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ATTORNEYS FOR DEMOCRATIC NATIONAL COMMITTEE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DWAYNE CHESNUT, an individual; JOHN CAHILL, an individual; VICKY BIRKLAND, an individual; JOHN BIRKLAND, an individual; PATRICIA MONTGOMERY, an individual; LYNN WARNE, an individual; NEVADA STATE EDUCATION ASSOCIATION, a Nevada nonprofit corporation;

Plaintiffs.

v.

DEMOCRATIC PARTY OF NEVADA, a Nevada nonprofit cooperative association.

Defendant.

DWAYNE CHESNUT, et al;

Plaintiffs,

v.

DEMOCRATIC NATIONAL COMMITTEE, an unincorporated association,

Defendant in Intervention

CASE NO. 2:08-CV-00046-JCM-PAL

DEFENDANT IN INTERVENTION DEMOCRATIC NATIONAL COMMITTEE'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

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The Democratic National Committee ("DNC"), the governing body of the Democratic Party of the United States, has moved to intervene as a party defendant in this case. The DNC submits

this memorandum of points and authorities in opposition to Plaintiffs' Application for a Temporary Restraining Order and Motion for Preliminary Injunction.

In this action, Plaintiffs are challenging the plan of the Nevada Democratic Party (the "State Party") for selection of that state party's delegates to the 2008 Democratic National Convention. That plan (the "Nevada Delegate Selection Plan," or the "Plan") was developed to conform to the DNC's Delegate Selection Rules for the 2008 Democratic National Convention. In accordance with those Rules, the State Party had released a draft of the Plan for public comment and then submitted the Plan to the DNC's Rules and Bylaws Committee ("DNC RBC"), for its review, in May 2007. In August, 2007, more than four months ago, the DNC RBC found the bulk of the Plan, including the at-large precincts, to be in compliance with the DNC Delegate Selection Rules. In October 2007, more than two months ago, the Plan was found to be in full compliance with the Delegate Selection Rules. The State Party has been in the process of implementing this Plan for months and the Democratic voters of Nevada have relied upon this Plan as setting forth the agreed and approved rules for their participation in the delegate selection process.

In these circumstances, Plaintiffs' last-minute invitation to this Court to insert itself into an intra-party dispute and rewrite those rules should be rejected. In summary, first, Plaintiffs are highly unlikely to succeed on the merits of their federal equal protection claim. The selection of delegates by the State Party pursuant to the DNC's Rules does not constitute state action. Even if it did, because the State Party and the DNC have their own, constitutionally protected rights to determine what they deem to be the best means of selecting delegates to the Democratic National Convention, the Plan would not be subject to strict constitutional scrutiny as claimed by Plaintiffs. Rather, the State Party's Plan should be found to pass constitutional muster if it rationally advances the Party's interests in achieving its electoral goals. The at-large precinct system included in the Nevada Delegate Selection Plan easily passes that test.

Second, it is the State Party, the DNC, and the Democratic voters of Nevada who will be irreparably harmed if the requested injunctive relief is granted. The State Party would be forced to rewrite the rules for participation in the caucuses at the last minute, throwing the process into chaos and confusion and effectively disenfranchising thousands of voters who have relied on the State

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Party Delegate Selection Plan—as they are entitled to do under the DNC Rules-- to tell them how, where, and when to participate in the Delegate Selection Process.

Finally, the balance of hardships and the public interest clearly favor the DNC. At this point, the DNC RBC has reviewed and approved virtually all of the delegate selection plans for the states and territories. Many primaries and caucuses are scheduled for the coming weeks. If the door is opened for last-minute judicial challenges seeking to rewrite the rules in state delegate selection plans, the entire nominating process could be thrown into confusion and chaos.

I. FACTUAL BACKGROUND

The Democratic National Committee is the governing body of the Democratic Party of the United States. It is composed of representatives from each of the state Democratic Parties, including Nevada's, and of various Democratic organizations. The nominee of the Democratic Party for President of the United States is chosen by the delegates to the Democratic National Convention held in each presidential election year. The National Convention is organized and run by an arm of the DNC. The delegates from each state are chosen through a process adopted by the state's Democratic Party.

Beginning in 1968, each state party's delegate selection process has been required to comply with principles or rules established by the Democratic National Committee, and for each presidential election starting in 1976 the DNC has established formal Delegate Selection Rules to govern the selection, in each state, of its delegates to the National Convention. These rules require each State Democratic Party to develop a written delegate selection plan and to submit that plan to the DNC RBC for review and approval. A copy of the Delegate Selection Rules for the 2008 Democratic National Convention is attached hereto as Exhibit **A**.

The delegate selection process in each state involves two basic functions: (i) the allocation of delegate position among presidential candidates, *i.e.*, how many delegates from that state will go to the Convention pledged to each candidate; and (ii) the selection of the actual individuals to fill those position, *i.e.*, determining the actual individuals who will attend the Convention as delegates and alternates. Generally, state parties use either a primary or a caucus/convention system. In a primary system, the state party uses the state-government-run or a party-run primary election to allocate

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delegate positions, and then a party-run meeting (caucus) to fill those positions. In a caucus system, the state party uses a series of party-run meetings—caucuses—both to allocate delegate positions and to select the persons to fill those positions. A caucus/convention system does not involve any use of the state's electoral machinery. The Nevada Democratic Party, for example, will pay for 100% of the costs of conducting its caucus system. Of the 56 states and territories that will send delegates to the 2008 Democratic National Convention, 20 will use party-run caucus/convention systems.

The DNC's Delegate Selection Rules govern all aspects of these processes and reflect the values and ideals of the Party in a variety of ways—for example, requiring transparency and openness in the process, ensuring participation by all voters who are registered as or identify themselves as Democrats, prohibiting discrimination and requiring affirmative action programs to achieve diversity in Convention delegations. The DNC Rules provide that delegates elected by each level of a caucus to the next level—for example, precinct caucuses electing delegates to a county convention, or county caucuses electing delegates to the state convention—be apportioned based on one-person, one-vote, with the "one person" denominator allowed to consist not only of population but also of some measure of Democratic voting strength. Rule 8(B) of the Delegates Selection Rules provides that, "Apportionment for each body selecting delegates to state, district and county conventions shall be based upon population and/or some measure of Democratic strength."

The Democratic Party of Nevada submitted its Plan for approval to the DNC RBC. At a meeting held on August 25, 2007, the Chair of the Democratic Party of Nevada and two additional State Party staff members testified in favor of the Plan before the DNC RBC and were questioned specifically about the at-large precincts. At that meeting, the RBC found the plan to be in "conditional compliance," meaning that certain technical features of the Plan needed to be corrected, but that the Plan complied with the fundamental elements of the Rules. No fault or problem was found with the establishment of the at-large precincts. On October 24, 2007, after fixing minor technical deficiencies, the final version of the Plan was found to be in "full compliance" by the DNC RBC staff.

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II. LEGAL ARGUMENT

Plaintiffs have correctly set forth the two alternative tests established by the Ninth Circuit for obtaining preliminary injunctive relief. Plaintiffs' Application for TRO and Emergency Motion for Preliminary Injunction ("Pl. App.") at 11-12, *citing Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007). Under those tests, however, Plaintiffs have failed to demonstrate that they are entitled to the requested relief.

A. Plaintiffs Have No Likelihood of Prevailing on the Merits

To assert a federal cause of action for deprivation of constitutional rights, a plaintiff "must demonstrate that the defendant acted under color of state law." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003). As Plaintiffs note, there are four tests used to determine if the actions of a private entity, such as the Nevada Democratic Party, constitute state action: (1) the "public function" test; (2) the "joint action" test; (3) "governmental compulsion or coercion" and (4) "governmental nexus." *Id.* at 1093-94. Here, Plaintiffs contend that the "public function" and "governmental compulsion" tests are satisfied because state law purports to require the State Party to conduct the precinct caucuses and to regulate the conduct of those caucuses in various respects, and because the Party is entitled to have its nominee for President placed on the State's general election ballot in November. Pl. App. at 18-20. Plaintiffs contend that the "governmental nexus" test is also satisfied because the State provides assistance to the State Party in conducting the caucuses by making the voter file available and allowing use of some public buildings.

In this case, none of the tests for finding state action by a private entity are met. Contrary to Plaintiffs' contention, it is not Nevada state law that empowers the State Party to use the caucuses to select delegates to the National Convention. It is the Charter of the Democratic Party, the DNC's Call to the Convention, and the Delegate Selection Rules that confer that authority. Nor does the State have the power to regulate how those caucuses are conducted. It is well established that were the State Party to conduct the caucuses in compliance with State law but in violation of the DNC's Delegate Selection Rules, the DNC would have the power to refuse to seat the State Party's delegates at the National Convention. *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); cf. *Cousins v. Wigoda*, 419 U.S. 477 (1975). Nor does state law

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confer upon the Democratic Party of Nevada the power to select the nominee whose name appears on the general election in November. No state law does that. The Democratic Party's nominee for president is not chosen by voters in state primaries or caucuses but by a majority of delegates to the Democratic National Convention. In that regard, the delegate selection process in no way resembles a state primary or caucus that directly selects a nominee for federal or state office.

Nor is the state's aid to the State Party in connection with the caucuses of any significance. The costs of the conducting the caucuses are borne entirely by the State Party; no public funds are used. Any political party or candidate can obtain the voter file; it is not provided for the specific purpose of facilitating the caucuses. And while the state may make some public buildings available, the at-large precinct caucuses of which Plaintiffs complain are scheduled to take place in private casino-hotels.

As the Supreme Court held in *Cousins*, the "[s]tates themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Id.*, at 489-90. Since *Cousins*, no court has held that a political party's establishment and implementation of its National Convention delegate selection rules constitutes state action. In this regard, Plaintiffs' reliance on *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) is misplaced. In *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972), the Supreme Court summarily affirmed a district court decision holding that national party delegate selection rules did not have to be pre-cleared under the Voting Rights Act ("VRA"). Later, in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) the Court ruled that a political party's imposition of a registration fee for participation in its state convention in effect constituted state action for purposes of section 5 of the VRA, because Virginia law directly conferred on the state party the power and authority to use that state convention to select its nominee for U.S. Senate. In *Morse*, the Court took pains to distinguish that situation from the enforcement of delegate selection rules, with respect to the issue of state action:

> *Williams* did not concern the selection of nominees for state elective office, but rather a political party's compliance with a rule promulgated by the Democratic National Party governing the selection of delegates to its national convention.... [T]he State exercised no control over, and played no part in, the State Party's selection of delegates to the Democratic National Convention.

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Morse, 517 U.S. at 201-02. For this reason, the Plaintiffs' reliance on *Morse* is misplaced.

In the three post-*Morse* cases squarely addressing the issue of whether enforcement of national party delegate selection rules constitutes state action, courts have held that it does not. In *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 89 (D.D.C. 1999) (three judge court), *aff'd w/o opinion*, 529 U.S. 1035 (2000), the court ruled that that such enforcement does not constitute state action for purposes of Voting Rights Act section 5. because the Act "should not be read to extend coverage that would interfere with core associational rights; specifically here, internal national party rules as followed by state parties in a covered jurisdiction." *Id.* at 89. The court specifically rejected the very argument made by Plaintiffs here, that "the DNC has received the delegated authority of covered jurisdictions by the states' allowing major party candidates to appear on the general election ballot. *Id.*, at 85. The court held that "the theory of delegation used in *Morse* does not extend that far." *Id.* Two federal courts in Florida also recently declined to find that the DNC's enforcement of its Delegate Selection Rules constitutes state action. *Nelson v. Dean*, No. 4:07cv427 (N.D. Fla., filed Dec. 14, 2007); and *DiMaio v. DNC*, No. 8:07cv1552T (N.D. Fla., Oct 5, 2007)(appeal pending).

Equally unavailing is Plaintiffs' effort to invoke the White Primary Cases—*Nixon v. Condon*, 286 U.S. 73 (1932)—to show that the Nevada Democratic Party Delegate Selection Plan constitutes state action. (Pl. App17). All of those cases involved exclusion of African-Americans from a party-run primary for statewide office, the winner of which was automatically put on the general election ballot by the state. In *O'Brien v. Brown*, 409 U.S. 1 (1972), the Supreme Court stayed lower court orders denying the Democratic National Convention the right to strip two states, Illinois and California, of all of their delegates because those delegates were selected in violation of national party rules. The Court held that, "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4. In so ruling, the Court specifically held the White Primary Cases to be inapplicable, explaining that, "This is not a case in which claims are made that injury arises from invidious discrimination based

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on race in a primary contest within a single state." *Id.* at 4, n. 1. The same is true of the instant case.

Nor is Plaintiffs' position supported by *Gray v. Sanders*, 372 U.S. 368 (1963), involving, like the White Primary Cases, exclusion of voters, by party-rule, from actually voting in a state-run primary. As the Eleventh Circuit has explained, "Justice Douglas' opinion for the majority [in *Gray*] was limited to primary elections, and did not reach issues concerning party conventions or delegate selections.... Moreover, the *Gray* Court was not faced with First Amendment issues. In the years since *Gray*, the Supreme Court has afforded broad protection to the speech and associational rights of political parties." *Wymb v. Republican State Executive Committee of Florida*, 719 F.2d 1071, 1083 n. 29 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

Even if the State Party's establishment and implementation of its Delegate Selection Plan *did* constitute state action, the Plan should not be held constitutionally infirm. Contrary to plaintiffs' contention (Pl App. at 15-16), the State Party does *not* need to demonstrate that the apportionment system in the Plan is narrowly tailored to serve a compelling state interest—the "strict scrutiny" test applicable to the actions of actual states. That test is inapplicable here because, unlike the State itself, the State Party and DNC have their *own* constitutional rights which must be weighed against those of the Plaintiffs. In the establishment and enforcement of rules for selecting delegates to its national convention, the "national Democratic Party and its adherents enjoy a constitutionally protected right of political association." *Cousins v. Wigoda*, supra, 419 U.S. at 487. "A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Democratic Party of the U.S. v. Wisconsin, supra*, 450 U.S. at 123-24. For that reason the "compelling state interest" test does not apply. Instead the Party must only show that its delegate selection rules rationally advance some legitimate interest of the party in achieving its political goals.

In *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975)(en banc), *cert. denied*, 424 U.S. 933 (1976), plaintiffs challenged the delegate allocation formula used by the national Republican Party on grounds that the formula failed to comply with one-person, one-vote and therefore violated the Equal Protection Clause—exactly the claim made in the instant case. The

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court held that the test for compliance of national party delegate selection rules with the Equal Protection Clause would not be "compelling state interest," but rather that, the "party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation." *Ripon Society, supra*, 525 F.2d at 585 (emphasis in original). The court determined that "the Equal Protection Clause, assuming it is applicable... is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-87. The exact same approach was taken in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), involving an Equal Protection challenge to a Party rule requiring that each state's delegation be equally divided between men and women.

Again, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the court ruled that the DNC could enforce a DNC delegate selection rule depriving a presidential candidate of any delegates based on a determination that he was not a bona fide Democrat, even though the candidate had won enough votes in the primaries to be allocated delegates. The court concluded that even if the DNC were to be treated as a state actor, it would not be subject to the "compelling state interest" test because of "the presence of First Amendment interests on both sides of the equation." 152 F. 3d at 995. Following *Ripon Society*, the court held that the Constitution would be "satisfied if [the party's rules] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 995, *quoting Ripon Society*, 525 F.21d at 586-87.

In the case before this Court, the applicable test is easily met. The State Party adopted the at-large precincts in order to facilitate participation by workers in one of the state's key industries, who otherwise would find it difficult or impossible to attend caucuses in their home precincts on a Saturday morning and afternoon when they are often required to work. Certainly this approach "rationally advances" the Party's interest in achieving its political goals—in particular, the laudable goal of maximizing voter participation in the delegate selection process. Further, the DNC RBC specifically found that the Nevada Democratic Party Plan complies with the DNC's Rules, including Rule 8(B), which requires that apportionment of delegates at each level be based on a measure of

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population and/or Democratic voting strength. The DNC and the State Party have determined that the at-large precincts are fair and best serve the party's political goals in terms of selection of delegates to the National Convention. As to that determination, "[a] State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of the U.S. v Wisconsin, supra*, 450 U.S. at 123-24.

For these reasons, it is highly unlikely that Plaintiffs succeed on the merits of their constitutional challenge to the Democratic Party of Nevada's Delegate Selection Plan.

B. The DNC and State Party Will Suffer Irreparable Harm if the Requested Relief Is Granted

It is not the Plaintiffs but rather the State Party, the DNC, and the Democratic voters of Nevada who will be irreparably harmed if the requested injunctive relief is granted. The State Party's Delegate Selection Plan, in all its essential features, was approved by the DNC months ago and the State Party has expended enormous amount of time and energy, and substantial funds, to implement that plan by setting up and staffing caucus sites, publicizing the times and locations of the caucuses, etc. Further, the voters are relying on the Plan—as they are entitled to under the DNC Rules—to inform them of how, where, and when to participate in the precinct caucuses and other aspects of the delegate selection process. Were the requested relief granted, the State Party would be forced to rewrite the rules for participation in the caucuses at the last minute, throwing the process into chaos and confusion and effectively disenfranchising thousands of voters who would show up at the wrong place in futile efforts to participate. Those voters would forever lose their ability to participate in this process, and that harm certainly would be irreparable. For these reasons, Plaintiffs have failed to demonstrate that they—rather than Defendant, Defendant in Intervention the DNC, and the voters—would suffer irreparable harm if the requested relief is granted.

C. The Balance of Hardships Favors the DNC

The balance of hardships in this case favors not only the State Party, but also the DNC. As the Supreme Court observed in *Cousins,* "If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an

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obviously intolerable result.... Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates...." 419 U.S. at 490.

At this point, as noted above, the DNC RBC has reviewed the delegate selection plans for all 56 states and territories and has approved all but two. The delegate selection process is well underway with two events (the Iowa caucuses and the New Hampshire primary) already having occurred. Many more are scheduled for the coming weeks. If the door is opened for last-minute judicial challenges seeking to rewrite the rules in state delegate selection plans, the entire nominating process could be thrown into confusion and chaos. Challenges like the present suit strike at the recognized ability of a political party to determine and advance its interests, and threaten to undercut or destroy the effectiveness of the process underpinning the National Party Convention and the determination of candidates for the highest offices in the United States. The hardship facing the DNC should its ability to coordinate and approve the delegate selection processes of state parties be denied would be immense, and the prospect would arise of innumerable legal challenges to any aspect of the primary or caucus plans in the days before they take place. A concerted effort along these lines could cripple the nominating process in the United States.

D. The Public Interest Favors Upholding the Rules and Procedures for Delegate Selection Approved and Implemented by the Democratic Party of Nevada and the DNC.

For many of the same reasons stated above, the public interest clearly weighs in favor of the Democratic Party of Nevada and the DNC. The disenfranchisement of Democratic voters, the confusion likely to result should a restraining order enter at this late moment, the specter of nation-wide chaos in the electoral primary season—all of these issues imply that it cannot be in the public interest to grant Plaintiffs' request for relief. Indeed, the public has a definite interest in strong, effective political parties dedicated to winning elections and representing its members' positions. The Democratic Party of Nevada and the DNC can only fulfill their important roles in our democracy if their ability to establish, approve, and implement the rules by which they select delegates to county, state, and national party conventions are recognized here again, as courts have always recognized them in the past.

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III. CONCLUSION

With the foregoing arguments in mind, the DNC respectfully prays this Court to deny Plaintiffs the requested temporary restraining order and preliminary injunction.

DATED this 16 day of January, 2008.

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