

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

LIBERTARIAN PARTY OF SOUTH  
DAKOTA, et al,  
  
Plaintiffs,  
  
v.  
  
SHANTEL KREBS, et al,  
  
Defendants.

Civ. No. 15-4111-KES

PLAINTIFFS' REPLY BRIEF

RE: MOTION TO AMEND

## INTRODUCTION

Plaintiffs filed a Rule 15(a) motion to amend their complaint (Doc. 12) that would add a claim seeking relief under the First and Fourteenth Amendments to the Constitution. Specifically, the new claim asserts that the deadline by which a new political party seeking access to the ballot in South Dakota must file a petition with the Secretary of State pursuant to SDCL § 12-5-1 is unconstitutionally restrictive.

A motion to amend filed early in the litigation, as here, is viewed charitably, given the settled principle that leave to amend "should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Eighth Circuit takes a "liberal viewpoint" in applying Rule 15(a). *Popp Telecom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000) (citing *Thompson–El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989)). Consistent with this principle, this Court has repeatedly granted motions to amend in situations similar to the one here. *See Kroontje v. CKE Restaurants, Inc.*, No. CIV. 13-4066-KES, 2014 WL 1513895, at \*2-3 (D.S.D. Apr. 16, 2014); *High Bear v. Dooley*, No. CIV. 13-4094-KES, 2014 WL 317444, at \*2 (D.S.D.

Jan. 28, 2014); *Sedlmeier v. S. Dakota State Penitentiary Health Servs.*, No. CIV. 13-4136-KES, 2014 WL 3969057, at \*3 (D.S.D. Aug. 13, 2014); *Dalrymple v. Dooley*, No. CIV. 12-4098-KES, 2013 WL 2389849, at \*4 (D.S.D. May 30, 2013).

Despite this settled principle, Defendants oppose Plaintiffs' Rule 15(a) motion to amend. Defendants make three arguments in their brief. All three lack merit.

### **ARGUMENT**

First, Defendants oppose Plaintiffs' Rule 15(a) motion on the ground that "[a]llowing Plaintiffs to amend their original complaint would require additional response from Defendants." *See* Defendants' Opposition to Plaintiffs' Motion to Amend Complaint (Doc. 16) (hereinafter, "Defs' Opp.") at 2. Clearly, this is an invalid basis on which to challenge a Rule 15(a) motion filed at this stage in the litigation. Indeed, if given credence, Defendants' argument would render Rule 15(a) a nullity because virtually every amendment requires the defendant to make an additional response. Defendants cite no case supporting their argument that merely because they will need to file a response if the complaint is amended, Plaintiffs' motion to amend should be denied. Defendants' first argument plainly lacks merit.

Second, Defendants oppose Plaintiffs' Rule 15(a) motion on the ground that adding the new claim would be an exercise in futility because, Defendants contend, Plaintiffs lack standing to challenge the constitutionality of SDCL § 12-5-1. Defendants acknowledge, however, that the named Plaintiffs include two political parties which have participated in prior elections in South Dakota, and that Plaintiffs' complaint alleges that these parties fully intend to try to satisfy the requirements for ballot access in the 2016 election. *See* Defs' Opp. at 3, quoting Plaintiffs' Amended Complaint (Doc. 12, Ex. 1) at 6, 7. According to Defendants, those facts are

insufficient to establish standing because, Defendants argue, the proposed amended complaint “fails to provide any factual evidence that Plaintiffs are in the process of collecting signatures pursuant to SDCL 12-5-1.” *See* Defs’ Opp. at 3.

Defendants’ argument borders on the frivolous. At least twice now, the Supreme Court has permitted political parties to challenge a ballot access requirement even though they had not yet begun collecting the required signatures. Indeed, any other conclusion would defy logic, as it would mean that if a state created an impossible signature requirement (for instance, requiring that signatures be submitted four years before the election), it would be immune from challenge because no one would ever have standing to mount an attack.

There is a reason, in other words, why Defendants cite no case holding that a challenge to a ballot access deadline can be filed only by someone currently engaged in collecting signatures. Every court to consider the question has held that no such prerequisite exists. *See Storer v. Brown*, 415 U.S. 724 (1974) (allowing Communist Party candidate Gus Hall to challenge California’s requirement that independent candidates must submit a petition containing the signatures of at least five percent of the last vote cast, even though Hall had not begun gathering signatures);<sup>1</sup> *Williams v. Rhodes*, 393 U.S. 23 (1968) (allowing the Socialist Labor Party, which had not attempted to gather signatures, as well as George Wallace’s American Independent Party, which was unable to gather enough signatures, to challenge Ohio’s early ballot access law, and

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<sup>1</sup> The complaint in *Hall v. Brown*, Civ. No. C-72-1468 (N.D. Cal. 1972), was filed before plaintiff Hall would have begun gathering signatures, and asserts that Hall was ready, willing, and able to become a candidate. The Supreme Court subsequently held that Hall had standing to challenge the California ballot access statute. *See Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974). As one federal court subsequently noted, the Court in *Storer* found that the plaintiffs had standing “even though they did not file any petition signatures.” *Libertarian Party v. Ehrler*, 776 F. Supp. 1200, 1202 (E.D. Ky. 1991).

the Court struck down the law).<sup>2</sup> *See also Lee v Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down an Illinois early petition deadline even though the party had yet to begin gathering signatures); *Libertarian Party v. Ehrler*, 776 F. Supp. 1200 (E.D. Ky. 1991) (holding that a political party need not initiate the process of gathering signatures in order to challenge a restrictive ballot access law).

The named Plaintiffs in this lawsuit, moreover, not only include two political parties but also four members of those parties. Defendants' argument therefore flies in the face of *McLain v Meier*, 851 F.2d 1045 (8th Cir. 1988), which held that members of political parties have standing *as voters* to challenge unduly restrictive ballot access laws. As the court explained in holding that Harley McLain had standing to challenge North Dakota's onerous access law for new political parties:

McLain's allegations, if true, would cause him injury as a voter because the ballot access laws would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public. Although the primary impact of restrictive ballot access laws is on the candidates, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Additionally, the Supreme Court has noted that the "primary concern is not the interest of [the] candidate . . . , but rather, the interests of the voters who chose to associate together to express their support for [his or her] candidacy and the views [he or she] espoused." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). We conclude that McLain has alleged a cognizable injury in fact. It is also clear that McLain's alleged injury can be traced to the North Dakota ballot access laws and that his injury could be redressed by granting the relief he seeks.

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<sup>2</sup> As in *Storer*, the plaintiff Socialist Labor Party (SLP) in *Williams v. Rhodes* was deemed to have standing even though no evidence was introduced in the district court indicating that the SLP had begun collecting signatures. The court in *Libertarian Party v. Ehrler*, which closely examined ballot access cases and their histories, noted that the SLP had not begun collecting signatures at the time suit was filed. *See Libertarian Party*, 776 F. Supp. at 1202.

*McLain*, 851 F.2d at 1048. *See also Anderson*, 460 U.S. at 786 (holding that supporters of an independent candidate for president had standing to challenge Ohio's ballot access laws); *Bullock*, 405 U.S. at 143 (holding that a voter had standing to challenge the constitutionality of a filing fee requirement that made it difficult for candidates to appear on the ballot); *Bachur v. Democratic National Party*, 666 F. Supp. 763, 770–72 (D. Md. 1987) (holding that a voter had standing to assert the claims of candidates), *aff'd on that issue, reversed on other grounds*, 836 F.2d 837 (4th Cir. 1987).

Thus, Defendants' argument is bankrupt for two reasons. Plaintiffs' two political parties have standing to challenge SDCL § 12-5-1 regardless of whether they have yet begun gathering signatures, and the other four named Plaintiffs have standing as voters. Defendants' second argument therefore should be rejected.

Lastly, Defendants argue that the Court should dismiss Plaintiffs' challenge to the constitutionality of SB 69 even if the Court allows Plaintiffs to challenge §12-5-1. Plaintiffs have already discussed this subject in response to Defendant's Motion to Dismiss (Doc. 15.) In a word, Plaintiffs continue to have a live controversy against SB 69. Of course, if SB 69 is rejected in the November 2016 referendum, Plaintiffs challenge to its constitutionality will be rendered moot. But until then, Plaintiffs are entitled to continue challenging SB 69, as that statute will immediately go into effect in November 2016 unless it is defeated in the election, impacting Plaintiffs' rights.

Had Plaintiffs known at the time they filed their lawsuit that SB 69 would be referred to a popular vote, Plaintiffs would have included a claim challenging the current deadline established in SDCL §12-5-1. Plaintiffs now respectfully request the Court's leave to amend their complaint

to add a new Claim for Relief challenging the existing deadline. Justice requires that leave to make this amendment be freely given. *See Foman v. Davis*, 371 U.S. at 182.

Respectfully submitted this 15th day of August, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2015, I electronically filed the foregoing Motion to File Amended Complaint with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following person:

Ellie J. Bailey            Ellie.Bailey@state.sd.us

/s/ Stephen L. Pevar

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