

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

CONSTITUTION PARTY OF SOUTH  
DAKOTA, JOY HOWE, MARVIN  
MEYER, and MARK PICKENS,

Plaintiffs,

v.

CHRIS NELSON, in his official capacity  
as Secretary of State of South Dakota,

Defendant.

Case No. CV 10-3011

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JOSEPH HAAS  
Clerk

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This complaint involves challenges to two statutes. The first statute involves three distinct constitutional violations regarding S.D. Codified Laws § 12-5-1.4. The first allegation of a constitutional violation of S.D. Codified Laws § 12-5-1.4 avers as unconstitutional the requirement that Governor candidates of new political parties obtain 250 signatures of voters registered to vote as members of the new political party while established political parties need obtain signatures equal to only 1% of their party membership. *Compare* S.D. Codified Laws § 12-5-1.4(1) *with* S.D. Codified Laws § 12-6-7. The second allegation of a constitutional violation of S.D. Codified Laws § 12-5-1.4 avers as unconstitutional the requirement that Governor candidates (a statewide candidate) are required to obtain ballot access via a petition process while other statewide candidates are chosen by state convention. *Compare* S.D. Codified Laws § 12-5-1.4 *with* S.D. Codified Laws § 12-5-21. The third allegation of a constitutional violation of S.D. Codified Laws § 12-5-1.4 avers as unconstitutional as applied to the Constitution Party the requirement that the Constitution Party candidate obtain signatures by

a March deadline for a primary election it cannot have by law because it is impossible for more than one candidate to qualify for the primary ballot.

2. The second statute challenged by the Plaintiffs involves petition circulators. The challenge avers as unconstitutional the requirement that non-residents of South Dakota are barred from circulating petitions for ballot access. The statute involved is S.D. Codified Laws 12-1-3(9) which defines the term “petition circulator” to include only residents of South Dakota.

### **JURISDICTION AND VENUE**

3. This is a civil action seeking declaratory, injunctive, and other legal and equitable relief, and the Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343(a) and 2201. The cause of action lies pursuant to 42 U.S.C. § 1983 because this is an action alleging civil rights violations and violations of the U.S. Constitution.

4. Venue of this action is properly in this district, pursuant to 28 U.S.C. § 1391(b)(2), on the ground that a substantial part of the events or omissions giving rise to the claim occurred in the District of South Dakota.

### **THE PARTIES**

#### **The Plaintiffs**

5. Plaintiff CONSTITUTION PARTY OF SOUTH DAKOTA (“Constitution Party”) is a political party that is qualified as a new political party under state law. The requirement that the Constitution Party’s Governor candidates obtain 250 signatures from a pool of approximately 315 violates the equal protection clause when other political party’s are required to obtain signatures equal to only 1% of their party membership. The requirement that the Constitution Party’s Governor candidates obtain 250 signatures from a pool of approximately 315 violates the equal protection clause when candidates in identical statewide districts (for example, attorney

general or secretary of state candidates) are nominated by state convention. These requirements, as well as the early March signature deadline, also violate the Constitution Party and its members' voting rights, rights to free speech, equal protection, and rights to freedom of association. (Hereinafter, the requirement for the Governor's candidate to obtain 250 signatures is referred to as the "250 signature rule.")

6. Furthermore, the statutory requirement barring non-residents from circulating nomination petitions violates the Constitution Party's and its members' voting rights, rights to free speech, rights to pick their own spokesmen, and rights to freedom of association. Because this statutory requirement bars the Constitution Party from hiring non-residents to come to the state and circulate nomination petitions, the statute also violates the federal commerce clause.

7. Plaintiff JOY HOWE ("Howe"), is a resident of South Dakota, a member of the Constitution Party, the Chairman of the Constitution Party of South Dakota, and a registered Constitution Party voter, who intends to seek the nomination of the Constitution Party as their Governor candidate at the next state convention to be held June 19, 2010. She will seek the nomination for Governor at the Constitution Party's state convention after one other candidate for the Governor's office named Peter Boeve could not obtain sufficient signatures for ballot access under the draconian "250-signature rule" despite diligent efforts. The March signature deadline and the "250-signature rule" violated Howe's voting rights (because she would have voted for Boeve had he obtained ballot access) and Howe's rights to equal protection of the law. The "250-signature rule" also bars Howe from obtaining the Constitution Party's nomination via state convention which violates Howe's voting rights, rights to equal protection, rights to free speech, and rights to free association.

8. Furthermore, the statutory requirement barring non-residents from circulating nomination petitions violates Howe's voting rights, rights to free speech, and rights to freedom of association.

9. Plaintiff MARVIN MEYER ("Meyer"), is a resident of South Dakota, a member of the Constitution Party, and a registered Constitution Party voter. Meyer intends to vote for the Constitution Party's candidate for Governor at the next general election. The "250-signature rule" violates Meyer's voting rights and Meyer's rights to equal protection of the law. The "250-signature rule" also bars Meyer from voting for the Constitution Party candidate for Governor. The March signature deadline and the ban on picking Governor candidates by nomination at a convention when other candidates for statewide office are picked by obtaining the Constitution Party's nomination via state convention violates Meyer's voting rights, rights to equal protection, rights to free speech, and rights to free association.

10. Furthermore, the statutory requirement barring non-residents from circulating nomination petitions violates Meyer's voting rights, rights to free speech, and rights to freedom of association.

11. Plaintiff MARK PICKENS ("Pickens"), is a resident of Arizona, has circulated petitions in South Dakota in the past. Pickens has also circulated petitions on a volunteer basis and as a paid petition circulator throughout the country. The "250-signature rule" violates Pickens voting rights in Arizona, rights to equal protection, rights to free speech, and rights to free association.

12. Furthermore, the statutory requirement barring non-residents from circulating nomination petitions violates Pickens' voting rights, rights to free speech, and rights to freedom of association. Because Pickens is also barred from selling his services as a petition circulator in

South Dakota, the statutory requirement barring non-residents from circulating nomination petitions violates the commerce clause.

### **The Defendant**

13. Defendant, CHRIS NELSON, (“Nelson”) is the Secretary of State of the South Dakota, and as such, oversees the State’s electoral processes. The Secretary of State enforces the state laws at issue. Defendant Nelson is sued in his official capacity.

### **FACTS**

14. A new political party in South Dakota is recognized and may participate in primary elections after filing with the Secretary of State a petition signed by voters of the state numbering greater than two and one-half percent of the total vote cast in the previous gubernatorial election. *See S.D. Codified Laws § 12-5-1.*

15. To qualify for a new political party’s primary election ballot, each candidate running for state or federal office must file a petition signed by two hundred and fifty registered voters of the party. *See S.D. Codified Laws § 12-5-1.4.*

16. A political party loses its recognition as a political party if the party’s candidate for governor fails to receive at least two and one-half percent of the votes cast for governor in the previous gubernatorial election. *See S.D. Codified Laws §§ 12-1-3, 12-5-1.*

17. A new political party whose candidate for governor received more than two and one-half percent of the votes cast for governor in the previous gubernatorial election is no longer considered a new political party and is instead a political party. *See S.D. Codified Laws § 12-1-3(10).*

18. To qualify for an established political party’s primary election ballot, each candidate must file a nominating petition signed by not less than one percent of the voters who cast their

vote for that party's gubernatorial candidate at the last gubernatorial election. *See* S.D. Codified Laws § 12-6-7.

19. Party candidates for Governor and State Legislature must be selected by primary election. *See* S.D. Codified Laws § 12-5-21.

20. The Constitution Party cannot choose two candidates for Governor if the 250-signature rule is enforced because the Constitution Party has less than 500 statewide registered voters. In this situation, no primary is held. *See* S.D. Codified Laws § 12-6-9.

21. Petition circulators must be residents of South Dakota. *See* S.D. Codified Laws 12-1-3(9).

22. The South Dakota Constitution Party candidate for governor in the 2006 gubernatorial election received 1.2% of the total vote, failing to receive 2.5%. *See* [http://www.sdsos.gov/electionsvoteregistration/pastelections\\_electioninfo06\\_GEgovernorreturns.shtm](http://www.sdsos.gov/electionsvoteregistration/pastelections_electioninfo06_GEgovernorreturns.shtm).

23. There are three recognized political parties in South Dakota: the South Dakota Democratic Party, the South Dakota Republican Party, and the South Dakota Constitution Party. *See* <http://www.sdsos.gov/electionsvoteregistration/registrationvoting.shtm>.

24. For the 2010 election cycle, the South Dakota Constitution Party is considered a new party under S.D. Codified Laws § 12-5-1 and the Constitution Party's primary election is governed by S.D. Codified Laws § 12-5-1.4.

25. In South Dakota, there are approximately 315 voters registered as members of the Constitution Party as of 2008. *See* [http://www.sdsos.gov/electionsvoteregistration/pastelections\\_voterstats1988-2004.shtm](http://www.sdsos.gov/electionsvoteregistration/pastelections_voterstats1988-2004.shtm).

26. The Constitution Party, Howe, and Meyer intend to encourage others to vote for Howe and Howe and Meyer intend to vote for Howe themselves.

27. The Constitution Party, Howe, and Meyers intend to use non-resident petition circulators in the future whether they be volunteers or paid circulators.

28. Because of the non-residency ban, Howe, Meyer, and the Constitution Party may not enlist the help of other like-minded persons who are not residents of South Dakota to circulate nominating petitions.

29. Pickens intends to offer his services, sometimes as a paid petition circulator and sometimes as a volunteer, in South Dakota, but will not do so while it remains against the law.

**COUNT I: SOUTH DAKOTA LAWS GOVERNING NEW POLITICAL PARTIES VIOLATE FOURTEENTH AMENDMENT RIGHTS TO EQUAL PROTECTION OF THE LAWS, FREE ASSOCIATION, FREE SPEECH AND VOTING RIGHTS**

30. This Count incorporates ¶¶ 1-29 as if set out fully herein.

31. The “250-signature rule” found in S.D. Codified Laws § 12-5-1.4 violates the Fourteenth Amendment rights of the Constitution Party, Howe, Meyer, and Pickens to equal protection of the laws by requiring signatures for access to the Governor ballot equaling almost 80% of the party registration when established political parties need only 1% of their respective party registration. The requirement also violates Howe’s, Meyer’s, and Pickens’ voting rights, rights to freedom of association, rights to free speech and rights to the equal protecton of the laws.

32. The “250-signature rule” found in S.D. Codified Laws § 12-5-1.4 violates the Fourteenth Amendment of the Constitution Party, Howe, Meyer, and Pickens when candidates for other statewide offices may be nominated at a party convention. This rule also violates Howe’s, Meyer’s, and Pickens’ voting rights, rights to freedom of association, and equal protection of the laws.

33. The deadline to submit signatures to satisfy the “250-signature rule” as applied to the Constitution Party candidate for Governor violates the Supreme Court’s holding in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) because in the situation where a new political party cannot nominate more than one person because they do not have over 500 party registrants, there cannot be a contested primary election. Consequently, the deadline is, in effect, a deadline for access to the general election ballot. This rule violates the Constitution Party and its members’, Howe’s, Meyer’s, and Picken’s voting rights, speech rights, and rights to freedom of association as applied to the Plaintiffs.

34. By reason of the foregoing, Nelson, acting under color of state law, has deprived the Plaintiffs of the rights, privileges and immunities secured to them under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 of title 42 of the United States Code to participate in the democratic process free from unreasonable impediments, undue restraints on core political speech, free and expressive associational rights, and the right to equal protection of the laws.

35. Plaintiffs have no adequate remedy at law for such deprivation of their rights, privileges and immunities

**COUNT II: SOUTH DAKOTA LAWS VIOLATE FIRST AND  
FOURTEENTH AMENDMENT RIGHTS TO FREE SPEECH, FREE  
ASSOCIATION, VOTING RIGHTS, AND THE COMMERCE CLAUSE**

36. This Count incorporates ¶¶ 1-29 as if set out fully herein.

37. The bar on non-resident petition circulators found in S.D. Codified Laws § 12-1-3(9) which defines the term “petition circulator” to include only residents of South Dakota, violates the Constitution Party’s right to pick its own spokesman, the Constitution Party and its members’, Howe’s, Meyer’s, and Pickens’ rights to free speech, free association, and voting



rights. These rights are violated because they prohibit the Plaintiffs from associating with each other to circulate petitions for candidates of their choice.

38. The bar on non-resident petition circulators found in S.D. Codified Laws § 12-1-3(9) also violates the commerce clause by barring Pickens from offering his petition circulation services to South Dakota residents and by barring the Constitution Party, Howe, and Meyer from soliciting non-residents to circulate petitions on their behalf.

39. S.D. Codified Laws § 12-1-3(9) represents a direct restraint of Plaintiffs' political speech and severely burdens the political speech, political association, and voting rights of Plaintiffs, in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

40. By reason of the foregoing, Nelson, acting under color of state law, has deprived Plaintiffs of the rights, privileges and immunities secured to them under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 to participate in the democratic process free from unreasonable impediments, undue restraints on core political speech, free and expressive associational rights, the right to equal protection of the laws, and the commerce clause.

41. Plaintiffs have no adequate remedy at law for such deprivation of their rights, privileges and immunities.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully ask this Court:

(1) To enter a judgment declaring that the statutory scheme limiting the circulation, speech, associational, voting, and commerce clause rights of Plaintiffs are in violation of the United States Constitution, including particularly (a) that requiring candidates of new political

parties obtain 250 signatures for gubernatorial candidates (nearly 80 times more signatures on a percentage basis than gubernatorial candidates for other political parties, and infinitely more signatures on a percentage basis than new political party candidates for non-gubernatorial statewide offices), and the early March signature deadline, violate the Fourteenth Amendment to the United States Constitution compelling equal protection of the laws for all; and, (b) that the residency requirement for petition circulators violates the First and Fourteenth Amendment to the United States Constitution and the commerce clause;

(2) To grant preliminary and permanent injunctive relief enjoining and restraining Defendant, his servants, agents, employees, and all other persons in active concert and participation with him from implementing and enforcing this statutory scheme, including but not limited to, enjoining Defendant from requiring more signatures for new political party candidates than for other candidates, from requiring Governor candidates to be nominated solely by primary ballot, as opposed to nomination via convention, and from requiring petition circulators be residents of the state;

(3) To mandate that Defendant recognize the Constitution Party's gubernatorial nomination at the Constitution Party's June 19, 2010 convention and place that nominee on the general election ballot as the Constitution Party candidate for Governor;

(4) To award Plaintiffs costs and disbursements associated with the filing and maintenance of this action, including an award of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

(5) To award such other equitable and further relief as the Court deems just and proper.

Dated this 5<sup>th</sup> day of June 2010.

THE BERNHOFT LAW FIRM, S.C.  
Attorneys for the Plaintiffs

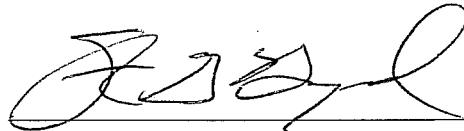


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Daniel J. Treuden, Wis. Bar No. 1052766  
*Pro hac vice* application pending

207 E. Buffalo Street, Suite 600  
Milwaukee, Wisconsin 53202  
Telephone: (414) 276-3333 (general)  
Facsimile: (414) 276-2822  
Email: [djtreuden@bernhoftlaw.com](mailto:djtreuden@bernhoftlaw.com)

HAUGAARD LAW OFFICE, P.C.  
Attorneys for the Plaintiffs



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Steven G. Haugaard, S.D. Bar No. 1934

1601 East 69th Street, Suite 302  
Sioux Falls, South Dakota 57108  
Telephone: (605) 334-1121  
Facsimile: (605) 332-1171  
Email: [Steve@Haugaardlaw.com](mailto:Steve@Haugaardlaw.com)