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
v.	)	AND
SHANTEL KREBS, et al.,	)	PLAINTIFFS' RESPONSE BRIEF
Defendants.	)	

Pending before the Court are cross motions for summary judgment. *See* Docket 97 (Plaintiffs' motion) and Docket 102 (Defendants' motion). Defendants filed their response to Plaintiffs' motion. *See* Docket 108. This brief combines Plaintiffs' reply brief on their motion, as well as their response to Defendants' motion. Defendants make identical arguments in both pleadings, and thus a single brief will suffice.

One point must be emphasized at the outset. The Court has already adjudicated several issues adverse to the Defendants. Defendants seek to relitigate all of those rulings. Defendants claim they are free to reopen these issues—despite the law of the case doctrine—because in July 2017, the South Dakota Legislature amended SDCL 12-1-3(10) to redefine "political party." *See* Docket 108 at 2-4. Under the previous definition, a political party would qualify to remain on the ballot for the next election only if the party's candidate for Governor obtained at least 2.5% of the vote cast for that office. Under the current definition, a political party qualifies for the next election if *any* candidate for statewide office obtains 2.5% of the vote cast for *that* office.

Defendants' argument lacks merit. The amendment to SDCL 12-1-3(10) has no effect on Plaintiffs' claims and thus its presence is irrelevant. From the outset of this case, Plaintiffs have

challenged the onerous burdens imposed on new political parties by SDCL 12-5-1 to *access* the ballot. In contrast, SDCL 12-1-3(10) merely makes it easier—though still difficult—for a party to *remain on* the ballot if it should satisfy those onerous burdens. Clearly, South Dakota's back-end change on how to remain on the ballot does not mitigate the State's front-end burdens on accessing the ballot in the first instance. In sum, SDCL 12-5-1 still combines an exceedingly early filing deadline (the last Tuesday in March) with an unusually high signature requirement (2.5% of those who voted for Governor in the last gubernatorial election), and nothing in SDCL 12-1-3(10) makes it easier for a new party to meet those excessive requirements. Plaintiffs' challenge to SDCL 12-5-1 remains the same as it always has been and, similarly, the Court prior rulings are unaffected by the amendment to SDCL 12-1-3(10).

ARGUMENT

Plaintiffs' Second Amended Complaint raises two distinct challenges. One is a First Amendment challenge to the facial validity of SDCL 12-5-1 due to the onerous requirements it imposes on accessing the ballot. The other is an Equal Protection challenge to SDCL 12-5-1 and SDCL 12-5-21 due to the fact that they divide candidates for elective office into two groups and invidiously discriminate against one of those groups.

I. PLAINTIFFS HAVE STANDING TO PURSUE THEIR FIRST AMENDMENT CHALLENGE.

Plaintiffs challenge SDCL 12-5-1 on the grounds that it violates the First Amendment on its face by creating unreasonable restrictions on access to the ballot. Defendants contend that Plaintiffs lack standing to make that challenge. *See* Docket 103 at 9. That contention fails for numerous reasons.

A. Defendants' standing argument is barred by the law of the case doctrine.

Defendants seek to relitigate Plaintiffs' standing to challenge SDCL 12-5-1. Defendants raised—and lost—this issue at the outset of the case. *See* Docket 18 at 4 ("Because SDCL 12-5-1 may unconstitutionally exclude plaintiffs' candidate-of-choice from the primary election, plaintiffs have standing to challenge the law."). "Plaintiffs here have shown an injury-in-fact," the Court held, because SDCL 12-5-1 substantially inhibits their ability to access the ballot. *Id.*

Defendants' efforts to relitigate the issue of standing is barred by the law of the case doctrine. "The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995) (citing *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456-57 (8th Cir. 1990)).

B. Defendants' standing argument fails because standing is assessed as of the time the Complaint was filed.

In an attempt to circumvent this Court's prior determination, Defendants contend that "the Court must conduct a review of the claims as they are now presented — not as they may have been presented in the prior complaint." Docket 103, at 9 n.5. Defendants' argument is contrary to well-established precedent that standing is assessed as of the date of filing. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.") (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)); *see also Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) ("Because standing is determined as of the lawsuit's commencement, we consider the facts as they existed at that time.").

Given that Defendants are claiming that post-filing events have changed the complexion of this case, Defendants are claiming that the case is moot, *not* that the Plaintiffs lack standing.[1] Plaintiffs have standing today because they had standing when the case was filed. *See Davis v. FEC*, 554 U.S. at 732-34; *Abbott Labs. v. Roxane Labs., Inc.*, Civil Action No. 12-457-RGA-CJB, 2013 WL 2322770, *5 n.7 (D. Del. May 28, 2013) ("[I]t is clear that if a party's claim is that a plaintiff who had a sufficient personal stake in the litigation when the lawsuit was filed (and thus had standing to sue) nevertheless lost that personal stake in the outcome due to certain post-filing events, the challenge is properly characterized as one of mootness.") (citing *Davis*, 554 U.S. at 732-34). Thus, Defendants have mischaracterized their argument.

C. The 2017 amendment to SDCL 12-1-3(10) does not change the injury suffered by Plaintiffs.

The amendment to SDCL 12-1-3(10) does not impact Plaintiffs' First Amendment challenge. The amendment merely relaxes the requirements to remain on the ballot. Plaintiffs were never challenging the requirements to remain on the ballot but, rather, the requirements to access the ballot. As the Court has already found, Plaintiffs were injured by SDCL 12-5-1. Docket 18 at 4.

Defendants now contend that the Constitution Party and the Libertarian Party lack standing because, according to the Defendants, neither of them suffered an injury in the 2016 election. *See* Docket 103 at 11. That contention lacks merit for two reasons.

First, Defendants' contention is flat wrong: both parties, in fact, suffered injuries in the 2016 election. The Libertarian Party was unable to meet South Dakota's onerous access requirements by March 29, 2016, and was thus denied the opportunity to place any "primary"

[1] As discussed in section III below, Plaintiffs' claims are not moot either.

candidates on the 2016 general election ballot.[2] The Constitution Party, too, was injured in the 2016 election. The Constitution Party, as explained in Plaintiffs' opening brief, sought to place on the November ballot a candidate for U.S. Senate and a candidate for State House of Representatives, both of whom were duly selected at the Party's convention. Both candidates, however, were refused access to the ballot by Defendant Krebs solely because the offices they sought are not included on the list of offices in SDCL 12-5-21. This is precisely the injury created by South Dakota's disparate treatment of candidates that Plaintiffs are challenging.

Second, and more to the point, the Court has already ruled that Plaintiffs are not required to prove actual injury in order to challenge South Dakota's access requirements. Defendants made the same claim in 2015 as they make now, and the Court rejected that claim, explaining:

> In *Williams*, the Supreme Court allowed the Ohio American Independent Party and the Socialist Labor Party to challenge ballot access laws without first attempting compliance. The Court concluded it had jurisdiction, . . . even though the Socialist Labor Party 'did not even attempt to comply with the statutory' requirements of the ballot access law.

Docket 18 at 5 (citing *Williams v. Rhodes*, 393 U.S. 23, 45-46 (1968)). *Accord Storer v. Brown*, 415 U.S. 724 (1974) (allowing independent candidate to challenge a ballot access signature requirement even though candidate had not attempted to gather signatures); *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) (striking down an Illinois early petition deadline even though the party had yet to begin gathering signatures); *Libertarian Party v. Ehrler*, 776 F. Supp. 1200 (E.D. Ky. 1991) (holding that a political party need not initiate the process of gathering signatures in order to challenge a restrictive ballot access law).

[2] As discussed in Plaintiffs' opening brief, candidates for office in South Dakota are divided into two groups: "primary" and "convention" candidates. In order for a party to place a "primary" candidate on the ballot, the party must file its signatures by the last Tuesday in March of the election year. Thus, by missing the March 29 filing deadline, the Libertarian party was ineligible to place any "primary" candidate on the general election ballot, a significant injury.

Another "second-bite" argument made by Defendants is their renewed claim that the individual (non-political party) Plaintiffs lack standing because, according to the Defendants, the political parties with which they are affiliated "had full opportunity to present candidates [in the 2016 election]" and, therefore, their associational rights were not inhibited. Docket 103 at 12. This argument also lacks merit. In the first place, as just explained, both the Constitution Party and the Libertarian Party *were* denied a full opportunity to present candidates in the 2016 election. But more to the point, the Court considered and rejected a virtually identical contention earlier in this case because this is not the correct analysis. Citing *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988), the Court recognized that Defendants' focus on Plaintiffs' associational rights overlooks the fact that the Plaintiffs have standing as *voters* "to challenge [these] ballot access laws." Docket 18 at 4. In *McLain*, the Eighth Circuit rejected a similar argument as Defendants make here, explaining that Mr. McLain had standing to challenge North Dakota's onerous ballot access law for new political parties in his capacity as a voter:

> McLain's allegations, if true, would cause him injury as a voter because the ballot access laws would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public. Although the primary impact of restrictive ballot access laws is on the candidates, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Additionally, the Supreme Court has noted that the "primary concern is not the interests of [the] candidate . . ., but rather, the interests of the voters who chose to associate together to express their support for [his or her] candidacy and the views [he or she] espoused." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). We conclude that McLain has alleged a cognizable injury in fact.

McLain, 851 F.2d at 1048. *See also Anderson*, 460 U.S. at 786 (holding that supporters of an independent candidate for president had standing as voters to challenge Ohio's ballot access laws); *Bullock*, 405 U.S. at 143 (holding that a voter had standing to challenge the constitutionality of a filing fee requirement that made it difficult for candidates to appear on the ballot).

II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR EQUAL PROTECTION CHALLENGE.

Defendants also contend that Plaintiffs lack standing to pursue their Equal Protection claim, arguing that Plaintiffs have not "presented or alleged sufficient facts to demonstrate that they have standing to contest the [disparate] classification of candidates" created by SDCL 12-5-1 and SDCL 12-5-21. Docket 103 at 1. That contention is incorrect, as a review of Plaintiffs' Second Amended Complaint shows. The Second Amended Complaints both alleges *and* presents facts that establish Plaintiffs' standing to assert their Equal Protection claim. The Second Amended Complaint presents the (undisputed) fact that two Constitution Party candidates were not allowed access to the 2016 general election ballot due to "[t]he discriminatory effect of defendants' policies." *See* Docket 85 at ¶ 37. In addition, the Second Amended Complaint describes the two groups of candidates created by South Dakota law and explains how candidates for the eight offices listed in SDCL 12-5-21 enjoy advantages not enjoyed by any other candidate, and expressly avers that "[i]t is unreasonable and discriminatory to force a new party to meet a March 29 signature deadline to select candidates for the offices not listed in SDCL 12-5-21 while permitting that same party to wait until July 11 to submit signatures for the eight offices listed in 12-5-21." *Id*. at ¶ 35. The Second Amended Complaint then states a separate claim for relief based on the grounds that South Dakota law is "being interpreted and enforced by defendants in a manner that results in invidious discrimination against candidates seeking an office not listed in SDCL 12-5-21. This results in denying to certain candidates and to the supporters of those candidates, including plaintiffs herein, rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983." *See id.* at ¶ 43.

Plaintiffs have standing to pursue this Equal Protection claim. The individual Plaintiffs as voters, as well as the Constitution Party and the Libertarian Party as political parties, have been and are being directly impacted by the application and enforcement of SDCL 12-5-1 and SDCL 12-5-21, the statutes that divide candidates into two groups and treat those groups differently.[3] It is beyond dispute, for instance, that in the 2016 election, the Constitution Party was unable to place candidates on the November ballot for the U.S. Senate and the State House solely due to the disparate treatment challenged in this lawsuit, and that, as a result, the individual Plaintiffs were unable to vote for those candidates. Those facts—alleged in Plaintiffs' Second Amended Complaint—confer standing to challenge the constitutionality of SDCL 12-5-1 and SDCL 12-5-21 for the same reasons this Court previously denied Defendants' challenge to Plaintiffs' standing. *See* Docket 18 at 4 (citing *Williams v. Rhodes* and *McLain v. Meier*).

Indeed, even if this Court were to hold that Plaintiffs' facial challenge to SDCL 12-5-1 was rendered moot by the 2017 amendment to SDCL 12-5-3(10)—which it is not—Plaintiffs would still have ability to pursue their Equal Protection claim. The Equal Protection claim is based on the fact that South Dakota law divides candidates for statewide elected office into two groups, and one group (the "convention" candidates) has distinct advantages over the other (the "primary" candidates) by being able to (1) avoid the March petition deadline, (2) avoid the time and expense of a primary election, and (3) be selected at the party's convention after the major

[3] Plaintiffs' Second Amended Complaint challenges the constitutionality of four statutes: SDCL 12-5-1, SDCL 12-5-21, SDCL 12-6-1, and SDCL 12-6-4. *See* Docket 85, ¶ 40. Defendants discuss the application of these statutes in Docket 103 at 23-26. Analytically, it appears to Plaintiffs that the statutes most directly creating the disparate treatment between groups of candidates are SDCL 12-5-1 and SDCL 12-5-21. This issue can be resolved in a remedy phase with input from Defendants, but it may be possible for the Court to grant appropriate relief without declaring SDCL 12-6-1 and SDCL 12-6-4 unconstitutional as applied to newly-qualifying parties. For purposes of Plaintiffs' motion for summary judgment, all references to the first two statutes should be considered as a reference to all four statutes. By citing only SDCL 12-5-1 and SDCL 12-5-21, Plaintiffs are not waiving their claims against the other two.

parties have chosen their candidates and the issues have further solidified. This statutorily-created disparate treatment applies to *all* parties, both those already qualified and those seeking qualification, and thus the amendment to SDCL 12-5-3(10) has no application to the Equal Protection claim. Stated differently, even though the Constitution Party and the Libertarian Party have qualified for the 2018 ballot, they are still unable to select their "primary" candidates at their convention. Thus, Plaintiffs' Equal Protection claim is wholly distinct from their First Amendment claim, and is not impacted by the amendment to SDCL 12-1-3(10).

III. PLAINTIFFS' CLAIMS ARE NOT MOOT

Plaintiffs' claims were not rendered moot by the 2017 amendment to SDCL 12-5-3(10). For reasons just explained, Plaintiffs' Equal Protection challenge could not possibly have been rendered moot by the 2017 amendment, given that the amendment merely redefines "political party" and has no bearing on the way in which *all* political parties are forced by SDCL 12-5-1 and SDCL 12-5-21 to select their "primary" and "convention" candidates. Therefore, Plaintiffs' Equal Protection claim is not moot.

With respect to Plaintiffs' First Amendment challenge to SDCL 12-5-1, Defendants contend: "To the extent that Plaintiffs are seeking a declaratory ruling as to the procedures implemented to gain party status prior to the 2017 Legislative Session, such claims are moot." Docket 103 at 12 n.6. That contention is misguided.

Defendants' statement rests on a false presumption because it implies that "the procedures implemented to gain party status prior to the 2017 Legislative Session" were different than today. Following the amendment, the requirements to *retain* party status are different, but not the requirements (or procedures) to *gain* party status. The requirements to gain party status are set forth in SDCL 12-5-1, and that statute was not amended in 2017. Both prior to 2017 and

today, a new party wishing to gain party status must satisfy SDCL 12-5-1's early filing deadline combined with its exceedingly high signature requirement. Plaintiffs' First Amendment challenge to SDCL 12-5-1 is not moot because that statute has not changed.

The Eighth Circuit's decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), is applicable in this context. There, as here, a state amended an election procedure after suit was filed, and the state claimed that the amendment rendered the case moot. The court carefully examined the likely impact of the amendment and rejected the claim of mootness, finding that although the amendment altered one aspect of the election process, "the amended statute still impairs the Appellants in the very same way that they claimed the prior section did." *Id.* at 1548. Here, South Dakota changed the requirements to remain on the ballot, but SDCL 12-5-1 is exactly the same today as when Plaintiffs commenced their challenge to its validity. Therefore, Defendants' mootness argument fails.

Defendants speculate that as a result of the amendment to SDCL 12-5-3(10), "it may very well be the case" that the Plaintiff political parties might remain on South Dakota's ballot "indefinitely," and, thus, never again have to satisfy the onerous demands of SDCL 12-5-1. *See* Docket 103 at 12 n.6. But the Defendants ignore the high standard they must meet to show a claim is moot. The issue is not whether the Constitution Party and Libertarian Party *might* remain on the ballot. Rather, as Chief Judge Viken recently explained in a similar situation, Plaintiffs are entitled to an adjudication of their constitutional claim unless the Defendants prove "'it is *absolutely clear*' that the violative policies and procedures of the defendants [cannot] 'be expected to recur.'" *Oglala Sioux Tribe v. Fleming*, Civ. No. 13-5020-JLV, 2016 WL 7324077, at *10 (D.S.D. Dec. 15, 2016) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987) (italics in *Gwaltney*)). *See also United States v.*

Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968) (holding that in order for a court to dismiss a claim as moot, "[t]he defendant must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur")

The party claiming mootness bears the "formidable burden" of establishing that as a result of changed circumstances, the challenged policy or practice cannot reasonably be expected to recur. *See Friends of the Earth*, 528 U.S. at 190. Although Defendants argue that Plaintiffs' claims are moot based on the post-filing passage of SDCL 12-5-3(10), Defendants provided no authority—legal or factual—in support of their position.

Defendants have not shown—and cannot show—that the amendment to SDCL 12-1-3(10) renders it "absolutely clear" that Plaintiffs are unlikely to face the onerous burdens of SDCL 12-5-1 in the future. Attached to this brief is the Second Supplemental Affidavit from Plaintiffs' ballot access expert, Richard Winger. Mr. Winger examined the voting patterns in South Dakota's elections since 1984, the year the current version of SDCL 12-5-1 went into effect. Based on his examination, Mr. Winger concludes that "by no means . . . [is] it likely that a minor party will be able to remain on the ballot after it qualifies for the ballot" despite the amendment; indeed, to the contrary, "[c]hances are high that both [Plaintiff] parties will lose their status as political parties in November 2020 and will need to petition again for party status." *See* Second Supplemental Affidavit of Richard Winger ("Sec. Supp. Winger Affidavit") at ¶¶ 6-7. In other words, although the amendment makes it easier for a party to remain on the ballot, the amendment does not make it easy. In the 2016 election, for instance, not a single one of the Constitution Party's statewide candidates received 2.5% of the vote. Only infrequently in South Dakota's electoral history has a minor party's statewide candidate obtained 2.5% of the vote. Thus, Plaintiffs retain a live, cognizable interest in the constitutionality of South Dakota's

requirements to access the ballot, given that it is highly likely Plaintiffs will need to satisfy those requirements within the next two election cycles. *See Constitution Party of New Mexico v. Duran*, Civ. No. 1:12-325 KG/LFG (Mem. Op. and Order D.N.M. Dec. 9, 2013) (Docket 63-A) (enjoining an April ballot access deadline for new parties, even though the plaintiff Constitution Party had met that deadline in the 2012 election, due to the fact that the Plaintiff would likely face that deadline in future elections).

In addition, Plaintiffs' claims are not moot because they are capable of repetition yet evading review. Election issues are "frequently saved" from mootness by this exception to the mootness doctrine. *See Norman v. Reed*, 502 U.S. 279, 288 (1992) (holding that review of signature requirements for ballot eligibility was "worthy of resolution as capable of repetition, yet evading review") (internal quotation omitted); *National Right to Life Political Action Committee v. Connor*, 323 F.3d 684, 691 (8th Cir. 2003). The "capable of repetition yet evading review" exception applies even where it is unclear whether the challenged conduct will recur. *Friends of the Earth*, 528 U.S. at 190 ("[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (holding that dismissal of a case "on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought"). That flexibility is due to the reality that, "[i]n contrast [to assessing standing at the beginning of a case], by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth*, 528 U.S. at 191-92. That concept has direct application here. This case is more than two years old and has engendered numerous voluminous

briefs and court decisions on virtually every legal issue in the litigation. All that remains is a final ruling on the merits based on principles already established by the Court. The advanced stage of litigation, combined with the likelihood that Plaintiffs will again need to meet the requirements of SDCL 12-5-1 within the next two election cycles, provide compelling reasons not to abandon this case.

IV. PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW.

Defendants argue that, if they do not persuade the Court that they prevail on standing or mootness grounds, the Court should find that Plaintiffs' claims are not ripe for review. Defendants cite *Connor*, 323 F.3d at 692-93, for the proposition that Plaintiffs' claims are not ripe. (Docket 108 at 6.) That reliance is misdirected. In *Connor*, the court *rejected* a claim of mootness based on the "capable of repetition" principle Plaintiffs discussed earlier. *See id.*, 323 F.3d at 691-92. The court held, however, that "further factual development" was necessary before those claims could be presented properly, and therefore the case was not ripe for adjudication. *Id*. at 692-94. Here, in contrast, the facts *are* fully developed:[4] the Plaintiff political parties have been unable to meet the twin requirements imposed by SDCL 12-5-1 in the past and are likely to face identical burdens in the future, and the Court need only determine whether those requirements violate the First and Fourteenth Amendments.

V. SDCL 12-5-1 VIOLATES THE FIRST AMENDMENT

Defendants do not dispute Plaintiffs' characterization of SDCL 12-5-1 as creating the most onerous ballot access regime in the nation. The one-two combination of South Dakota's early filing deadline and inordinately high signature requirement places SDCL 12-5-1 in a league of its own.

[4] Indeed, Defendants themselves have moved for summary judgment, which motion requires that Defendants establish that no material facts remain in dispute.

Defendants seek to justify SDCL 12-5-1 by reciting all of the interests used in other cases to justify access requirements, such as avoiding voter confusion and safeguarding the integrity of the ballot. But what Defendants fail to do is explain—or even discuss—why less drastic means than those imposed on new parties by SDCL 12-5-1 would not suffice. For instance, 47 states protect those same interests with a one percent or less signature requirement. Why does South Dakota need 2.5 percent? Defendants devote not one sentence in either brief to that subject.

Compounding Defendants' failure to support its claim that the current access structure is necessary, the evidence in this case establishes that South Dakota's draconian access requirements are *not* necessary. Defendant Shantel Krebs conceded this in her deposition. Ms. Krebs knows of no reason why South Dakota cannot have a later filing deadline, *see* Docket 101-3 at depo. p. 36, and no reason why South Dakota cannot have a 1% or less signature requirement. *Id*. at depo. p. 50 ("I do not know of any reason we could not.")[5]

Faced with the absence of any supporting evidence, Defendants point out that such evidence is not always necessary because courts are willing to presume a need to protect the integrity of the ballot. *See* Docket 103 at 21. But *no* court has upheld restrictions on ballot access that are excessive in comparison with those of other states without proof that such restrictions are necessary. If the burden of proof were otherwise, every state could enact draconian restrictions immune from challenge. As the Eighth Circuit admonished in precisely this circumstance: "The remote danger of multitudinous fragmentary groups cannot justify an immediate and crippling effect on the basic constitutional right to vote for a third party candidate." *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). *See also MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977)

[5] Defendants accuse Plaintiffs of personally attacking Ms. Krebs and claim that this attack was "beyond the pale." *See* Docket 108 at 13 n.4. All citations to Ms. Krebs testimony in Plaintiffs' brief relate to the issues in this litigation. Citation to relevant sworn testimony is not a personal attack.

(holding that ballot access laws "may not go beyond what the state's interests actually require"). Defendants have done nothing to demonstrate that circumstances are so unique in South Dakota that they actually require restrictions on ballot access far more onerous that those in sister states.[6]

Defendants also make the unsupported claim that "reasonably diligent third parties could (and repeatedly have) satisfy [sic] the new party filing requirements found in SDCL 12-5-1." *See* Docket 108 at 9. Defendants do not present any evidence to support this claim. Worse, Defendants apparently have not compared the frequency by which third parties appear on the ballot in South Dakota with their appearance on ballots in other states. South Dakota has one of the worst records in the nation. The following analysis by Mr. Winger deserves careful consideration:

> 3. In my opinion, the best test of whether a nationwide third party is "diligent" is whether it can place its nominee for president on the ballot in enough states to capture a majority of the electoral vote. Since 1983, six minor parties have done that in one presidential election or another: the Reform Party in 1996 and 2000; the Libertarian Party in all years 1984 to the present; the Green Party in all years 2000 to the present; the Natural Law Party in 1996 and 2000; the New Alliance Party in 1984, 1988, and 1992; and the Constitution Party in 1996, 2000, 2004, and 2008.
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> 4. Of those six diligent third parties, three of them have not succeeded even once in qualifying as a party in South Dakota: the Green Party, the New Alliance Party, and the Natural Law Party. The Reform Party succeeded only one time, in 2000, and was not able to qualify as a party in South Dakota even in 1996 when its candidate was Ross Perot, who polled 8.5% of the vote nationally. South Dakota is one of only five states in which the Green Party's presidential nominee has never been on the ballot. In 2016, Green Party candidate Jill Stein got on the ballot in 44 states, but not South Dakota. Similarly, since 2007 when South Dakota established its March deadline, the Libertarian Party has succeeded only once, in 2012, in completing the party petition by the March deadline. The Constitution Party is the only party that

[6] Defendants beseech the Court to apply the rational basis test in analyzing SDCL 12-5-1. *See* Docket 108 at 8-12. The Court has already determined that SDCL 12-5-1 imposes such severe burdens on Plaintiffs' constitutional rights that it must be subjected to the compelling state interest test. *See* Docket 43 at 11-12, 15. This subject is discussed in Plaintiffs' Opening Brief, Docket 98, at 8-10. Defendants' reiterated arguments are barred by the law of the case doctrine.

> has completed the party petition by the March deadline more than once; it did so in 2008, 2012, and 2016. Page 15 of the Defendants' brief mentions the petitioning success of the Libertarian and Constitution Parties in years prior 2007, but the brief does not state that during those years, the deadline was in April.
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> 5. Page 29 of the Defendant's Brief quotes my e-mail to Kea Warne, saying that now that a party can remain on the ballot if it obtains 2.5% of the votes cast for Public Utilities Commission, it will be easier for a minor party to remain ballot-qualified. That statement is true. *It is also true, however, that although it is easier for a party to remain on the ballot, it will be very difficult to satisfy the new standard, even for PUC Commission.* In fact, the only times in the last 80 years that a minor party nominee for PUC managed to poll as much as 2.5% were instances when that party was the only choice for that office on the ballot other than the Republican and Democratic nominees. When both the Libertarian Party and the Constitution Party had a candidate on the ballot for PUC—in 2004—the Libertarian Party nominee only got 2.04% and the Constitution Party nominee only got 1.42%.
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> 6. *Therefore, by no means does the amendment to SDCL 12-5-3(10) make it likely that a minor party will be able to remain on the ballot after it qualifies for the ballot. In fact, South Dakota's electoral history indicates that the opposite is true.* The only statewide offices up for election in presidential years in South Dakota are president, U.S. Senate, U.S. House, and PUC. Neither the Libertarian Party nor the Constitution Party has ever polled as much as 2.5% for either U.S. Senate or U.S. House in South Dakota, and the only time either party polled as much as 2.5% for president in South Dakota was the Libertarian Party in 2016. Now that the new law, HB 1034, requires parties to meet the vote test in presidential years as well as in midterm years, *it is my opinion based on my examination of past election results that both parties will most likely fail to meet the vote test in future presidential years,* given the fact that both parties will inevitably nominate someone for PUC, just as they did in 2004, and neither will get 2.5% for PUC. Therefore, the chances are high that both parties will lose their status as political parties in November 2020 and will need to petition again for party status.

See Sec. Supp. Winger Affidavit at ¶¶ 3-6 (emphasis added). Thus, Defendants' assertion that SDCL 12-5-1 only imposes a "modest burden" on voters and political parties, *see* Docket 108 at 12, is not only a gross understatement but conceals the damage that South Dakota's draconian requirements have been causing for decades. Similarly, Defendants' assertion that SDCL 12-5-1 is necessary to avoid "ballot overcrowding" hides the truth that South Dakota has made its

requirements so tough that parties qualifying for ballots in the majority of states have been unable to meet South Dakota's excessive requirements.

Defendants seek to support South Dakota's 2.5% percent signature requirement by relying on *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20 (1st Cir. 2016), which notes that New Hampshire has a three percent requirement. That case is easily distinguishable for several reasons. First, the plaintiffs in *Gardner* were not challenging the signature requirement but, rather, the state's January 1 restriction on gathering signatures. Second, the deadline for obtaining those signatures in New Hampshire *is August*, not March, as in South Dakota. *See* Sec. Supp. Winger Affidavit at ¶ 7. Third, New Hampshire (unlike South Dakota) permits independent candidates to appear on the ballot with a partisan label. As a result, even a party candidate can instead meet the lower signature requirement to run as an independent candidate (just 3000 signatures), wait until August to file his/her petition, and still appear on the ballot with a party label. *See id.* No similar option exists in South Dakota.[7] Thus, it is manifestly misguided for Defendants to tout *Gardner* as supporting the validity of SDCL 12-5-1.

"[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 at 7 (citing *Williams v. Rhodes*, 393 U.S. at 30). Every state may place some burden on those rights in order to manage its ballot, but South Dakota's restrictions go well beyond what is actually required. These excessive restrictions have thwarted diligent third parties for decades in their effort to offer voters in South

[7] South Dakota previously allowed independent candidates to appear on the November ballot with a party label but the Legislature repealed that option in 2007. *See* SB 81.

Dakota an alternative to the two-party system that has dominated state politics. "[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." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). The means codified in SDCL 12-5-1 are not the least drastic, or anywhere close.

The recent decision in *United Utah Party v. Cox*, Civ. No. 2:17-cv-00655, 2017 WL 3311220 (D. Utah, Aug. 2, 2017), is particularly instructive in this regard. In that case, the court ordered that a minor party be placed on the ballot for a special election, holding that the State's May 26 deadline was unreasonable. That deadline is two months later than South Dakota's. Notably, the May 26 deadline was held to be unreasonable even though the number of signatures required for a new party to access the ballot in Utah is only 2,000. *See id.* at **16-22.

Defendants have failed to meet their burden of showing that their onerous restrictions on ballot access—far in excess of those elsewhere—are actually required. The March deadline is so far in advance of the major parties' nomination conventions and the November election that voter dissatisfaction necessary to support a new party is unlikely to exist prior to the deadline, and the State's signature requirement is substantially higher than the requirement in 47 other states. No justification has been provided by the Defendants to explain what is so different about South Dakota. The fact that Defendant Krebs is unaware of any justification supports Plaintiffs' assertion that none exists. Plaintiffs are entitled to judgment as a matter of law that SDCL 12-5-1 violates the First Amendment.

IV. SDCL 12-5-1 AND SDCL 12-5-21 VIOLATE THE FOURTEENTH AMENDMENT

Defendants also do not put forth any cogent argument in opposition to Plaintiffs' Equal Protection challenge. In the first place, it is illogical (if not absurd) to conclude, as South Dakota does in SDCL 12-5-1 and SDCL 12-5-21, that everyone in the legislative branch of state government has more "power" than executive officials such as the Secretary of State and Attorney General, and to then have candidates for those offices selected differently based on the "power" they wield. Second, even if some logic is hidden in that assessment, that logic is defeated by the fact that the Governor is placed in the same group as state legislators.

Try as they might, Defendants are unable to articulate a rational basis for this disparate treatment, much less a compelling interest. For instance, Defendants claim that "South Dakota, as a policy, has determined that those who create *and affect* the laws should be chosen in a more populous manner." Docket 103 at 25 (emphasis added). But the Attorney General and Secretary of State affect the laws as much, and probably more, than any single member of the State House of Representatives. More to the point, however, is the question of how does one determine which of those officials "affects" the law more than the others, given that they play such different roles in the government? It is difficult to imagine, for instance, that any one person in state government affects the law more than does the Attorney General.

Defendants argue that "[t]he laws are neutral on their face" because all political parties are treated equally in how they must select their candidates. Docket 103 at 25; *see also id*. at 26 ("the South Dakota Legislature treats all candidates for the same office equally."). Plaintiffs readily acknowledge that all political parties are equally disadvantaged by South Dakota's scheme. But that does not save the scheme. A law that forced all political parties to select only

male candidates for office would treat all parties equally, as well, and yet would clearly violate the Fourteenth Amendment.

The focus of Plaintiffs' Equal Protection challenge is that South Dakota law arbitrarily places candidates into two different groups and advantages one group over the other for no legitimate reason. The fact that all parties in South Dakota suffer the same violation of their rights does not make the law constitutional.

Defendants contend that election laws imposing " 'only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters' " are permissible. Docket 103 at 29 (quoting *Burdick v. Takushi*, 504 U.S. 428, 424 (1992), and *Anderson v. Celebreeze*, 460 U.S. at 788). South Dakota's election laws, however, are neither reasonable nor nondiscriminatory. As discussed in Plaintiffs' opening brief, no other state in the nation divides candidates in this manner, and there is no compelling basis for creating this division. *See* Supplemental Affidavit of Richard Winger (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 Court has already remarked 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 at 15 (citing *Illinois State Board of Elections*, 440 U.S. at 186). Nothing in Defendants' recent filings fills that void, and Defendant Krebs expressly admitted that she has no evidence that allowing third parties to select all of their candidates at the party's convention (in the same manner as she was selected at the Republican convention) would harm any state interest. *See* Docket 101-3 at depo. pp. 149, 162, 165.

SDCL 12-5-1 and SDCL 12-5-21 create an invidious classification. These statutes divide candidates into two groups. One group, as explained earlier, has distinct advantages over the other, particularly in being able to avoid announcing their candidacy by March and instead being able to be selected at the party's convention after the major parties have selected their nominees. Defendants have failed to provide a compelling basis for this discrimination. Defendants' scheme thus violates the Equal Protection Clause of the Fourteenth Amendment.

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 SDCL 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, Defendants' motion for summary judgment should be denied, and Defendants should be enjoined from any further enforcement of those statutes in this manner.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, 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 persons:

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