No. 10-2910

IN THE

United States Court of Appeals for the Eighth Circuit

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

Plaintiffs – Appellants,

Versus

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

Defendant – Appellee.

On Appeal from the Final Order of the U.S. District Court for the District of South Dakota, District Judge Roberto A. Lange, No. CIV 10-3011-RAL

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The case involves fundamental rights of free speech and association that impact core political speech at its absolute base. All persons have the right to speak and argue for political change in the manner they perceive to be the most effective means possible, and to associate with others in pursuit of a common political goal. Yet the State of South Dakota, in this litigation, maintains that the Constitution allows it to limit certain political speech to a certain class of persons, mainly, residents of the State, and that those outside that class – non-residents – are without standing to assert their political ideas in the manner they believe most effective towards that goal. Consequently, South Dakota bans non-residents from circulating ballot-access petitions for candidates for political office.

The Eighth Circuit Court of Appeals has held, in the context of an initiative petition, that residency restrictions are constitutional. *See Initiative & Referendum Institution v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). Every other circuit court that has considered the issue since *Jaeger* has rejected *Jaeger*'s reasoning. This Panel may overrule *Jaeger* if it determines applying *Jaeger* would be unjust or if it determines *Jaeger* is clearly erroneous.

Oral argument is appropriate to discuss *Jaeger* and the contra-authority from other circuit courts of appeal and will assist this court in its decision. Fifteen minutes per side is an adequate amount of time to argue these issues.

CORPORATE DISCLOSURE STATEMENT

There are no nongovernmental corporate parties in this appeal required to be disclosed.

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JURISDICTIONAL STATEMENT

The Federal District Court for the District of South Dakota (the "District Court") had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. The issues before the District Court were federal questions under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. As for relevant facts relating to jurisdiction, Mark Pickens is a non-resident of South Dakota and is barred by South Dakota state law from circulating candidate ballot access petitions. (R. 1, ¶¶ 11-12.) Furthermore, as to the other three Plaintiffs-Appellants, the Complaint alleges all three are residents of South Dakota and are barred from fully associating with non-residents in candidate signature-gathering campaigns for ballot access petitions. *Id.*, ¶¶ 5-10.

The Eighth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4 (a)(1). The District Court, which is a district court within the Eight Circuit Court of Appeals' jurisdiction, entered final Judgment on August 4, 2010. (R. 34, Appendix, p. 1.) The Judgment dated August 4, 2010 was a final order disposing of all of the parties' rights and claims. *Id.* Plaintiffs-Appellants timely filed the Notice of Appeal on August 26, 2010. (R. 35.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether residents of South Dakota have standing to seek declaratory relief against statute barring non-residents from circulating ballot-access petitions within South Dakota as violative of their rights to associate.

Apposite cases include: (1) *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); (2) *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000); and (3) *Wersal v. Sexton*, 613 F.3d 821, 830 (8th Cir. 2010).

2. Whether South Dakota can limit core political speech and fundamental First Amendment association rights by prohibiting non-residents of South Dakota from circulating petitions for a candidate's ballot access within South Dakota.

Apposite cases include: (1) *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999); (2) *Meyer v. Grant*, 486 U.S. 414 (1988); and (3) *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008).

STATEMENT OF THE CASE

The Nature of the Case

The Plaintiffs-Appellants, The Constitution Party ("Constitution Party"), Joy Howe ("Howe"), Marvin Meyer ("Meyer"), and Mark Pickens ("Pickens"), filed a civil rights case pursuant to 42 U.S.C. § 1983 alleging two counts of constitutional violations related to South Dakota's election laws. (R.1.) Howe and Meyer are residents of South Dakota and members of the Constitution Party. *Id.*, ¶¶ 7 and 9;

R. 7, ¶ 1; and R. 9, ¶ 1. Pickens is a resident of Arizona and is not a member of the Constitution Party. (R. 1, ¶ 11.) Pickens has circulated petitions on behalf of others across the country, sometimes as a paid petition circulators and sometimes as a volunteer. *Id*., ¶ 11. The Constitution Party is an officially recognized political party for the 2010 election season, but is considered a "new" political party. *Id*., ¶ 5.

The Complaint's first count alleged that the 250-signature requirement for a Governor's candidate was unconstitutionally burdensome on new political parties as applied to the Constitution Party – a party with only 315 registered members. *Id*., ¶¶ 30-35. This count was dismissed on Summary Judgment and is not part of this appeal. (R. 33; Appendix, p. 2; Addendum, p. 1.)

The Complaint's second count sought declaratory and injunctive relief and alleged that South Dakota's ban on non-residents, like Pickens, from circulating petitions for a governor candidate's ballot access violated the non-resident's First Amendment right to free speech, his rights to associate for political purposes with residents of South Dakota, and violated the Commerce Clause of the Constitution by barring the non-resident from marketing his petition circulation services in the state. (R. 1, ¶¶ 36-41.) The second count also alleged that the constitutional right to associate for residents of South Dakota, like Howe, Meyer, and the Constitution Party, were violated by the same ban on non-resident petition circulators. *Id*.

Course of Proceedings

The Plaintiffs-Appellants filed a Motion for a Preliminary Injunction on Count I. (R. 5.) The District Court set a hearing for July 16, 2010 to consider the Motion for Preliminary Injunction. (R. 19.) Prior to that hearing, Nelson filed a Motion to Dismiss styled in the alternative as a motion for judgment on the pleadings or a motion for summary judgment. (R. 20; Appendix, p. 29.) The memorandum in support of Nelson's motion to dismiss was filed on July 2, 2010. (R. 21.) The memorandum not only responded to the Plaintiffs-Appellants' Motion for Preliminary Injunction, but also moved to dismiss the entire complaint. *Id*. The Plaintiffs-Appellants filed their Reply to the Motion for Preliminary Injunction on July 9, 2010, prior to the hearing on the Motion for Preliminary Injunction. (R. 25.) The hearing on the preliminary injunction motion, (again, which was relevant only as to Count I), was held on July 16, 2010. (R. 30.) The District Court denied the preliminary injunction motion and reserved resolution of the case until after the briefing was complete on the Motion to Dismiss. *Id*.

The Plaintiffs-Appellants filed their memorandum opposing the motion to dismiss on July 23, 2010, followed by Nelson's reply on July 30, 2010. (R. 31 and 32.) On August 4, 2010, the District Court granted Nelson's motion to dismiss and

dismissed the entire case; Judgment was entered the same day. (R. 33 and 34; Appendix, pp 1 and 2; Addendum, p. 1.)

The Disposition Below

Count II, the only count relevant on this appeal, was dismissed in the District Court's final order dated August 4, 2010. (R. 33; Appendix, p. 2; Addendum, p. 1.) A timely appeal was filed on August 26, 2010. (R. 35.)

STATEMENT OF FACTS

Pickens is a resident of Arizona who would like to circulate petitions in South Dakota. (R. 1, ¶¶ 11, 12, and 29.) The Constitution Party is a South Dakota political party and is considered a "new" political party because it qualified for the 2010 ballot via signature petition rather than by the state's "grandfather" statutes that allow other political parties that poll a certain percentage of votes in the prior gubernatorial races an automatic recognition. *Id*., ¶¶ 5, 14, and 24.) Howe and Meyer are residents of South Dakota and members of the Constitution Party. *Id*., ¶¶ 7 and 9. Howe, Meyer, and the Constitution Party would like to associate with non-residents to coordinate and execute petition-gathering campaigns in support of future Constitution Party candidates. *Id*., ¶¶ 6, 8, 10, and 27.

Petition circulators must be residents of South Dakota pursuant to S.D. Codified Laws 12-1-3(9). *Id*., ¶ 21. Pickens will not circulate candidate ballot access petitions while it is unlawful in South Dakota. *Id*., ¶ 29. Howe, Meyer, and

the Constitution Party will not enlist the help of non-residents in candidate ballot access petition campaigns while it is unlawful in South Dakota. *Id*., ¶ 28.

SUMMARY OF ARGUMENT

Associational rights are fundamental First Amendment rights that are directly implicated by South Dakota's ban on non-resident petition circulators from circulating election-related ballot-access petitions. *See* S.D. Codified Laws 12-1-3(9). The Constitution Party, Howe, and Meyer are all residents of South Dakota who are unable to fully associate with non-residents in petition gathering campaigns because South Dakota bars those non-residents from circulating ballot-access petitions. The District Court impermissibly applied its standing analysis as to Count I, (which held that the Constitution Party's and Meyer's standing was inextricably linked to whether Howe had standing to pursue Count I), to Count II, which has nothing to do with a particular candidate. Count II, which challenged as unconstitutional the general ban on non-resident petition circulators, sought only declaratory and injunctive relief against the future enforcement of that statute. The Constitution Party, Howe, and Meyer have standing to challenge S.D. Codified Laws 12-1-3(9).

Getting to the merits of the non-resident petition circulator issue, the Eighth Circuit's holding in *Initiative & Referendum Institution v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) was incorrect, as demonstrated by the numerous contra sister-

circuit opinions issued since *Jaeger* was decided. The Supreme Court has referred to ballot-access petition circulation as core political speech, and the South Dakota ban on non-resident petition circulation completely bars Pickens from this core political speech activity. Indeed, strict scrutiny is the required standard of review given the fundamental right involved.

While the *Jaeger* Panel did apply the correct standard of review – strict scrutiny – the *Jaeger* Panel failed to consider, as subsequent sister-circuit courts have done, whether certain less-intrusive regulatory measures exist to further the state interests contemplated by the residency requirement. For example, South Dakota could require non-residents to voluntarily submit to the subpoena power of the state as a condition of circulating petitions. This has been held by other circuit courts to be a reasonable and less-restrictive means to protect the state's interest in preventing fraud.

The failure of *Jaeger* to consider this fact distinguishes it from this case where the Plaintiffs-Appellants have specifically raised this issue in this litigation, and applying *Jaeger* in this context would be unjust because it would effectively foreclose the Plaintiffs-Appellants from raising the issue of whether there is an less-restrictive means to protecting South Dakota's interest in preventing voter fraud. *See Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 (8th Cir. 1993) ("[A subsequent appeals panel] will not disturb a prior panel's

decision unless intervening controlling authority has reached a contrary decision, or unless the prior panel decision was clearly erroneous and letting it stand would work a manifest injustice.") Therefore, the Plaintiffs-Appellants seek the Eighth Circuit's reconsideration of *Jaeger* in light of these factual differences and the stark circuit conflicts with every circuit since *Jaeger* was decided because recognizing the prior panel would be unjust.[1]

ARGUMENT AND APPLICABLE STANDARD OF REVIEW

The standard of review is well settled. "We review a motion for judgment on the pleadings *de novo*. We accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party." *Faibisch v. University of Minnesota*, 304 F.3d 797, 803 (8th Cir. 2002) (internal quotations omitted). In turn, "a district court must accept as true all factual allegations set out in the complaint and construe the complaint in the light most favorable to the plaintiffs, drawing all inferences in their favor." *Miner v. Standing Rock Sioux Tribe*, 619 F.Supp.2d 715, 721-22 (2009) (internal quotations omitted) (citing *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir.

[1] The First Circuit has held that "[s]tare decisis is neither a straightjacket nor an immutable rule, *Carpenters Local Union No. 26 v. United States Fidelity & Guaranty Co.*, 215 F.3d 136, 142 (1st Cir. 2000). But if the Panel feels bound by *Jaeger*, the Panel should consider the Plaintiffs-Appellants' brief as a good-faith argument for a change in existing law. The Plaintiffs-Appellants must make this argument here to preserve the issue for this Court *En Banc* or the United States Supreme Court.

2009)). "[T]he court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Miner*, 619 F.Supp.2d at 722 (internal quotations omitted) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)).

In cases involving election laws, appellate courts are required to balance "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" with "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

I. THE CONSTITUTION PARTY, HOWE, AND MEYER HAD STANDING TO CHALLENGE THE STATUTE BARRING NON-RESIDENT PETITION CIRCULATORS.

The District Court erroneously ruled that the Constitution Party, Howe, and Meyer (hereinafter, the "Resident Plaintiffs"), did not have standing to challenge the statute barring non-resident petition circulators. Unfortunately, while the District Court adequately discussed its reasoning for the Resident Plaintiffs' standing as to Count I (which dealt with the signature requirements for the Constitution Party's gubernatorial candidate), the District Court failed to discuss the Resident Plaintiffs' standing as it related to the residency requirement. (R. 33, pp. 6-15; Appendix, pp. 7-16; Addendum, pp. 6-15.) The District Court simply

decided, without further analysis, that since the resident plaintiffs did not have standing to challenge a statute regarding signature requirements for a candidate to appear on a ballot they also did not have standing to challenge the statute barring non-resident petition circulators. The District Court's holding that the Resident Plaintiffs had no standing to challenge South Dakota's residency requirement is incorrect and contradicts precedents from the United States Supreme Court, sister circuit courts, and other federal courts.

To show standing, a plaintiff must establish that: (1) plaintiff has suffered an "injury in fact," (2) "a causal connection between the injury and the conduct complained of" exists, and (3) the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Roe v. Milligan*, 479 F. Supp. 2d 995, 1002 (S.D. Iowa 2007). The Ninth Circuit articulated it best when a statute implicates First Amendment free speech by requiring plaintiffs to meet a three fold test to establish standing: (1) "evidence that in the past they have engaged in the type of speech affected by the challenged government action"; (2) "affidavits or testimony stating a present desire, though no specific plans, to engage in such speech"; and, (3) "a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced." *Marijuana Policy Project v. Miller*, 578 F.Supp.2d 1290, 1301 (D. Nevada 2008) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir.

2006)). Resident Plaintiffs stated that they have circulated petitions in the past, wish to circulate petitions in the future, and wish to employ non-resident circulators to circulate petitions but would not for fear that the statutes in question will be enforced. The Resident Plaintiffs clearly meet these requirements for standing.

It is beyond question that the Resident Plaintiffs meet the second and third requirements for standing stated in *Lujan*. As the Supreme Court has held: "The First Amendment protects appellees' right not only to advocate their cause, but also to select what they believe to be *the most effective means for doing so*." *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (emphasis added). If this includes having non-residents circulate petitions, then a resident plaintiff's association with that person is directly affected when that non-resident is barred from pursuing "the most effective means" of "advocating their cause," namely, circulating ballot-access petitions. *Id*. As the Seventh Circuit has observed:

> [B]y preventing the candidates from using signatures gathered by [non-resident] circulators . . ., the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access.

Krislov v. Rednour, 226 F.3d 851, 861 (2000) (quoted favorably by *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 147 (2nd Cir. 2000)).

There is an obvious connection between the injury (lack of association with non-residents in signature gathering efforts) and the statute in question (barring non-residents from circulating petitions) and the injury would be redressed by a favorable decision. The only reason left to deny standing is a lack of an injury-in-fact, but a holding of that nature would contradict multiple precedents in the First Amendment context.

When a challenged statute affects First Amendment rights to free speech, the requirements for showing an injury in fact are lower. A plaintiff must only show a cognizable interest and the possibility of future injury. *See Roe*, 479 F. Supp. 2d at 1003 (The "certainty of injury is not necessary, at least in the First Amendment context.") This rule was established by the Supreme Court. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), the plaintiffs only alleged an intention to return to an environmentally distressed area if and when the area was cleaned up:

> FOE member Kenneth Lee Curtis averred . . . that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the [polluting] facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.

Id. at 181-82.

Other plaintiffs in *Friends of the Earth* made similar averments and the Supreme Court held that "the affiants' conditional statements" could not be

considered "speculative 'some day' intentions." *Id*. at 184. The Supreme Court quoted *Lujan*, 504 U.S. at 562-63 in *Friends of the Earth* favorably when it said that "'the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.'" *Friends of the Earth*, 528 U.S. at 183 (quoting *Lujan*, 504 U.S. at 562-63)). The focus on whether a plan is speculative or not is whether the plaintiff sets forth a cognizable interest, and here, the Resident Plaintiffs have done just that because circulating nomination petitions and associating with others who circulate nomination petitions are cognizable interests in and of itself, especially for members of a political party.

Furthermore, the Resident Plaintiffs are curtailing their activities as a direct result of the statutes in question. Courts have previously recognized a plaintiff's standing based on the "chilling effect" potential criminal prosecution had on plaintiffs. "Where a regulation . . . chills protected First Amendment activity, its hardship upon the plaintiff is sufficiently substantial to justify a pre-enforcement declaratory judgment action." *Wersal v. Sexton*, 613 F.3d 821, 830 (8th Cir. 2010) (citing *Minnesota Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997)).

Other circuits concur:

> The bottom line is that plaintiffs' asserted harm is not "imaginary" or "speculative." As discussed above, plaintiff Rankin testified that he

> has curtailed his initiative activity because he is concerned about criminal liability. It is this chilling effect, rather than any actual criminal prosecution or a prosecutor's threat to prosecute, that renders the case ripe for resolution: "[T]he alleged danger is, in large measure, one of self-censorship: a harm that can be realized without an actual prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 . . . (1988). The Court therefore rejects Idaho's argument that the case is not ripe for resolution.

United for Bears v. Cenarrusa, 234 F.Supp.2d 1159, 1162 (D. Idaho 2001).

The Resident Plaintiffs meet all requirements for standing. A residency requirement for petition circulators injures not only non-resident circulators but also resident citizens and political parties by limiting the rights of resident citizens and political parties to engage in political speech and associate with like-minded non-residents. Based on all of the foregoing, the Resident Plaintiffs have standing to prosecute this action and the case should be reversed on this ground.

II. THE RESIDENCE REQUIREMENT FOR PETITION CIRCULATORS VIOLATES THE FIRST AMENDMENT.

The South Dakota statute that prevents a non-resident to circulate petitions for ballot access severely limits political speech and associational rights. *See* S.D. Consolidated Laws § 12-1-3(9). This statute infringes on the constitutional rights to free speech and free association of non-residents and residents. When a statute infringes on core political speech, courts must use a strict scrutiny standard of review to ensure the statute is narrowly tailored to serve a compelling state interest and that there are no other options to serve the state interest that place a lesser

burden on core political speech. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech,'" further applying strict scrutiny.). *See also Nader v. Brewer*, 531 F.3d 1028, 1036-37 (9th Cir. 2008), cert. denied, 129 S. Ct. 1580, 173 L. Ed. 2d 675 (U.S. 2009).

The District Court correctly ruled that the South Dakota statute places a severe burden on political speech and was subject to strict scrutiny. The District Court, however, incorrectly ruled that the residency requirement for petition circulators is narrowly tailored to serve a state interest and that no other less burdensome option is available. The District Court based its decision on *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) where the Eighth Circuit looked at residency requirements for circulators of petitions for initiatives, not candidates, and was decided before several decisions in other circuits found residency requirements for petition circulators to not be the least burdensome option and therefore unconstitutional. These cases uncontrovertibly show that the *Jaeger* Opinion failed to consider lesser restrictive means for the state to protect its compelling interests, specifically by requiring non-residents to voluntarily submit to the subpoena power of the state rather than completely banning non-residents from "select[ing] what they believe to be the most effective means for so doing,"

referring to communicating as a petition circulator. *Meyer*, 486 U.S. at 424. A brief look at the history of voting regulations is necessary to predicate the discussion of *Jaeger* and the contra cases from sister Circuit courts of appeal.

A. History of States Regulating Voter Speech and Voter Choice.

State control of the ballot was foreign to America's Founders. *See* Richard Winger, *History of U.S. Ballot Access Law for New and Minor Parties*, The Encyclopedia of Third Parties in America (2000); *see also* A. Ludington, *American Ballot Laws, 1888-1910* (1911). The invention of the state ballot originated in the late nineteenth century. *See id*. Before that, voters and their supporters could bring their own ballot to the voting polls. *See id*. Most states adopted the state ballot and employed a free and open ballot with few ballot access restrictions, during most of the subsequent half-century. *See id*. Even then, what restrictions did exist in a handful of states were quite modest: signature requirements around 500 or 1,000, with no deadline until 30 days prior to the general election. *See* Winger, *supra*. Consequently, for most of the first half-century of state ballot use, the ballot was open and free: any candidate who met the Constitutional qualifications for the office could be listed on the ballot by mere request. *See id*. Efforts to require signature totals above minimal thresholds – like 500 signatures – were summarily stricken by reformist courts as clearly and

patently violating the very intent of these reform laws. *See People ex. rel. Hotchkiss v. Smith*, 99 N.E. 568 (N.Y. 1912).

It was only when third parties and candidates outside the two-party system began to seriously challenge for power or reshape the debate in ways the political incumbents found threatening that state approaches to the state ballot access began to change. *See e.g.,* Richard H. Pildes, *The Theory of Political Competition*, Va. L. Rev., Nov. 1999, 1605, 1617 (noting "the history of ballot access restrictions which get elevated just as serious new parties or independent candidates emerge as threats"); A. James Reichley, *The Future of the Two-Party System After 1996*, in The State of the Parties 14 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999) ("The representatives of the two major parties have taken pains to enact election laws that strongly favor major party candidates"); *The Law of Democracy: Legal Structure of the Political Process* (Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes eds., Foundation Press 2d ed. 2001) (noting "the self-interest existing power holders have in manipulating the ground rules of democracy in furtherance of their own partisan, ideological, and personal interests"); Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory & The Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002); Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 Harv. J.L & Pub Policy 91, 96-97

(2000) (the natural side effect of politicians overseeing the terms and conditions of their competition).

Outsider options through third-party campaigns or candidacies provide the most effective method of venting for those feeling excluded from the two-party system but does so within the system: channeling dissent through democratic means and giving voice to that dissent, dissent that led to abolition, direct election of senators, the right of women and draft-eligible citizens to vote, the right to overtime, the limits on child labor, aid to farmers, the graduated income tax, and expanded participation in the public arena with more confidence in American institutions as representative. *See e.g*., John D. Hicks, *The Third Party Tradition in American Politics*, 20 Miss. Valley. Hist. Rev. 3 (1933); A. Ranney & W. Kendall, *Democracy & the American Party System* (1956); W. Goodman, *The Two-Party System in the United States* (1960); D. Mazmanian, *Third Parties in Presidential Elections* (1974); G. Sartori, *Parties and Party Systems* (1976); Rosenstone, Behr & Lazarus, *Third Parties in America* (1984).

With the slow, steady closing of the ballot, more and more independent and outside parties disappeared from potential choices for voters, disappeared from the public discourse, and disappeared from the public consciousness. Other scholars note how badly these restrictions limit the marketplace of ideas the First Amendment was intended to promote and protect. *See* Steven Rosenstone,

Restricting the Marketplace of Ideas: Third Parties, Media Candidates & Forbes' Imprecise Standards, 18 St. Louis U. Pub. L. Rev. 485 (1999). The Supreme Court concurred in its seminal decision in *Anderson*. *Anderson v. Celebrezze*, 460 U.S. 780, 791-92 (1983).

The public increasingly concurs, as they refuse partisan labels in registration, voting patterns and public opinion, while seeking more options for debate participants in Presidential debates and more options for choices on the ballot. *See The Appleseed Center for Electoral Reform and the Harvard Legislative Research Bureau, A Model Act for the Democratization of Ballot Access*, 36 Harvard J. on Legislation 451, 454 (noting wide spread public desire for third options outside the two-party system in consistent public opinion surveys). It is for this reason that those judicial decisions closing the ballot and suppressing speech are subject to some of the fiercest criticism by legal scholars. See Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harvard Journal on Legislation 167 (1991). Recent jurists agree: they routinely complain how "arcane" ballot access laws appear as "nothing more than incumbent protection devices." *See Dotson v. NYC Board of Elections*, 2001 WL 1537689 (N.Y. Sup. 2001). In cases like this one, where a state is restricting the method of the dissemination of speech and the pool of those who can speak, the burden falls particularly hard on smaller independent-minded or "third party"

groups because their pool of messengers is necessarily smaller. Therefore, Courts should pay special attention to these statutory restrictions and regard them with the skepticism they deserve.

B. *Jaeger* Was Wrongly Decided Because the Opinion Failed to Consider Any Lesser Restrictive Means to Protect the State's Compelling Interest to Protect the Electoral Process From Fraud.

South Dakota limits the right to circulate candidate nomination petitions to those who are "a resident of the state of South Dakota." S.D. Consolidated Laws § 12-1-3(9). The residency limitation on the right to circulate petitions set forth in that statute infringes on core political speech and is not a sufficiently narrowly-tailored means to protect any compelling state interest and has been condemned by most Courts around the country. *Jaeger* is the only post-*Buckley* circuit court opinion to hold that residency requirements for petition circulators are a narrowly-tailored regulation aimed at preventing fraud. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (striking down a Colorado statute requiring a petition circulator to be a registered voter in an initiative petition). The Second, Sixth, Seventh, Ninth, and Tenth Circuits have all held contra, most notably by the Ninth in *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) wherein the Ninth Circuit commented on *Jaeger*: "We do not find *Jaeger* persuasive." *Id*. at 1037.

In *Nader v. Brewer*, the Ninth Circuit struck down an Arizona statute requiring state residency for a petition circulator circulating nomination petitions for an independent candidate for president. *Id*. Other circuits agreed. *See also Lerman v. Board of Elections in the City of New York*, 232 F.3d 135 (2nd Cir. 2000) (striking down a statute requiring "witnesses" to those signing candidate nomination petitions to be residents of the political subdivision from which the candidate ran); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (striking down a Ohio statute requiring a petition circulator of either an initiative petition or candidate nomination petition to be a registered voter and resident of the state); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (striking down an Illinois statute requiring a petition circulator to be a registered voter); and *Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (striking down a residency requirement on petition circulators of initiative petitions).

1. Buckley *Struck Down Voter Registration Requirements to Petition Circulation.*

Buckley was the predicate holding to all of the critical apposite cases cited in subsection 2, *infra*, and a brief overview of it is required to understand this issue. In *Buckley*, the Supreme Court considered whether Colorado could restrict the circulation of local initiative petitions to persons who were "registered voters," and to persons that wore "an identification badge bearing the circulator's name." *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999).

The Supreme Court also considered whether paid circulators, and the amount each circulator was paid, had to be reported by initiative supporters. *Id*. Only the first of these three issues is relevant here.

After recognizing that petition circulation "is 'core political speech,' because it involves 'interactive communication concerning political change,'" and that "First Amendment protection for such interaction . . . is 'at its zenith,'" *id*. at 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)), the Supreme Court applied strict scrutiny, *id*. at 192, n.12, and struck down the registered voter requirement, *id*. at 192. Specifically, the Supreme Court held that "the State's subpoena service objective" could be "more precisely achieved" by removing the voter registration requirement, but leaving the state residency requirement. *Id* at 197 (internal quotations omitted). In so holding, the Supreme Court carefully cautioned that it was not deciding whether residency requirements were constitutional. That issue was not properly raised in the litigation underlying *Buckley*. *Id*.

> In sum, assuming that a residence requirement would be upheld as a needful integrity-policing measure – a question we . . . have no occasion to decide because the parties have not placed the matter of residence at issue – the added registration requirement is not warranted.

Id. at 197.

The Supreme Court, because a state residency requirement was less-restrictive than a voter registration requirement needed to look no further to decide whether the voter registration requirement met the strict scrutiny standard of review. However, the Supreme Court's caveat set out above, should have served as a warning that a further analysis of less-restrictive means over and above the residency requirement was necessary to decide whether the residency requirement satisfied strict scrutiny. As will be shown below, the *Jaeger* opinion failed to make any inquiry in this regard.

2. Jaeger *Failed to Consider Less-Restrictive Means to Protecting the State's Interest in Achieving Subpoena Service and Preventing Fraud in the Election Process*.

> Federal courts have generally looked with favor on requiring petition circulators to agree to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result.

Nader v. Brewer, 531 F.3d at 1037 (citing *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236, 1242-1244 (10th Cir. 2002), *Krislov*, 226 F.3d at 866, n. 7, and *Frami v. Ponto*, 255 F.Supp.2d 962, 970 (W.D. Wis. 2003)).

Jaeger failed to do any such analysis summarily concluding: "The one restriction is that out-of-state residents cannot personally collect and verify the signatures, and that restriction is justified by the State's interest in preventing fraud." *Jaeger*, 241 F.3d at 617. *Jaeger* then cited two district court cases

supporting the conclusion: *Kean v. Clark*, 56 F.Supp.2d 719, 728-29, 732-34 (S.D. Miss. 1999) and *Initiative & Referendum Institute v. Secretary of State of Maine*, 1999 WL 33117172, at *16 (D. Me. 1999). *See Jaeger*, 241 F.3d at 617. Importantly missing from *Jaeger* was any discussion of the two circuit court opinions that had issued at the time of the *Jaeger* Opinion. *See Lerman*, 232 F.3d 135 and *Krislov*, 226 F.3d 851, both issued 2000, several months before *Jaeger* was issued in early 2001.

Conditioning core political speech rights on state residency cannot be tolerated. The Ninth Circuit held exactly so in *Nader v. Brewer* when it struck down an Arizona statute's residency requirement virtually identical in effect to South Dakota's residency requirement found in S.D. Consolidated Laws § 12-1-3(9). The Ninth Circuit rightfully relied on Supreme Court precedent, including *Buckley*, 525 U.S. 182, where the Supreme Court found unconstitutional the registration restriction on the speech rights of potential petition circulators. *See id*. Given the complete lack in *Jaeger* of considering this important aspect of the strict scrutiny analysis, namely that there might be less restrictive means of achieving South Dakota's interests, imposing *Jaeger* as precedent here would be unjust. *See Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 (8th Cir. 1993).

3. *Six Circuit Courts of Appeal Have Considered* **Buckley** *and All But the Eighth Circuit Have Struck Down Residency Requirements*.

The Second, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeal have examined the same resident-only petition circulator issue and came to a unanimous conclusion: prohibiting all non-residents from circulating petitions violated their First Amendment rights. A brief review of each case is appropriate.

The Second Circuit:

The Second Circuit correctly decided residency requirements as to political subdivisions of the state when it issued an Opinion in *Lerman v. Bd. of Elections of the City of New York*, 232 F.3d 135 (2nd Cir. 2000). In *Lerman*, the issue was whether witnesses (ie., petition circulators), must be residents of the political subdivision of the candidate for whom they were circulating petitions. *Id*. at 139. The state set forth three state interests that were protected by the residency requirement:

> (1) ensuring integrity and preventing fraud in the electoral process; (2) ensuring that candidates demonstrate a sufficient modicum of support before their name is included on the ballot; and (3) ensuring that non-residents may not impose the cost of a primary on the district.

Id. at 149 (internal quotations omitted).

The Second Circuit applied strict scrutiny, *id*. at 146, and ultimately went so far as to hold "that the [petition circulator] residency requirement does not bear

even a *rational* relationship to any of the three justifications, let alone the narrowly tailored relationship that strict scrutiny demands" *id*. at 149.[2]

The Sixth Circuit:

The Sixth Circuit recently and persuasively rejected the *Jaeger* philosophy, citing the Ninth Circuit's *Nader v. Brewer* decision discussed *supra*. *See Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008). In *Nader v. Blackwell*, the plaintiff Ralph Nader, a presidential candidate who sought access to the ballot using petitions circulated by persons who were non-residents to Ohio, filed suit challenging the rejection of those signatures. *Id*. at 462. Ultimately, the Sixth Circuit held "that Blackwell violated Nader's First Amendment rights when he enforced Ohio's registration and residency requirements against Nader's candidate-petition circulators." *Id*. at 475. The case was affirmed, however, because the case did not involve declaratory or injunctive relief. Rather, Nader had sought "nominal damages" against the Secretary of State. *Id*. at 469-70. The Sixth Circuit held the Secretary of State immune from liability pursuant to the doctrine of qualified immunity. *Id*. at 478.

[2] It should be noted, however, that *Lerman* dealt with a political subdivision of the state, and not state-wide residence. Like *Buckley*, *Lerman* did not have occasion to consider the statewide residency requirement. Yet *Lerman* is important because it considered residency in light of *Buckley* rather than just voter registration, and did so before *Jaeger* was decided.

The Seventh Circuit:

The Seventh Circuit was the first Circuit to decide whether state residency requirements were constitutional in light of *Buckley*. The Opinion issued in *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) was absolutely consistent with *Buckley*. The issue in *Krislov* not only involved the registered voter requirement at issue in *Buckley*, but also "that the circulator must be registered to vote in the same political subdivision for which the candidate is seeking office, which for Krislov would be the entire State of Illinois" because Krislov was a United States Senator candidate. *Id*. at 856. The statewide district Krislov ran in meant that *Krislov* would have to apply *Buckley* and decide whether non-residents to Illinois should have been allowed to circulate petitions on Krislov's behalf.

The Seventh Circuit applied the strict scrutiny standard, *id*. at 862, and considered whether the state's interest in banning non-resident from participating in Illinois politics was appropriate concluding, "we question its legitimacy," *id*. at 866. Expounding on that idea:

> Allowing citizens of the other forty-nine States to circulate petitions [in Illinois] increases the opportunity for the free flow of political ideas. In some cases this might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular. . . . Because circulating nominating petitions necessarily entails political speech, it follows that the First and Fourteenth Amendments compel States to allow their candidates to associate with nonresidents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access.

Id. at 866.

The state-wide residency requirement was struck down. *Id*.

The Ninth Circuit:

The Ninth Circuit's Decision in *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) best articulated how the most common state defense to residency requirements – that the residency requirement is necessary to combat fraud in the election process – is not narrowly tailored to defend that interest. This case involved a statute very similar to South Dakota's residency requirement. Like the United States Senate candidate in *Krislov*, the Plaintiff, Ralph Nader, was a candidate for President, another statewide district. *Id*. at 1031. Interestingly, the Ninth Circuit noted that Nader, a resident of Connecticut, was barred from circulating petitions in his own behalf by Arizona's statewide residency requirement. *Id*. at 1031 and 1036.

The Ninth Circuit applied strict scrutiny and rejected all of Arizona's arguments that the statute was narrowly tailored to protect a compelling state interest. *Id*. at 1038. As to the State's argument that the residency restriction was necessary to make sure "circulators are subject to the state's subpoena power," the Ninth Circuit rejected that contention by holding:

> Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more

> narrowly tailored means than a residency requirement to achieve the same result.

Id. at 1037.

The Tenth Circuit:

The Tenth Circuit looked at *Buckley* like *Jaeger* had, but came to the opposite decision. *See Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). This case involved Oklahoma's ban on non-residents circulating initiative or referendum petitions. *Id*. at 1025. After applying strict scrutiny, *id*. at 1028, the Tenth Circuit found that the state residency restriction violated the First and Fourteenth Amendments, *id*. at 1031. The Tenth Circuit concluded that an outright ban on the circulation of petitions by non-residents could be cured by "requiring non-residents to sign agreements providing their contact information and swearing to return in the event of a protest." *Id*. at 1030.

All of these Circuit decisions simply followed the governing logic of Supreme Court precedent: petition circulation is "core political speech" and protecting such speech reaches its "zenith" when someone is circulating a petition. *Buckley*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422, 425). This requires "exacting" and "strict" scrutiny. *Meyer*, 486 U.S. at 421. This is because elections are as much a means of disseminating ideas and expressing dissent, often evolving and shifting with the sands of a campaign season, as they are means of attaining

office and political objectives. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979).

Since the Supreme Court decided *Buckley*, the federal courts routinely and regularly strike down state law requirements that petition circulators could only circulate petitions to those in the same area where they could vote. *See e.g., Nader v. Brewer,* 531 F.3d 1028; *Nader v. Blackwell*, 545 F.3d at 476; *Krislov v. Rednour*, 226 F.3d at 858-66; *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003); *Morrill v. Weaver*, 224 F.Supp. 882, 904 (E.D. Penn. 2002) (Permanent injunction granted holding Pennsylvania residency requirement unconstitutional under *Buckley* and *Lerman*); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002) (Ordinance prohibiting non-residents of the city from circulating initiative, referendum or recall petitions.); *Lerman*, 232 F.3d at 145-54 (New York requirement that witnesses to ballot access designating petitions be resident of the political subdivision in which the office or position is to be voted for held unconstitutional); *Nader 2000 Primary Committee, Inc. v. Hechler*, 112 F.Supp.2d 575, 579 (S.D.W.V. 2000) (preliminary injunction granted where court found that "*Buckley* strongly suggests the West Virginia statute's resident registered voter requirement for petition circulators is presumptively unconstitutional"); *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 110 F.Supp.2d 1201, 1205 (D.S.D. 2000) (South Dakota requirement that petition circulator be registered voters

"became a nullity with the [*Buckley*] decision"); *Bernbeck v. Moore*, 126 F.3d 1114, 1117 (8th Cir. 1997) (pre-*Buckley* decision holding unconstitutional Nebraska law requiring petition circulators to be registered voters); *Lawrence v. Jones*, 18 P.3d 1245 (Ariz. App. 2001) (ruling that cities cannot limit circulator rights to city voters); 1999 Nev. Op. Atty. Gen. No. 37 (Dec. 1, 1999) (Nevada provisions requiring initiative petition circulators to be registered voters are unenforceable); 82 Ops. Cal. Atty. Gen. 250 (Dec. 22, 1999) (circulators of initiative petitions need not declare they are residents and voters).

The Ninth Circuit's logic in *Nader* paralleled that of prior courts facing the identical issue and presaged the incipient trend in all the federal courts. *See Frami*, 255 F.Supp.3d 962. Wisconsin, like Arizona and Idaho, imposed residency restrictions on petition circulators. Relying on *Buckley* and the Seventh Circuit case *Krislov*, 226 F.3d 851, the district court struck down Wisconsin's residency requirement since the requirement could not be narrowly tailored to protect a compelling state interest.

Judge Crabb found that *Krislov*'s voter registration requirement was a *de facto* residency requirement, *Frami*, 255 F.Supp.2d at 967, and ruled on the broader issue: residency requirements. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Krislov*, 226

F.3d at 865 (internal quotations omitted) (cited in *Frami*, 255 F.Supp.2d at 970). Moreover, the state must "show that the recited harms are real, not merely conjectural and that the regulation will in fact materially alleviate the anticipated harm." *Frami*, 255 F.Supp.2d at 970 (internal quotations omitted). Wisconsin's "parade of horribles" assertion failed to show how the residency requirement was narrowly tailored to protect a compelling state interest.

CONCLUSION

Every other Circuit considering residency restrictions since *Buckley* applied strict scrutiny and agreed: banning all non-residents from core political speech cannot conform to First Amendment protections. Like the statutes in the all the above cases, the South Dakota residency requirement for petition circulators places severe restrictions on core political speech and is not, as the District Court incorrectly decided, narrowly tailored to serve a compelling state interest. The South Dakota statute cannot survive the required constitutional analysis.

Furthermore, given the fact that *Jaeger* failed to consider whether residency restrictions are narrowly tailored to further a compelling state interest, to apply *Jaeger* to the facts of this case as precedent would be unjust. *See Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 571 (8th Cir. 1993) (holding that subsequent appellate panels may overrule prior panels when the prior panel opinion is clearly erroneous or would be unjust). Here, applying *Jaeger* would

foreclose the Plaintiffs-Appellants from arguing that the residency requirement is not the least restrictive means of furthering South Dakota's interest in combating fraud in the state electoral process without the Eighth Circuit ever considering the issue. For all of the foregoing reasons, the District Court's decision should be reversed.

Dated at Milwaukee, Wisconsin, on this the 18th day of October, 2010.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF COMPLIANCE

The following is hereby certified by the undersigned below:

1. All fonts are Times, in 14-point type. (Footnotes are in 14-point type).

2. This brief contains 7,532 words, exclusive of the Summary of the Case and Request for Oral Argument, the Corporate Disclosure Statement, Table of Contents, Table of Authorities, this Certificate of Compliance, and the Certificate of Service. This word count was performed with the Macintosh "Microsoft Word X" word count tool.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated on October 18, 2010.

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ADDENDUM
(Fed. R. App. P. 28(f) Material)

1. The District Court's Final Order (R. 33.)