

South Dakota's Election Deadline for Initiatives Ruled Invalid

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- 'Effectively prohibits' circulating petitions year before election
- Case returns to trial court to change permanent injunction

South Dakota's requirement that initiative petitions be filed a year before an election violates the First Amendment, the Eighth Circuit ruled Friday.

The US Court of Appeals for the Eighth Circuit agreed with a trial judge that the legislatively imposed deadline for state statutes offends the First Amendment and reversed the lower court's finding that the year-in-advance requirement didn't violate the US Constitution for state constitutional amendments.

SD Voice, a ballot question committee, sued Gov. Kristi Noem (R) and other state officials challenging the change in the law from requiring petitions to be filed in May, or six months before an election, to one year before the general election. The federal district court concluded the legislation was unconstitutional, and, on remand from the Eighth Circuit, held the restriction on initiatives affecting statutes violated the First Amendment while the restriction on constitutional amendments didn't violate the First Amendment.

"SD Voice has sought and will continue to seek political change via circulating petitions to amend South Dakota law. South Dakota's filing deadline, however, 'limits the number of voices who will convey [the proposed] message' during the year before the election," the appeals court said, citing a 1988 US Supreme Court decision. "In fact, it effectively prohibits circulating petitions during the year prior to the election."

That year-long advance requirement diluted the effectiveness of speech and effectively reduced the number of petitions that made it onto the statewide ballot, the appeals court said. The state failed to connect the one-year deadline to its asserted interests, including election integrity, furthering an important regulatory interest, and the ability for legislature to respond to petitions, the panel found.

Judge L. Steven Grasiz wrote for the court. Judges James B. Loken and Raymond W. Gruender joined the opinion.

The appeals court also ordered the trial judge to modify a permanent injunction to remove the court-imposed new filing deadline of six months before the general election. Imposing that new deadline was outside the scope of the trial court's authority, the panel held.

"It's a great decision," said James Leach, the Rapid City, S.D., attorney who represented SD Voice and Cory Heidelberger, who operates the ballot question committee. "It is of great practical importance in South Dakota because initiatives are the only way that citizens can get important measures on the ballot."

Initiatives were already used to expand healthcare access in 2022 and a proposed initiative is circulating to restore abortion rights that were eliminated last year in a US Supreme Court ruling, Leach said.

Representatives for Noem and state Attorney General Marty Jackley didn't immediately respond to emails seeking comment.

Leach said he would be seeking attorneys' fees when the case returns to US District Court for the District of South Dakota.

Law Offices of James Leach represented SD Voice. The South Dakota Attorney General's office represented the state.

The case is SD Voice v. Noem, 8th Cir., Nos. 21-3195, 21-3197, opinion 2/17/23.

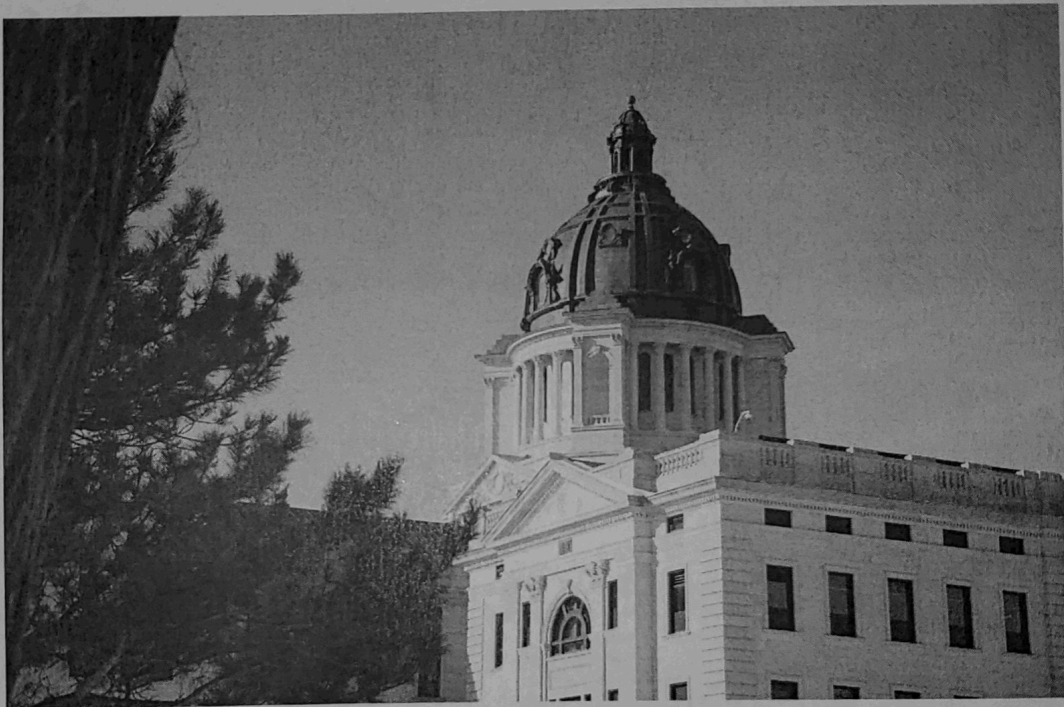
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NEWS SOUTH DAKOTA

Federal court rules South Dakota petition law hinders 'core political speech' of ballot measures

The change strikes down law requiring ballot measures and amendments referred by petition to compile all required signature one year prior to Election Day.





The South Dakota State Capitol in Pierre. Adam Thury / Mitchell Republic



By **Jason Harward**

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 News reporting

PIERRE, S.D. — With several big-ticket petition drives hoping to earn a spot in front of voters on Election Day in 2024, a ruling by the Eighth Circuit Court of Appeals last week striking down South Dakota's signature deadline as unduly restricting speech is welcomed news, organizers say.

“From our perspective, it sounds like the court is more protective of the ballot initiative process than the South Dakota Legislature,” said Rick Weiland, a ballot measure organizer with Dakotans for Health, which is behind attempts to put provisions allowing abortion access and repealing the grocery tax on the 2024 ballot.

The lawsuit that led to the decision was brought by Cory Heidelberger, an active political writer in the state who publishes the Dakota Free Press(<https://dakotafreepress.com/>) and runs a ballot question committee called SD Voice, which also participated in the challenge.

The defendants included Gov. Kristi Noem, Attorney General Marty Jackley and Secretary of State Monae Johnson, all in their official roles.

Under current South Dakota law, initiated measures looking to change state law must collect valid signatures equal to 5% of the total votes cast in the previous gubernatorial election.

In comparison, initiated amendments looking to change the state constitution must reach a 10% threshold.

For consideration on the 2024 ballot, measures and amendments must reach about 17,000 and 34,000 signatures, respectively.

Petition signature drives have exactly one year to collect the necessary signatures to find their way onto the ballot, stretching from 24 months to 12 months before the targeted election.

However, in an opinion issued on Feb. 17(<https://ecf.ca8.uscourts.gov/opndir/23/02/213195P.pdf>) by Judge L. Steven Gras — who was appointed by President Donald Trump and confirmed by the Senate in 2017 — that one-year-prior deadline was struck down as inhibiting the “core political speech” of circulating and signing petitions to further political and social change.

"It is common sense that cabining core political speech in the form of petition circulation to a period no closer than a year before an election would dilute the effectiveness of the speech," Grasz wrote in the opinion.

While the federal court did recognize "legitimate state interests in administrative efficiency and election integrity," the defense, in their mind, failed to show that the deadline was necessary for these ends. The state, "merely relies on a bare assertion of election integrity rather than evidence or a reasonable response connected to the filing deadline," Grasz wrote.

The immediate impact of this ruling requires clarification from the South Dakota Legislature to fill a glaring hole now at the center of the petition issue.

"Thus, the question on every petition sponsor's mind is, When are our petitions due?" Heidelberger wrote in a piece(<https://dakotafreepress.com/2023/02/18/heidelberger-right-sd-wrong-one-year-deadline-initiative-petitions-violates-first-amendment/>) laying out the Eighth Circuit's ruling. "The answer is... We don't know!"

Although a lower court had ruled in favor of returning the deadline to six months prior to the coming election, the Eighth Circuit simply ruled the current deadline unconstitutional and signaled support for a deadline at most six months prior, leaving the exact deadline up to legislative order.

"It's all hands on deck because there are bills in the legislature looking to make [the process] harder again," Weiland said about whether the ruling changes his organization's calculus ahead of 2024.

One of those proposals is House Bill 1200, (<https://sdlegislature.gov/Session/Bill/24151>) which would

require an equal amount of petition signatures to come from each legislative district in the state. That bill will appear in front of the House Local Government committee on Feb. 21.