

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

LIBERTARIAN PARTY OF SOUTH)	Civ. No. 4:15-CV-4111-KES
DAKOTA, et al.,)	
)	
Plaintiffs,)	PLAINTIFFS’ REPLY BRIEF IN
)	SUPPORT OF PLAINTIFFS’
v.)	MOTION FOR SUMMARY JUDGMENT
)	
SHANTEL KREBS, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pending before the Court are the parties’ cross-motions for summary judgment on the constitutionality of SDCL 12-5-1. The answer to that question will determine, among other things, whether two Constitution Party candidates for office—one for U.S. Senate and the other for the South Dakota House of Representatives—will have their names placed on the 2016 general election ballot. The Secretary of State has notified the Court that the Secretary needs an answer by August 16 in order to have the ballot printed and distributed on time.

Plaintiffs have already written three briefs on the issues presented for summary judgment: the first (Docket 33) in reply to Defendants’ first motion for summary judgment, the second (Docket 55) in support of Plaintiffs’ motion for summary judgment, and the third (Docket 61) in response to Defendants’ second motion for summary judgment. The brief just filed by the Defendants (Docket 64) raises no new issues. Given the extensive briefing already, Plaintiffs can shorten their arguments here. Six

issues will be addressed in the order in which Defendants raise them in their brief. See Defendants' Brief in Opposition To Plaintiffs' Motion for Summary Judgment (Docket 64) ("Defendants' Opp. Brief").

A.

Defendants state at the outset: "Plaintiffs' arguments stretch SDCL 12-5-1 beyond the point of recognition. Despite Plaintiffs' arguments to the contrary, SDCL 12-5-1 *does not* mandate participation in the primary election." Defendants' Opp. Brief at 4 (emphasis in original). This statement wholly mischaracterizes Plaintiffs' challenge to SDCL 12-5-1.

Plaintiffs' Opening Brief explains in the Introduction that there are two reasons why SDCL 12-5-1 is unconstitutional. Neither reason depends on whether candidates must participate in a primary election: "Plaintiffs ask this Court to grant their Motion for Summary Judgment for two distinct reasons. First, SDCL 12-5-1 imposes an unreasonable filing deadline in violation of the First Amendment. Second, 12-5-1 divides otherwise similarly situated candidates for political office into two sets, invidiously discriminating against one of them in violation of the Equal Protection Clause of the Fourteenth Amendment by imposing greater burdens on them." Plaintiffs' Brief in Support of Summary Judgment (Docket 55) ("Plaintiffs Opening Brief") at 3.

As discussed in detail in Plaintiffs' Opening Brief, SDCL 12-5-1 violates the First Amendment because it creates unreasonable hurdles to access the ballot—an unusually early filing deadline combined with an unusually high signature requirement—and Defendants have failed to prove a compelling interest that requires those

restrictions on First Amendment rights. In addition, SDCL 12-5-1 violates the Equal Protection Clause because it divides otherwise similarly situated candidates into two groups and harshly discriminates against one of them. For example, candidates for governor must meet a March 29 filing deadline whereas candidates for lieutenant governor, attorney general, and secretary of state have the luxury of waiting until July 11. Defendants have been unable to offer a rational reason—much less a compelling one—for those classifications. Thus, primary or no primary, SDCL 12-5-1 is unconstitutional for the reasons explained in Plaintiffs’ Opening Brief.

B.

Defendants claim that Plaintiffs lack standing. According to the Defendants, merely because no Libertarian Party or Constitution Party candidate submitted a nominating petition to the Secretary of State’s office by the March 29 deadline, the Plaintiffs cannot show the requisite injury-in-fact to establish standing. Defendants Opp. Brief at 5-6. Indeed, the Defendants claim that although the Secretary recently prevented two Constitution Party candidates from accessing the ballot for failure to comply with SDCL 12-5-1—US Senate nominee Kurt Evans and State House District 23 nominee Wayne Schmidt—the fault lies at the feet of those candidates and not with SDCL 12-5-1. *Id.* at 6 (“SDCL 12-5-1 is not what is keeping Mr. Evans and Mr. Schmidt off the ballot. These candidates are ineligible for the ballot because they failed to file nominating petitions with a sufficient amount of signatures pursuant to 12-5-1.4.”)

Defendants previously made a similar argument, which the Court rejected based on well-settled law.¹ This Court squarely held: “Plaintiffs have standing to challenge SDCL 12-5-1, even if plaintiffs have not attempted to comply with the statute.” See Order Granting Plaintiffs’ Motion to Amend Complaint and Granting in Part and Denying in Part Defendants’ Motion to Dismiss and Alternative Motion for Change of Venue (Docket 18) (“Docket 18 Order”) at 5. As this Court explained, the plaintiff political parties have standing because they allege that their *candidates* are being unfairly denied access to the ballot, and the four named plaintiffs have standing because they allege that their First Amendment rights as *voters* are being violated because they cannot vote for those candidates. *Id.* at 4-5 (“The restrictive nature of SDCL 12-5-1 impacts plaintiffs’ candidates, whom plaintiffs support. Because SDCL 12-5-1 may unconstitutionally exclude plaintiffs’ candidates-of-choice from the primary election, plaintiffs have standing to challenge the law. . . . Plaintiffs here have shown an injury-in-fact, not merely a generalized grievance. The law’s impact on plaintiffs’ right to vote is sufficient to provide plaintiffs standing.”). Defendants have shown no reason why the Court should reconsider these explicit holdings.

C.

Next, the Defendants claim that the restrictions imposed by SDCL 12-5-1 are “reasonable” and do not impose a severe burden on Plaintiffs’ constitutional rights. Defendants’ Opp. Brief at 6. Defendants’ claim is patently untenable.

¹ At least half of the claims in Defendants’ Brief were previously made and rejected by this Court. Apparently, Defendants see no need to acknowledge that they are relitigating issues they already lost.

SDCL 12-5-1, as discussed in all three of Plaintiffs' previous briefs, imposes one of the nation's earliest filing deadlines and combines that hurdle with one of the nation's highest signature requirements. This Court has already characterized the March 29 deadline in SDCL 12-5-1 as "particularly oppressive" due to its stifling impact on third parties, which tend to garner support "after the major political parties have chosen their candidates and platforms." Docket 18 Order at 11. Moreover, "the late March time burden coupled with the substantial signature requirement is particularly troublesome." *Id.*

Ballot access expert Richard Winger has provided undisputed testimony regarding the oppressive nature of SDCL 12-5-1. First, only two states (Alabama and Oklahoma) have a signature requirement equal to or higher than South Dakota's; the signature requirement in the other 47 states is a small fraction of the 2½ percent requirement set in SDCL 12-5-1. See Affidavit of Richard Winger (Docket 39), ¶ 7. As for the March 29 filing deadline, it is one of—if not *the*—most restrictive in the nation. Only one other state (Alabama) has an earlier deadline, and what is more, "[n]o other state has a deadline that is that much earlier than its [congressional] primary" than South Dakota. *Id.* ¶ 6.

As a consequence of these harsh burdens, SDCL 12-5-1 must be subjected to strict scrutiny. The Court has already reached this conclusion. See Memorandum Opinion and Order Denying Defendants' Motion for Summary Judgment (Docket 43) ("Docket 43 Order") at 7-15. Yet without mentioning the Court's decision on this very

issue, Defendants contend that SDCL 12-5-1 “does not impose a severe burden on Plaintiffs.” Defendants’ Opp. Brief at 10.

SDCL 12-5-1 imposes a signature requirement more onerous than that employed in forty-seven other states and a filing deadline that is among the earliest in the nation, which compels new parties seeking to get their candidates on the ballot to gather signatures during South Dakota’s winter months. SDCL 12-5-1 places a severe burden on Plaintiffs’ right to vote and freedom of association, and must therefore be subjected to strict scrutiny. See Docket 43 Order at 11 (“the court finds that the late March time burden coupled with the substantial signature requirement is particularly troublesome. The reasoning of *McLain I* and *McLain II* supports a conclusion that South Dakota’s ballot access laws place a severe burden on plaintiffs’ rights.”) (citing *McLain v. Meier*, 637 F. 2d 1159 (8th Cir. 1980), *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988)); see *also id.* at 12 (“This court finds that . . . the burden imposed by SDCL 12-5-1 is severe.”); *id.* at 15 (“South Dakota’s ballot access laws impose a severe burden on third parties and their candidates.”). Thus, SDCL 12-5-1 imposes severe burdens on Plaintiffs’ First Amendment rights and must be subjected to strict scrutiny.

D.

Next, the Defendants list the interests they claim justify the requirements set forth in SDCL 12-5-1. See Defendants’ Opp. Brief at 11-14. The glaring flaw with this section of Defendants’ brief is that, although they cite the correct *interests*, they fail to explain how these interests justify SDCL 12-5-1’s *onerous requirements*. For instance, the Defendants cite the fact that each state has an interest in regulating the number of

candidates on the ballot to prevent clogging of its election machinery. Defendants' Opp. Brief at 13, citing *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 697 (8th Cir. 2011). Every state has that same interest, and yet the vast majority of states satisfy that interest in a far less oppressive manner than South Dakota. Nothing in Defendants' brief explains why South Dakota would be compelled to depart from the norm.

Similarly, Defendants claim that "[t]he Secretary of State's Office must be allowed sufficient time to diligently review the signatures submitted pursuant to SDCL 12-5-1." Defendants' Opp. Brief at 11. This argument, too, misses the point. First, every state has the identical need to review signatures, but South Dakota's deadline is the earliest in the nation with respect to the date of its congressional primary. See Affidavit of Richard Winger (Docket 39) ¶ 7. Defendants fail to explain what is so unique about South Dakota that it needs so much more time than everyone else. Moreover, Defendants' argument ignores the fact that the state has *already* determined that July 11 gives the Secretary of State plenty of time to review those signatures. Here again, Defendants cite a valid interest but fail to provide a compelling reason for prohibiting third parties from selecting all of their candidates by convention and submitting their signatures by July 11.

The law is clear that where, as here, a ballot access restriction imposes a severe burden on plaintiff's First Amendment rights, it cannot withstand judicial scrutiny unless it satisfies a compelling state interest and nothing less onerous will suffice. See *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[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.”); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980); *MacBride v. Exxon*, 558 F.2d 443, 448 (8th Cir. 1977) (holding that ballot access requirements “may not go beyond what the state’s compelling interests actually require”).

Plaintiffs acknowledge that all of the interests cited in Defendants’ brief are valid interests. Defendants, however, fail to show that those interests actually require an extremely early signature deadline or an extremely high signature requirement, much less both in combination. Accordingly, SDCL 12-5-1 is unconstitutional.

E.

At the outset of their brief, Defendants accuse Plaintiffs of challenging SDCL 12-5-1 on the grounds that it requires candidates to participate in a primary election, even though, as explained above, Plaintiffs challenge SDCL 12-5-1 on wholly different grounds. Oddly, later in their brief, the Defendants acknowledge that SDCL 12-5-1 *does* require candidates to participate in primary elections, which the Defendants then contend is appropriate. See Defendants’ Opp. Brief at 12 (“Further, the State has an interest in requiring each type of candidate who is currently required to participate in the primary election to do so.”); see *also id.* at 10 (“SDCL 12-5-1 requires a new political party to obtain 6,936 signatures by March 29, 2016, if that party seeks to have candidates participate in the June 7, 2016, primary election.”).

Defendants’ argument is schizophrenic, but in any event, Plaintiffs reiterate that their challenge to SDCL 12-5-1 is not based on whether candidates are mandated to

participate in a primary election. Primary elections are mentioned in the context of SDCL 12-5-1 only because *the Defendants* defend SDCL 12-5-1 on the grounds that the state has created its deadlines based on when the state holds its primary election—an election that is irrelevant to third parties. New political parties have no need to participate in a primary election for any office, so why create early deadlines that apply *to everyone* when not everyone wants to participate in a primary? To use an analogy, what the state is doing here would be as if a school superintendent told a student who had no desire to play football that she needed to apply for the football team seven months before school starts, and if she does not apply, she cannot go to school. See Docket 43 Order at 13 (“Defendants have given no reason why third party candidates for governor must participate in the primary election.”); *see also id.* (“Any argument for why primary elections are necessary for gubernatorial candidates is undermined by the fact that South Dakota apparently does not have a similar interest in the party’s selection of candidates for president, state attorney general, and other state-wide elected officials.”).

In short, the Plaintiffs are not challenging SDCL 12-5-1 on the grounds that it mandates participation in a primary. But because the state admits it created the March 29 deadline so candidates can participate in a primary, this supports Plaintiffs’ argument that SDCL 12-5-1 is unreasonable, given that it makes no sense to apply that deadline to a candidate who has no need to participate in a primary.

F.

Lastly, Defendants' brief states: "Given that the only candidates Plaintiffs are currently requesting be placed on the general election ballot are candidates for the state legislature and U.S. Senate—those are the only offices at issue in the case currently before the Court." Defendants' Opp. Brief at 14. Plaintiffs are not sure what Defendants mean. It may be true that those are the only two offices that will be *immediately* impacted by the Court's decision, but those are not the only offices that will be impacted. After all, the Defendants filed a motion for summary judgment regarding the constitutionality of SDCL 12-5-1—and the Plaintiffs filed a cross-motion—and thus this Court's decision will affect numerous offices, if not in this election then in all future elections. Put another way, this case implicates a facial challenge to 12-5-1, and the Court's decision on the constitutionality of this statute will necessarily impact other candidates subject to its restrictions.

Granted, the only *urgent* issue before the Court concerns whether Mr. Evans and Mr. Schmidt should be placed on the ballot. Plaintiffs know of no way to decide that question, however, without adjudicating the constitutionality of SDCL 12-5-1. This is not a preliminary injunction proceeding. It is a summary judgment proceeding.

ADDENDUM

Plaintiffs have now addressed all of the issues raised in Defendants' response. Plaintiffs wish to add that nowhere in their brief do the Defendants address Plaintiffs' argument that SDCL 12-5-1 violates the Equal Protection Clause. There is no attempt, for instance, to explain why candidates for governor should be saddled with far more

onerous requirements to access the ballot than candidates for lieutenant governor, secretary of state, or attorney general. Defendants have implicitly conceded this issue.

Similarly, nowhere in their brief do the Defendants challenge Plaintiffs' assertion that Defendants' answers to Plaintiffs' discovery were non-responsive and evasive. For instance, Defendants have still not provided a substantive response to Interrogatory 5, which asked "what state interests would be harmed or placed in jeopardy" if a new party were permitted to select all of its candidates the same way as SDCL 12-5-21 allows for some candidates. Additionally, Defendants have not provided a substantive response to Interrogatory 6, which asked Defendants to describe what state interests compels a March 29, 2016 signature deadline for certain offices but not for others. Defendants have implicitly conceded no such compelling interest exists.

Lastly, Plaintiffs wish to confront a claim made by the Defendants in their brief that is not tied to the issues presented on summary judgment but it so untrue that it deserves a rebuttal. Defendants assert: "Further, the signature requirements for new party candidates are less onerous than the signature requirements required to be gathered by other political party candidates. See SDCL 12-6-7 and 12-6-7.1." Defendants Opp. Brief at 4. Plaintiffs' motion for summary judgment focuses on the signature requirement for *party* eligibility and not *candidate* eligibility, but the statement quoted above is grossly incorrect regarding candidate eligibility and deserves to be noted. A new party's candidate for governor must collect 250 signatures *from party members*. For a small party like the Constitution Party, that total is more than 40 percent of the party's membership scattered across the state. No candidate for a major

party must gather anything close to 40 percent of the party's membership for any office. In short, Defendants ignore the facts regarding candidate eligibility just as they ignore the facts regarding party eligibility.

Conclusion

For the reasons set forth above, Plaintiffs' motion for summary judgment should be granted, and the Court should conclude that SDCL 12-5-1 violates both the First and Fourteenth Amendments. As part of the remedy awarded, Plaintiffs respectfully request that Defendants be ordered to place Mr. Evans and Mr. Schmidt on the general election ballot for U.S. Senate and South Dakota House of Representative District 23, respectively.²

Respectfully submitted this 4th day of August, 2016.

² Perhaps as an aside, Defendants note that Plaintiffs have not sought to prove that Mr. Schmidt resides in District 23. First, Defendants have all of his voter registration information and they know where he resides, and they do not deny his lives in District 23. But more importantly, the Secretary of State denied him access to the ballot for one reason only: he failed to comply with SDCL 12-5-1. Plaintiffs challenge the grounds on which Mr. Schmidt was denied access to the ballot.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing Reply Brief with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to Ellie J. Bailey at Ellie.Bailey@state.sd.us.

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