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

LIBERTARIAN PARTY OF SOUTH DAKOTA, et al.,	)	Civ. No. 15-4111-KES
Plaintiffs,	)	PLAINTIFFS' REPLY BRIEF RE:
v.	)	MOTION FOR RECONSIDERATION
SHANTEL KREBS, et al.,	)	
Defendants.	)	

Understanding the procedural history of this case is critical to properly evaluating Plaintiffs' motion for reconsideration. Plaintiffs filed their original complaint on June 15, 2015 (Docket 1), challenging SB 69 on First Amendment grounds. When SB 69 was withdrawn pending the outcome of a referendum vote, the Court authorized Plaintiffs (Docket 18) to file an amended complaint (Docket 12-1) challenging the current law, SDCL 12-5-1, on First Amendment grounds. Notably for our purposes here, Plaintiffs' amended complaint sought *broad* declaratory and injunctive relief against the operation and effect of SDCL 12-5-1. Plaintiffs' prayer for relief asked the Court to:

> (2) Enter a declaratory judgment that South Dakota's deadline set forth in SDCL Section 12-5-1, and in SB 69, for new political parties to submit signed petitions seeking to organize and participate in South Dakota elections violates rights guaranteed to the Plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983;
>
> (3) Enjoin the Defendants from enforcing South Dakota's existing deadline for new political parties to submit signed petitions seeking to organize and participate in elections, and enjoin the state from enforcing SB 69 should that law not be repealed by referendum;
>
> (4) order the Defendants, until such time as the South Dakota

> Legislature enacts a constitutionally adequate law, to provide that a new or newly-qualifying political party can be organized and participate in the general election by submitting the requisite petition not later than August 1 prior to the general election, similar to the system established by Nebraska following *MacBride v. Exon, see* N.R.S. 32-716 (creating a February 1 deadline for a party seeking to participate in the state's second-Tuesday-in May primary, and an August 1 deadline for a party desiring to participate in the general election but not in the primary); . . .
>
> (6) Retain jurisdiction of this action and grant the Plaintiffs any further relief which may in the discretion of this Court be necessary and proper.

Docket 12-1 at 8-9.

Thus, this case was conceived as a broad First Amendment challenge to South Dakota's early filing deadline for new political parties to access the ballot. After the amended complaint was filed, however, Defendants literally handed Plaintiffs a second—and totally independent—ground on which to attack SDCL 12-5-1. Defendants notified the Court that the candidates listed in SDCL 12-5-21 were exempt from the early filing deadline imposed by SDCL 12-5-1 and could wait more than three months longer to file their signatures. As a result of that announcement, Plaintiffs now had a viable challenge to SDCL 12-5-1 under the Equal Protection Clause, as this Court noted in its Memorandum Opinion and Order Denying Defendants' Motion for Summary Judgment (Docket 43) at 13-15.

In other words, what began as a First Amendment challenge was now transformed into both a First Amendment and Equal Protection challenge. There was no need for Plaintiffs to file yet another amended complaint, however, because their Amended Complaint *already* sought relief on the ground that Defendants were violating rights "guaranteed to the Plaintiffs by the First and Fourteenth Amendments to the

United States Constitution, as enforced by 42 U.S.C. § 1983." *See* Docket 12-1 at 8. The addition of an Equal Protection challenge merely gave Plaintiffs a second ground of attack; it did not change the nature of Plaintiffs' claim for relief. The implications of this fact are discussed below.

In addition to reviewing the procedural history of this case, one other issue should be addressed at the outset. In denying Plaintiffs' motion for a permanent injunction, the Court stated: "To be successful on their motion for a permanent injunction, this court would have to address the constitutionality of SDCL 12-5-21. But plaintiffs did not challenge the constitutionality of SDCL 12-5-21 in their amended complaint." Docket 68 at 4 (footnote omitted). Plaintiffs respectfully ask the Court to reconsider that conclusion. Plaintiffs have no reason to challenge SDCL 12-5-21, nor does this Court need to address the constitutionality of that statute in assessing the constitutionality of SDCL 12-5-1.

Indeed, Plaintiffs firmly believe that SDCL 12-5-21 is constitutional. The problem with South Dakota's statutory scheme is not 12-5-21, but 12-5-1, which (1) creates an unreasonable deadline in violation of the First Amendment, and (2) creates a set of candidates who are treated more onerously than the candidates covered by 12-5-21, in violation of the Equal Protection Clause. With respect to the latter, as this Court explained in its Docket 43 Order, "candidates in South Dakota are being treated differently based on which office they seek, and similar to the defendants in *Illinois State Board of Elections*, defendants here have 'advanced no reason, much less a compelling

one' for why the distinction is necessary." Docket 43 at 15, citing *Illinois State Board of Elections v. Socialist Worker's Party*, 440 U.S. 173 (1979).

With these two concepts in mind, Plaintiffs now address the specific arguments contained in Defendants' Brief in Opposition to Plaintiffs' Motion for Reconsideration (Docket 71) ("Defendants' Brief"). First, Defendants claim that the Court's denial of Plaintiffs' motion for a permanent injunction was not a "final order" for purposes of Rule 60)(b)(1) of the Federal Rules of Civil Procedure, and therefore Plaintiffs are barred from seeking reconsideration. That argument lacks merit. Defendants are confusing Rule 59(e) motions, which allow a party to challenge a final judgment, with Rule 60(b) motions, which allow a party to challenge *any* order. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999). This Court's order denying Plaintiffs' motion for injunctive relief is not only subject to a Rule 60(b) motion for the reasons explained in *Broadway*, but it is an appealable order pursuant to 28 U.S.C. § 1292(a)(1), and "final" for that purpose. *See* 28 U.S.C. § 1292(a)(1) (authorizing courts of appeals to review orders of a district court "refusing or dissolving injunctions"). Defendants' first argument, therefore, is untenable.

Next, Defendants point out that "SDCL 12-5-1 is the sole statute challenged in Plaintiffs' amended complaint" and Plaintiffs cannot obtain the injunctive relief they seek for candidates Schmidt and Evans because, Defendants contend, 12-5-1 was not responsible for preventing those candidates from accessing the ballot. *See* Defendants' Brief at 3-4. As explained earlier, however, Plaintiffs limit their challenge to 12-5-1 because 12-5-1 is the only culprit. The inescapable truth is that if 12-5-1 treated

candidates for the offices sought by Schmidt and Evans the same way 12-5-21 treats the offices listed in that statute (that is, if 12-5-1 contained the same deadline for submitting signatures as does 12-5-21), Schmidt and Evans would today be on South Dakota's ballot. Therefore, Plaintiffs properly sought this Court's scrutiny of SDCL 12-5-1, and the Court has already addressed the apparent discrimination created by 12-5-1.

Defendants conclude their brief with the following statement: "Because Plaintiffs have failed to challenge any South Dakota election law statutes that actually prohibited the Constitution Party candidates from gaining access to the general election ballot, Plaintiffs arguments should be denied." *See* Defendants' Brief at 4. That argument is erroneous. There is only one statute that prohibited Constitution Party candidates Schmidt and Evans from accessing the general election ballot: SDCL 12-5-1. SDCL 12-5-1 sets criteria for the offices sought by Schmidt and Evans that are unreasonable (in violation of the First Amendment) and discriminatory (in violation of the Equal Protection Clause). Plaintiffs correctly challenged SDCL 12-5-1, and that challenge should prevail.

Respectfully submitted this 26th day of August, 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
765 Asylum Avenue
Hartford, CT 06105
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 August 26, 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 the following person:

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

/s/ Stephen L. Pevar
Stephen L. Pevar