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

LIBERTARIAN PARTY OF SOUTH DAKOTA, et al.,	)	
Plaintiffs,	)	
v.	)	Civ. No. 15-4111-KES
SHANTEL KREBS, et al.,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment, Doc. 25, is without merit and should be denied.

INTRODUCTION

This lawsuit challenges the early deadline set by SDCL 12-5-1 by which a new or newly-qualifying political party may organize and participate in South Dakota elections on the grounds that the deadline violates Plaintiffs' rights under the First and Fourteenth Amendments of the United States Constitution. *See* Amended Complaint, Doc. 19. Section 12-5-1 requires that: "A new political party may be organized and participate in the primary election by filing with the secretary of state not later than the last Tuesday of March at five p.m. prior to the date of the primary election, a written declaration signed by at least two and one-half percent of the voters of the state as shown by the total vote cast for Governor." The filing deadline for 2016 is March 29, and the number of required signatures is 6,936. *See* Brief in Support of Defendants' Motion for Summary Judgment ("Defendants' Brief"), Doc. 26, at 3.

Upon information and belief, every Secretary of State until today interpreted SDCL 12-5-1 as limiting a new political party to just one method by which that party could place a candidate on the November general election ballot for *any* office: the party had to comply with that statute's March deadline. *See* Plaintiffs' Statement of Undisputed Material Facts (hereinafter, "Plaintiffs' SUF") at ¶ 5. In their Answer to Plaintiffs' Amended Complaint (Doc. 21), however, Defendants state that there is, in fact, a second method to obtain ballot access, at least for certain candidates. "New political parties are not precluded from organizing and nominating candidates at a state convention as provided in SDCL 12-5-21." Doc. 21, ¶ 7.

SDCL 12-5-21 provides: "The state convention shall nominate candidates for lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, commissioner of school and public lands, and public utilities commissioner and in the years when a President of the United States is to be elected, presidential electors and national committeeman and national committeewoman of the party." Defendants conclude that: "Applying these dates to the 2016 calendar, the last possible date a new political party could file a written declaration pursuant to SDCL 12-5-1 [for the above eight offices] is July 11, 2016." *Id.*

Defendants discuss this second option in their brief: "A political party that seeks to pursue having a presidential candidate on the general election ballot has two options. SMJ 41. The first option is for the presidential candidate to participate in the primary election. SMJ 42. This requires notice to the Secretary of State's office pursuant to SDCL 12-3.14 and SDCL 12-5-3.8. The second option is for the party to nominate presidential electors at the state convention pursuant to SDCL 12-5-21." Defendants' Brief at 17.

Thus, Defendants now interpret state law as creating two sets of candidates, with one set having to satisfy a far more onerous filing deadline than the other. The eight elected offices listed in 12-5-21 (hereinafter, "the eight offices" or "the 12-5-21 candidates") may be selected at the party's convention in August, and the party can wait until July 11 to file its 6,936 signatures for those offices. For all other offices, including US House, US Senate, State House, State Senate, and Governor (hereinafter, the "congressional-legislative-gubernatorial" or "12-5-1" candidates), the party must file its 6,936 signatures by the March deadline set forth in 12-5-1.

Defendants ask this Court to rule as a matter of law on summary judgment "that SDCL 12-5-1 imposes a reasonable and nondiscriminatory restriction on new political parties." Defendants' Brief at 7. That request should be rejected for two reasons.

First, it is unreasonable and discriminatory to force a new party to meet a March 29 signature deadline to select its congressional-legislative-gubernatorial candidates while permitting that same party to wait until July 11 for all others, including candidates for lieutenant governor, state attorney general, secretary of state, state auditor, state treasurer, and President. Under this scheme, for instance, a new party may select its candidate for lieutenant governor at its August convention (and wait until July 11 to file its 6,936 signatures), but if the party wants to also nominate a candidate for governor, it must file its 6,936 signatures by March 29. Indeed, this scheme permits a new party to select all of its statewide candidates at its convention *except* governor. No other state in the nation has created a similar irrational and discriminatory scheme. *See* Supplemental Affidavit of Richard Winger, attached as Exhibit 6, ¶ 3 ("A law that sets a different filing deadline to run for attorney general or lieutenant governor than governor is not rational. There is no other state with such a peculiar election law provision.") Defendants have

yet to offer a single reason—much less a compelling one—why South Dakota must burden the congressional-legislative-gubernatorial candidates in this manner. Unless and until Defendants satisfy that burden, South Dakota's system cannot pass constitutional muster.

Second, the material facts remain in sharp dispute, thus precluding summary judgment. Defendants' Brief evades rather than addresses such critical facts as (1) which candidates receive favored treatment under state law, (2) why, and (3) what compelling interest necessitates this disparate treatment?[1] Plaintiffs strenuously contend that there is no legitimate reason—much less a compelling one—to impose on congressional-legislative-gubernatorial candidates a March 29 signature deadline when the eight 12-5-21 candidates have a July 11 deadline.

Plaintiffs did not raise the issue of disparate treatment of candidates in their Amended Complaint because it was only in Defendants' Answer that this new interpretation of state law was announced. This interpretation is so new, it is not mentioned in Defendants' websites discussing qualifications for ballot access.[2] None of the named Plaintiffs, including Mr. Santema and Ms. Stacey who often communicated during past years with employees of the Secretary of State's office, were ever told that a second option existed under South Dakota law. *See* Affidavit of Ken Santema ("Santema Afft."), attached as Exhibit 2, ¶ 10; Affidavit of Lori Stacey ("Stacey Afft."), attached as Exhibit 3, ¶ 21.

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[1] Nowhere in Defendants' brief is there an acknowledgement that Defendants' second option applies to all statewide offices except for governor. Do Defendants dispute that point or are they just seeking to avoid its implications?

[2] Attached to Defendants' Motion for Summary Judgment is the "South Dakota Election Calendar," Docket 27-2, which does not mention the second option for ballot access. Indeed, the Calendar omits July 11 as being a date of any consequence, while for March 29 the Calendar says: "Last day for a new political party to file petitions declaring organization with the Secretary of State to participate in the presidential primary election. (SDCL 12-5-1.)" A similar omission exists in Defendant Krebs' "2016 Presidential Candidate Ballot Access in South Dakota" https://sdsos.gov/elections-voting/assets/PRESIDENTIALballotaccess2016.pdf (attached hereto as Exhibit 1). This site, intended to explain how to access the ballot in South Dakota, fails to mention the second option.

Plaintiffs welcome this new interpretation of state law because it allows some of Plaintiffs' candidates a later deadline for filing signatures.[3] Defendants' new interpretation narrows this lawsuit. Previously, Plaintiffs believed (based on the actions of prior state officials and Defendants' websites) that the March 29 deadline applied to all candidates. Now, that deadline applies only to the congressional-legislative-gubernatorial candidates, but it remains just as unconstitutional as to them as it always was. For reasons set forth below, Defendants' motion for summary judgment regarding the 12-5-1 deadline should be denied.

II. THE SUMMARY JUDGMENT STANDARD

Plaintiffs have no quarrel with the summary judgment standard set forth in Defendants' brief. *See* Docket 26 at 4. Plaintiffs emphasize that under this standard, the burden is on Defendants (as the moving party) to demonstrate "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. *See Estate of Johnson v. Weber*, 785 F.3d 267, 271 (8th Cir. 2015). In the instant case, not only are the material facts in genuine dispute, but to the extent the material facts are known, South Dakota's March 29 petition deadline violates the First and Fourteenth Amendments.

III. THE ROLE OF THIRD PARTIES IN OUR POLITICAL SYSTEM

Plaintiffs' challenge to SDCL 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

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[3]Ultimately, Plaintiffs will seek a permanent injunction so as to prevent these Defendants or their successors from eliminating the second option for ballot access. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 772 (D.S.D 2015) (recognizing that where, as here, state officials suddenly abandon a long-pursued but unconstitutional policy, victims of that policy are entitled to a permanent injunction to ensure that the defendants or their successors cannot return to their old ways).

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 U.S. policy. During the late 18th and early 19th centuries, for example, 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 certain third party candidates, must be analyzed against this backdrop.

IV. 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 658, 663 (D. S.D. 2014). But as Judge Piersol further noted, because a ballot *access* statute impacts both the right to vote and the freedom of association, two of our most precious liberties, it should be subjected to strict scrutiny. *See id.* at 664-67 (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, by precluding candidates from the ballot, they prevent supporters from voting for them. *See Libertarian Party v. Krebs*, 4:15-cv-4111-KES (Order Granting Plaintiffs' Motion to Amend Complaint, Jan. 26, 2016) (Doc. 18) 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 of the type at issue here 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"). 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 not only that a compelling interest requires that the congressional-legislative-gubernatorial candidates meet a March 29 deadline but also that no later deadline would suffice. *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."); *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."). Moreover, in determining whether Defendants have met their burden of proof, this Court "cannot avoid a hard and realistic review of [South Dakota's] access statute" and to consider all of 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 (access laws must be scrutinized "in their totality").

SDCL 12-5-1, as discussed below, places significant restrictions on access to the ballot by third parties for all of their congressional-legislative-gubernatorial candidates. Therefore, Defendants have the burden of proving that South Dakota's interests actually require those restrictions and that nothing less drastic will suffice. Obviously, it will be difficult (if not impossible) for Defendants to meet that burden, given that South Dakota is satisfied with a July 11 deadline for all eight 12-5-21 offices, including lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, and presidential electors. As yet, Defendants

have not even tried to show that granting the same July 11 deadline to the congressional-legislative-gubernatorial candidates would threaten a compelling state interest.

V. THE BURDENS IMPOSED BY SDCL 12-5-1

The burdens imposed by SDCL 12-5-1 are multiple. They include the March 29 deadline combined with a 6,936-signature requirement. Also, the most practical time to gather signatures occurs in the months prior to the November general election, but because of the March 29 deadline, canvassers in South Dakota must gather signatures during South Dakota's winter. Another obstacle is the State's sparse population.

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.") ¶ 5. According to Newland, if the March 29 deadline is missed and the Libertarian Party is denied a place on the 2016 ballot for congressional-legislative-gubernatorial candidates, he 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 "March 29 is simply too close of a deadline to overcome the problems we have experienced thus far collecting signatures." Santema Afft. ¶ 8. One major problem 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.* ¶ 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." Stacey Afft. ¶ 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 views. *See* Santema Afft. ¶ 7; Stacey Afft. ¶¶ 6, 11-12.

Santema and the National Libertarian Party have made a concerted effort this election to meet the March 29 deadline. Santema first began trying to get volunteers to collect signatures in late summer 2015. 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. ¶¶ 4-6. Last fall, 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. ¶ 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. ¶¶ 4-6; *See also* Stacey Afft. ¶ 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 store owners such as Walmart to allow canvassers to engage in political activities on their property. *See* Stacey Afft. ¶¶ 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.* ¶ 16.

Defendants contend the sparse population in South Dakota is not a factor because all signatures can be collected from one of the major cities in the state. Defendants' Brief at 9. The sparse population is, however, a serious factor because *candidate* petitions can only be signed by members of the party. In their brief, Defendants fail to inform the Court that there are two deadlines that occur on March 29: one for the party and one for the candidate. A new party must submit a written declaration signed by 6,936 voters. *See* SDCL 12-5-1. In addition, each candidate who wishes to appear on the ballot with his/her party label must submit a separate petition signed by the number of *party members* prescribed in SDCL 12-5-1.4. For Governor, that number is 250. Yet, the Constitution Party only has 593 registered members *in the entire state*. *See* Plaintiffs' SUF ¶ 6 (citing email from Kea Warne, Deputy Secretary of State). Thus,

a person could spend a lifetime standing in front of the Minnehaha County Administration Building and never find 250 members of the Constitution Party passing by.

Plaintiffs believe from their many years of experience that the early 12-5-1 deadline has been severely detrimental to their Party's political activities. As Santema explains, "[b]eing able to circulate around the time of the [June] 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. ¶ 7. *See also* Stacey Afft. ¶ 5.

Plaintiffs' experience from prior elections demonstrates that in order to obtain 6,936 *valid* signatures, more than 11,000 signatures should be gathered if possible. 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. ¶ 12. Stacey identified other problems that seriously impede the Party's efforts to collect signatures. One 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," which her party does not have. *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*. ¶ 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.) ¶ 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." *Id.* ¶ 3.

Gathering signatures is difficult 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. ¶ 19.

Defendants note that Plaintiffs have a full year to gather signatures (from March 29, 2015 to March 29, 2016), which they claim is more than ample time. Has Mr. Jackley or Ms. Krebs ever tried to gather signatures in March of a non-election year, nearly 20 months prior to the next general election, and have they ever tried to gather signatures for a new political party? While this option is theoretical, it is not practical. Besides, it takes money to hire canvassers to gather these signatures, and it is exceedingly difficult to raise money in non-election years. *See* Santema Afft. ¶ 9; Stacey Afft. ¶ 20. *See also Anderson v. Celebreeze*, 460 U.S. at 792-93 (noting that forcing a candidate to gather signatures even eight months prior to a general election "is especially difficult for the State to justify" because "[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.")

Defendants seek to defend the March 29 deadline by saying that the Libertarian and Constitution parties have "demonstrated consistent success in gaining access to the South Dakota ballot." Defendants' Brief at 6. But Defendants fail to note that most of these successes occurred when the South Dakota petition deadline was in April. When the deadline went from

April to March in 2007, the Libertarian Party petition failed in 2008. There have been only three successful petition drives for parties since the March 29 deadline went into effect: the Constitution Party in 2008 and the Libertarian and Constitution Parties in 2012. *See* Affidavit of Richard Winger (attached as Exhibit 5) ¶ 12. Besides, the willingness of party members to brave freezing temperatures and long hours to gather signatures, and the willingness of the Parties to devote scarce financial resources to South Dakota, is a testament to their devotion and tenacity, not a sign that South Dakota's early deadline is reasonable and actually necessary.

VI. THE MARCH 29 DEADLINE IS UNDULY BURDENSOME AND NOT NARROWLY TAILORED

In *Anderson v. Celebrezze*, the Supreme Court struck down Ohio's March filing deadline for independent presidential candidates because the state's "minimal" interests in imposing such an early deadline did not justify the "extent and nature" of its burdens. 460 U.S. at 806. This Court should reach the same conclusion regarding SDCL 12-5-1 for the same reasons.

Defendants contend that South Dakota's March 29 filing deadline is not burdensome because "South Dakota's presidential primary is one of the latest in the nation." Defendants' Brief at 11. That argument is a *non sequitur*. Plaintiffs are not challenging the date of the primary election but, rather, the date by which a new political party must submit its signatures in order to *participate* in that election.[4] South Dakota could have the latest primary in the country and it would not offset its early filing deadline. Defendants, in other words, ask the wrong question, and that is why they reach the wrong answer. The question is not whether South Dakota's primary election is early or late. The question is whether South Dakota has a

[4] The Plaintiff Parties do not want a primary election, given that they never have more than one candidate for office. *See* Stacey Afft. ¶¶ 7-8, 21. Under South Dakota law, however, the only way for them to have their congressional-legislative-gubernatorial candidates appear on the *general* ballot in November is to qualify for the primary ballot.

compelling interest that requires congressional-legislative-gubernatorial candidates to submit party signatures by March 29 in order to participate in that election.

Defendants have not even attempted to show—and, Plaintiffs submit, cannot possibly show—that nothing less drastic than a March 29 signature deadline will suffice for the 12-5-1 candidates. The state already has a July 11 deadline for lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, and other candidates, and allows them to be selected at the party's convention. There is no rational (much less compelling) reason why the 12-5-1 candidates cannot be selected the same way. Why should a candidate for governor be forced to file a party petition by March 29 when the lieutenant governor can wait until July 11?

South Dakota's March 29 deadline is so far in advance of the major parties' July 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. Indeed, in *McLain v. Meier*, the Eighth Circuit invalidated a far 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 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*.

Id., 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). The fatal flaw in the Nebraska scheme was the early deadline, despite the lower signature requirement. It was "completely unreasonable and unrealistic" for Nebraska to require a new party to qualify "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." 558 F.2d 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.

393 U.S. at 33. *See also Anderson v. Celebreeze*, 460 U.S. at 792-93 (noting that a March deadline "is especially difficult for the State to justify" because this is so early in the election process that "[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."); *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 (3rd Cir. 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"); *Nader v. Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2011) (finding a June 9 deadline for independent presidential candidates not "narrowly tailored to further compelling administrative needs"); *Greaves v. State Board of Elections of North Carolina*, 508 F. Supp. 2d 78, 84 (E.D.N.C. 2009) (invalidating filing deadline of April 25 for independent candidates seeking access to the general ballot for president). These cases cast a long shadow over South Dakota's March 29 deadline, and it would seem impossible that Defendants can introduce sufficient evidence to save it.

South Dakota would have an easier time defending its March 29 deadline if the signature requirement were, say, 500 voters. But SDCL 12-5-1 also imposes a 2½ percent signature requirement, rendering 12-5-1 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. ¶ 5.

Defendants rely on *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988) ("*McLain II"*), to support their argument that SDCL 12-5-1 is constitutional. That reliance is misplaced. For one thing, the deadline at issue in *McLain* was April 15, not March 29, and the court found the April 15 deadline "troubling." *Id.*, 851 F.2d at 1049. The court upheld the deadline because it was "mitigated" by the fact that "there is no voter registration in North Dakota, so that any United States citizen who has attained the age of eighteen and who has resided in a precinct thirty days may sign a third party petition," and thus signatures could not be verified at the state level. *Id*. In South Dakota, by contrast, a party must gather far more than 6,936 signatures because the state has voter registration and signatures are verified.

Defendants also rely upon *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011), a case clearly distinguishable from the present case. For one thing, *Green Party* involved how a party certified for the current election would retain its certification for the next election, and not how a party could get on the ballot in the first instance. The case it did not involve a petition deadline, as here. In fact, at the time the complaint in *Green Party* was filed, the deadline by which a party had to file its signatures to get on the ballot in the first instance was June 30 (two months later than South Dakota's deadline). Notably, Defendants fail to mention a single one of the cases cited above that invalidated early petition deadlines, including *McLain I*, which invalidated a June 1 deadline.

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). In South Dakota, however, by the time the major parties select their candidates, it will be far too late for voters to promote any third party candidates for congressional-legislative-gubernatorial seats unless those candidates had already submitted party signatures by March 29.

Now that Defendants have interpreted South Dakota law as bestowing on third parties a choice, Defendants have jumped from the frying pan into the fire. First, as just explained, it is irrational and discriminatory to confer on one set of candidates a July 11 deadline while saddling another set with a March 29 deadline. Second, the Supreme Court has made it clear that a state cannot force a political party to follow a particular course of internal conduct when another course of conduct would otherwise be available. In *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), for instance, the Court recognized that "[a] political party has a First Amendment right to . . . choose a candidate selection process that will in its view produce the nominee who best represents its political platform." *Id*. 552 U.S. at 202. Here, Plaintiffs believe the convention method of candidate selection best represents their interests and political platforms and they have always wanted to select their candidates that way. *See* Stacey Afft. ¶ 21. Therefore, Defendants violate First Amendment rights by forcing Plaintiffs to meet a March 29 deadline, when all that does is qualify their candidates for a *wholly unnecessary* primary election. Other decisions similarly support the First Amendment rights of political parties to regulate their

own affairs. In *Eu v. San Francisco County Democratic Committee*, 489 U.S. 214 (1989), the Court unanimously held that a state cannot tell political parties how to structure themselves, where to hold their state conventions, or to rotate their party chairs every two years. Such laws, the Court concluded, "burden the First Amendment rights of political parties and their members without serving a compelling state interest." *Id.,* at 233. In *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975), the Court held that a political party, and not the state, had the right to determine intra-party disputes as to which delegates should be seated, provided it acts within the confines of the Constitution. In *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), the Court held a state could not, consistent with the First Amendment, compel a political party to accept the results of a state primary that was conducted contrary to national party rules.

Perhaps Defendants would prefer that new parties select their congressional-legislative-gubernatorial candidates by a primary, while allowing them to select eight other candidates by convention. But South Dakota cannot force new parties to follow the state's preferences. Plaintiffs' desire to nominate candidates for all offices by convention raises no constitutional concerns and is protected by the First Amendment.

Admittedly, South Dakota has an interest in regulating the ballot and protecting against voter confusion and fraudulent candidacies. But South Dakota can achieve all of those goals far less oppressively than by imposing a March 29 deadline. South Dakota has not produced any evidence to show that it has a compelling need to force congressional-legislative-gubernatorial candidates to file party petitions more than three months earlier than petitions filed by candidates for eight other offices. "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. SDCL 12-5-1 fails to provide that time and opportunity.

Conclusion

The overwhelming legal precedent, the evidence Plaintiffs have produced thus far, and the sheer absence of evidence from Defendants, demonstrate that SDCL 12-5-1, as it applies to the congressional-legislative-gubernatorial candidates, violates Plaintiffs' right to vote and their freedom of association protected by the First and Fourteenth Amendments. Defendants' motion for summary judgment is without merit and should be denied.

Respectfully submitted this 23rd day of March, 2016.

/s/ M. Laughlin McDonald
M. Laughlin McDonald
American Civil Liberties Union Foundation
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
T/404-500-1235
F/404-565-2886
Lmcdonald@aclu.org

/s/ Stephen L. Pevar
Stephen L. Pevar
American Civil Liberties Union Foundation
330 Main Street, 1st Fl.
Hartford, CT 06106
T/860-570-9830
F/860-570-9840
spevar@aclu.org

/s/ Brendan V. Johnson
Brendan V. Johnson
Robins Kaplan, LLP

101 S. Main Street, Suite 100
Sioux Falls, South Dakota 57104
T/605-335-1300
F/612/339-4181
Bjohnson@robinskaplan.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 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 person:

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

/s/ Stephen L. Pevar____________________
Stephen L. Pevar