STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
DAN LEDERMAN, individually and in his capacity as Chairman of the of the SOUTH DAKOTA REPUBLICAN PARTY,	)	Civ. 18-147
Petitioner,	)	MEMORANDUM IN SUPPORT OF APPLICATION FOR WRIT OF PROHIBITION
vs.	)	
HONORABLE SHANTEL KREBS, in her official capacity as SECRETARY OF STATE, and the CONSTITUTION PARTY OF SOUTH DAKOTA,	)	
Respondents.		

COMES NOW the Petitioner above-named, personally and by and through his undersigned counsel, and submits this memorandum in support of his Application for issuance of a Writ of Prohibition pursuant to SDCL Ch. 21-30.

FACTS

Although there is a complex set of unmaterial fact, the material facts that will be set forth at hearing are as undisputed. On July 11, 2016, the Constitution Party of South Dakota certified to the South Dakota Secretary of State that the following people were officers of the South Dakota Constitution Party: Chairman – Lora Hubbel, Vice Chairman – Joel Bergan, Treasurer and Secretary – Lori Stacey. No certifications for change in officers was received by the Secretary of State's office until July 14, 2018, at which time, Lori Stacey sent an email showing that Lora Hubbell had resigned as the Chair of the Constitution Party of South Dakota. That resignation contemplates that Joel Bergan, the Vice Chair, would assume the Chairmanship. During the interim, Lora Hubbel changed her registration to Republican, and as Republican for

Governor and State Senate in 2018, and then on or about June 22, 2018, Lora Hubbel changed her voter registration to Republican and ran for Governor and State Senate back to the Constitution Party.

On April 23, 2018, although never certifying to the Secretary of State that there was an election electing her Chairman, Lori Stacey gave notice, purporting to be Chairman, of a State Convention for the Constitution Party of South Dakota to be help on July 14, 2018. The day prior to the "July 14 Convention", Lora Hubbell sent a notice, purporting to be Chairman, of a State Convention to be held on August 14, 2018. No certification of nominees was received by the Secretary of State for the July 14 Convention. Rather, on Sunday, July 15, 2018, Lori Stacey emailed a Notice of Convention to the Office of the Secretary of State for a convention to be held on August 14, 2018.

On July 19, 2018, Joel Bergan, the certified Vice Chair, sent in a letter stating that he was the chairman under the bylaws. On August 2, 2018, Mr. Bergan submitted a letter approving of the notice of convention sent by Lora Hubbell.

On August 6, 2018, Lori Stacey emailed a copy of a letter stating that "Joel Bergan has now twice resigned as a party officer" and purporting to appoint Mike Gunn as vice chair. The letter goes on to say that Lori is resigning as state chairman, and that Mike Gunn will become chairman. Until this letter was received, no filings indicate that Joel Bergan had resigned as Vice Chair of the Constitution Party of South Dakota

The bylaws of the Constitution Party of South Dakota state that upon vacancy, the office the State Chairman, "shall be filled by the vice Chairman who shall serve the remaining unexpired term[.]" If the offices of both the Chair and Vice Chair become vacant, the vacancies are to be filled by a meeting of the Executive Committee. Otherwise, other officers can be

appointed by the Chair. In addition, the Bylaws clearly state that "The Call for the State Convention, to be held in election years no later than 60 days following the South Dakota Primary elections, shall be issued by the duly elected Chairman of the State Central Committee." Art.VII, § 1.

On August 14, 2018, the members of the Constitution Party certified two separate slates of candidates. One certification, executed by Mike Gunn as Convention Chairman, and others, certified Terry Lee LaFleur as a Candidate for Governor, Rick Gortmaker as a candidate for Lt. Governor, and Mike Gunn as a candidate for PUC. Another certification, executed by Joel Bergan, and others, certified G. Matt Johnson for US House of Representatives, Lora Hubbel as a Candidate for Governor, SD Lt. Governor as a candidate for Lt. Governor, Katherine Rice as a candidate for the State House in District 29, George Ferebee as a candidate for the State House in District 32, and Janette McIntyre as a candidate for the State House in District 34.

ARGUMENT

1. A PREEMPTORY WRIT OF PROHIBITION IS APPROPRIATE AS NEITHER LORA HUBBEL NOR LORI STACEY WERE STATE CHAIRMAN OF THE CONSTITUTION PARTY OF SOUTH DAKOTA WHEN EXECUTING THE NOTICE OF CONVENTION REQUIRED BY SDCL 12-5-17.

SDCL 12-5-17 states:

> Each political party shall hold a state convention in each even-numbered year in which they are necessary for the purposes of § 12-5-21. The time and place of holding such convention shall be determined by the State Central Committee of each political party, the chairman of which shall notify the secretary of state at least thirty days previous to the date so chosen.

As it relates to the matter at hand, there are three unambiguous requirements in state law. First, "the time and place of holding such convention shall be determined by the State Central Committee of each political party." Second, "the *chairman* of which shall notify the secretary of state[.]" Third, Said notice must be given "at least thirty days previous to the date so chosen."

The Constitution Party has failed to satisfy these basic requirements set forth by the Legislature. As a starting point, there is no evidence that either party called a meeting of the State Central Committee to set a time and place for the convention. It is rather, quire apparent, that the "leaders" of two factions simply decided to pick a date.

But, more importantly, state law requires the *chairman* of which shall notify the secretary of state of the date of the convention. In this case, neither Lora Hubbel or Lori Stacey were Chairman of the Constitution Party.

Indeed, the for lack of a better term, the "Bergan Faction" now concedes that Hubbel was not the chairman of the Constitution Party at the time the State Constitution party, but simply relies on a later filed ratification of the Hubbel notice by Joel Bergan, who they now claim is the chair of the Constitution Party of South Dakota. However, that does not meet with the clear dictates of South Dakota law. *See In re Famous Brands, Inc.*, 347 N.W.2d 882, 885 (SD 1984) ("This court assumes that statutes mean what they say and that legislators have said what they meant.").

The "Stacey Notice" similarly fails to comply with statute, as she was never certified as the chairman of the Constitution Party, nor do any documents received by the Secretary of State indicate that a call of the Executive Committee took place to elect Stacey to that position. Further, the "Stacey Notice" does not comply with the 30-day notice requirement of code. To the extent that the second notice by Lori Stacey has any value, such is further invalid because it was electronically sent to the office of the Secretary of State on Sunday, July 15, 2018. The office of the Secretary of State is statutorily barred from taking any official actions on Sunday. See SDCL 1-5-1 and SDCL 1-5-2. Accordingly, the earliest the office of the Secretary of State

could receive this notice was on Monday, July 16. Such notice is not timely 30-day advance notice for a convention on August 14.

To the extent that any party seeks to argue that either of the notices, substantially complies with code, that argument is in error. As a starting point, although several chapters in the election code of statutes which require "liberal" construction of statutes, such as what is found in SDCL 12-6-64. However, no such is not found in SDCL 12-5.

In addition, there is no way to simply "construe" away a clear duty from the plain language of the statue.

> "Substantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Larson v. Hazeltine, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835. The reasonable objective of the SDCL 12-5-17 is to prevent exactly what has happened in this case. If a meeting of the central committee is not called and then certified by an actual state chairman, a party runs the risk of devolving into waring factions who could call multiple conventions at the same time. In addition, the plain 30-day notice requirement is, in part a requirement to give the public notice, which is incredibly important given that any registered voter of the Constitution Party of South Dakota is a member of the Constitution Party with an ability to vote at the Constitution Party State Convention for nomination pf candidates.

2. A PREEMPTORY WRIT OF PROHIBITION IS APPROPRIATE BECAUSE STATUTE ONLY AUTHORIZES ONE CONVENTION FOR A PARTY.

SDCL 12-5-17 states that a party shall hold "**a** state convention in each even-numbered year[.] " SDCL 12-5-21 states: "**The** state convention shall nominate candidates for lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, commissioner of school and public lands, and public utilities commissioner and in the years when a President of the United States is to be elected, presidential electors and national committeeman and national committeewoman of the party." SDCL 12-5-18 states: "At **the** state convention of a political party, each delegate shall vote the number of votes equal to his proportionate representation as to all delegates present from that county bears to the number of votes cast in his county at the last gubernatorial election for his party candidate for Governor." SDCL 12-5-17 states: "Nominations by a state convention shall be made by a majority vote of the votes cast and shall be certified to the secretary of state by the officers of the convention, within three days of the close of **the** convention"

These statutes read in conjunction do *not* authorize multiple conventions. To the extent any notice is valid, the Constitution Party of South Dakota has held one convention, and is not authorized hold another. The use of the word "the" and the context of the word "a" in SDCL 12-5-17 clearly denote a singular intent by the Legislature.

The use of the definite article "the" indicates a singular convention. *CSX Transp., Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 471 (2d Cir. 2018) ("The use of the definite article "the" indicates a singular court, whereas the indefinite article "any" or "a" denotes multiple courts. *See Nat'l Foods, Inc. v. Rubin*, 936 F.2d 656, 660 (2d Cir. 1991) ("[a]bsent some reason to conclude otherwise . . . 'the court' referred to the second time . . . should be the same one referred to the first time -- a 'court of competent jurisdiction'"); *see also Renz v. Grey Advert.*,

Inc., 135 F.3d 217, 222 (2d Cir. 1997) ("Placing the article 'the' in front of a word connotes the singularity of the word modified. . . . In contrast, the use of the indefinite article 'a' implies that the modified noun is but one of several of that kind."); *Noel Canning v. NLRB*, 403 U.S. App. D.C. 350, 363, 705 F.3d 490, 503 (2013) ("This interpretation also cannot explain the use of the definite article "the," the singular 'Recess' in the Clause"). Although "a" is an indefinite article that can sometimes mean "any," given the context of SDCL 12-5-17, it clearly denotes a singular usage read in context, ing conjunction with the rest of the chapter, and the fact that it is used to modify "a" [one] convention every two year, which would be make such plural, making the word "the" improper.

This makes significant policy sense. A political party ought not be able to hold a convention, get buyers remorse, and try to do a do-over, or parties having multiple conventions simply in response to each other. Such could lead to infinite election contests at the certification deadline.

In short, statute plainly contemplates a single convention. The constitution party has noticed three and certified no candidates at its first convention. This practice is not authorized, and the secretary of state should be prohibited from certifying said candidates.

3. A PREEMPTORY WRIT OF PROHIBITION IS APPROPRIATE BECAUSE THE CONSTITUTION PARTY DID NOT HOLD THE AUGUST 14 CONVENTIONS WITHIN 60 DAYS OF THE PRIMARY ELECTION IN SOUTH DAKOTA

The South Dakota primary election is the first Tuesday after the first Monday in June. SDCL 12-2-1. This year, that was June 5, 2018. Sixty days thereafter would be August 4. The August 14, 2018 elections do not meet this deadline imposed by the bylaws of the Constitution party. Those bylaws are binding upon a state party pursuant to SDCL 12-5-1.1 and are filed for public record by the Office of the Secretary of State. *Id.*

As the Secretary of State has the bylaws on file as required by state law, they have the legal authority to enforce clear violations of the bylaws. Such would fit within their ministerial role. In this case, the Secretary of State should be prohibited from certifying either slate of candidates for failure to follow the file bylaws of the Constitution Party.

4. A PREEMPTORY WRIT OF PROHIBITION IS APPROPRIATE BECAUSE THE CONSTITUTION PARTY DID NOT INTERNALLY DETERMINE ITS OWN LEADERSHIP AND CANDIDATES PRIOR TO AUGUST 14.

In her July 17, 2018 letter to the Constitution Party, the Secretary of State told the Constitution Party of South Dakota: "Furthermore, it is imperative that the Constitution Party of South Dakota, in accordance with South Dakota law and the Constitution Party of South Dakota by-laws, certify to the Secretary of State's Office who holds the office of state chairperson prior to, or simultaneous with, the Party's presentation of the certification of nominations." However, Constitution Party has failed to do so.

The hearing at hand is not a Declaratory Judgment action. It is for a Writ of Prohibition. Although it cannot be disputed that neither Lora Hubbel nor Lori Stacey were not the chairman at the time of signing the notice of the August 14 convention, the Court should not be forced to make factual determinations regarding who are the rightful leaders of the Constitution Party. Rather, the focus should be, given the documents submitted to the Secretary of State, should she be prohibited from certifying candidates of the Constitution Party.

Given the filings and there being no clear nominees, the Secretary of State should be prevented from accepting either slate. This is consistent with the rationale in *Am. Indep. Party v. Austin*, 420 F. Supp. 670 (E.D. Mich. 1976). In a very similar situation, ach of two rival factions of the American Independent Party submitted a slate of candidates for inclusion on a ballot at the upcoming general election. The director of elections determined that each slate was properly

certified and qualified for a place on the ballot for the election. The director of elections required the party to submit a single slate of candidates that was certified by both chairmen and drawn from the two slates that were submitted. The party did not follow certify one slate, and the Secretary of State was sued. The Court held it was appropriate to apply a one-party, one-slate rule. The Court reasoned:

> The state's requirement that the AIP must itself agree upon a single slate of candidates fully accords with the long-established tradition that American political parties must resolve their intraparty disputes internally. Such a requirement relieves the voters, the state, and the courts of the responsibility for solving internal party problems, allows the party to resolve its own problems, and provides a means of assuring the state that the party has problem-solving capabilities and some measure of internal cohesion. The court concludes that this requirement directly furthers important state interests and does not unduly burden the party or its candidates. It does not offend the equal protection clause.
>
> The AIP also claims that the state violated its rights and the rights of its followers under the due process clause of the Fourteenth Amendment. The state must follow the strictures of the due process clause in regulating elections, just as it must obey the commands of the equal protection clause. *See Williams, supra*, 393 U.S. at 42 (Harlan, J., concurring). In this case, however, the state's one-party/one-slate rule is a requirement that is not disproportionate to the magnitude of the state interests that it seeks to protect.

Id. at 674.

In short, at this point, the Republican Party is only asking that the Secretary of State be prohibited from certifying candidates when she already gave warning to the Constitution Party factions that if they did not come to agreement, the office would not certify candidates. There can be no dispute that this is the appropriate outcome, given what has transpired since the filing of the Application.

5. IN THE ALTERNATIVE, A PREEMPTORY WRIT OF PROHIBITION REGARDING THE NOMINATION OF GEORGE FEREBEE IS APPROPRIATE, AS HE IS NOT A REGISTERED VOTER IN DISTRICT 32.

George Ferebee is a purported nominee for District 32 House on the Bergan Faction certification. From review of the voter registration records, Petitioner is not aware of a George

Ferebee registered to vote in District 32. In the alternative to a blanket writ, Petitioner would request his name be prohibited from being on the ballot, pursuant to South Dakota Const. Art 3, § 3 ("No person is eligible for the office of representative who is not a qualified elector in the district from which such person is chosen, and a citizen of the United States, and who has not been a resident of the state for two years next preceding election, and who has not attained the age of twenty-one years.") and SDCL 12-6-3.1 ("Any candidate for office in the State Legislature shall be a resident of the district for which he is a candidate at the time he signs his declaration of candidacy as required by this chapter.").

CONCLUSION

In accordance with said principles, the Petitioner submits that the Court should grant its Application for a Preemptory Writ of Prohibition.

Dated this 15rd day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon the following on the 15th day of August, 2018, by either electronically filing and serving or mailing a true and correct copy thereof to them by first class mail, postage prepaid, at their last known addresses, to wit:

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