶ 164, 45 ¶ 169. For example, the registration of Common Cause member Luke Jesser was canceled pursuant to the 20-Day Rule. Ps' Undisputed Facts ¶ 172; Secretary's Opposition to Partial Summary Judgment at 46 ¶ 172, 62 ¶ 14. Jesser's registration status remains "Failed 20-Day." Finberg Decl. ¶ 5. Moreover, this problem is on-going. The registration of SEIU member Antonio Lewis was placed in "Failed 20-Day" status on July 12, 2010, and remains in that status. Declaration of Andrew Supe ¶¶ 3-5; Finberg Decl. ¶ 5.<sup>3</sup> As described above, absent

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<sup>3</sup> Presumably like many of the cancelled voters, Mr. Lewis appears to have failed the 20-Day Rule due to a transcription error with his initial registration. The address information in the Secretary's database and SEIU's member database is identical, except

interim injunctive relief these voters will not receive mail-in ballots or be permitted to cast regular ballots during the upcoming federal election.

### ARGUMENT

Preliminary relief is generally appropriate if a movant can demonstrate “(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.” *Valley Community Preservation Comm’n. v. Mineta*, 373 F.3d 1078, 1083 (10th Cir. 2004) (citation omitted).

As explained herein, Plaintiffs can establish all of these requirements for a preliminary injunction. Plaintiffs’ motion is appropriate notwithstanding Plaintiffs’ pending motion for summary judgment because that motion, which was filed well before the upcoming election, requested that the Court “order all appropriate relief” but did not specify the particular relief necessary to remedy Defendant’s unlawful enforcement of the 20-Day Rule. In light of the upcoming election the issue of the specific relief that is appropriate must be addressed. The nearly 6,000 Colorado voters currently in “Failed 20-Day” status require immediate relief. The Secretary should be ordered to change their status in the database from “Failed 20 day” to “active” before early voting begins on October 18, and all persons in that status who have requested mail-in ballots should be sent their ballots.

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for a minor variation in the house number. Finberg Decl. Exh. B at Attachment, p. 1; Supe Decl. ¶ 5.

**I. Plaintiffs Have More Than a Substantial Likelihood of Success on the Merits.**

Colorado's policy and practice of removing from its eligible voter list those voters whose nonforwardable voter information card is returned within 20 days of registration is a violation of the NVRA, which provides that otherwise eligible voter registrants can be removed from a state's eligible voter list due to a purported change in residence only (A) if the registrant "confirms in writing that [he or she] has changed residence to a place outside the registrar's jurisdiction," or (B) if the registrant fails to respond to a notice sent by *forwardable* mail *and* thereafter does not vote or appear to vote in the next two federal elections. 42 U.S.C. § 1973gg-6(d)(1). Defendant does not claim that Colorado's 20-Day Rule is consistent with these provisions of the NVRA, but argues instead that the voters whose registrations have been canceled pursuant to the 20-Day Rule are, as a matter of state law, not "registrants" subject to the protections of the NVRA. As noted in Plaintiffs' summary judgment briefing, this argument is contrary to both the NVRA and Colorado state law and was explicitly rejected by the only federal appellate court to consider the issue. *See U.S. Student Ass'n. Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008) (holding that the meaning of "registrant" in the NVRA is a matter of federal law rather than state law and that a voter becomes a "registrant" under the NVRA "from the first moment that he or she is actually able to go to the polls and cast a regular ballot"). Rather than repeat the extensive merits briefing already before the Court on the parties' cross-motions for summary judgment, Plaintiffs simply incorporate the arguments in that briefing. For the reasons explained therein, Plaintiffs have more than a

substantial likelihood of success on the merits of their challenge to Colorado’s 20-Day Rule.<sup>4</sup>

**II. Plaintiffs Are Likely To Suffer Irreparable Harm Outweighing Any Harm to Defendant in the Absence of Injunctive Relief.**

The NVRA provides for injunctive relief to remedy violations of the Act. *See* 42 U.S.C. § 1973gg-9 (b)(2) (creating private right of action “for declaratory or injunctive relief with respect to” violations of the NVRA). Where Congress has expressly provided for injunctive relief, as in the NVRA, “it is not the role of the courts to balance the equities between the parties [because] Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue . . .” *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 601-02 (8th Cir. 1992). “When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.” *Atchison, T. & S.F. Ry. Co. v.*

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<sup>4</sup> Likewise, Plaintiffs will not separately address their standing to pursue the relief sought herein, as that issue has also been extensively briefed. The declarations of Jennifer Flanagan, Jessie Ulibarri, and Steven Ury establish that Plaintiffs are participating in the 2010 federal election process in the same manner that they participated in the 2008 federal election process, and that the Plaintiffs are thus are likely to suffer the same harms in 2010 from Defendant’s enforcement of the 20-Day Rule that they suffered before and during the 2008 election. *See supra* ¶¶ 9-10. In addition, it is undisputed that the registrations of Common Cause member Luke Jesser and SEIU member Antonio Lewis were canceled pursuant to the 20-Day Rule, and that Mr. Lesser and Mr. Lewis’s registrations remain in “Failed 20-Day” status. *Supra* ¶ 12. Common Cause and SEIU have standing to pursue this action on behalf of their members Mr. Jesser and Mr. Lewis. *See Hunt v. Wash. State Apple Advert. Comm’n.*, 432 U.S. 333, 343 (1977). In an action for injunctive relief such as this, only one plaintiff need have standing. *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008).

*Lenner*, 640 F.2d 255, 259 (10th Cir. 1981). Because Congress has determined that injunctive relief is an appropriate remedy for violations of the NVRA such as Colorado's, this Court should issue the requested relief if it agrees with Plaintiffs that the 20-Day Rule is contrary to federal law.

Even if a showing of irreparable harm and a balance of the equities favoring injunctive relief were required, injunctive relief would be proper because Plaintiffs will suffer irreparable harm in the absence of injunctive relief and the threatened harm to Plaintiffs vastly outweighs any harm to Defendant from the requested relief.

Most important, if the requested injunctive relief is not granted, numerous Colorado voters will suffer irreparable harm through the state's infringement of their fundamental right to vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("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."). Due to Defendant's enforcement of the 20-Day Rule, 5,938 Colorado voters, including Plaintiffs' members, will not appear on the state's eligible voter list on November 2 and will not be permitted to cast regular ballots on that day. Despite their federally protected right to appear on the state's eligible voter list and to vote by regular ballot until the state has complied with the procedures for removal required by the NVRA, these voters will be required to either cast provisional ballots or to vote through emergency registration. *See supra* ¶ 7. Many will simply refrain from voting given the significant additional burdens imposed upon them as a result of their registration status. Such an infringement of the federally protected right to vote is the quintessential injury

justifying injunctive relief. *See Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (explaining that, “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”). An order enjoining future enforcement of the 20-Day Rule but failing to require that Defendant change the status of previously affected voters from “Failed 20 day” to “active” would be insufficient, because the 5,938 voters currently in “Failed 20 day” status would, in such circumstances, still face the burdens caused by Defendant’s illegal enforcement of the 20-Day Rule whenever they next appeared at the polls.<sup>5</sup>

Plaintiffs will suffer several other distinct injuries if the 5,938 voters whose registrations have been canceled by Defendant are not restored to “active” status. Plaintiffs will be required to devote their limited resources to educating and assisting voters affected by the 20-Day Rule rather than to the other election-related programs they have planned. In addition, SEIU and Mi Familia Vota will suffer irreparable injury to their voter registration efforts if Defendant is permitted to enforce the 20-Day Rule to prevent otherwise eligible voters from voting in the November 2010 election. The ability

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<sup>5</sup> The ability of a voter in “Failed 20 day” status to cast a provisional ballot and to have that ballot counted “[i]f the elector substantially confirms the street address at which he or she attempted to register to vote anywhere on the provisional ballot affidavit,” 8 Colo. Code. Regs. §1505-1:26.4.4(a), does not eliminate or significantly reduce the injury to such voters caused by the 20-Day Rule. These voters face significant additional burdens to voting not faced by voters in “active” status and the experience with the stipulated post-election remedy aptly demonstrates the vulnerability of voters to improper disenfranchisement in the counting of provisional ballots. Despite specific instructions from the Secretary in connection with the parties’ stipulated preliminary injunction, 54 ballots in 2008 were improperly rejected at the county level.

of SEIU and Mi Familia Vota to register voters and to engage marginalized communities in the political process will be irreparably damaged by the loss of confidence in the political system caused by Defendant's unlawful cancelation of eligible voter registrations.

The harm to Plaintiffs, Plaintiffs' members, and Colorado's voters resulting from continued enforcement of the 20-Day Rule vastly outweighs any harm to Defendant or the state associated with the proposed injunctive relief. As noted in Plaintiffs' summary judgment briefing, *see* Ps' Reply Br. at 64, Colorado law already requires that *every* voter confirm his or her address before voting. Ps' Undisputed Facts ¶21. Defendant's own practices demonstrate that this confirmation of a voter's address is sufficient to protect Colorado's interests in ensuring that its voter lists are accurate. *See* Secretary's Opposition to Partial Summary Judgment at 83 (where individuals appear in person to vote during the 20-day period following the state's mailing of their voter information card, an in-person address confirmation is sufficient for the state's purposes, *even if their voter information card is returned as undeliverable within the same 20-day period*). Further, the administrative burdens of complying with such an order will be minimal, because the state would merely be required to change the status of the affected voters in its eligible voter list to "active." *See* Finberg Decl. ¶¶ 9-10.

### **III. The Proposed Injunctive Relief Would Serve the Public Interest.**

Finally, the proposed interim relief serves the public interest. "Protecting an individual's right to vote is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). Further, in enacting the

NVRA, Congress found that “unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office,” 42 U.S.C. § 1973gg(a)(3), and explained that the Act’s requirements are designed “(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement [the Act] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained.” 42 U.S.C. § 1973gg(b). Enforcing the NVRA through injunctive relief here would serve the public interest because, as Congress explicitly recognized and endorsed, doing so would increase the number of eligible citizens who are registered to vote while nonetheless protecting the integrity of the electoral process and the accuracy of Colorado’s voter registration rolls.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully seek interim relief enjoining and restraining Defendant from canceling the registrations of any otherwise eligible voters pursuant to the 20-Day Rule, and requiring Defendant to restore to “active status” the registrations of all voters whose registrations have already been canceled or removed pursuant to the 20-Day Rule and who remain in “Failed 20 day” status and send mail-in ballots to any such voters who requested a mail-in ballot.

Date: October 6, 2010

Respectfully Submitted by:

/s/ James M. Finberg\_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2010, I electronically filed the foregoing Plaintiffs' Motion for Interim Relief with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered, interested parties via electronic mail.

Executed on October 6, 2010

/s/ James M. Finberg