

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

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

**INTRODUCTION**

This case presents a facial constitutional challenge to the most onerous and irrational ballot-access regime in the United States. South Dakota’s procedures for ballot access needlessly hamper the democratic process and curtail voter choice by making it exceedingly difficult for new (or “third”) political parties to place candidates on the November general election ballot. In addition, South Dakota divides candidates for state office into two groups and gives one group opportunities to access the November ballot denied the other group, for no rational reason.

Plaintiffs’ Second Amended Complaint raises two distinct constitutional claims, and Plaintiffs seek summary judgment on both of them based on the undisputed facts. Plaintiffs’ first claim (the “deadline/signature” claim) asserts that SDCL § 12-5-1 violates the First and Fourteenth Amendments to the United States Constitution because it imposes unreasonable restrictions on access to the ballot for third political parties. SDCL § 12-5-1 states: “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.” These requirements combine an unusually early deadline by which a new party must submit signatures to qualify for the ballot with an exceedingly high number of signatures that must be submitted. These twin requirements render South Dakota’s restrictions the most difficult in the nation.

Plaintiffs’ second claim—the “equal protection” claim—asserts that SDCL § 12-5-1, taken together with SDCL § 12-5-21, violate the First and Fourteenth Amendments by creating two sets of candidates for political office—the “primary” candidates and the “convention” candidates—and conferring significant advantages on the “convention” candidates and irrationally discriminating against the “primary” candidates. While § 12-5-1 appears to impose the March deadline on all candidates for state office, § 12-5-21 carves out an exception for eight of those offices and gives the candidates for them a much easier path to the ballot.

Section 12-5-21 states: “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.” Thus, “convention” candidates have two advantages over “primary” candidates. First, “convention” candidates never need to spend the time and money running in a primary election because they are selected at the party’s convention. *See* Plaintiffs’ Statement of Uncontested Facts (“Pls’ SUF”) ¶ 11. Second, these candidates can wait longer to decide to run because the party need only submit its signatures by July rather than by the last Tuesday in March, the deadline applicable to the party’s “primary” candidates. *See* Defendants’ Answer to Plaintiffs’ Amended Complaint, Docket 21, ¶ 7; Pls’ SUF ¶ 10. To illustrate, a new

party that wished to place a candidate on the ballot for State Senate or Congress in the 2016 election needed to submit nearly 7000 signatures (6,936, to be exact) to the office of the Secretary of State by March 29, 2016. *See* Pls’ SUF ¶ 2. Yet that same party could wait until July 11 to submit its signatures to place candidates on the ballot for Secretary of State and Attorney General and then select those candidates at its party convention in August. *See* Defendants’ Answer to Second Amended Complaint (Docket 90) ¶ 24. Similarly, for the 2018 election, a new party that wishes to place a candidate on the ballot for Governor must file its signatures by the March deadline, and yet that same party can wait until July to file its signatures for Lt. Governor. *See* Pls’ SUF ¶ 2. Clearly, then, as this Court has already noted, “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.” *See* Memorandum Opinion and Order Denying Defendants’ Motion for Summary Judgment (Docket 43) (hereinafter “Docket 43 Order”) at 15 (citing *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

### **SUMMARY JUDGMENT STANDARD**

Rule 56(a), Fed. R. Civ. P., provides that a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” This Court, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), discussed the Rule 56 summary judgment standard in its Docket 43 Order at 4-5. That discussion applies with full force to this motion. Simply put, the material facts underlying Plaintiffs’ constitutional claims are undisputed, and Plaintiffs are entitled to judgment as a matter of law that SDCL §§ 12-5-1 and 12-5-21 are facially unconstitutional.

### **FACTUAL BACKGROUND**

Two political parties, the Libertarian and the Constitution Parties, and four of their current or former officers and supporters, brought this action on June 15, 2015. Plaintiff Ken Santema is a resident and registered voter of South Dakota and was the Chair of the Libertarian Party of South Dakota at the time suit was filed. 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. The two defendants, South Dakota Secretary of State Shantel Krebs and South Dakota Attorney General Marty Jackley, are the state officials directly responsible for enforcing the state laws challenged herein. Both are sued in their official capacities.

Plaintiff 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 for 25 years. 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 in his Affidavit, because the State's requirements make it too difficult: "the March 29 deadline imposes undue burdens and is unrealistic [and] the 2.5% [signature] requirement to maintain ballot status is unrealistic and unfair." Affidavit of Bob Newland (hereinafter "Newland Afft."), Docket 35, ¶ 5. According to Mr. Newland, South Dakota's requirements are so difficult to satisfy, he is "disfranchised as a Libertarian." *Id.* at ¶ 5.

Ken Santema, former Chair of the Libertarian Party, agrees with Mr. Newland that "March 29 is simply too [remote] of a deadline to overcome the problems we have experienced thus far collecting signatures." Affidavit of Ken Santema (hereinafter "Santema Afft."), Docket

36, ¶ 8. For one thing, the March deadline forces parties to gather signatures during winter months. As Mr. 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 (hereinafter “Stacey Afft.”), Docket 37, ¶ 17. The closer it gets to the general election, the easier it is for third parties to gain supporters and raise money, when many voters realize that the candidates of the major parties do not represent their views. *See Santema Afft.*, Docket 36, ¶ 7; *Stacey Afft.*, Docket 37, ¶¶ 6, 11-12.

Mr. Santema and the National Libertarian Party made a concerted effort in the 2016 election to meet the March 29 deadline but came up short of signatures. Mr. Santema first began trying to get volunteers to collect signatures in late summer of 2015. Mr. Santema 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. *Santema Afft.*, Docket 36, ¶¶ 4-6. The National Libertarian Party invested \$15,000 to assist in gathering signatures, but even this proved insufficient. *Id.*

South Dakota’s sparse population presents difficulties to canvassers seeking signatures because petitioning door-to-door is time-consuming and not very effective. Exacerbating the signature-gathering process is that South Dakota, unlike many other states, does not have “open-access” laws that require private store owners such as Walmart to allow canvassers to engage in political activities on their property. *See Stacey Afft.*, Docket 37, ¶¶ 14, 16. This drastically reduces the locations where canvassers can obtain numerous signatures in a relatively short period of time. Plaintiffs are relegated to canvassing on street corners and in front of county

courthouses in cold winter months, which present stiff challenges to effective solicitation. *See* Santema Afft., Docket 36, ¶¶ 4-6; Stacey Afft., Docket 37, ¶ 14. Ms. Stacey identified other problems that seriously impede her Party's ability 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," and her party does not have much money for that purpose. *Id.* Moreover, Plaintiffs' experience from prior elections demonstrates that in order to ensure the submission of 6,936 *valid* signatures, the party should gather many more than that number. *See* Stacey Afft., Docket 37, ¶ 12.

It would be of "great benefit," Mr. Santema states, if the Libertarian Party could wait until after the major parties have selected their candidates to canvass for support and to fundraise. Santema Afft., Docket 36, ¶ 7; *see also* Stacey Afft., Docket 37, ¶ 5. Only rarely since the March deadline went into effect in 2007 has any party placed a candidate on the general election ballot in South Dakota: the Constitution Party in 2008, 2012, and 2016 and the Libertarian in 2012, far fewer than in other states. *See* Affidavit of Richard Winger ("Winger Afft."), Docket 39, ¶ 12.

Plaintiff Joy Howe, former Secretary of the Constitution Party of South Dakota, believes it is important for 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 (hereinafter "Howe Afft."), Docket 38, ¶ 2. Ms. Howe also believes her rights as a voter are diminished when new parties are denied a fair chance to get on the ballot, and that being denied an opportunity to vote for a Constitution Party candidate would not only violate her right to vote but would "destroy[] my desire to participate in the process." *Id.* ¶ 3.

## **ARGUMENT**

### **I. THIRD PARTIES PLAY A CRITICAL ROLE IN OUR POLITICAL SYSTEM**

SDCL §§ 12-5-1 and 12-5-21 restrict access to the ballot by third parties. A state may impose reasonable restrictions on ballot access, but restrictions on ballot access by third parties are inherently suspect due to the critical role they play in the democratic process by disseminating ideas and information, and offering choices to voters disenchanted with the major parties. As the Supreme Court stated more than 35 years ago in striking down unnecessary restrictions on 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 (5<sup>th</sup> ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

*Illinois State Board*, 440 U.S. at 185-86.

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 anti-monopoly legislation. Third parties influenced several 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 Democrat 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 gave millions of voters a peaceful outlet for their strong opinions. 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)).<sup>1</sup>

## **II. SDCL §§ 12-5-1 AND 12-5-21 MUST BE SUBJECTED TO STRICT SCRUTINY**

In South Dakota, in order for a new party to place a candidate on the ballot for Governor or for any state or federal legislative office in the November 2018 general election, the party must file nearly 7000 signatures supporting the party by the last Tuesday in March of 2018. *See*

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<sup>1</sup> Notably, the following exchange occurred during Ms. Krebs' deposition:

Q: Are you familiar with the role third parties have played in the history of our country?

A: No.

*See* Deposition of Shantell Krebs, attached to Declaration of Stephen L. Pevar (“Pevar Decl.”) Ex. 3. at 7.



Pls’ SUF ¶ 2. For reasons discussed below, the combination of this early deadline and high signature requirement render South Dakota’s restrictions the most onerous access requirements in the nation. These restrictions must be subjected to strict judicial scrutiny.

“[B]allot access laws impose a burden 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 which are conferred by the First Amendment. Docket 43 Order at 7 (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). The Supreme Court has explained:

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. at 30-31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); see also *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988) (“*McLain I*”); *McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980) (“*McLain I*”); *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977).

In *McLain I*, relying on *MacBride*, the Eighth Circuit made clear that ballot restrictions of the type at issue here can survive scrutiny only if they satisfy a compelling interest and no less drastic restrictions would suffice: “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; *see also 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 “broad and stringent [ballot access] requirements cannot stand where more moderate ones would do as well.”).

There is an “inherent tension between the individual’s right to vote and the state’s power to regulate elections,” and thus a court analyzing ballot access restrictions must “‘weigh the character and magnitude of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary.’” Docket 43 Order at 6 (quoting *Green Party of Ark. v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011)). “The degree of the burden determines the extent the challenged law must advance the state’s interests. Laws placing severe burdens on the right to vote receive greater judicial scrutiny than laws imposing lesser burdens.” *Id.*

This Court has already determined that the access restrictions challenged in this lawsuit place a severe burden on Plaintiffs’ right to vote and freedom of association and must therefore be subjected to strict scrutiny. Docket 43 Order at 11 (“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.”); *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.”) Accordingly, the restrictions challenged here must be invalidated unless the State proves they serve a compelling interest and that lesser burdens would not suffice.

### III. SDCL § 12-5-1 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

SDCL § 12-5-1 violates the First and Fourteenth Amendments. It imposes two unreasonable burdens on access to the ballot by new parties: the March deadline is unreasonably early, and the signature requirement is unreasonably high. Each of these restrictions is alone sufficient to render § 12-5-1 unconstitutional. The combination of these obstacles renders South Dakota's requirements patently indefensible.<sup>2</sup>

#### A. The March deadline is unreasonable

Section 12-5-1 requires that a new party file its signatures by the last Tuesday in March of an election year. This date was selected, the Defendants previously explained, to give the Secretary of State sufficient time to print and distribute ballots prior to the State's primary election in June. Defendants have never provided a rational reason, however, why this deadline should apply to a party that has no need or desire to participate in a primary election. *See* Docket 43 Order at 13 (noting that Defendants "have given no reason" why third parties "must participate in the primary election.")

Primary elections permit members of a political party to select which candidate will represent the party, among competing candidates, at the general election in November. But a new political party typically has no need to participate in a primary because it only has one candidate

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<sup>2</sup> Defendants argue that the restrictions imposed by § 12-5-1 are reasonable. Yet, they have no idea how South Dakota's restrictions compare with those in other states. The following exchange with Ms. Krebs is significant:

Q: Have you compared South Dakota's access requirements for third parties with those in other states?

A: No.

Krebs Dep. at 11. *See also id.* at 35 ("I do not know what other states' deadlines are.")

per office (and, for many offices, no candidate). To accommodate new parties, most states permit them to skip primary elections and select their candidates for the November election by convention (just as South Dakota allows new parties to do in selecting their “convention” candidates). *See* Supplemental Affidavit of Richard Winger, Docket 40, ¶ 2.

In South Dakota, in contrast, even parties that have only one candidate per “primary” office must submit their signatures by the March deadline. For instance, a political party will be disqualified from placing on the November 2018 ballot a candidate for Governor, or state or federal legislative office, unless the party files its supporting signatures by the March deadline, even if it only has one candidate per office.

For the 2016 election, this meant that new parties needed to file 6,936 signatures by March 29, 2016. *See* Pls’ SUF ¶ 2. In 2018, the last Tuesday in March falls on March 27 and the signature requirement will once again be 6,936, given that this is two and one-half percent of those who voted for Governor in the last gubernatorial election. *Id.*

South Dakota’s March deadline is so far in advance of the major parties’ nomination conventions and the November general election that voter dissatisfaction necessary to support the creation of a new party is unlikely to exist. It is therefore unreasonable for South Dakota to require new parties to gather 6,936 signatures by that date. In *McLain I*, the Eighth Circuit invalidated an even later deadline than South Dakota’s, 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).

Also on point is *MacBride v. Exon*. Although the Nebraska deadline at issue in that case was February 11, the rationale employed by the court in striking down that deadline applies equally to South Dakota's March deadline. The court held that 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." *Id.*, 558 F.2d at 449. Voter discontent "sufficient to produce third party movements and independent candidacies does not manifest itself until after the major parties have adopted their platforms and nominated their candidates." *Id.* Consequently, Nebraska's 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 apposite is *Anderson v. Celebreeze*, in which the Court held unconstitutional an Ohio statute requiring independent candidates for president to submit a nominating petition in March in order to appear on the general election ballot. *Id.*, 460 U.S. at 805-06. The Court found

the March deadline unreasonable because in most election years, many issues generating voter interest have not formed by March and the candidates of the major parties have not been selected. 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. A March deadline “is especially difficult for the State to justify.” *Id.* at 793. *See* Docket 43 Order at 11 (“This early deadline is particularly oppressive because, as the court noted in *McLain I*, a third part candidate’s viability is largely determined after the major political parties have chosen their candidates and platforms.”)

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); *see also Nader v. Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2011) (finding a June 9 deadline for independent presidential candidates “is [not] narrowly tailored to further compelling administrative needs”); *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”); *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); *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”).

South Dakota’s March deadline suffers the same infirmities as did the deadlines invalidated in the cases just cited. By the time the major parties select their candidates and voter dissatisfaction might support a third party, South Dakota’s ballot deadline has long since passed, leaving South Dakota’s disaffected voters disenfranchised.

A March deadline is particularly onerous in South Dakota because it means that concerted efforts to gather signatures must be made by new parties during South Dakota’s frigid winter months. Defendants will undoubtedly point out that a new party is free to gather signatures for a year prior to the March deadline, but that opportunity is a hollow one because the further away the election, the less interest voters have in political activity. *See Williams v. Rhodes*, 393 U.S. at 33 (finding it unreasonable to expect a new party to have an “extensive organization . . . by a very early date”); *Anderson v. Celebrezze*, 460 U.S. at 792 (invalidating a March deadline because it is too remote from the November election). In reality, the best chance of getting people to sign a petition or donate funds to support a new political party is in the months after the major parties have chosen their candidates.

South Dakota’s March deadline is unreasonable and arbitrary. For one thing, it is illogical to link a filing deadline for new parties to a date that *only* those parties participating in a primary election would find relevant. The only way to assure that new parties will have a reasonable chance of accessing the ballot is for South Dakota to do what the vast majority of other states do: allow them to select *all* of their candidates by convention, in the same way that South Dakota

currently allows them to select the “convention” candidates. *See* Supplemental Affidavit of Richard Winger, Docket 40, ¶ 2.

In *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008), 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.” Other decisions similarly support the First Amendment right of political parties to regulate their own affairs. In *Eu v. San Francisco County Democratic Committee*, 489 U.S. 214 (1989), the Court held unanimously that a state cannot tell political parties how to structure themselves, where to hold their state conventions, or order them to rotate their party chairs every two years because such laws “burden the First Amendment rights of political parties and their members without serving a compelling state interest.” *Id.* at 233. *See also Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (holding that states generally lack the authority to instruct political parties on how to resolve intra-party disputes regarding the seating of delegates); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981) (holding that a state generally lacks the authority to require political parties to select candidates by a particular primary process created by the state).

South Dakota runs afoul of this precedent in two ways. First, rather than allow new parties to determine for themselves how their candidates will be selected, the State makes that decision for them and dictates which candidates may be selected at the party’s convention and which may not. This directly conflicts with the needs and desires of the Plaintiffs. *See* Stacey Afft, Docket 37, ¶ 2 (stating that the convention method of candidate selection is best for the Constitution Party). Second, rather than allow new parties to avoid a primary and all of the requirements that go with it, South Dakota instead requires that new parties submit their



signatures by the deadline needed by the State to print a primary ballot, even when the party has no need to participate in a primary. This, too, infringes on Plaintiffs' constitutional right to access the ballot. *See id.* (stating that the Constitution Party should not be required to meet a signature deadline applicable to primary elections when the Party has never needed one).

The March deadline imposed by § 12-5-1 must be declared unconstitutional unless the deadline satisfies a compelling state interest that cannot be achieved by any less drastic means. *See McLain I*, 637 F. 2d at 1163; *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977) (holding that ballot access laws "may not go beyond what the state's interests actually require"). The very existence of § 12-5-21 precludes such a finding because we know that *all* of the State's interests in protecting the ballot can be achieved even with a July signature deadline.

South Dakota has determined that a July deadline meets all the State's interests in protecting the ballot for the "convention" offices. Indeed, Ms. Krebs is the person who created the July 11 deadline for the 2016 election, and she would not have settled on that date if it jeopardized a state interest. *See Krebs Dep.* at 111-12. Ms. Krebs conceded that nothing in state law established a separate deadline for the "convention" offices. *Id.* at 99, 103. Ms. Krebs also conceded that "typically only the Legislature creates deadlines [for ballot access]," not the Secretary of State. *Id.* at 99. Nothing in state law authorized her to create the July 11 deadline, but she created it anyway. *Id.* at 100-02. Several months later, the Legislature passed a law, HB 1037, codifying a July 1 deadline for all "convention" candidates in the future. Thus, Ms. Krebs' unilateral action in 2016 is now statutory law, although the Legislature set a July 1 deadline rather than July 11.

Significantly, Ms. Krebs conceded in her deposition that she knows of no reason why South Dakota cannot have a later deadline for the "primary" candidates as well:

Q. Do you know of any reason why South Dakota could not have a later deadline [for the “primary” candidates]?

A. I’m unaware.

Krebs. Dep. at 36.

This Court has already determined that “South Dakota’s ballot access laws impose a severe burden on third parties and their candidates.” Docket 43 Order at 15. Defendants must therefore show that South Dakota’s interests actually require a March deadline and nothing less drastic will suffice. In conducting this analysis, the Court must “assess realistically whether the law imposes excessively burdensome requirements” on ballot access, *Storer v. Brown*, 415 U.S. 724, 738 (1974), and must scrutinize South Dakota’s ballot access laws “in their totality.” *Williams v. Rhodes*, 393 U.S. at 32.

This would be a different situation if South Dakota were besieged by third parties seeking to place candidates on the ballot, forcing the State to impose onerous restrictions in order to limit the field and ensure a manageable ballot. But this has never been the case. Why, then, is South Dakota taking drastic preemptive measures that stifle third party activity? Surely South Dakota voters are no less intelligent than voters elsewhere or less able to cast a meaningful ballot when more than two candidates vie for the same office on the ballot. Likewise, Defendants cannot claim that voters in South Dakota need more protection than voters in other states from third party candidacies or from alternative political parties. If anything, South Dakota should foster the democratic process by relaxing the restrictions for ballot access to compensate for South Dakota’s difficult winter weather and the State’s sparse population. In any event, South Dakota’s preemptive restrictions cannot pass constitutional muster. 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” created by an early filing deadline. *McLain*, 637 F.2d 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.

We know that South Dakota can satisfy its legitimate interests in protecting the ballot without imposing a draconian March deadline because *it already does that* for the eight offices listed in § 12-5-21. As this Court has noted: “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.” Docket 43 at 13. It is illogical to contend that access requirements acceptable to select the Attorney General, Secretary of State, and Lieutenant Governor are not acceptable for Governor or any state or federal legislative office. South Dakota’s March deadline imposes heavy burdens on Plaintiffs’ First Amendment rights to associate and to vote, and is not narrowly tailored to advance a compelling state interest. Defendants have yet to offer an acceptable justification for this stultifying deadline.

B. The two and one-half percent signature requirement is unreasonable

For reasons just explained, a March deadline is crippling and unrealistic because it is too far in advance of when the major parties select their candidates and when election issues coalesce. But this Court need not determine whether the March deadline is alone sufficient to render South Dakota’s restrictions unconstitutional because § 12-5-1 combines that deadline with an unusually high signature requirement and, taken together, these twin obstacles render the statute indefensible. *See* Docket 43 Order at 11 (“[T]he court finds that the late March time burden coupled with the substantial signature requirement is particularly troublesome.”)

SDCL § 12-5-1 imposes a two and one-half percent party access signature requirement. 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.*, Docket 39, ¶ 7.

Notably, even Secretary Krebs agrees there is no reason South Dakota could not lower its signature requirement to one percent or less:

Q: My question is, do you know of any reason South Dakota could not have a one percent or less signature requirement?

A: I do not know of any reason we could not.

Krebs. Dep. at 50.

Defendants have the burden of proving that South Dakota needs a higher signature requirement than 47 other states and that no less drastic alternative will suffice. Defendants must explain what is so different about the voters in South Dakota or South Dakota's election process that actually requires a tougher standard than the one 47 other states find adequate. This point deserves emphasis because in Defendants' previous briefs, Defendants sought to justify their unusually high signature requirement by listing the State's *general* interests in regulating the ballot. What they neglected to do, however, is explain how those general interests "actually require" such a high signature requirement for South Dakota. All states have those same interests, but South Dakota has responded by enacting an unusually draconian restriction. Unless Defendants can explain what is so different about South Dakota that only such drastic means will suffice, the Court must conclude that Defendants have failed to satisfy their burden of proof.

Defendants will likely note that the Libertarian and Constitution Parties have on occasion met South Dakota's high signature requirement by the March deadline. But merely because a party through enormous tenacity can meet a requirement does not answer the question of whether that requirement was too onerous in the first place. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 592 ("The fact that an election procedure can be met does not mean the burden imposed is not severe."); *Constitution Party of New Mexico v. Duran*, 1:12-cv-325 (Mem. Op. and Order, D.N.M. Dec. 9, 2013) (invalidating an April signature deadline and holding that a political party does not lose standing by satisfying a requirement that was too severe to begin with) (attached to Second Declaration of Stephen L. Pevar (Docket 63) Ex. 1A).

In 2016, the Constitution Party met the March deadline but, despite the concerted efforts detailed in Mr. Santema's affidavit, the Libertarian Party could not get enough signatures by the deadline. Although Defendants may wish to point to the former, it is the latter that has the most constitutional significance. Defendants must explain why South Dakota actually needs a higher signature requirement than 47 other states.

In short, SDCL § 12-5-1 enters this Court on life support. Both its early signature deadline and its high signature requirement are so oppressive and unreasonable that it cannot survive unless Defendants demonstrate that unique factors exist in South Dakota that actually require these draconian measures to curtail access to the ballot by third parties. In the absence of such proof, the Court should enjoin further enforcement of that statute.

#### **IV. SDCL §§ 12-5-1 AND 12-5-12 VIOLATE THE EQUAL PROTECTION CLAUSE**

As just shown, both restrictions on ballot access imposed by § 12-5-1—the March deadline, and the two and one-half percent signature requirement—are unreasonable and, therefore, violate the First Amendment. Section 12-5-1 is also unconstitutional for a different

reason: when combined with SDCL § 12-5-21, the two statutes create more onerous restrictions for some candidates than for others for no logical reason, thus violating the Equal Protection Clause of the Fourteenth Amendment.

Sections 12-5-1 and 12-5-21 divide candidates into two groups and treat them differently. With respect to the “primary” candidates covered by § 12-5-1, including candidates for Governor, and congressional and state legislative office, a new party must file its signatures by the March deadline. But that same party can wait until July to file its signatures for candidates seeking offices listed in § 12-5-21, including Lt. Governor, Secretary of State, and Attorney General.<sup>3</sup> This permits a new party to select all of its statewide candidates at its convention *except* Governor, including the person who will become Governor if the elected Governor vacates that office prior to completing the term.<sup>4</sup> No other state in the nation has created such differences in how candidates are selected, and there is no rational basis for creating these groupings. As Richard Winger, a nationally known expert on ballot access, states in his

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<sup>3</sup> The equal protection claim arose after Plaintiffs filed their initial complaint. Plaintiffs alleged in the complaint that the March deadline applied to all candidates. In their answer, however, Defendants announced that, in fact, a very different deadline applied to candidates for the eight offices listed in § 12-5-21, who could be placed on the ballot if the party submitted its signatures to the Secretary of State by July 11 and selected those candidates at the party’s convention. *See* Docket 21, ¶ 7. Ms. Krebs admitted during her deposition that, to her knowledge, she is the first person to interpret South Dakota law in this fashion. *See* Krebs’ Dep. at 93-94, 108. In fact, at the time suit was filed, Ms. Krebs’ public website contained two postings, introduced during Ms. Krebs’ deposition as Exhibits 1 and 2 (attached to Pevar Decl. as Exhibits 1 and 2) setting forth the relevant deadlines for ballot access, and they made no reference to a July deadline for any office. *See* Krebs. Dep. at 105-06. Due to Defendants’ unexpected announcement, Plaintiffs needed to file a Second Amended Complaint (Docket 85) to challenge the discrimination created by Defendants’ new interpretation of South Dakota law, one that gave the “convention” candidates advantages not enjoyed by the “primary” candidates.

<sup>4</sup> Lt. Governors in South Dakota were elevated to Governor in 1978, when Governor Kneip left office to take a federal post, and in 1993, when Governor Mickelson died in a plane crash.

Supplemental Affidavit (Docket 40) at ¶ 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.”

The discriminatory impact of these statutory provisions is illustrated by what occurred in the 2016 election. At its convention, the Constitution Party selected one candidate, Wayne Schmidt, for a seat in the State House and another candidate, Kurt Evans, for a seat in the U.S. Senate and submitted their names to the Secretary of State for inclusion on the November ballot. On July 13, 2016, however, Kea Warne, Deputy Secretary of State, informed those candidates by letter that they were not eligible to be placed on the ballot because “[p]ursuant to SDCL 12-5-21, US Senate and state legislator are not included in the list of offices that can be nominated at state party conventions.” *See* Docket 47-5 at 2, 3. Thus, Mr. Evans and Mr. Schmidt were discriminated against based solely on the offices they had been seeking.

This Court previously noted that “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 Order at 15 (citing *Illinois State Board of Elections*, 440 U.S. at 186). That lack of evidence still exists. In fact, the testimony provided by Ms. Krebs during her deposition confirms that no evidence exists to support Defendants’ claims. On the contrary, her testimony bolsters the conclusion that a new party should be allowed to select all of its candidates by convention, the same process the Republican Party employed in selecting Ms. Krebs and Mr. Jackley. Indeed, one of the ironies of this case is that both Defendants ask the Court to sustain onerous restrictions on ballot access they were able to avoid.

In her answers to Plaintiffs' interrogatories, Ms. Krebs cited a few boilerplate reasons why, in her opinion, it is reasonable to treat the "convention" candidates differently than the "primary" candidates. During her deposition, she was asked to provide evidence to justify each of those reasons. Ms. Krebs was unable to support a single one. Here is an example. Ms. Krebs claimed in answer to an interrogatory that allowing the "primary" candidates to be selected by convention, as she had been selected, could cause an "erosion in voter confidence." During her deposition, she was asked if she had "even a single shred of evidence" to support her claim. That question prompted the following exchange:

A: I have no opinion.

Q: I didn't ask for your opinion. I'm asking whether you have any evidence.

A: I have no opinion.

Q: Do you have any evidence?

A: I have no opinion.

Mr. Pevar [to Ms. Krebs' attorney, Steven Blair] Counsel?

Mr. Blair [to Ms. Krebs]: It's appropriate to — it's an appropriate yes or no question, whether there's evidence you're aware of.

A: [By Ms. Krebs] I have no evidence.

Krebs Dep. at 149.<sup>5</sup>

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<sup>5</sup> Similarly, Ms. Krebs had no evidence to support her claim that these two groupings "fostered participation" in the election process, *see* Krebs Dep. at 162, or any evidence to support her claim that dividing candidates into these groupings helped avoid "voter confusion." *Id.* at 165. Indeed, what could be *more* confusing than the regime that currently exists in South Dakota, in which each member of the state legislature is deemed more "powerful" than the Attorney General and the Secretary of State and, as a result, voters must select the former in a primary but the political party gets to select the latter at a convention?



There is no principled basis on which to justify treating these two groups of candidates differently, and Defendants are forced to manufacture an illogical one instead. Defendants contend that “the offices that require participation in the primary election hold a significant amount of power and as such there is a strong basis for allowing voters across the state, or the voters of a particular district, to have a say in determining which candidate should be afforded the opportunity to be placed on the general election ballot.” *See* Brief in Support of Defendants’ Motion for Summary Judgment (Docket 45) at 19. *See also* Krebs Dep. at 66 (arguing that the difference in treatment can be explained by the fact that these two groups of state offices hold “significantly different powers.”)

That argument lacks merit. It is patently irrational to determine which candidates will be selected by convention and which by a primary election based on the officeholder’s “power.” How can anyone assess whether a member of the State House is more powerful than the Attorney General (or vice versa)? And why should that be a determining factor anyway? Indeed, Ms. Krebs was a member of the South Dakota Legislature before becoming Secretary of State. *See* Krebs Dep. at 6-7. Surely no one, including her, believes her career took a nosedive when she became Secretary of State, and yet if Defendants’ argument has credence, she went from having a “powerful” office to one less “powerful.”

It makes no sense to compare the “power” of a legislative official with the “power” of an executive official because each branch wields different powers. As Secretary of State, Ms. Krebs has the power to do many things that no legislative official can do, and vice versa. For example, the Legislature has the power to create the requirements for ballot access. But only the Secretary of State has the power to determine which parties meet those requirements. Defendants are comparing apples with oranges, and their reliance on the relative “power” of different offices to

determine which candidates have easier access requirements than others is irrational. Thus, the restrictions on ballot access imposed by SDCL §§ 12-5-1 and 12-5-21 on some candidates but not on others violate the Equal Protection Clause.

Of great significance is the candid admission of Defendant Krebs that if the Legislature “allowed new parties to select all of their candidates by convention,” it would “not be difficult to enforce that change in state law.” Krebs. Dep. at 19. Ms. Krebs also acknowledged that selecting candidates by convention “strengthens public confidence in the integrity of the electoral process” because “conventions allow opportunities for people to become involved in the process.” *Id.* at 152, 154. Another advantage to selecting candidates by convention, Ms. Krebs admitted, is that the convention process is less expensive than primary elections. *Id.* at 154. In fact, Ms. Krebs explained, compelling candidates to participate in a primary election can actually “stifle” a person’s desire to become a candidate due to the cost. *Id.* at 157.

South Dakota has no legitimate reason to give favored status to candidates seeking the eight offices listed in § 12-5-21 by allowing them to be selected by convention and, in addition, imposing a far more onerous signature deadline on those not included on that list. No other state has such a peculiar arrangement, and for good reason.

### **CONCLUSION**

Plaintiffs are entitled to judgment as a matter of law that SDCL § 12-5-1 violates Plaintiffs’ rights under the First Amendment due to its unreasonably early signature deadline combined with its unreasonably high signature requirement. Plaintiffs are also entitled to judgment as a matter of law that, taken together, SDCL §§ 12-5-1 and 12-5-21 invidiously discriminate against the “primary” candidates in violation of Plaintiffs’ rights under the Fourteenth Amendment. Accordingly, Plaintiffs’ Motion for Summary Judgment should be

granted and Defendants should be enjoined from any further enforcement of those statutes in this manner.

Respectfully submitted this 27th day of July, 2017.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned counsel of record hereby certifies pursuant to Local Rule 7.1(B)(1) that this brief contains 8172 words, as determined by the word-count utility of Word 2010, which is less than the 12,000 words permitted by the rules of the Court.

/s/ Stephen L. Pevar  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 2017, I electronically filed the foregoing Response with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to the following persons:

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