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' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

SDCL § 12-5-1 is an unreasonable election law that violates Plaintiffs' rights under the First and Fourteenth Amendments. This statute creates an excessively early deadline by which third parties seeking a place on South Dakota's federal election ballot must submit their petitions. Indeed, this deadline is so early that unless this Court issues a preliminary injunction, § 12-5-1 will cause Plaintiffs to suffer irreparable injury before the Court can decide the merits of Plaintiffs' constitutional claims.

Section 12-5-1 requires a new or newly-qualifying political party seeking to appear on South Dakota's ballot to submit a written petition to the Secretary of State—containing signatures from 2½ percent of the voters who voted in the last gubernatorial election—by "the last Tuesday of March at five p.m. prior to the date of the primary election." This year, **that deadline is March 29, 2016**. Unless the Court suspends the March 29 deadline—to allow the Court sufficient time to consider Plaintiffs' claims on the merits—the plaintiff political parties

will be *permanently* barred from having their names appear on the November 8, 2016 election ballot. This will cause these parties and their supporters to suffer irreparable injury. Plaintiffs therefore seek a court order that suspends the March 29 deadline.

In a series of cases discussed below, the Supreme Court and the Eighth Circuit have explained that ballot access statutes must be viewed in real terms—in their totality—in determining whether they create unreasonable obstacles to ballot access. At trial or hearing on the merits, when this Court conducts that analysis here, it will be evident that SDCL § 12-5-1 is legally indefensible. The combination of four factors render this statute unnecessarily difficult for a party to satisfy: (1) the March 29 deadline is the second earliest party deadline for presidential candidates in the country,[1] (2) the 2½ percent signature requirement (which, for 2016, requires 6,936 qualified signatures) is the third most onerous in the country,[2] (3) as a practical matter, the 6,936 signatures must be collected during South Dakota's harsh winter months, and (4) South Dakota's sparse population makes it difficult to easily gather signatures.

The issue before the Court today, however, is not whether § 12-5-1 is unconstitutional. The issue is whether Plaintiffs are entitled to a preliminary injunction until the Court can decide this case on its merits.

I. THE STANDARD FOR GRANTING A PRELIMINARY INJUNCTION.

A court must weigh four factors in determining whether to grant a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits; (2) the threat of irreparable harm to the plaintiff if an injunction is not issued; (3) whether the harm to the plaintiff outweighs the

[1] Only Alabama has an earlier deadline by which a presidential candidate may appear on a ballot with a party label. *See* Affidavit of Richard Winger (attached hereto as "Exhibit 5") (hereinafter "Winger Afft.") at ¶ 5.
[2] Of the state mandatory qualification requirements, only the 3 percent requirements in Alabama and Oklahoma are higher than South Dakota's 2½ percent. *See* Winger Afft. at ¶ 7.

injury the defendant may incur if the injunction is issued; and (4) the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 730-32 (8th Cir. 2008) (*en banc*); *Myers v. Gant*, 49 F. Supp.3d 658, 663 (D.S.D. 2014) (granting preliminary injunction against South Dakota's Secretary of State in election challenge).

Here, all four factors weigh heavily in favor of granting a preliminary injunction. Before conducting this four-part analysis, Plaintiffs will first discuss the role that third parties play in our political system, explain the standard of review the Court should employ in assessing the validity of South Dakota's ballot restrictions, and summarize the relevant facts.

II. THE ROLE OF THIRD PARTIES IN OUR POLITICAL SYSTEM.

Plaintiffs' challenge to § 12-5-1 should be examined against the backdrop of our political system, in which third parties play a critical role in disseminating ideas and providing information essential to preserving democratic values. As the Supreme Court stated more than 35 years ago in striking down unnecessary requirements for access to the ballot by third parties:

> The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. *See* A. Bickel, *Reform and Continuity* 79-80 (1971); W. Binkley, *American Political Parties* 181-205 (1959); H. Penniman, *Seit's American Political Parties and Elections* 223-229 (5th ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979).

Third parties have helped shape US policy. During the late 18th and early 19th centuries, for instance, the Greenback Party, the Union Labor Party, and the Peoples' Party forced the

major parties to pass significant anti-monopoly legislation. Third parties influenced several significant pieces of Franklin Delano Roosevelt's "New Deal" legislation. The success of George Wallace's American Independent Party in 1968 caused the Republican Party to develop its "Southern Strategy" to attract conservative Democrats, a move that changed the political landscape in the South. Ross Perot's focus on balancing the budget in 1992 compelled both the Republican and Democratic parties to shift their positions on that issue.

In addition to forcing changes in societal policy, third parties act like a safety valve on a tea kettle, providing an opportunity for disaffected voters to voice their opposition in a peaceful manner. The presidential campaigns of George Wallace in 1968, John Anderson in 1980, and Ross Perot in 1992 attracted millions of supporters disenchanted by the major parties and gave them a voice. Moreover, on occasion third parties win elections. Indeed, today's Republican Party began as a third-party movement competing against the dominant Whig Party.

The presence of third parties signifies a healthy system; "[t]he absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957). "In short, the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open'—are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). SDCL § 12-5-1, which places stringent limits on access to the ballot by third parties, must be analyzed against this backdrop.

III. SDCL § 12-5-1 MUST BE SUBJECTED TO STRICT SCRUTINY.

The degree of judicial scrutiny a statute must receive increases with the severity of the burden that statute imposes on a constitutional right. As Judge Piersol noted in *Myers v. Gant*, "voting regulations are not automatically subjected to heightened scrutiny." *Myers*, 49 F. Supp.3d at 663. As Judge Piersol also noted, however, because a ballot access statute will always impact both the right to vote and the freedom of association, two of our most precious liberties, such laws must be subjected to strict scrutiny. *See id*. at 664-66 (citing *Anderson v. Celebrezze*, 460 U.S. at 792-96, *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), and *Burdick v. Takushi*, 504 U.S. 428, 433-37 (1992)).

Ballot access restrictions burden both the right to vote and the freedom to associate because they preclude candidates from securing a place on the ballot and thus prevent supporters from voting for them. *See Libertarian Party v. Krebs*, 4:15-cv-4111-KES (Order Granting Plaintiffs' Motion to Amend Complaint, Jan. 28, 2016) at 4 (holding that SDCL § 12-5-1 impacts both the right to vote and the freedom of association). As the Supreme Court has explained:

> [Ballot access] laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms….
>
> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."

Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). *See also Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

The Eighth Circuit has consistently subjected restrictions on ballot access to strict scrutiny. *See McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980) (subjecting a North Dakota ballot access statute to strict scrutiny because "'voting is of the most fundamental significance under our constitutional structure' and requires jealous protection.") (quoting *Illinois State Board*, 440 U.S. at 184); *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977) (holding that ballot access requirements "must be justified by reference to a compelling state interest").

SDCL § 12-5-1 places significant restrictions on access to the ballot by third parties. Therefore, Defendants have the burden of proving that South Dakota's interests actually require those restrictions and that nothing less drastic will suffice. As the Eighth Circuit explained in *McLain*: "We have noted in the past that access restrictions must be reasonable, must be justified by reference to a compelling state interest, and may not go beyond what the state's compelling interests actually require, *MacBride*, 558 F.2d at 448, because the fundamental right to vote is inseparable from the right to place the candidate of one's choice on the ballot." *McLain*, 637 F.2d at 1163.

Here, then, Defendants must prove that nothing less onerous will suffice other than the this State's unusually early deadline and unusually high signature requirement. *See Illinois State Board*, 440 U.S. at 185 ("[W]e have required that States adopt the least drastic means to achieve their ends. *This requirement is particularly important where restrictions on access to the ballot are involved.*") (emphasis added); *MacBride*, 558 F.2d at 448 (holding that ballot access requirements "must be justified by reference to a compelling state interest" and "may not go

beyond what the state's compelling interests actually require, and broad and stringent requirements cannot stand where more moderate ones would do as well.")

This Court "cannot avoid a hard and realistic review of [South Dakota's] access statute" and to consider its requirements in combination. *See McLain*, at 1163. *See also Storer v. Brown*, 415 U.S. 724, 738 (1974) (holding that a court must "assess realistically whether the law imposes excessively burdensome requirements" on ballot access); *Williams v. Rhodes*, 393 U.S. at 32 (noting that access laws must be scrutinized "in their totality"). Here, the relevant factors create a four-punch attack: (1) South Dakota has an exceedingly early filing deadline, (2) combined with an unusually high signature requirement, and (3) these signatures as a practical matter must be gathered during harsh winter months, (4) in a large, sparsely populated state that does not lend itself to collecting these thousands of signatures easily.

Defendants will have a particularly difficult time justifying SDCL § 12-5-1 because that statute limits access to a *Presidential* ballot. In Presidential elections, "a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders." *Anderson*, 460 U.S. at 795 (footnote omitted). A state "has a less important interest in regulating Presidential elections" than local elections, and therefore its restrictions on ballot access deserve particular scrutiny. *Id*. *See also Myers*, 49 F. Supp.3d at 664-65 (noting that restrictions on voting in Presidential elections deserve heightened scrutiny, but also applying that test to restrictions on ballots in state elections because they, too, inhibit the rights to vote and associate). At trial, in short, this Court should subject § 12-5-1 to a realistic analysis under heightened scrutiny, and take into account the fact that this statute limits the ability of third parties to appear on a ballot in a Presidential election.

IV. FACTUAL BACKGROUND

The facts upon which this Motion is based are set forth in Plaintiffs' January 28, 2016 Amended Complaint (Docket 19), the Affidavits of the four Plaintiffs and of ballot access expert Richard Winger, attached hereto as Exhibits 1-5. A summary of those facts are as follows.

The plaintiffs in this action include two political parties, the Libertarian and the Constitution Parties, both of which have appeared on election ballots in prior South Dakota elections. Plaintiff Ken Santema is a resident and registered voter of South Dakota and the Chair of the Libertarian Party of South Dakota. Plaintiff Bob Newland is a resident and registered voter of South Dakota and a member of the Libertarian Party. Plaintiff Lori Stacey is a resident and registered voter of South Dakota and the Chair of the Constitution Party of South Dakota. Plaintiff Joy Howe is a resident and registered voter of South Dakota and a member of the Constitution Party. All four personal plaintiffs desire to have the option of participating meaningfully in elections in South Dakota, which for them requires that they be allowed to vote for candidates of the political parties with which they are associated.

The two defendants in this litigation, South Dakota Secretary of State Shantel Krebs and South Dakota Attorney General Marty Jackley, are the state officials directly responsible for enforcing and defending SDCL § 12-5-1, the statute challenged herein. Both are sued in their official capacities only.

SDCL § 12-5-1 requires new or newly qualified political parties to submit a petition by March 29, 2016 supported by at least 6,936 valid signatures in order to be listed on the November 2016 ballot. The Republican and Democratic parties need not meet those

requirements because they garnered at least 2½ percent of the vote in the previous gubernatorial election and therefore will automatically appear on the 2016 ballot. *See* SDCL § 12-1-3.

As discussed in Plaintiffs' affidavits, there have been some elections when the Libertarian and Constitution Parties were able to meet the requirements of SDCL § 12-5-1, and other years not. This year, both parties are unlikely to meet those requirements for reasons explained in Plaintiffs' affidavits.

Bob Newland currently serves on the Executive Committee of the Libertarian Party of South Dakota. He has been involved with ballot access in South Dakota since 1992. He has run for office several times as a Libertarian, and has circulated petitions to obtain ballot access for the Libertarian Party. Mr. Newland will no longer seek public office in South Dakota, he states, because the state's requirements make it too expensive and difficult. He says "the March 29 deadline imposes undue burdens and is unrealistic. I also believe the 2.5% requirement to maintain ballot status is unrealistic and unfair." Affidavit of Bob Newland (attached as Exhibit 1) (hereinafter "Newland Afft.") at ¶ 5. According to Newland, "based upon my past experience and understanding of the present situation in South Dakota, it does not appear that the circulators for the Libertarian Party will meet the existing March 29 deadline for the collection of signatures." *Id*. at ¶ 9. If the deadline is missed and the Libertarian Party is denied a place on the 2016 ballot, all of their supporters will suffer irreparable injury. *See id*. at ¶ 8 ("If the ballot access requirements are not met, then I will be disfranchised as a Libertarian.")

Ken Santema, the Chair of the Libertarian Party of South Dakota, agrees with Newland that "it is unlikely that the Libertarian Party of South Dakota will attain ballot access in 2016. March 29 is simply too close of a deadline to overcome the problems we have experienced thus

far collecting signatures." Affidavit of Ken Santema (attached as Exhibit 2) (hereinafter "Santema Afft."), at ¶ 8. Both Newland and Santema agree that one of the major problems in collecting signatures in South Dakota is that the current deadline forces the parties to gather their signatures during winter months. As Santema explains, "the current deadline places petition circulation at what is often the harshest and coldest part of the year in South Dakota." *Id*. at ¶ 7. Plaintiff Lori Stacey, State Chair of the Constitution Party of South Dakota, agrees that the cold weather in South Dakota "has been another serious impediment drastically slowing our efforts down in collecting signatures." Affidavit of Lori Stacey (attached as Exhibit 3) (hereinafter "Stacey Afft.") at ¶ 17.

All affiants agree that the closer it gets to the primary and general elections, the easier it is for third parties to gain supporters and raise money, as voters realize that the candidates of the major parties do not represent their viewpoints. In South Dakota, however, by that time it is too late for a party to gain access to the ballot. *See* Santema Afft. at ¶ 7; Stacey Afft. at ¶¶ 6, 11-12.

Santema's affidavit explains the concerted efforts that Mr. Santema and the National Libertarian Party have made in an attempt to meet the March 29 deadline. Santema first began trying to get volunteers to collect signatures in late summer of 2015, and although the volunteers were confident they could gather hundreds, if not thousands, of signatures while also circulating petitions for an initiated measure, they produced far fewer signatures than anticipated, and some of those lacked the necessary notary attestations. Mr. Santema personally drove around eastern South Dakota at his own expense to train volunteers on petition circulation, but the canvassers still failed to produce many valid signatures. *See* Santema Afft. at ¶¶ 4-6.

Last fall, Mr. Santema states, the National Libertarian Party invested $15,000 to assist in gathering signatures, but even this was insufficient. For one thing, there were many petitions being circulated for ballot initiatives. Voters apparently did not have the time or interest to stop and sign numerous petitions when confronted at public locations, such as courthouses, where canvassers typically go to find voters. Moreover, there were so many initiatives being pursued this year that there was a competition in hiring good canvassers, and some well-financed initiatives were able to pay good canvassers more money than the Libertarian Party could afford to pay. *Id*. *See also* Stacey Afft. at ¶ 14.

The sparse population of South Dakota presents difficulties to canvassers seeking signatures. Circulating petitions door-to-door is very time-consuming and ineffective. Petitioners have found it more useful to canvass in front of the county courthouse, used by many voters each day. The significant competition this year, however, made those efforts unproductive. Santema Afft. at ¶¶ 4-6; *See also* Stacey Afft. at ¶ 14 (noting "the competition for a place to gather signatures"). Exacerbating the problem is that South Dakota, unlike other states, does not have "open-access" laws that force private storeowners such as Walmart to allow canvassers to engage in political activities on their property. *See* Stacey Afft. at ¶¶ 14, 16. This drastically reduces the locations where canvassers can obtain numerous signatures in a short period of time. As Stacey explains, canvassers had always been able to collect signatures at fairs and convention centers, but this year "we were instead met with outrageous violations of our First Amendment ability to petition even in public places." *Id*. at ¶ 16.

Canvassers this year have even experienced unusual resistance from an administrator of the Minnehaha County Administration Building. On February 10, 2016, a petitioner working for

the Constitution Party went inside that building to collect signatures due to the freezing weather outside. A building administrator forced him back outside, saying that the weather wasn't "inclement" enough, even though the Weather Channel's website "showed a current wind chill temperature of only 2 degrees." *Id*. at ¶ 18.

Plaintiffs believe from their many years of experience that the March 29 deadline is severely detrimental to their Party's political activities. As Mr. Santema explains, "[b]eing able to circulate around the time of the primary election would be of great benefit for the Libertarian Party of South Dakota. It would also be easier to fund-raise at that time to pay circulators to gain signatures." Santema Afft. at ¶ 7. *See also* Stacey Afft. at ¶ 5.

Plaintiffs' experience from prior elections demonstrates that in order to obtain 6,936 *valid* signatures, at least 11,000 signatures must be gathered. Stacey testified the Constitution Party would "realistically need to turn-in 11,560 signatures in order to be able to feel safe and confident of being successful." Stacey Afft. at ¶ 12. Stacey identified other problems that seriously impede the Party's efforts to collect signatures. One is that South Dakota is a closed primary state which requires voters to register as a member of a party to vote in its primary. According to Stacey: "This can have a direct impact on the ability to build the Constitution Party and retain our members through the pre-presidential primary season." *Id*. at ¶ 5. Another problem is that the Constitution Party is small and finding volunteers is difficult. As a result, "we must have a significant amount of funds available to pay for paid circulators throughout the entire petition drive." *Id*. According to Stacey: "The negative impact on our efforts to have a successful party petition have been met with nothing short of a devastating perfect storm of problems in 2015-2016." *Id*. at ¶ 20.

Plaintiff Joy Howe is the Secretary of the Constitution Party of South Dakota. As a voter, she believes it is important for minor or new parties to have a fair chance to get on the ballot to address issues often avoided or ignored by the major parties and to encourage a dynamic electorate. Affidavit of Joy Howe (attached as Exhibit 4) (hereinafter Howe Afft.) at ¶ 2. Howe believes her rights as a voter are diminished if minor or new parties are denied a fair chance to get on the ballot, and that being denied a fair chance to vote for a Constitution candidate would not only violate her right to vote but would "destroy[] my desire to participate in the process." Howe Afft. at ¶ 3.

Gathering signatures is no easy task even in good weather. Plaintiff Stacey has spent many days trying to get people to sign her party's petition. Most paid volunteers she uses average only ten signatures an hour, and only if they find a place with good foot-traffic that day. *See* Stacey Afft. at ¶ 19. Both the Libertarian and Constitution Parties have made and are making strenuous efforts to obtain the necessary signatures by the March 29 deadline, but despite their best efforts, they are not likely to succeed. Failure to meet the deadline will mean that both parties will be barred from placing their Presidential and other candidates on the November 8, 2016 election ballot with the party label. This will result in the effective disenfranchisement of all four of the personal Plaintiffs in that election.

IV. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

All four prongs of the preliminary injunction test weigh heavily in Plaintiffs' favor. Indeed, the difference in hardships could not be starker: unless an injunction is granted and the March 29 deadline is suspended, Plaintiffs will suffer an irreparable loss of their voting and associational rights, whereas extending the deadline will have virtually no impact on Defendants.

An extension will merely allow the Libertarian and Constitution Parties additional time to demonstrate whether they have sufficient community support to deserve placement on the ballot. South Dakota has no legitimate interest in keeping off the ballot a party that meets that showing. *See Anderson*, 460 U.S. at 792, 806. To the contrary, democratic values are best served "when election campaigns are not monopolized by the existing political parties." *Id*. at 794. *See also MacBride*, 558 F.2d at 448.

1. Plaintiffs are likely to prevail on the merits.

Plaintiffs must first show they are likely to prevail on the merits of their claims. Unless they make that showing, the Court need not examine the other three elements of the preliminary injunction test. *See Planned Parenthood*, 530 F.3d at 731-32; *Myers*, 49 F. Supp.3d at 663. Here, Plaintiffs easily satisfy this first prong because South Dakota's access requirements are unreasonable on their face. Most glaringly, South Dakota's March 29 deadline is so far in advance of the major parties' July 2016 nomination conventions and the November general election that voter dissatisfaction necessary to support a third party cannot yet be expected to exist. Therefore, it is unreasonable for South Dakota to require new parties to gather 6,936 signatures by that date.[3] Indeed, in *McLain* the Eighth Circuit invalidated and even later deadline than South Dakota's March 29 deadline, explaining:

> North Dakota's filing deadline of June 1, . . . more than one hundred fifty days before the general election is particularly troublesome. . . .[M]ost voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties. This dissatisfaction often will not crystalize until party nominees are known . . . . Accordingly, it is important that voters be permitted to express their support

[3] The March 29 deadline is also far in advance of South Dakota's primary election. Pursuant to SDCL § 12-2-1, primaries in South Dakota occur the first Tuesday in June, which this year is June 7. That is 70 days (10 weeks) after the March 29 filing deadline.

> for independent and new party candidates during the time of the major parties' campaigning *and for some time after the selection of candidates by party primary*.

McLain, 637 F.2d at 1164 (emphasis added).

MacBride is equally relevant. *MacBride* concerned a Nebraska law that created a February 11 deadline but had only a 1 percent signature requirement (in comparison to South Dakota's March 29 deadline and 2½ percent requirement). *Id.* at 446. The fatal flaw in the Nebraska scheme was the early deadline. It was "completely unreasonable and unrealistic" for Nebraska to require a new party to qualify (as South Dakota does, too) "in advance of primary elections and at a time when the individual's candidacy itself is purely potential and contingent upon developments that may occur months later." *Id.* at 449. Voter discontent "sufficient to produce third party movements and independent candidacies does not [ordinarily] manifest itself until after the major parties have adopted their platforms and nominated their candidates." *Id.* Consequently, Nebraska's pre-primary filing deadline was "an arbitrary restriction upon the right of voters to vote for candidates of their choice." *Id.*, at 448-449.

MacBride and *McLain* both relied on the Supreme Court's 1968 decision in *Williams v. Rhodes*, which found early ballot access deadlines inherently suspect:

> Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the [general] election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well.

Id., 393 U.S. at 33.

Also directly on point is *Anderson v. Celebreeze*, in which the Court struck down a March filing deadline. In March, the general election is still seven months away, when neither the issues are settled nor the candidates of the major parties are known. At this point in time, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Id*. at 792. Therefore, a March deadline "is especially difficult for the State to justify." *Id.* at 793. *See also New Alliance Party v Hand*, 933 F 2d 1568 (11th Cir. 1991) (invalidating as too early an April deadline for minor parties to submit nominating petitions); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) ("Deadlines early in the election cycle require minor political parties to recruit supporters at a time when the major party candidates are not known and when the populace is not politically energized," adversely impacting the right to vote and to associate); *Council of Alternative Political Parties v. Hooks,* 121 F.3d 876, 880 (1997) (invalidating an April deadline because it required third parties to rally support "when the election is remote and voters are generally uninterested in the campaign"); *Stoddard v. Quinn*, 593 F. Supp. 300, 304 (D. Me. 1984) (invalidating an April deadline for non-party candidates because it required signatures to be gathered "when election issues are undefined and the voters are apathetic").

Many third party movements in our history were formed only *after* the major parties had selected their candidates. "Theodore Roosevelt did not run for President as the nominee of the Bull Moose Party until he had failed to gain the regular Republican nomination at the national convention of that party held in Chicago in June 1912." *MacBride*, 558 F.2d at 449 n.6. "Indeed, several important third-party candidacies in American history were launched after the two major

parties staked out their positions and selected their nominees at national conventions during the summer." *Anderson*, 460 U.S. at 791-92 (footnote omitted).

It would be one thing if South Dakota's March 29 deadline was accompanied by a signature requirement of, say, 500 voters. But SDCL § 12-5-1 imposes a 2½ percent signature requirement, rendering this statute patently indefensible. In *Williams v. Rhodes*, the Court, in striking down Ohio's 15 percent party access requirement, noted that 42 other states had signature requirements of 1 percent or less and that these states reported "no significant problems" with that standard. *Id*., 393 U.S. at 33 n.9. Today, South Dakota's signature requirement is higher than 47 other states. *See* Winger Afft. at ¶ 5.

Plaintiffs are not unsympathetic to the legitimate needs of South Dakota to regulate its ballot and protect against fraudulent candidacies. But comparing this State's requirements with those in other states demonstrates that South Dakota can achieve all of its legitimate goals far less oppressively. In other words, Defendants have a lot of explaining to do: is South Dakota really that different to justify such unusually onerous ballot restrictions? After all, as the Eighth Circuit has admonished: "The remote danger of multitudinous fragmentary groups cannot justify an immediate and crippling effect on the basic constitutional right to vote for a third party candidate." *McLain,* at 1165.

"New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams v. Rhodes*, 393 U.S. at 32. Based on overwhelming precedent, Plaintiffs are likely to prevail at trial by demonstrating that SDCL § 12-5-1 violates both the right to vote and the freedom of association. Plaintiffs have therefore satisfied the first prong of the test.

2. Plaintiffs are likely to suffer irreparable injury.

The next consideration is whether Plaintiffs are likely to suffer irreparable injury unless a preliminary injunction is issued. *See Planned Parenthood*, 530 F.3d a 731-32; *Myers*, 49 F. Supp.3d at 663. Clearly, they will: the Supreme Court and the Eighth Circuit have repeatedly recognized that unreasonable restrictions on ballot access deprives supporters of both the right to vote and the freedom of association. *See* cases cited above at 3-7, 14-17.

Absent an injunction, the Libertarian and Constitution Parties and their members will be denied the opportunity to place party candidates on the ballot for South Dakota's 2016 Presidential election and enjoy the rights and benefits associated with that status, including the ability to spread their political message through official campaigning, gain the attention and support that necessarily flow with appearance on the ballot, increase their name recognition, more easily recruit followers and volunteers in the future, and associate with other like-minded supporters in voting for the candidates of their choice. In short, unless a preliminary injunction is issued, even if this Court should later determine that the March 29 deadline is unconstitutional, every voter in South Dakota who might have cast a ballot for the candidates of the Constitution and Libertarian parties will be disenfranchised in the November election.

For now, it must be *assumed* that SDCL § 12-5-1 will cause Plaintiffs to suffer irreparable harm, given that Plaintiffs have shown they are likely to prevail on the merits. As Judge Piersol explained in *Myers*, "[o]nce a constitutional injury has been demonstrated, the Court assumes that [the plaintiff] has satisfied the irreparable harm prong. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ('The loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.')" *Myers*, 49 F. Supp.3d at 668. Plaintiffs have thus satisfied the second prong of the test.

3. The harm to the Plaintiffs outweighs the harm the Defendants may incur.

The Supreme Court and the Eighth Circuit have repeatedly held, as just explained, that citizens lose both their right to vote and their freedom of association when the third parties they support are denied reasonable access to the ballot. Here, then, Plaintiffs will suffer irreparable constitutional injury unless South Dakota's March 29 deadline is suspended, given that the Libertarian and Constitution Parties will be permanently barred from appearing on the 2016 Presidential ballot in South Dakota. This harm far outweighs any harm the State may incur if the deadline is suspended long enough for the Court to decide Plaintiffs' claims on the merits.

It must be emphasized that extending the deadline does *not* eliminate Plaintiffs' obligation to obtain the necessary signatures; it only gives them more time to gather them. If neither party gathers those signatures, they will not be on the ballot. In other words, while South Dakota has a strong interest in protecting the integrity of the ballot, it has a negligible interest in maintaining the March 29 deadline. A preliminary injunction would not give the Libertarian nor Constitution Parties a free ride or thwart the State's interests. It would only allow those parties more time to demonstrate they have the requisite support to entitle them a place on the ballot. Therefore, this prong weighs in Plaintiffs' favor.

4. The public interest favors the issuance of a preliminary injunction.

Our democratic form of government depends on maintaining an open and fair ballot, one not monopolized by the political parties that enacted SDCL § 12-5-1. Without a preliminary injunction, the supporters of the Libertarian and Constitution Parties will be denied "not only a

choice of leadership but a choice on the issues as well." *Williams v. Rhodes*, 393 U.S. at 33. The loss of those rights is especially difficult to defend given that Plaintiffs will be denied the right to cast a meaningful vote in a Presidential election, in which South Dakota's interests are diminished and Plaintiffs interests are at their apex. *See Anderson*, 460 U.S. at 787-88.

The public has everything to gain and nothing to lose by having this Court grant a preliminary injunction. Section 12-5-1 impinges on associational and voting rights. Therefore, "[t]he public interest favors corrective action in this case." *Myers*, at 669.

A number of courts have issued preliminary injunctions to suspend the imposition of an unreasonably early ballot access deadline or other restriction on ballot access. *See Norman v. Reed*, 502 U.S. 279, 287 (1992) (reversing denial of a preliminary injunction and entering a stay pending review, thereby enabling third party to appear on ballot); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 879-884 (3d Cir. 1997) (granting preliminary injunction to suspend New Jersey's April 10 deadline); *Rockefeller v. Powers*, 78 F.3d 44, 45 (2d Cir. 1996) (affirming preliminary injunction easing ballot access requirements and requiring that candidates' names appear on ballot); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008) (granting preliminary injunction and ordering Secretary of State to place candidates on the ballot); *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722 (E.D.N.C.), *aff'd and modified*, 27 F.3d 563 (4th Cir. 1994) (granting preliminary injunction in January to extend February filing deadline for judicial candidates seeking to have their names on the November ballot).

Thus, Plaintiffs have satisfied all four prongs of the test and are entitled to a preliminary injunction halting the enforcement of the March 29 deadline. Plaintiffs suggest that the Court

suspend the deadline until August 1, 2016, or until the Court can render a decision on the merits of this case, whichever is sooner. An August 1 deadline will give Plaintiffs reasonable time to gather the necessary signatures while also ensuring that the State will have ample time to prepare a final ballot prior to the November election.

ADDENDUM

There is a gorilla in the room that Plaintiffs wish to identify, even though the Court need not do anything about it at this time. The fact is, enjoining the enforcement of SDCL § 12-5-1 will be an incomplete remedy unless Defendants agree to also suspend the enforcement of SDCL § 12-6.8.1.

SDCL § 12-6-8.1 requires that candidates for certain statewide offices—including the US House and Senate, and State House and Senate—must submit individual petitions to the South Dakota Secretary of State by March 29 (containing a certain number of signatures depending on the office) if they wish to appear on the ballot with their party label. Therefore, suspending the *party* deadline set by § 12-5-1 without also suspending the *candidate* deadline set by § 12-6-8.1 could result in the anomalous situation where the Libertarian and Constitution Parties will have columns on the ballot but most of their candidates will not qualify to have their names placed in those columns. (The need to submit a candidate petition does not apply to candidates for President, Vice-President, presidential electors, Lieutenant Governor, Attorney General, Secretary of State, Auditor, Treasurer, Commission of School and Public Lands, and Public Utilities Commissioner. *See* SDCL § 12-5-21.)

Plaintiffs certainly hope—and reasonably expect—that if this Court enjoins § 12-5-1 and sets a new deadline for party access based on the constitutional principles set forth above,

Defendants will set an identical deadline under § 12-6-8.1 for candidate access. An even better solution is for Defendants to interpret SDCL § 12-6-9 as not requiring an unopposed party candidate to submit a petition *at all* and allow them to be selected at the party's convention, which seems the clear intent of § 12-6-9. If Defendants refuse to do at least one of the above, Plaintiffs will seek a further remedy from the Court. Plaintiffs will brief the issue at that juncture, but there is abundant authority for this Court to order the placement of a candidate on a state's election ballot where that candidate was unconstitutionally denied such placement, or to allow a party to select that candidate by convention after the deadline for submitting a candidate petition had passed. *See, e.g., Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008); *Citizens to Establish a Reform Party in Arkansas v Priest*, 970 F. Supp 690 (E.D. Ark. 1996); *Socialist Labor Party v. Rhodes*, 318 F. Supp 1262 (S.D. Ohio 1970).

CONCLUSION

Plaintiffs respectfully request the issuance of a preliminary injunction suspending enforcement of SDCL § 12-5-1 until August 1, 2016.

Respectfully submitted this 22nd day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following counsel for defendants:

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