

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

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, :
: Civil No. 08-CV-2321-JLK
: Plaintiffs, :
: vs. :
: BERNIE BUESCHER, in his official capacity as Secretary :
of State for the State of Colorado, :
: Defendant. :

**JOINT MOTION TO STRIKE PORTIONS OF PLAINTIFFS’ REPLY IN
SUPPORT OF PLAINTIFFS’ MOTION FOR ENFORCEMENT OF
STIPULATION AND TO STRIKE DEFENDANTS’ SURREPLY**

The Parties hereby submit this joint motion to strike certain portions of Plaintiffs’ Reply to the Secretary’s Response to Motion for Enforcement of Stipulation (the “Reply”) and to withdraw the Secretary’s Motion for Leave to File a Surreply (the “Motion for Leave”) and the Secretary’s Sur-Reply (the “Surreply”). A proposed revised Reply brief is attached herewith as Exhibit A.

Plaintiffs’ Reply raised certain arguments concerning the consistency of the standards applied by the Secretary in determining whether to count provisional ballots covered by the parties’ Stipulation. (*See* Reply pp. 2-3, 5-10). That argument was primarily based upon Plaintiffs’ then-current understanding of the Secretary’s treatment of eight provisional ballots. Plaintiffs submitted documentation relating to those ballots as Exhibits I thru P of the Reply brief. Plaintiffs also raised a legal argument in their

Reply that was not raised in the Memorandum in Support of Plaintiffs' Motion for Enforcement of Stipulation..

The Secretary's Motion for Leave and Surreply disputed Plaintiffs' argument and proffered additional documentation relating to the eight additional ballots. *See* Motion for Leave ¶¶ 4-6; Surreply pp. 1-8 and Exhibits 1-4. Plaintiffs had not previously seen the additional documentation proffered by the Secretary.

The parties subsequently conferred and reached agreement regarding the state of the factual record relating to the additional ballots. The parties therefore jointly move as follows:

- to entirely strike Plaintiffs' original Reply, docket number 62, and its attachments;
- to docket Plaintiffs' attached revised Reply which no longer includes (i) the portions of the original Reply related to the eight additional provisional ballots and the argument concerning the Secretary's treatment of those ballots; and (ii) Section III of the Reply; Plaintiffs specifically withdraw those arguments; and
- to withdraw the Secretary's Motion for Leave and the accompanying Surreply and attachments.

For the avoidance of doubt, the parties wish to make clear that neither party deliberately or purposefully withheld facts relevant to the Motion for Enforcement from each other or from the Court.

Dated: June 1, 2009

Respectfully submitted by:

/s/ S. Gale Dick
James E. Johnson

S. Gale Dick
Semra Mesulam
Elaina J. Loizou
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Tel: 212-909-6000
Fax: 212-909-6836
jejohnsn@debevoise.com
sgdick@debevoise.com

Richard Rosenblatt, Esq.
RICHARD ROSENBLATT &
ASSOCIATES, L.L.C.
8085 East Prentice Avenue
Greenwood Village, Colorado 80111
Tel: 303-721-7399 x11
Fax: 720-528-1220
rosenblatt@cwa-union.org

Penda D. Hair
Elizabeth S. Westfall
Bradley Heard
ADVANCEMENT PROJECT
1730 M Street, NW #910
Washington, D.C. 20036
Tel: 202-728-9557
Fax: 202-728-9558
phair@advancementproject.org
ewestfall@advancementproject.org
bheard@advancementproject.org

Wendy Weiser
Myrna Pérez
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, New York 10013
Tel: 212-998-6284
Fax: 212-995-4550
wendy.weiser@nyu.edu
myrna.perez@nyu.edu

Karen Neuman
Sarah Brannon

FAIR ELECTIONS LEGAL
NETWORK
1730 Rhode Island Avenue, NW
Suite 712
Washington, D.C. 20036
kneuman@fairelectionsnetwork.com
sbrannon@fairelectionsnetwork.com

Stephen P. Berzon
James Finberg
Stacey M. Leyton
Barbara J. Chisholm
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Tel: 415-421-7151
Fax: 415-362-8064
sberzon@altshulerberzon.com
jfinberg@altshulerberzon.com
sleyton@altshulerberzon.com
bchisholm@altshulerberzon.com

*Attorneys for Plaintiffs Common Cause
of Colorado, Mi Familia Vota Education
Fund and Service Employees
International Union*

CERTIFICATE OF SERVICE

I S. Gale Dick, herein certify that on June 1, 2009, I electronically filed the Joint Motion to Strike Part of Plaintiffs' Reply with the Clerk of the Court for the United States District of Colorado. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system upon:

Monica M. Márquez
Assistant Solicitor General
Public Officials Unit
Office of the Attorney General
1525 Sherman St., 5th Fl.
Denver, CO 80203
303-866-5163
Email: monica.marquez@state.co.us

Maurice G. Knaizer
Colorado Attorney General's Office-State Services
1525 Sherman Street
Denver, CO 80203
303-866-5380
Email: maurie.knaizer@state.co.us

Melody Mirbaba
Colorado Attorney General's Office
1525 Sherman Street
7th Floor
Denver, CO 80203
303-866-4224
Email: melody.mirbaba@state.co.us

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

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. :

Civil No. 08-CV-2321-JLK

**PLAINTIFFS’ AMENDED REPLY IN SUPPORT OF PLAINTIFFS’ MOTION
FOR ENFORCEMENT OF STIPULATION**

In opposing Plaintiffs’ motion, the Secretary has, for the second time, interpreted the Stipulation in a manner that would render it completely superfluous. The first instance was when the Secretary took the position that the Stipulation permitted him to continue purging voters in advance of the November 2008 election, including through enforcement of Colorado’s “20-day rule.” The Court summarily rejected that position.¹ In its opposition to the present motion, Secretary argues that the Stipulation permits him to reject provisional ballots cast by voters who were purportedly “unregistered” by operation of the 20-day rule.

The motion seeks to enforce the Stipulation in connection with three voters whose provisional ballots were rejected on the ground that the voters’ registration cards were

¹ TRO, *Common Cause v. Buescher*, No. 08-2321 (D. Colo. ordered Oct. 31, 2008) (No. 18 Civ.) (enjoining the Defendant to immediately “cease and stop removing or redacting names within the 90-day period” or otherwise “pending the general election”).

returned as undeliverable, resulting in the cancellation of their registrations pursuant to Colorado's 20-day rule. According to the terms of the Stipulation, these voters and all others who cast provisional ballots but "were determined to have failed the 20-day rule," among others, must be presumed to be eligible and their ballots must be counted absent clear and convincing evidence that they are not eligible. (Pls.' Mem. in Support Ex. A. ¶ 2(b)) (henceforth referred to as "Ex. A.")

In upholding the rejection of these ballots, the Secretary does not point to any evidence at all that the voters were ineligible. Instead, the Secretary contends that the evidence "failed to resolve the problem" created by the initial cancellation of their registrations under the 20-day rule (Def. Br. at 4) because the voters did not list the same address on their provisional ballot envelope as the one on their registration application. The Secretary's approach effectively reverses the presumption of eligibility mandated by the Stipulation, and treats these voters as presumptively *ineligible* unless their provisional ballot or other evidence affirmatively establishes their eligibility. The Stipulation requires the Secretary to apply precisely the opposite presumption.

The Secretary's position also amounts to an argument on the merits of the 20-day rule. This motion does not, however, require the Court to rule whether the statutory 20-day rule is valid. Rather, the issue is whether the Secretary of State has complied with the Stipulation approved by the Court. The Secretary has failed to do so with respect to the provisional ballots at issue, and those ballots should be counted pursuant to the Stipulation's express terms.

For these reasons, this Court should reject the Secretary's interpretation and count the three contested provisional ballots.

ARGUMENT

Plaintiffs' motion for preliminary injunction sought to enjoin, among other things, the operation of the state statute cancelling registration records of those voters whose information cards were returned as undeliverable within 20 days of being sent. The Stipulation settled the request for preliminary relief by establishing a post-election method of ensuring that voters who were otherwise eligible did not have their provisional ballots disqualified by virtue of the 20-day rule or other challenged purge practices. Specifically, the Stipulation set forth that "individuals who were determined to have failed the 20-day rule," among others, "will presumed to be eligible and their ballots will be counted," unless there is "clear and convincing evidence that [the] voter is not eligible." Ex. A. ¶¶ 1, 2(b).

The present motion concerns three voters who were affected by the operation of the 20-day rule and thus were on the "List" of persons protected by the Stipulation. By the terms of the Stipulation, their ballots must be counted in the absence of "clear and convincing evidence that [they were] not eligible" to vote. Ex. A. ¶ 2(b). In upholding the rejection of these ballots, however, the Secretary cites *no* evidence, let alone clear and convincing evidence, that the voters were ineligible. Instead, the Secretary defends its action solely on the basis that the voters were "not registered" under the 20-day rule, that is, that the 20-day rule was correctly applied in the first instance.

The validity of the 20-day rule is a question upon which this Court will eventually rule. But it is not the question raised by the Plaintiffs' motion, and the Court need not and should not rule on it at this stage. Instead, the motion seeks to enforce the Stipulation, which the Secretary entered into and the Court approved. The Secretary

must comply with this judicially enforceable Stipulation even if it mandates deviation from the rules and procedures that Colorado law would otherwise dictate. Thus, the Secretary's assertion that "the Secretary could not disregard Colorado's 20-day statute" because "the Stipulation did not render section 1-2-903(3) invalid or unenforceable" is wrong. (Def. Br. at 13.) The Secretary upheld the rejection of all of the provisional ballots at issue on the basis of his belief that the voters who cast these ballots were "not registered" because their information cards were returned as undelivered, and that these voters are therefore ineligible. In other words, the Secretary points to the existence of the 20-day rule—the impetus behind the temporary restraining order/preliminary injunction—as evidence sufficient to overcome the presumption of eligibility.

This interpretation renders the Stipulation meaningless. By its terms, the Stipulation requires the Secretary to presume that these voters are eligible *despite* the fact that their registrations were cancelled by operation of the 20-day rule. The facts cited by the Secretary do not show that the voters were "not eligible," as the Stipulation requires; they show only that the voters were deemed "not registered" under the 20-day rule. But being disenfranchised by the 20-day rule is the very reason that these voters are protected by the Stipulation. It cannot also be the basis for stripping them of that protection.

It is no response to contend that the Stipulation changed the status quo because under it, the Secretary counted the ballots of voters who listed the same address on their provisional ballot as they did in their original voter registration application. This position would turn the presumption of eligibility on its head by requiring voters to have produced affirmative evidence of their eligibility in order for their votes to count. The Secretary's brief makes this point explicit, arguing, for instance, that the provisional ballots at issue

were properly rejected because “[t]he voters’ record *could not cure* the reason they were not registered.” (Def. Br. at 7 (emphasis added).)

This position is contrary to the terms of the Stipulation which establishes that the operation of the 20-day rule cannot result in a presumption of ineligibility. Ineligibility would need to be established by clear and convincing evidence of something other than the operation of the challenged statute. In effect, the Secretary contends that the Stipulation does not protect voters who were purged by operation of the statutes being challenged—the very voters whom the Stipulation was very explicitly meant to protect.

CONCLUSION

The entirety of the Secretary’s 19-page response presumes this Court will conclude that the Stipulation offers no protections to those affected by the practices challenged in connection with the lawsuit. Such an interpretation defies logic, and more importantly, contravenes the express terms of the Stipulation, which sets forth a presumption of eligibility for all affected voters and mandates that their votes be counted unless there is clear and convincing evidence of their ineligibility. Being victimized by the 20-day rule does not constitute clear and convincing evidence of ineligibility under the Stipulation. For the foregoing reasons and those set forth in Plaintiffs’ initial brief, Plaintiffs respectfully ask this Court to enforce the Stipulation and order the Secretary to count the provisional ballots of Brett Koeneker, Cory Hansen, and Leslie Peterson.

Dated: June 1, 2009

Respectfully submitted by:

/s/ Myrna Pérez

Wendy Weiser

Myrna Pérez

BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas

12th Floor

New York, New York 10013

Tel: 212-998-6284

Fax: 212-995-4550

wendy.weiser@nyu.edu

myrna.perez@nyu.edu

James E. Johnson

S. Gale Dick

Semra Mesulam

Elaina J. Loizou

DEBEVOISE & PLIMPTON LLP

919 Third Avenue

New York, New York 10022

Tel: 212-909-6000

Fax: 212-909-6836

jejohnsn@debevoise.com

sgdick@debevoise.com

Richard Rosenblatt, Esq.

RICHARD ROSENBLATT &

ASSOCIATES, L.L.C.

8085 East Prentice Avenue

Greenwood Village, Colorado 80111

Tel: 303-721-7399 x11

Fax: 720-528-1220

rosenblatt@cwa-union.org

Penda D. Hair

Elizabeth S. Westfall

Bradley Heard

ADVANCEMENT PROJECT

1730 M Street, NW #910

Washington, D.C. 20036

Tel: 202-728-9557

Fax: 202-728-9558

phair@advancementproject.org

ewestfall@advancementproject.org

bheard@advancementproject.org

Karen Neuman
Sarah Brannon
FAIR ELECTIONS LEGAL
NETWORK
1730 Rhode Island Avenue, NW
Suite 712
Washington, D.C. 20036
kneuman@fairelectionsnetwork.com
sbrannon@fairelectionsnetwork.com

Stephen P. Berzon
James Finberg
Stacey M. Leyton
Barbara J. Chisholm
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Tel: 415-421-7151
Fax: 415-362-8064
sberzon@altshulerberzon.com
jfinberg@altshulerberzon.com
sleyton@altshulerberzon.com
bchisholm@altshulerberzon.com

*Attorneys for Plaintiffs Common Cause
of Colorado, Mi Familia Vota Education
Fund and Service Employees
International Union*

CERTIFICATE OF SERVICE

I Myrna Pérez, herein certify that on June 1, 2009, I electronically filed Plaintiffs' Reply in Support of Motion For Enforcement of Stipulation with the Clerk of the Court for the United States District of Colorado. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system upon:

Monica M. Márquez
Assistant Solicitor General
Public Officials Unit
Office of the Attorney General
1525 Sherman St., 5th Fl.
Denver, CO 80203
303-866-5163
Email: monica.marquez@state.co.us

Maurice G. Knaizer
Colorado Attorney General's Office-State Services
1525 Sherman Street
Denver, CO 80203
303-866-5380
Email: maurie.knaizer@state.co.us

Melody Mirbaba
Colorado Attorney General's Office
1525 Sherman Street
7th Floor
Denver, CO 80203
303-866-4224
Email: melody.mirbaba@state.co.us

/s/ Myrna Pérez