IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff, and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs/Appellees, v. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Intervenor Defendants/ Appellants.	Appeal No. 29546

BRIEF OF APPELLANTS SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE

Notice of Appeal filed on February 17, 2021

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

The Honorable Christina Klinger
Circuit Court Judge

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104
Attorneys for Intervenor Defendants/Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave., Ste. 402
Sioux Falls, SD 57101
Attorneys for Plaintiff/Appellee Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Defendant Steve Barnett, in his official capacity as South Dakota Secretary of State

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Plaintiff/Appellee Sheriff Kevin Thom, in his official capacity as Pennington County Sheriff

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF LEGAL ISSUES 2

I. Did the circuit court err when it concluded that Thom had standing to sue the state in his official capacity as county sheriff? 2

II. Did the circuit court err when it concluded that Miller had standing to sue the state in his official capacity as State Highway Patrol Superintendent? 2

III. Did the circuit court err when it determined that the challenge to Amendment A's placement on the November 2020 ballot could not be brought until after the election? 3

IV. Did the circuit court err when it determined that Amendment A plainly and palpably violated the South Dakota Constitution because it contained multiple subjects that had no rational relationship? 4

V. Did the circuit court err when it determined that Amendment A plainly and palpably violated the South Dakota Constitution because it instituted far-reaching changes to South Dakota's basic governmental plan? 4

VI. Did the circuit court err when it concluded it did not have the legal authority to separate any unconstitutional provisions? 5

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 6

STANDARD OF REVIEW 8

ARGUMENT 8

I. Thom did not have standing to bring this declaratory judgment action in his official capacity. 11

A. County officials, as a matter of law, cannot sue the State. 12

B. Thom does not meet the established criteria for standing. 13

II. Miller did not have standing to bring this declaratory judgment action in his official capacity. 17

A. As with Thom, Miller has no standing. 17
B. The Executive Order cannot cloak Miller with standing. 18
III. Thom and Miller's decision to file this lawsuit after the election precludes their claims as untimely. 22
A. Governor Noem, and Thom and Miller, passed up earlier opportunities to challenge Amendment A. 23
B. Waiver and laches preclude these claims. 26
C. The law does not preclude pre-election procedural challenges. . 29
IV. Amendment A does not violate the single-subject rule. 37
A. South Dakota courts apply a broad interpretation of what constitutes a single subject. 39
B. The circuit court erred when it determined that parts of Amendment A were not reasonably germane to its purpose. 41
V. Amendment A did not require a constitutional convention. 52
A. Amendments may add a new article to the Constitution. 53
B. Amendment A was not a far-reaching change to South Dakota's basic plan of government. 54
VI. Even if Amendment A is unconstitutional, the circuit court erred when it failed to separate and sever the unconstitutional provisions. 71
CONCLUSION 75

TABLE OF AUTHORITIES

Page(s)

Cases

Accts. Mgmt., Inc. v. Williams,
484 N.W.2d 297 (S.D. 1992) 39, 41

In re Admin. of the C.H. Young Revocable Living Tr.,
2008 S.D. 43, 751 N.W.2d 715 27

Apland v. Bd. of Equalization for Butte Cnty.,
2013 S.D. 33, 830 N.W.2d 93 8

Baker v. Atkinson,
2001 S.D. 49, 625 N.W.2d 265 ..... *passim*

Barnhart v. Herseth,
222 N.W.2d 131 (S.D. 1974) ..... *passim*

Bd. of Supervisors of Linn Cnty. v. Dep't of Rev.,
263 N.W.2d 227 (Iowa 1978) 12

Beinert v. Yankton Sch. Dist., 63-3,
507 N.W.2d 88 (S.D. 1993) 24

Black Bear v. Mid-Cent. Educ. Coop.,
2020 S.D. 14, 941 N.W.2d 207 ..... *passim*

Bowyer v. Ducey,
No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz.
Dec. 9, 2020) 27

Brendtro v. Nelson,
2006 S.D. 71, 720 N.W.2d 670 ..... 62, 66

Byre v. City of Chamberlain,
362 N.W.2d 69 (S.D. 1985) ..... *passim*

Christensen v. Gale,
917 N.W.2d 145 (Neb. 2018) 3, 33, 49

State ex rel. Cranmer v. Thorson,
68 N.W. 202 (S.D. 1896) 3, 29, 30, 31

Dakota Systems, Inc. v. Viken,
2005 S.D. 27, 694 N.W.2d 23 ..... 5, 72, 73

Danforth v. City of Yankton,
25 N.W.2d 50 (S.D. 1946) ..... *passim*

Discover Bank v. Stanley,
2008 S.D. 111, 757 N.W.2d 756 8

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue,
1999 S.D. 48, 593 N.W.2d 36 ..... *passim*

State ex rel. Evans v. Riiff,
42 N.W.2d 887 (S.D. 1950) 3, 29, 30, 31

Hensley v. Att'y Gen.,
53 N.E.3d 639 (Mass. 2016) 48

In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions,
132 So. 3d 786 (Fla. 2014) 50

Indep. Cmty. Bankers Ass'n of S.D., Inc. v. State,
346 N.W.2d 737 (S.D. 1984) ..... *passim*

Johnson v. United Parcel Serv., Inc.,
2020 S.D. 39, 946 N.W.2d 1 8

Kanaly v. State,
368 N.W.2d 819 (S.D. 1985) 37, 39, 50

Kolb v. Monroe,
1998 S.D. 64, 581 N.W.2d 149 26

Larkin v. Gronna,
285 N.W.59 (N.D. 1939) 51

Legislature of Cal. v. Eu,
816 P.2d 1309 (Cal. 1991) 56, 58

McIntyre v. Wick,
558 N.W.2d 347 (S.D. 1996) (Sabers, J., dissenting) 35

Meierhenry v. City of Huron,
354 N.W.2d 171 (S.D. 1984) ..... *passim*

Mettet v. City of Yankton,
25 N.W.2d 460 (S.D. 1946) 41

Noel v. Cunningham,
5 N.W.2d 402 (S.D. 1942) 26

Nooney v. StubHub, Inc.,
2015 S.D. 102, 873 N.W.2d 497 14

In re Request of Janklow,
530 N.W.2d 367 (S.D. 1995) 23, 32

S.D. Educ. Ass'n/NEA v. Barnett,
1998 S.D. 84, 582 N.W.2d 386 ..... 5, 71, 72, 74

S.D. State Fed'n of Lab. AFL-CIO v. Jackley,
2010 S.D. 62, 786 N.W.2d 372 ..... 3, 32, 45

S.D. Trucking Ass'n, Inc. v. S.D. Dep't of Transp.,
305 N.W.2d 682 (S.D. 1981) 66

Schafer v. Shopko Stores, Inc.,
2007 S.D. 116, 741 N.W.2d 758 8

Sherburn v. Patterson Farms, Inc.,
1999 S.D. 47, 593 N.W.2d 414 8

Simpson v. Tobin,
367 N.W.2d 757 (S.D. 1985) 5

Sorrels v. Queen of Peace Hosp.,
1998 S.D. 12, 575 N.W.2d 240 65

State v. Outka,
2014 S.D. 11, 844 N.W.2d 598 21

Steger v. Franco, Inc.,
228 F.3d 889 (8th Cir. 2000) 14

To His Excellency Wollman, 268 N.W.2d 820 (S.D. 1978) 23

In re Tod,
81 N.W. 637 (S.D. 1900) 3, 20

Trump v. Biden,
951 N.W.2d 568 (Wis. 2020) 27

W. Cas. & Sur. Co. v. Am. Nat'l Fire Ins. Co.,
318 N.W.2d 126 (S.D. 1982) 26

Watland v. Lingle,
85 P.3d 1079 (Haw. 2004) ..... *passim*

Constitutions

Ark. Const. amend. 98, § 2 43

Colo. Const. art. XVIII, § 16(2) 42

Colo. Const. art. XVIII, § 16(2)(c) 64

Colo. Const. art. XIX, § 1 43

Colo. Const. art. XIX, § 2 ..... 42, 43

Fla. Const. art. X, § 29(b) 43

Mo. Const. art. XIV, § 1(2) 43

S.D. Const. art. V, § 5 ..... 23, 32

S.D. Const. art. XXIII § 1 ..... *passim*

S.D. Const. art. XXIII § 2 ..... 5, 53

S.D. Const. art. IV, Historical Note; 1972 S.D. Session Laws, ch. 1 69

S.D. Const. art. V, Historical Note; 1972 S.D. Session Laws, ch. 2 70

S.D. Const. art. X, Historical Note; 1972 S.D. Session Laws, ch. 3 70

S.D. Const. art. XXIV, Historical Note; 1915 S.D. Session Laws, ch. 231 54

Statutes

S.D.C.L. § 2-1-11 ..... 40, 45

S.D.C.L. § 2-1-14 24

S.D.C.L. § 2-1-17.1 24

S.D.C.L. § 2-1-18 24

S.D.C.L. § 35-1-2 57

S.D.C.L. § 35-10-1 57

S.D.C.L. § 38-35-1(2) 43

Other Authorities

1933 S.D. Session Laws, ch. 128 54

2017 S.D. Sess. Laws, HB 1069 68

2020 S.D. Sess. Law ch. 176, 2020 HB 1008 58

16 Am. Jur. 2d *Constitutional Law* § 41 (Feb. 2021 update) 30

Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937 (2005) 34

S.D. Sec'y of State, *Past South Dakota ballot question titles and election returns from 1890 – 2016*, page 25, *available at* https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/general-ballot-question-information.aspx (last accessed March 3, 2021 68

PRELIMINARY STATEMENT

Plaintiffs-Appellees Sheriff Kevin Thom and Colonel Rick Miller sued in their official capacities, seeking a judicial declaration that Amendment A was unconstitutional. South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele (collectively, the "Proponents") intervened as defendants before the circuit court. Thom and Miller also filed an election contest, and have concurrently but separately appealed the circuit court's dismissal of that matter.

JURISDICTIONAL STATEMENT

The circuit court issued an opinion granting Thom and Miller's motion for summary judgment on February 8, 2021. (App.5-16.)[1] The circuit court entered its corresponding judgment in favor of Thom and Miller on February 10, 2021, which was served on February 11, 2021. (App.17-20.) The Proponents timely filed this appeal on February 17, 2021. This Court has appellate jurisdiction pursuant to S.D.C.L. § 15-26A-3(1).

[1] Citations to the Proponents' Appendix are denoted as "App." followed by the referenced page number(s). Citations to the record before the circuit court are denoted as "R." followed by the referenced page number(s).

STATEMENT OF LEGAL ISSUES

I. Did the circuit court err when it concluded that Thom had standing to sue the state in his official capacity as county sheriff?

The circuit court found that Thom had standing in his official capacity because he took an oath to uphold the South Dakota Constitution and because his duties include enforcing the laws of the state. (App.7.) The circuit court did not address whether *Edgemont* precluded Thom from suing the state in his official capacity.

Most relevant authority:

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, 593 N.W.2d 36.

Black Bear v. Mid-Cent. Educ. Coop., 2020 S.D. 14, 941 N.W.2d 207.

Danforth v. City of Yankton, 25 N.W.2d 50 (S.D. 1946).

II. Did the circuit court err when it concluded that Miller had standing to sue the state in his official capacity as State Highway Patrol Superintendent?

The circuit court found that Miller had standing in his official capacity because he took an oath to uphold the South Dakota Constitution and because his duties include enforcing the laws of the state. (App.7-8.) The circuit court did not address whether *Edgemont* precluded Miller from suing the state in his official capacity. The circuit court did not address

whether the Governor could delegate authority to bring this action to Miller.

Most relevant authority:

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, 593 N.W.2d 36.

Black Bear v. Mid-Cent. Educ. Coop., 2020 S.D. 14, 941 N.W.2d 207.

Danforth v. City of Yankton, 25 N.W.2d 50 (S.D. 1946).

In re Tod, 81 N.W. 637 (S.D. 1900).

III. Did the circuit court err when it determined that the challenge to Amendment A's placement on the November 2020 ballot could not be brought until after the election?

The circuit court ruled that Thom and Miller could not challenge Amendment A's placement on the ballot until after the election, and that a pre-election lawsuit would amount to an advisory or hypothetical opinion. (App.8-9.)

Most relevant authority:

S.D. State Fed'n of Lab. AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372.

State ex rel. Evans v. Riiff, 42 N.W.2d 887 (S.D. 1950).

State ex rel. Cranmer v. Thorson, 68 N.W. 202 (S.D. 1896).

Christensen v. Gale, 917 N.W.2d 145 (Neb. 2018).

IV. Did the circuit court err when it determined that Amendment A plainly and palpably violated the South Dakota Constitution because it contained multiple subjects that had no rational relationship?

The circuit court determined that the subject of Amendment A was the legalization of marijuana. (App.11.) The circuit court then determined that Amendment A contained additional distinct subjects that did not relate to the legalization of marijuana: the legalization of hemp, professional or occupational licensing, and taxation. (App.11-12.)

Most relevant authority:

S.D. Const. art. XXIII § 1.

Baker v. Atkinson, 2001 S.D. 49, 625 N.W.2d 265.

Indep. Cmty. Bankers Ass'n of S.D., Inc. v. State, 346 N.W.2d 737 (S.D. 1984).

Meierhenry v. City of Huron, 354 N.W.2d 171 (S.D. 1984).

Barnhart v. Herseth, 222 N.W.2d 131 (S.D. 1974).

V. Did the circuit court err when it determined that Amendment A plainly and palpably violated the South Dakota Constitution because it instituted far-reaching changes to South Dakota's basic governmental plan?

The circuit court rejected Thom and Miller's argument that constitutional amendments could only amend existing articles. (App.13.) Although the circuit court found that Amendment A was not a drastic rewrite of the state Constitution, the circuit court found that it created far-

reaching changes in the structure of government. (App.14.) Specifically, the circuit court determined that Amendment A (1) removed the legislature's ability to enact laws relating to the regulation and licensing of marijuana and to enact civil penalties; (2) removed the power of the executive branch to reallocate authority from the Department of Revenue; and (3) waived the state's sovereign immunity by establishing a new cause of action against the Department of Revenue. Therefore, the circuit court determined that Amendment A required a constitutional convention.

Most relevant authority:

S.D. Const. art. XXIII §§ 1, 2.

Byre v. City of Chamberlain, 362 N.W.2d 69 (S.D. 1985).

Barnhart v. Herseth, 222 N.W.2d 131 (S.D. 1974).

VI. Did the circuit court err when it concluded it did not have the legal authority to separate any unconstitutional provisions?

The circuit court concluded that, due to the intermingling of multiple subjects within Amendment A, it was not possible to determine which subjects the voters intended to adopt. (App.16.)

Most relevant authority:

Dakota Systems, Inc. v. Viken, 2005 S.D. 27, 694 N.W.2d 23.

S.D. Educ. Ass'n/NEA v. Barnett, 1998 S.D. 84, 582 N.W.2d 386.

Simpson v. Tobin, 367 N.W.2d 757 (S.D. 1985).

STATEMENT OF THE CASE

Thom and Miller moved for summary judgment, seeking a declaration that Amendment A violated the single-subject rule and was a constitutional revision rather than an amendment. The Proponents and the Secretary of State separately moved for judgment on the pleadings. Judge Christina Klinger held a hearing on all pending motions on January 27, 2021, and later issued a written opinion granting Thom and Miller's motion for summary judgment and denying the motions for judgment on the pleadings filed by the Proponents and the Secretary of State. This appeal followed. On February 26, 2021, the Supreme Court entered an order approving a consolidated briefing schedule (with separate briefs) and increased word limit for this appeal and appeal no. 29547. The Secretary of State, through the Attorney General, is not participating in this appeal.

STATEMENT OF FACTS

All parties and the circuit court agreed that the facts in this matter were uncontested and that this lawsuit only presented questions of law. (*See* App.5.)

On August 16, 2019, the Attorney General's office provided to the Secretary of State the final form of Amendment A, along with a title and

explanation, which authorized the sponsors of Amendment A to begin collecting signatures to place Amendment A on the ballot. (App.77-85.) On November 4, 2019, the sponsors of Amendment A timely submitted signed petitions initiating Amendment A to the South Dakota Secretary of State for validation. (App.89.) On January 6, 2020, the Secretary of State announced that Amendment A received sufficient signatures and would be placed on the ballot in the 2020 general election. (App.88.) The deadline to challenge this decision was Wednesday, February 5, 2020, at 5:00 p.m. central time. (*Id.*)

At the general election held on November 3, 2020, South Dakota voters approved Amendment A, with 54.2% of voters voting in favor of adopting Amendment A. (App.60.)

Thom and Miller filed this declaratory judgment action on November 20, 2020. (App.23-33.) They explicitly brought this action in their official capacities only, as Pennington County Sheriff and South Dakota State Highway Patrol Superintendent, respectively. (*Id.*)

STANDARD OF REVIEW

This Court will not affirm a summary-judgment order unless "there are no genuine issues of material fact and the legal questions have been decided correctly." *Schafer v. Shopko Stores, Inc.*, 2007 S.D. 116, ¶ 5, 741 N.W.2d 758, 760 (quoting *King v. Landguth*, 2007 S.D. 2, ¶ 8, 726 N.W.2d 603, 607). Conclusions of law are reviewed under a de-novo standard. *Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 47, ¶ 4, 593 N.W.2d 414, 416. Thus, constitutional issues are generally subject to de-novo review. *See Apland v. Bd. of Equalization for Butte Cnty.*, 2013 S.D. 33, ¶ 7, 830 N.W.2d 93, 97. Questions of statutory interpretation are also reviewed de-novo. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15, 757 N.W.2d 756, 761. When applying the de-novo standard of review, this Court "give[s] no deference to the circuit court's decision." *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶ 26, 946 N.W.2d 1, 8 (quoting *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486).

ARGUMENT

This case is not just about marijuana. It is also about the future of the initiative process in South Dakota. If this Court affirms the decision of the circuit court, it will substantially impair the fundamental right of South Dakotans to initiate laws and constitutional amendments.

South Dakotans have retained for themselves the power to initiate legislation and constitutional amendments. The ability of voters to decide what rights their constitution guarantees is a fundamental and sacred right. This power to initiate laws and constitutional amendments enables South Dakotans to enact new laws or amend the state's Constitution where the ordinary legislative process does not reflect the will of the people. *See Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985) ("The purpose of the initiative is not to curtail or limit legislative power to enact laws, but rather to compel enactment of measures desired by the people, and to empower the people, in the event the legislature fails to act, to enact such measures themselves.").

Thom and Miller bear an exceedingly heavy burden of proof to prevail on their arguments that Amendment A is unconstitutional. A strong presumption of constitutionality exists in favor of an amendment after it is adopted by the voters: "When considering a constitutional amendment after its adoption by the people, the question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it." *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (cleaned up). An amendment passed by the people "should be sustained unless is

'plainly and palpably appear(s) to be invalid.' " *Id.* This is consistent with the approach followed in other states:

> [C]onstitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt. The burden of showing this invalidity is upon the party challenging the results of the election. And "[e]very reasonable presumption is to be indulged in favor of a constitutional amendment which the people have adopted at a general election."

Watland v. Lingle, 85 P.3d 1079, 1084 (Haw. 2004) (internal citations omitted).

Rather than apply this standard, the circuit court strained to strike down Amendment A. The circuit court's decision is a misapplication of the law and logic. The arguments offered by Thom and Miller, and those accepted by the circuit court, do not support a finding that Amendment A is unconstitutional.

More fundamentally, however, the circuit court's decision—if affirmed— does great damage to the integrity of the initiative process. A ruling that Amendment A included multiple subjects improperly establishes new and heightened restraints on the right of the people to legislate by initiative. It would mark South Dakota as an outlier from the other states that have added marijuana provisions to their constitutions. In addition, a determination that Amendment A required a constitutional

revision not only calls into serious question the constitutional validity of past amendments to the Constitution (including those made in 1972 to reshape the Constitution itself) but could effectively excise the right to initiate constitutional amendments from the Constitution. Finally, allowing Thom and Miller to override the results of the 2020 election will subject virtually every initiated measure to a post-election court challenge, undermining the finality of elections and placing the judicial branch in the politically-fraught position of adjudicating the validity of elections after the results are known.

This Court should reverse the circuit court, affirm the will of the voters, and preserve the fundamental right of South Dakotans to initiate laws and constitutional amendments.

I. Thom did not have standing to bring this declaratory judgment action in his official capacity.

The circuit court determined that Thom had standing to bring the underlying lawsuit in his official capacity because he took an oath to uphold the law, and because his duties include enforcing laws on the roads and highways. (App.7.) This conclusion is wrong as a matter of law for several reasons.

A. County officials, as a matter of law, cannot sue the State.

The circuit court ignored well-established precedent in South Dakota that a county (or a county official in his or her official capacity) cannot sue the state. *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40 ("District and County are creations of the legislature and lack standing to challenge the constitutionality of [a statute]."); *Bd. of Supervisors of Linn Cnty. v. Dep't of Rev.*, 263 N.W.2d 227, 234 (Iowa 1978) ("A county and its ministerial officers ordinarily have no right, power, authority, or standing to question the constitutionality of a state statute."). Thom explicitly brought the underlying declaratory judgment action in his official capacity only. Neither Thom nor the circuit court explained how a county sheriff can sue the state, in contravention of this Court's holding in *Edgemont*.

There is simply no way around this fatal flaw. Whether other plaintiffs could bring a declaratory judgment action is not at issue, and neither the circuit court nor this Court needs to speculate on which, if any, other plaintiffs might have standing. Consistent with *Edgemont*, this Court must reverse and remand for entry of an order dismissing the claim by Thom for a lack of standing in his official capacity as a county sheriff.

B. Thom does not meet the established criteria for standing.

The circuit court's justifications for conferring standing on Thom in his official capacity are contrary to established law. To establish standing, a plaintiff must prove (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision. *See, e.g.*, *Black Bear v. Mid-Cent. Educ. Coop.*, 2020 S.D. 14, ¶¶ 11-12, 941 N.W.2d 207, 212-13 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). A plaintiff bears the burden to prove the alleged harm they have or will have to a legally protected interest; speculative harm is insufficient. *See id.* at ¶ 11, 941 N.W.2d at 212-13.

Merely having taken an oath of office is not a legally-protected interest sufficient to confer standing. As the circuit court itself noted, every person elected or appointed to any civil office takes an oath to support the federal and state constitutions. (App.7 n.2.) Affirming the circuit court's decision that Thom has standing based on his oath of office would allow any elected or appointed official to challenge any law, regardless of whether that official otherwise had standing. Such a precedent is incompatible with the requirement that a plaintiff establish a specific,

concrete, and tangible harm. *See Black Bear*, 2020 S.D. 14 at ¶ 11, 941 N.W.2d at 212-13.

Furthermore, neither the circuit court nor Thom ever explained why Thom's oath of office should permit him to bring a lawsuit based on the laws at issue in this case. Thom, in his official capacity, is not charged with enforcing the single-subject requirement in Article XXIII, § 1, nor is it his responsibility to determine whether an initiative is an amendment or a revision. In short, Thom's duties have no connection whatsoever to the claims he brought in this lawsuit.

Thom and the circuit court both took the position that Thom has standing because Amendment A affects his ability to keep intoxicated drivers off the road. (App.7.) This position is unsupported and, in any event, does not confer standing. The complaint did not contain any reference to Amendment A's purported impact on Thom's ability to keep intoxicated drivers off the road. (*See* App.23-33.) Because the Proponents moved for judgment on the pleadings, Thom could not rely on materials outside the pleadings to carry his burden to prove standing. *See Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 7, 873 N.W.2d 497, 499 ("A court may not consider documents 'outside' the pleadings when ruling on a motion to dismiss for failure to state a claim."); *Steger v. Franco, Inc.*, 228 F.3d 889, 892

(8th Cir. 2000) (noting that "standing is determined as of the lawsuit's commencement, [so courts] consider the facts as they existed at that time"). Even if the circuit court could have considered this argument, Thom did not offer any evidence to support it. *See, e.g.*, *Black Bear*, 2020 S.D. 14 at ¶ 12, 941 N.W.2d at 213 (requiring that a party provide specific facts, rather than bare assertions, to establish standing when moving for summary judgment). This unsupported assertion by Thom—particularly the regurgitation of an argument rejected by the voters who passed Amendment A—does not satisfy his burden to prove he has standing.

Furthermore, Thom has no legally protectable interest in enforcing the laws as they are currently written. Laws can, and frequently do, change. Thom does not have the ability to judicially veto changes in the law simply because he enforces some laws. Such a rule would eviscerate this Court's settled standing law allowing officials to challenge any law they wanted. *See, e.g.*, *Danforth v. City of Yankton*, 25 N.W.2d 50, 53 (S.D. 1946) (requiring a plaintiff to prove a specific and tangible legally-protected interest to obtain a declaratory judgment). It would also freeze the status quo and create a new type of judicial review over every piece of legislation.

Thom never pleaded, briefed, or proved any specific legally-protected interest. Generalizations about taking an oath and enforcing laws on the highways do not identify specific, tangible, and legally-protected interests. After the passage of Amendment A, Thom can still legally enforce every law on the books. In fact, Amendment A specifically states that it "does not limit or affect laws that prohibit or otherwise regulate . . . [o]perating or being in physical control of any motor vehicle . . . while under the influence of marijuana[.]" (App.1 § 2(4).) It is immaterial that some previously illegal conduct will no longer be a crime. Thom has no legally protectable interest in stopping or arresting anyone for conduct that is no longer criminal. Thom needs to enforce the laws as they exist, not as they once existed. Because Thom did not—and cannot—explain how Amendment A causes a concrete injury to a legally-protected interest in his official capacity, he does not have standing. The circuit court's contrary conclusion is wrong.

Thom also failed to establish the type of adversarial legal relationship that would support standing. There is no contract for this Court to construe or declare, nor any other legally enforceable set of rights and obligations between the parties. Instead, there is a theoretical disagreement about the wisdom of Amendment A. The disagreement

about Amendment A is precisely the type of academic dispute that *Danforth* found did not confer standing. *Danforth*, 25 N.W.2d at 53 ("Unless the parties have such conflicting interests, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justiciable.") (citation omitted). Moreover, as noted above, the issues Thom raised regarding Amendment A have no connection to his office.

Danforth spells out the consequences when a plaintiff fails to prove standing:

> Litigants cannot by consent confer upon a person, who does not have a sufficient interest to entitle him to bring suit, the right to maintain suit or agree that a justiciable controversy exists so as to confer jurisdiction, when, in fact, it appears no such controversy is presented. When it is ascertained that no jurisdiction exists, we can go no further.

Danforth, 25 N.W.2d at 55. As in *Danforth*, this Court need go no further, and should remand for dismissal of Thom's complaint for lack of standing.

II. Miller did not have standing to bring this declaratory judgment action in his official capacity.

A. As with Thom, Miller has no standing.

The circuit court similarly determined that Miller had standing to bring this action because he took an oath of office and is charged with

enforcing laws on highways. (App.7-8.) As with Thom, this is insufficient to establish an injury to a legally-protected interest. The circuit court erred in concluding that Miller had standing for the reasons stated in the preceding section. The Proponents incorporate those arguments here without repeating them.

The circuit court also failed to consider whether Miller had standing to sue the state in his official capacity under *Edgemont*. Miller is an employee of a department of the executive branch of the state. (App.7-8.) Therefore, he is subordinate to the state and may not sue the state in his official capacity. *See Edgemont*, 1999 S.D. 48, ¶¶ 14-15, 593 N.W.2d at 40. Because Miller explicitly brought this declaratory judgment action only in his official capacity, the circuit court erred when it failed to consider the rule set forth in *Edgemont*. For the reasons set forth with respect to Thom, which the Proponents incorporate here without repeating, *Edgemont* compels the dismissal of Miller's claim in his official capacity.

B. The Executive Order cannot cloak Miller with standing.

Miller has another unique standing problem that the circuit court failed to address. When the Proponents pointed out that Miller lacked standing to sue the state in his official capacity under *Edgemont*, Miller changed his approach. On January 8, 2021—the same day Miller's response

brief was due—Governor Noem issued Executive Order 2021-02 (the "EO"), which claimed that she delegated her constitutional authority under Article IV, § 3 of the South Dakota Constitution to Miller, and directed the lawsuit from the beginning. (App.110-11.)

The EO was a transparent effort to avoid the clear consequences of *Edgemont*. The circuit court never addressed the EO, other than to note its existence in a footnote. (App.7 n.1.) On de-novo review, this Court should reject this improper attempt to circumvent jurisdictional standing requirements through the EO.

1. Miller's lawsuit was not under Section 3 of Article IV.

Miller's lawsuit did not fall under Article IV, § 3. That section authorizes the Governor, "by appropriate action or proceeding brought in the name of the state, [to] enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its civil divisions." S.D. Const. art. IV, § 3 (emphasis added). This declaratory-judgment action was not, and is not, brought in the name of the state. On its face, Miller's lawsuit is not the type of suit described in Article IV, § 3.

Moreover, Article IV, § 3 explicitly states that it does not authorize a suit against the Legislature, which prohibition would also apply to the voters when they legislate via initiative. Article IV, § 3 ("This authority shall not authorize any action or proceeding against the Legislature."). Here, the voters of South Dakota, legislating through their reserved power of the initiative, are not subject to suit under Article IV, § 3. Similarly, the voters are not a state officer, department, or agency. The claims for relief and arguments in Miller's lawsuit confirm that it is outside the confines of Article IV, § 3, and, in fact, violate the limitation contained in that section.

2. The EO is an improper delegation of power.

Miller's attempt to pass his declaratory-judgment action off as a lawsuit under Article IV, § 3 depends wholly on an impermissible delegation of the Governor's constitutional authority. A governor may not delegate constitutional powers conferred personally on the executive. *In re Tod*, 81 N.W. 637, 640 (1900), *overruled on other grounds by Grogan v. Welch*, 227 N.W. 74 (1929). The power to enforce compliance with the law in the name of the state is one of seven duties the Constitution directly confers on the governor. S.D. Const. art. IV, § 3. No governor may delegate this core function.

In addition, the EO contained no direction on how Miller should exercise the authority purportedly delegated to him. Even when branches of government can delegate certain authority, they must supply intelligible standards to guide the exercise of delegated powers. *Cf. State v. Outka*, 2014 S.D. 11, ¶¶ 25-26, 844 N.W.2d 598, 606 (requiring intelligible standards to guide the exercise of delegated power). The EO contained no direction on how Miller should exercise the power purportedly delegated to him. Thus, even if Governor Noem could have delegated her authority under Article IV, § 3, the EO was an improper mechanism for doing so.

The circuit court did not address whether the EO constituted a proper delegation of authority. It plainly does not. The EO also makes no sense: if Governor Noem truly intended this lawsuit to be an exercise of her powers under Article IV, § 3, she did not need Miller's involvement at all. On top of being wholly unnecessary, allowing this type of delegation would create a problematic precedent. It would allow a governor to circumvent the express constitutional requirement that lawsuits under Article IV, § 3 be brought in the name of the state. Worse, it would also allow a governor to "delegate" unpopular actions to unelected subordinates, thereby avoiding political accountability for those actions. If the Governor wants to try to undo the results of an election, she needs to

be politically accountable for that exercise of her power. She may not instruct an unelected subordinate—who is unaccountable to the voters but could be fired by the Governor—to act as her proxy.

In short, while a governor can, in certain circumstances, bring an appropriate action under Article IV, § 3, this declaratory-judgment action is not proper. Standing is not transferable by consent. *See Danforth*, 25 N.W.2d at 55 (declaring that "[l]itigants cannot by consent confer upon a person, who does not have a sufficient interest to entitle him to bring suit, the right to maintain suit or agree that a justiciable controversy exists so as to confer jurisdiction"). Miller never had standing to bring this declaratory judgment action in his official capacity, and the EO did not—and cannot—change that fundamental flaw. This Court should reverse and remand with an instruction to dismiss Miller's claim for lack of standing.

III. Thom and Miller's decision to file this lawsuit after the election precludes their claims as untimely.

Thom and Miller acknowledge that they are not challenging the substantive constitutionality of legalized marijuana—and, indeed, there is no basis to argue that the subject matter of Amendment A is substantively unconstitutional. (*See, e.g.*, R.343 ("Colonel Miller is not alleging that Amendment A is substantively unconstitutional . . . .").) Their lawsuit centers on the process by which Amendment A was initiated. But that

challenge is untimely. By waiting until after the results of the election went against them, Thom and Miller are belatedly seeking, in effect, to undermine the democratic process. This Court should not allow anyone, particularly public officials, to wait until after an election and then sue to judicially veto the will of the voters based on arguments that were fully available to them before the voters spoke.

A. Governor Noem, and Thom and Miller, passed up earlier opportunities to challenge Amendment A.

Taking Governor Noem at her word that she is directing this litigation, she could have asked the Supreme Court to issue an advisory opinion on the constitutionality of Amendment A before the November 2020 election. "The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of [the Governor's] executive power and upon solemn occasions." S.D. Const. art. V, § 5; *see also To His Excellency Wollman*, 268 N.W.2d 820, 822 (S.D. 1978) (holding that the Supreme Court answers important questions of law (1) involving the Governor's exercise of power and (2) upon solemn occasions); *In re Request of Janklow*, 530 N.W.2d 367, 368-70 (S.D. 1995) (addressing when the Supreme Court answers questions under Article V, § 5). Notably, a governor can seek an advisory opinion even if the reviewed action is not "final." *In re Request of Janklow*, 530 N.W.2d at 369. The effort

to establish standing through the Governor essentially admits that she had an earlier opportunity to raise the arguments now presented.

Setting the Governor's authority aside, Thom and Miller had two alternate pre-election options to challenge Amendment A. South Dakota law prohibits the Secretary of State from counting petition signatures that are gathered in contravention of the law. *See* S.D.C.L. § 2-1-14. Here, if Thom and Miller believed the form of Amendment A, as circulated on the petitions, did not comply with the law, then the Secretary should not have counted any signatures gathered on a petition that did not comply with the South Dakota Constitution. Thom and Miller could have challenged the Secretary's decision to place Amendment A on the ballot under S.D.C.L. §§ 2-1-17.1 or 2-1-18. The statutory deadline to file that challenge was February 5, 2020. (App.88.)

Alternatively, if Thom and Miller believed they did not have a pre-election statutory remedy, they could have sought a writ preventing the Secretary of State from placing Amendment A on the ballot. Injunctive or equitable relief is proper where a statutory remedy does not exist. *Beinert v. Yankton Sch. Dist., 63-3*, 507 N.W.2d 88, 90 (S.D. 1993). Thus, if Thom and Miller could not bring a challenge under the statutes discussed above, by

definition they could have sought injunctive or equitable relief on the same grounds.

Had a court determined before the election that Thom and Miller could not bring a challenge at that time, then they would have been able to re-file their challenge after the election without timeliness concerns. But by waiting until after the election to sue, Thom and Miller never gave the courts a chance to make that decision. They bear the risk of making that strategic choice.

Any one of these options would have allowed Thom and Miller (or the Governor) to raise their arguments before the election. Instead, they chose to wait until after the election. This Court should not allow a party to wait until after the election results are in to decide if it will pursue a challenge: "Efficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Watland v. Lingle*, 85 P.3d 1079, 1088 (Haw. 2004) (quoting *Lewis v. Cayetano*, 823 P.2d 738, 741 (Haw. 1992)).

B. Waiver and laches preclude these claims.

As a result of Thom and Miller's failure to pursue pre-election relief, their claims are barred by statute and are waived. The deadline to file a statutory challenge to the Secretary's decision that Amendment A qualified for the November 2020 ballot was February 5, 2020. A party waives a right when, with full knowledge of the material facts, the party does or forbears the doing of something inconsistent with the intention to rely on that right. *See Kolb v. Monroe,* 1998 S.D. 64, ¶ 11, 581 N.W.2d 149, 151; *see also W. Cas. & Sur. Co. v. Am. Nat'l Fire Ins. Co.*, 318 N.W.2d 126, 128 (S.D. 1982). This Court has made clear, for example, that a party alleging that a candidate's petition is invalid should pursue that challenge before an election, or the invalidity of the petition is waived. *See Noel v. Cunningham*, 5 N.W.2d 402, 404 (S.D. 1942) ("This Court has already indicated that a candidate desiring to challenge the nomination of his opponent must act with some diligence. . . . The American authorities are almost unanimous in holding that objections to irregularities in the nomination of a person for office must be taken prior to the election, and that thereafter it is too late." (citations omitted)). The same result should apply here: objections regarding alleged irregularities in a petition placing

a measure on the ballot should be raised before an election, or should not be raised at all.

Similarly, the doctrine of laches bars Thom and Miller's complaints after the election. Laches will bar an action where a party (1) has full knowledge of the facts, (2) regardless of that knowledge, the party unreasonably delayed before seeking relief in court, and (3) it would be prejudicial to proceed with the action. *See In re Admin. of the C.H. Young Revocable Living Tr.*, 2008 S.D. 43, ¶ 10, 751 N.W.2d 715, 717-18. Here, Thom and Miller's delay in bringing this lawsuit was unreasonable because they waited until after the election. *See, e.g.*, *Trump v. Biden*, 951 N.W.2d 568, 573-76 (Wis. 2020) (noting the importance of laches in the election context and finding that waiting until after an election was over to file a challenge was unreasonable delay); *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *9-11 (D. Ariz. Dec. 9, 2020) (applying the doctrine of laches to an election challenge and finding that prejudice in the potential disenfranchisement of Arizona voters would be "extreme" and "unprecedented").

Thom and Miller's delay prejudiced the sponsors and supporters of Amendment A, prejudiced the voters of South Dakota, and prejudiced the taxpayers in that, if Thom and Miller prevail, the taxpayers will have

borne the burden of funding an election that was apparently void from the outset. Allowing voters to vote on a measure only to have the will of the voters undone in court undermines faith in the democratic process, the initiative process, and in the judiciary itself. *Watland* provides a succinct summary of the equitable application of laches in the election context: "[t]he general rule is that[,] if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward." *Watland*, 85 P.3d at 1087 (alterations in original) (quoting *Lewis*, 823 P.3d at 741).

The application of laches is particularly compelling where, as here, a complaining party is trying to void the results of an election that it opposed. Had the electorate voted in the way that Thom and Miller preferred, they would happily abide by the results of the same election they now claim was void from the outset. Moreover, their decision to wait until after the election forced the state and the voters to bear the cost of putting Amendment A on the ballot and voting on it—only to potentially have the results taken away. This Court should not adopt a rule that requires post-election procedural lawsuits.

C. The law does not preclude pre-election procedural challenges.

The circuit court did not address the issues of laches or waiver. Instead, the circuit court held that Thom and Miller could not bring their claim until after the election, relying on *State ex rel. Cranmer v. Thorson* and *State ex rel. Evans v. Riiff.* (App.9.) The law does not support the circuit court's conclusion.

In *Cranmer*—a decision from 125 years ago—a relator commenced an original proceeding in the Supreme Court seeking an injunction prohibiting the Secretary of State from certifying to county auditors a joint resolution proposing a constitutional amendment.[2] 68 N.W. 202, 202-03 (S.D. 1896). The Court determined that it could not intervene when a proposed amendment was on its way from the legislature to the voters any more than it could intervene if a bill was on its way from the legislature to the governor's desk. *Id.* at 204. The Court twice noted that no precedent supported judicial intervention in the initiative process. *Id.* at 203-04. Therefore, the Supreme Court decided not to insert itself in the

[2] At that time, constitutional amendments were initiated by the legislature and then submitted to a vote of the people—the people could not directly initiate constitutional amendments until 1972.

amendment process until the voters had acted on the proposed amendment.

Evans reached a similar conclusion. 42 N.W.2d 887 (S.D. 1950). In that case, voters submitted a petition for a new statute to the legislature, which passed the proposed act and submitted it to the voters. *Id.* at 887. The plaintiff sued, alleging that the signatures on the petition were not in the form prescribed by law. *Id.* After quoting extensively from *Cranmer*, the Court noted that several other states "entertain a different view." *Id.* at 888. Nonetheless, the Court determined that waiting until after the election was a more appropriate public policy choice. *Id.* at 889.

Cranmer, and by extension *Evans*, relied on the fact that in the late 1800s, states had not developed precedent on how courts should monitor compliance with initiative requirements. That is no longer the case:

> [T]here are two exceptions to the rule that judicial review of the constitutionality of an initiative is unavailable until after it has been enacted by the voters: first, where the initiative is challenged on the basis that it does not comply with the state's constitutional and statutory provisions regulating initiatives, and second, where the initiative is challenged as clearly unconstitutional or clearly unlawful.

16 Am. Jur. 2d *Constitutional Law* § 41 (Feb. 2021 update). This rule has a powerful justification: challengers should not be permitted to wait to see the results of an election before they decide whether to challenge it. The

rationale from 1896 that pre-election litigation is unsupported by precedent is no longer accurate.

Moreover, the central principle animating *Cranmer* and *Evans*—namely, that courts may not interfere to answer procedural questions regarding a voter-initiated ballot measure before a vote on the measure—is no longer accurate either. South Dakota courts do, in fact, have the statutory ability to consider the presentation of initiated measures to the voters before an election. For example, S.D.C.L. § 2-1-17.1, adopted in 2017, allows an interested person to challenge the sufficiency of petitions to the secretary of state, and provides that, "[t]he secretary of state's decision regarding a challenge under this section may be appealed to the circuit court of Hughes County." Similarly, S.D.C.L. § 2-1-18, adopted in 2007, allows other challenges relating to petitions to be brought in circuit court by serving a summons and complaint on each petition sponsor. Each of those statutes allows a court to review the presentation of an initiated measure to the voters before an election. Thus, when revisiting the question the *Cranmer* court posed 125 years ago—can the court address alleged procedural deficiencies in a petition prior to its submission to the voters?—the answer today is a clear yes.

South Dakota State Federation of Labor AFL-CIO v. Jackley is consistent with the general rule that substantive challenges to a proposed law are not ripe until the law is enacted. 2010 S.D. 62, 786 N.W.2d 372. That case concerned whether a proposed constitutional amendment was substantively unconstitutional "in light of federal preemption law." *Id.* at ¶ 10, 786 N.W.2d at 376. The Court expressed skepticism that it could "anticipate conditions which may never exist" and so declined to rule on the substantive constitutionality of an amendment before it was adopted. *See id.* at ¶ 12, 786 N.W.2d at 376-77. Challenges to the substantive constitutionality of a statute or amendment necessarily relate to future lawsuits, such that the issue is not properly before the court until a plaintiff with standing articulates a challenge. Until then, any judgment on the substantive constitutionality of a law would amount to an advisory opinion.

That rationale does not apply to challenges like Thom and Miller's. *Jackley* did not consider whether a court could address a question posed by a governor under Article V, § 5. In such a situation, courts need not wait for a final action before answering such a question. *In re Janklow*, 530 N.W.2d at 369.

In addition, Thom and Miller's challenge to Amendment A does not depend on a resolution of any future or contingent facts, nor would such a decision before November 2020 have amounted to an advisory opinion. The harm alleged by Thom and Miller—that Amendment A was an example of logrolling, and that voters would be confused by Amendment A—would necessarily happen before the election. It was not contingent on the outcome of the election, because no matter what the outcome of the vote, the voters still had to vote one way or the other on an allegedly improper measure. And once the election is over, the precise harm alleged here ceased—Amendment A will not be on the ballot again.

Procedural challenges are distinguishable from a substantive challenge, such as a law infringing on free speech. The harm of a law infringing on free speech does not happen until after the law passes, and only occurs if the law passes. Until the illegal restriction actually goes into place, no harm occurs. That type of substantive challenge is not ripe until after the law passes. Here, Thom and Miller are not raising a substantive challenge to Amendment A's constitutionality. As the Nebraska Supreme Court recently held, a single-subject challenge to a voter-initiated measure is a procedural challenge that is ripe for pre-election adjudication. *Christensen v. Gale*, 917 N.W.2d 145, 156-58 (Neb. 2018) (determining that

the expansion of Medicare and the funding of the expansion were, in fact, a single subject).

To the extent that South Dakota law is not clear on this issue, this case presents the Court with an important opportunity to clarify the law. Allowing post-election procedural challenges such as these would create significant and ongoing problems from a public policy perspective. In 2005, Professor Richard Hasen warned about the dangers of post-election efforts to overturn election results in court. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937 (2005). Among other problems, post-election legal challenges invite litigants to take a second bite at the apple (i.e., the election and the ensuing court case), and puts judges in the difficult position of deciding a political question when the results of the election are already clear. *Id.* at 993-94. Post-election litigation undermines the integrity of the electoral and judicial processes and imposes unnecessary costs on the public. *Id*.

Allowing pre-election procedural challenges is the better-considered policy position. Otherwise, every election in South Dakota may be followed by a lawsuit to determine the validity of the election results. Every voter initiative drive will have to be prepared to defend the will of

the voters in court. If a measure is ultimately struck down on procedural grounds, the state will have incurred the costs of unnecessarily holding an election. In addition, state court judges will be put in the exceedingly difficult position of ruling on procedural issues after the results of the election are known. Those serious consequences counsel in favor of allowing courts to adjudicate pre-election procedural challenges.

Permitting post-election challenges also improperly creates an extra-constitutional mechanism for repealing adopted constitutional amendments. Once approved by a majority of the voters, a constitutional amendment is part of the Constitution. *See* Art. XXIII, § 3 ("Any constitutional amendment or revision must be submitted to the voters and shall become a part of the Constitution only when approved by a majority of the votes cast thereon."). The language of Article XXIII, § 3 is mandatory: once the voters approve an amendment, it "shall" be a part of the Constitution. *See McIntyre v. Wick*, 558 N.W.2d 347, 364 (S.D. 1996) (Sabers, J., dissenting) ("When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning."). After its adoption, a constitutional amendment may only be repealed using one of the mechanisms provided in Article XXIII.

If this Court permits post-election procedural challenges, it will effectively create another way for opponents to repeal a constitutional amendment—one that bypasses the voters entirely. Indeed, Thom and Miller's dire predictions about the impact of Amendment A overlook the plain remedy they have: they can try to repeal or revise the amendment at the ballot box. Of course, to do so they would have to convince a majority of South Dakota voters to agree with them, which would be a daunting challenge, considering the broad public support Amendment A enjoyed at the polls.

In short, because Thom and Miller could have brought this lawsuit before the election, they waived their ability to challenge Amendment A, and their challenge is barred by laches. The equitable rule is simple and effective: "if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward." *Watland*, 85 P.3d at 1087 (cleaned up). Any other rule would permit parties dissatisfied with an election outcome to take a second bite at the apple and attempt to obtain a judicial veto of election results. This Court should not countenance that result, and should reject this lawsuit as untimely.

IV. Amendment A does not violate the single-subject rule.

The law places two significant hurdles in front of a plaintiff seeking to overturn an adopted constitutional amendment based on an alleged violation of the single-subject rule.

First, the bar for establishing the necessary relationship between subjects is low: the topics must only have a "reasonably germane" relationship. *Baker v. Atkinson*, 2001 S.D. 49, ¶ 25, 625 N.W.2d 265, 273. In *Barnhart*, this Court upheld a multi-part constitutional amendment with the strikingly general goal of "making the executive branch of state government more efficient and responsible" because each of the changes were "rationally related to this general purpose." *Barnhart v. Herseth*, 222 N.W.2d 131, 135-36 (S.D. 1974). In the legislative context, South Dakota courts have routinely upheld laws with numerous provisions relating to one broad overall goal. *See, e.g.*, *Indep. Cmty. Bankers Ass'n of S.D., Inc. v. State ex rel. Meierhenry*, 346 N.W.2d 737, 740 (S.D. 1984) (upholding an act that amended six different statutory sections, which governed bank holding companies, insurance, taxation of insurance companies, and bank sales, because each provision related to "the regulation of 'certain banks and their subsidiaries'"); *Kanaly v. State*, 368 N.W.2d 819, 828 (S.D. 1985) (upholding an act that amended several statutory provisions dealing with

prison facilities, escape, and prison funding, because all eleven sections of the bill were reasonably related to the single goal of closing a university and establishing a prison using its facilities); *Meierhenry v. City of Huron*, 354 N.W.2d 171, 182 (S.D. 1984) (upholding an act that authorized various public entities to issue and register bonds and revised statutes relating to tax incremental districts because they related to the subject of municipal finance).

Second, courts apply a strong presumption in favor of constitutionality. An amendment adopted by the voters must "plainly and palpably" violate the Constitution before courts will strike it down. *Barnhart*, 222 N.W.2d at 136 (quoting *State ex rel. Adams v. Herried*, 72 N.W. 93, 97 (S.D. 1897)). As the *Barnhart* court eloquently stated: "When considering a constitutional amendment after its adoption by the people, the question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it." *Id.* (cleaned up).

The circuit court's decision did not correctly apply either of these legal principles, and must be reversed.

A. South Dakota courts apply a broad interpretation of what constitutes a single subject.

Article XXIII, § 1 of the South Dakota Constitution states that "[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject." The public purposes behind the single-subject rule for legislation are to (1) prevent logrolling, or the combining of otherwise unpopular measures with other popular measures to force a single vote on all the measures combined; (2) prevent the unintentional passage of a provision that is not listed in the title; and (3) fairly apprise the public of what is in the measure and avoid fraud or deception. *See Kanaly*, 368 N.W.2d at 827.

This Court has not yet interpreted the "single subject" rule for constitutional amendments, which was added to the Constitution in 2018. But this Court has interpreted a similar constitutional provision, Article III, § 21, which provides: "No law shall embrace more than one subject, which shall be expressed in its title." This Court liberally construes enactments in favor of constitutionality. "Sound policy and legislative convenience dictate a liberal construction of title and subject matter." *Accts. Mgmt., Inc. v. Williams*, 484 N.W.2d 297, 302 (S.D. 1992) (citing *State v. Morgan*, 48 N.W.

314, 317 (S.D. 1891)); S.D.C.L. § 2-1-11 (applying the rule of liberal construction to initiated petitions). Thus, "[o]bjections to an act on the basis that it embraced more than one subject and was not adequately expressed in its title should be grave, and the conflict between the statute and the constitution plain and manifest, before it may be justifiably declared unconstitutional and void." *Indep. Cmty. Bankers Ass'n of S.D., Inc. v. State*, 346 N.W.2d 737, 742 (S.D. 1984) (citing *Morgan*, 48 N.W. at 318).

"The constitution does not restrict the scope or magnitude of the single subject of a legislative act." *Meierhenry v. City of Huron*, 354 N.W.2d 171, 182 (S.D. 1984) (citing *Morgan*, 48 N.W. at 317). This Court employs a broad interpretation of what falls under a single subject for legislation:

> [W]e are of the view that the [single subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, *all parts which are reasonably germane*. The provision was not enacted to provide means for the overthrow of legitimate legislation. Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute *a single scheme* may be properly included within a single act.

Baker, 2001 S.D. 49 at ¶ 25, 625 N.W.2d at 273 (italics in original) (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1290 (Cal. 1978)).

Notably, "the subject of a statute 'is singular when a number of things constituting a group or class are treated as a unit for general legislation.' " *Indep. Cmty. Bankers Ass'n*, 346 N.W.2d at 741 (quoting *State v. Youngquist*, 13 N.W.2d 296, 297 (S.D. 1944)); *Mettet v. City of Yankton*, 25 N.W.2d 460, 463 (S.D. 1946).

> [W]hile the subject must be single, the provisions to accomplish the objective of an act may be multifarious. . . . "When the title of a legislative act expresses a general subject or purpose which is single all matters which are naturally and reasonably connected with it and all measures which will or may facilitate the accomplishment of the purpose so stated, are germane to its title."

Accts. Mgmt., 484 N.W.2d at 302 (citations omitted) (quoting *Morgan*, 48 N.W. at 317).

B. The circuit court erred when it determined that parts of Amendment A were not reasonably germane to its purpose.

The circuit court correctly recognized the "reasonably germane" standard and the permissive principles of construction designed to uphold legislation. (App.11-12.) But the circuit court erred when it failed properly to apply those principles to Amendment A.

The circuit court determined that "[t]he subject of Amendment A is: the legalization of marijuana." (App.11.) The circuit court then found that Amendment A included the following three unrelated subjects: hemp,

professional licensing, and taxation. Contrary to the circuit court's conclusion, each relates to Amendment A's general subject.

1. Marijuana and hemp are not separate subjects simply because Amendment A defines both terms.

The circuit court's decision that marijuana and hemp are not reasonably related to each other rests solely on the fact that the attorney general's title and explanation use the word "marijuana," but the definitions section of Amendment A defines marijuana and hemp differently. (App.11-12.) This reasoning is the type of hypertechnical approach this Court has rejected. *See, e.g., Meierhenry*, 354 N.W.2d at 182. This Court has also been clear that a single subject may include a "number of things constituting a group or class." *Indep. Cmty. Bankers Ass'n*, 346 N.W.2d at 741 (quoting *Youngquist*, 13 N.W.2d at 297). The circuit court's conclusion that, because marijuana and hemp are subsets of cannabis, they are separate subjects is contrary to this established law.

Definitions sections are common in legislation and amendments. The Colorado Constitution contains similar definitions of marijuana and hemp. *See, e.g.*, Colo. Const. art. XVIII, § 16(2) (separately defining "industrial hemp" and "marijuana"). Notably, Colorado's Constitution also contains a single-subject requirement (Colo. Const. art. XIX, § 2) and distinguishes between amendments and revisions by constitutional

convention (Colo. Const. art. XIX, §§ 1-2). In addition, other state constitutions addressing medical marijuana contain detailed and extensive definitions. *See* Ark. Const. amend. 98, § 2 (containing 26 detailed definitions); Fla. Const. art. X, § 29(b) (including a definitions section with ten detailed definitions); Mo. Const. art. XIV, § 1(2) (including a definitions section with sixteen detailed definitions). Prohibiting constitutional amendments from containing definitions sections that guide the details of the amendment's construction would improperly impose a de-facto limit on the types of constitutional amendments that voters can draft.

Moreover, the definitions in Amendment A actually show that marijuana and hemp are part of the same subject. Marijuana is broadly defined as the cannabis plant, and hemp is the cannabis plant with a THC concentration of .3% or less.[3] (App.1.) In other words, cannabis is marijuana, and hemp is a specific subset of cannabis. Thus, the definitions in Amendment A do not support the circuit court's conclusion.

It makes perfect sense that Amendment A would contain different definitions of these two subsets of the cannabis plant. THC is the ingredient in marijuana that causes a high. The laws governing the version

[3] Amendment A's definition of hemp is effectively identical to the definition of hemp in existing South Dakota law. *See* S.D.C.L. § 38-35-1(2).

of cannabis that can cause a high (and can be used recreationally) are necessarily different from the laws governing the version of cannabis that does not cause a high but is only used for agricultural or industrial purposes. The portions of Amendment A that address limits on the personal growth, consumption, and sale of cannabis with THC for adult recreational use would not—and should not—apply to the agricultural production of cannabis without THC. Amendment A had to distinguish between recreational marijuana and hemp to ensure that the limits on one did not inadvertently apply to the other. Therefore, the distinction in Amendment A between marijuana and hemp is rationally related to accomplishing the objective of Amendment A: legalizing and regulating marijuana. That does not mean that the definitions "plainly and palpably" deal with different subjects that bear no rational relationship to each other.

The circuit court's reliance on the fact that Amendment A's title and the Attorney General's explanation used the words "marijuana" and "hemp" rather than the word "cannabis" is misplaced. The sponsors of Amendment A did not draft the title or the explanation, and those statements are not included in the text of the Constitution. This is neither the time nor the place to challenge the Attorney General's explanation. In addition, the title and explanation need not be perfect, they only need to

fairly set forth the substance of the proposed amendment. *See, e.g.*, *Jackley*, 2010 S.D. 62 at ¶¶ 14-26, 786 N.W.2d at 377-79 (discussing the purposes of the attorney general's explanation and the discretion in drafting it); *Barnhart*, 222 N.W.2d at 137. No voter would be confused by the title and explanation's use of the terms marijuana and hemp—the explanation itself fairly sets forth the substance of Amendment A. The circuit court's reliance on the title and explanation are not only flawed, but again represent the restrictive and hypertechnical approach this Court should not take when evaluating an amendment after its adoption by the voters.

Finally, the circuit court's reliance on its restrictive interpretation of the technical parsing of definitions falls well short of the requirement that a constitutional violation be "plain and palpable" before an amendment adopted by the voters is overturned. *Barnhart*, 222 N.W.2d at 136). It also runs afoul of the statutory requirement that initiated petitions "shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere technicality." S.D.C.L. § 2-1-11; *accord Baker v. Atkinson*, 2001 S.D. 49, ¶¶ 18, 19, 22-27, 625 N.W.2d 265, 271-74 (requiring only substantial compliance for initiated measures). Thus, the circuit court erred when it determined that Amendment A was unconstitutional because it referenced hemp and defined that term separately from marijuana.

2. Protecting professional licensing is reasonably germane to the purpose of Amendment A.

The circuit court separately found that the provision in Amendment A relating to professional discipline did not relate to the legalization of marijuana. (App.12.) The circuit court provided no rationale for its decision, stating in conclusory fashion simply that "[m]andating what various professions can and cannot discipline their members for is not a part of the 'general object' of legalizing marijuana." (*Id.*) The circuit court did not try to explain why relieving professionals of potential disciplinary actions is not related to the legalization of marijuana.

For Amendment A to effectively legalize marijuana in South Dakota, including the medical prescription of marijuana and the commercial sale of marijuana, it is easy to anticipate that professional services will be required—doctors will need to prescribe medical marijuana, lawyers will need to advise marijuana businesses, and lawyers will need to draft, review, and interpret the rules and regulations governing the personal use and commercial sale of marijuana. Ensuring that professionals are not subject to professional discipline is reasonably germane to the legalization of marijuana. It is in the public interest that everyone involved in the marijuana industry abides by the laws and regulations. They need the advice of counsel, and other professionals, to do so. This provision is

directly related and necessary to ensuring that legalized marijuana functions according to the law.

The professional-licensing clause does not rise to the level of a "plain and palpable" constitutional violation. The voters' decision to enact Amendment A, including its provision on professional licensing, is entitled to great deference.

3. Providing funding to carry out the provisions of Amendment A is reasonably germane to the purpose of Amendment A.

Finally, the circuit court found that "imposing a tax on marijuana sales and allocating the revenue derived from that tax are not 'reasonably germane' to the overall topic of legalizing marijuana." (App.12.) Again, the circuit court provided no rationale for this sweeping holding, nor did it cite any authority specifically supporting its conclusion.

The circuit court's conclusion is wrong. Indeed, in the same paragraph the circuit court noted that "[t]he Department of Revenue is to receive the revenue necessary to cover the costs of administering Amendment A." (App.12.) Thus, the connection between the imposition of a tax and the accomplishment of Amendment A's purpose is obvious from the text of Amendment A itself. By providing funding for the accomplishment of Amendment A's objectives, the tax is reasonably germane to Amendment A's purpose.

The circuit court's decision is also contrary to the well-reasoned opinion in *Hensley v. Att'y Gen.*, 53 N.E.3d 639 (Mass. 2016). There, the Massachusetts Supreme Court considered whether an initiative petition that would legalize marijuana violated Massachusetts' "related subject" rule. The petition had fourteen sections, that would legalize the possession, use, and cultivation of marijuana and products containing marijuana concentrate by adults over 21. *Id.* at 643-44. The petition also contained provisions for the licensing, operation, and regulation of marijuana-related businesses, created a cannabis control commission and cannabis advisory board within the Department of the State Treasurer, and provided for the taxation of the sale of marijuana. *Id.*

The court explained that "the related subjects requirement is met where "one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane." *Id.* at 647 (internal quotations omitted). It held that the petition "easily" satisfied the requirement because the petition's different provisions were all part of an integrated scheme to legalize and regulate marijuana.

So too here. Taxation of marijuana sales, and the corresponding regulation and licensing of sales, are all related to the regulated legalization of marijuana. In fact, the taxation of marijuana could not occur

at all without legalization, and legalization could not occur as a practical matter without regulation and a corresponding source of funding.

The circuit court's finding is also contrary to other decisions that funding mechanisms relate to the subject of an initiated measure. For example, in *Meierhenry*, this Court determined that the establishment and operation of tax-incremental-financing districts was "merely [an] element[] of the larger subject of municipal finance." *See Meierhenry*, 354 N.W.2d at 182. Similarly, in *Christensen v. Gale*, the Nebraska Supreme Court determined that a constitutional amendment expanding Medicaid coverage did not violate Nebraska's single-subject rule—which employs a stricter test than South Dakota law—because "the expansion of Medicaid and its funding have a natural and necessary connection with each other and, thus, a singleness of purpose." 917 N.W.2d 145, 157 (Neb. 2018).

Amendment A legalizes marijuana. Funding that policy, particularly through a tax on the legalized activity itself, is reasonably germane to the purpose of Amendment A. The circuit court erred when it determined that Amendment A's taxation was a plain and palpable violation of the Constitution.

4. Thom and Miller never established logrolling or voter confusion.

Setting aside the lack of logical or legal support for any of the three separate "subjects" the circuit court identified, Thom, Miller and the circuit court never pointed to any evidence of logrolling, voter confusion, or the unintentional passage of a policy provision. *See Kanaly*, 368 N.W.2d at 827-28 (discussing purposes of the single-subject rule).

Logrolling does not occur every time voters consider a ballot measure containing multiple provisions. Rather, logrolling is "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 795 (Fla. 2014) (citations omitted). It is not a concern where all of the provisions of an amendment relate to the same subject, or constitute "a single plan." *Id.* at 796. Here, as explained above, the provisions of Amendment A all relate to a single purpose: the legalization and regulation of marijuana, including its recreational, medical, and agricultural uses. Each part of Amendment A—including its distinction between recreational marijuana and agricultural marijuana (hemp),[4] its

[4] The South Dakota legislature legalized hemp after the form of Amendment A was finalized but well before the November 2020 election.

professional-licensing provision, and its taxation system—is designed to accomplish the legalization of marijuana in a meaningful and effective way.

"The people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people." *Larkin v. Gronna*, 285 N.W.59, 63 (N.D. 1939); *see also Watland*, 85 P.3d at 1084 (citing *Larkin*, 285 N.W. at 63). Furthermore, the publicity and scrutiny directed at Amendment A over the year-long campaign preceding its passage minimize any risk of voter confusion. *See Baker*, 2001 S.D. 49 at ¶ 27, 625 N.W.2d at 274. In *Baker*, the Court emphasized that "the circuit court found no evidence of confusion, corruption, or fraud" and noted that the publicity surrounding the petition supported that finding. *Id.* As in *Baker*, the "public attention" directed at Amendment A "dilute[s] the risk of voter confusion or deception." *See id.* Without any evidence of logrolling or voter confusion, the circuit court's decision was an improper remedy to a problem that never existed.

Thus, there is no support for the idea that the inclusion of hemp in Amendment A was an example of logrolling.

In sum, the three reasons the circuit court used to support its conclusion that Amendment A violated the single-subject rule do not enjoy any logical or legal support. The circuit court's decision runs counter to case law in this state and in other states. Thom and Miller have not, and cannot, prove a plain and palpable violation of the Constitution. This Court must, if at all possible, preserve the adoption of Amendment A. *See Barnhart*, 222 N.W.2d at 136. If this Court reaches the merits of the Thom and Miller's claims, it should find that Amendment A consists only of a single subject.

V. Amendment A did not require a constitutional convention.

The circuit court erred when it determined that Amendment A instituted a fundamental change in South Dakota's basic governmental plan. (*See* App.13-16.) In so finding, the circuit court failed to apply the heavy presumption in favor of adopted constitutional amendments, misapplied the law on constitutional revisions, and misinterpreted Amendment A. The circuit court's decision must be reversed.

Article XXIII provides two avenues for altering the Constitution—amendments and by calling a constitutional convention. Under § 1: "Amendments to this Constitution may be proposed by initiative or by a majority vote of all members of each house of the Legislature." Art. XXIII,

§ 1. And under § 2: "A convention to revise this Constitution may be called by a three-fourths vote of all the members of each house." Art. XXIII, § 2.

A. Amendments may add a new article to the Constitution.

As an initial matter, the circuit court properly rejected Thom and Miller's argument that an amendment could not add a new section to the Constitution. (App.13.) Article XXIII does not limit amendments to only amending one or more existing articles of the Constitution. Had the people intended amendments to be so limited, they plainly could have said so. The only limitation Article XXIII places on constitutional amendments is that they must embrace a single subject, which—as discussed above—Amendment A does.

Further, the arbitrary distinction Thom and Miller drew between amendments and revisions is inconsistent with the structure of the South Dakota Constitution. Article XXI, titled "Miscellaneous," includes nine sections, which address everything from the state seal and coat of arms, to the rights of married women, to hail insurance. It makes no sense to require that Amendment A be added as a new section to Article XXI, for example, rather than stand on its own as a separate section. The circuit court properly rejected this overly formalistic approach.

Tellingly, South Dakota has adopted—and repealed—entire constitutional articles by amendment rather than constitutional convention throughout its history. For example, Article XXIV, establishing prohibition in the original constitution, was repealed, re-adopted, and repealed again—all by constitutional amendment rather than a constitutional revision. *See, e.g.*, S.D. Const. art. XXIV, Historical Note; 1915 S.D. Session Laws, ch. 231; 1933 S.D. Session Laws, ch. 128.

In sum, the circuit court correctly concluded that "a proposed amendment is not barred from creating a new article of the Constitution." (App.13.)

B. Amendment A was not a far-reaching change to South Dakota's basic plan of government.

The circuit court next articulated the definition of a constitutional revision as "an enactment which is so extensive in its provisions as to change directly the substantial entirety of the Constitution by the deletion or alteration of numerous existing provisions." (App.13 (citation omitted).) Although the circuit court started down the correct path, it then misapplied the law and misinterpreted Amendment A when it determined that Amendment A instituted "far reaching changes in the nature of our basic governmental plan." (App.14.) In reality, Amendment A does no such thing.

The circuit court stated: "Amendment A is not a drastic rewrite of the South Dakota Constitution. It is also not as extensive as the proposed amendment in *McFadden*. Amendment A does not make any written changes to the existing provisions of the South Dakota Constitution. However, it does institute 'far reaching changes in the nature of our basic governmental plan.' " (App.14 (citations omitted) (quoting *Amador*, 583 P.2d at 1286).)

The circuit court based its conclusion on four separate ways in which it believed Amendment A changed the structure of government in South Dakota: (1) Amendment A removed the ability of the legislature to enact laws relating to marijuana by giving "exclusive power" to the Department of Revenue to perform certain functions; (2) Amendment A removed the ability of the legislature to enact civil penalties; (3) Amendment A removed the power of the executive branch to reallocate authority over the licensing and regulation of marijuana; and (4) Amendment A established a new cause of action against the Department of Revenue. (App.14-15.) Each of these reasons is based on a misreading of Amendment A.

1. Amendment A did not limit the power of the legislature to otherwise enact laws relating to marijuana.

The circuit court agreed with Thom and Miller that the inclusion of the word "exclusive" in relation to the Department of Revenue's authority wrought a fundamental change to South Dakota's structure of government. This is an overblown fear based on an unpersuasive interpretation of Amendment A. "We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure." *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1315 (Cal. 1991).

Granting the Department of Revenue the authority to promulgate regulations did not fundamentally alter the structure of South Dakota's government. Legislation routinely delegates regulatory authority to agencies. Amendment A's delegation of power also provides sufficient direction for the administrative agency. Amendment A lays out precisely what the Department of Revenue should do. (*See* App.2-3, §§ 6, 7, 8, 13.) The Department of Revenue is subject to the guiding principles and standards in Amendment A. It is also subject to the normal executive and judicial oversight as it would be in administering any other regulatory program. Neither the circuit court nor Thom or Miller ever identified any

manner in which Amendment A did not provide sufficient standards or guidance to the Department of Revenue. Moreover, even if gaps in the delegation of power existed, the legislature can supply additional guidance via future legislation.

Nor is it of any consequence that Amendment A uses the phrase "exclusive" when modifying the Department of Revenue's administrative authority. The word "exclusive" only modifies particular authority: namely, the authority "to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article." (App.2, § 4.) Those functions are classic administrative functions, the exclusive delegation of which does not fundamentally change South Dakota's government. *See, e.g.*, S.D.C.L. § 35-1-2; S.D.C.L. § 35-10-1 (delegating the promulgation of rules relating to the sale, purchase, distribution, and licensing of alcoholic beverages to the secretary of the Department of Revenue).

Thom and Miller speculated that the word "exclusive" transformed the Department of Revenue into a fourth branch of government, unaccountable to any checks and balances. That overblown doomsday scenario is precisely the type of overstated and out-of-context argument

the *Eu* court politely but firmly dismissed. *See Eu*, 816 P.2d at 1315-16. This Court should do the same.

The better interpretation of the word "exclusive" is much simpler: the Department of Revenue is the only administrative agency charged with administering the licensing and regulation requirements set out in Amendment A. Many pieces of legislation will delegate certain administrative authority to one agency and certain authority to another agency. *See, e.g.*, 2020 S.D. Sess. Law ch. 176, 2020 HB 1008 (legalizing the growth, production and transportation of industrial hemp and giving the Department of Agriculture and the Department of Safety authority to promulgate rules). The plain reading of Amendment A's delegation of administrative authority is simply that the Department of Revenue is the only agency with regulatory authority over the administrative issues delegated in Amendment A. It stretches credulity to imagine that Amendment A's delegation of authority to the Department of Revenue fundamentally changed the structure of South Dakota's government. This Court should adopt the interpretation that preserves Amendment A. *Barnhart*, 222 N.W.2d at 136.

Furthermore, the circuit court and Thom and Miller overlooked the fact that the definitions section of Amendment A specifically states that the

"department" means "the Department of Revenue or its successor agency." (App.1, § 1(1) (emphasis added).) Thus, the responsibilities delegated to the Department of Revenue are not irrevocably placed there. The circuit court and Thom and Miller would impermissibly read this phrase out of Amendment A.

Amendment A does not limit the Legislature's ability to pass additional laws, so long as those laws do not conflict with the rights conferred by Amendment A. This is the hierarchical relationship between a constitutional provision and statutes or regulations. No section of Amendment A otherwise limits the powers of the legislature. Section 2 of Amendment A clearly states that Amendment A does not limit or affect a variety of laws, which compels the conclusion that the legislature may continue to legislate in those areas. In fact, the only actions the legislature could not take would be actions to criminalize conduct that Section 4 of Amendment A expressly legalizes.

In addition, Amendment A clearly contemplates that the legislature may take additional action by noting that the legislature may change the tax structure in the future, but not before November 3, 2024. (App.3, § 11.) The legislature must also take action regarding hemp and medical marijuana. (App.3, § 14.) Thom and Miller's claims of usurpation are

inconsistent with the liberal construction of initiated amendments to accomplish the amendment's purpose and preserve the right to act by initiative. These claims are also inconsistent with Article III, § 1 of the South Dakota Constitution, which empowers the legislature to enact legislation and states that the initiative process "shall not be construed so as to deprive the Legislature or any member thereof of the right to propose any measure."

The Legislative Research Council concluded that Amendment A, as submitted to the voters, would not deprive the legislature of the ability to enact legislation. The original version of Amendment A, Section 6, stated that the legislature could legislatively implement Amendment A, provided that the legislation was consistent with the terms of Amendment A. (App.72.) The LRC removed this language because "[t]he Legislature is already constitutionally empowered to enact legislation, and is already required to legislate within the bounds of the Constitution." (App.66.) Thus, in the LRC's view, Amendment A, as revised by the LRC, did not displace or restrict the legislature from exercising its constitutional authority to enact legislation.

Tellingly, the legislature itself appears to agree that it retains the authority to enact legislation relating to marijuana. In this legislative

session alone, the legislature has introduced the following bills relating to marijuana:

- House Bill ("HB") 1061: An Act to prohibit smoking marijuana and its derivatives in a motor vehicle and create a penalty therefore;
- HB 1095: An Act to establish criteria regarding marijuana;
- HB 1160: An Act to prohibit driving a motor vehicle while exceeding the legal limit of delta 9-tetrahydrocannabinol;
- HB 1203: An Act to authorize banks to engage in business with industrial hemp or marijuana licensees and associated persons;
- HB 1225: An Act to establish provisions concerning the sale of adult-use retail marijuana;
- Senate Bill ("SB") 35: An Act to make an appropriation to implement provisions concerning the legalization, regulation, and taxation of marijuana, and to declare an emergency; and
- SB 187: An Act to establish provisions concerning the sale of adult-use retail marijuana.

Furthermore, whether any future legislative action may, or may not, conflict with Amendment A cannot be decided now. That speculative issue should be left for a future lawsuit, if it ever arises.

The single term "exclusive," used only once and in reference to specific administrative functions, did not limit the ability of the legislature to enact legislation. The circuit court erred when it interpreted Amendment A in such a manner.

2. Amendment A did not change the power of the legislature to enact civil penalties.

The circuit court found that Section 5 of Amendment A, which set various civil penalties, deprived the legislature of the power to enact civil penalties. (App.15.) This is not accurate. Section 5 of Amendment A sets a maximum civil penalty for certain enumerated violations. Nothing in Amendment A prevents the legislature from establishing a civil penalty lower than the maximum. Nothing in Amendment A prohibits the legislature from imposing other civil or criminal penalties relating to marijuana except to the extent such legislative action would conflict with the Constitution—a limitation that always exists on legislative enactments.

Moreover, this argument is circular. True, the legislature generally has the authority to enact civil penalties. But the people enjoy that power too; their power is concurrent with the power of the legislature. *Brendtro v.*

Nelson, 2006 S.D. 71, ¶ 35, 720 N.W.2d 670, 682 ("Indeed, while article III, § 1 gives the legislature power in areas excluded from the scope of the referendum, the power is not exclusive. It is concurrent with the people's right to initiate measures."); *Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985) ("The purpose of the initiative is not to curtail or limit legislative power to enact laws, but rather to compel enactment of measures desired by the people, and to empower the people, in the event the legislature fails to act, to enact such measures themselves."). The fact that the people exercised their power to enact something that the legislature could also enact does not deprive the legislature of anything. Otherwise, every initiated measure or amendment would fall to the same argument.

Finally, even if Amendment A displaced the ability of the legislature to address civil penalties relating to marijuana, the circuit court never explained how that would result in a fundamental change to South Dakota's system of government. After all, such a limitation would only apply to the specific civil penalties set forth in Section 5 of Amendment A. It would not limit the ability of the legislature to set civil penalties in any other area. Therefore, Amendment A did not enact any type of sweeping change to the structure of government.

3. Amendment A did not limit the power of the executive branch to reassign authority.

As noted above, the definitions section of Amendment A specifically states that the "department" means "the Department of Revenue or its successor agency." (App.1, § 1(1) (emphasis added).) The circuit court did not consider this portion of Amendment A when it determined that Amendment A deprived the governor's office of the ability to reallocate powers among executive agencies. Based on the plain language of Amendment A, the executive may assign the powers of the "department" to a successor agency.

Other portions of the South Dakota Constitution confer powers on specific entities. Article XII, § 5, commit certain investments to the "South Dakota Investment Council or its successor." This "successor" language is similar to the language used in Amendment A. Article XIII, § 20, creates a trust fund deposited by the South Dakota Cement Commission. Notably, there is no successor organization designated here. Similarly, the Colorado Constitution defined the "Department" as "the department of revenue or its successor agency"—language identical to that used in Amendment A. *See* Colo. Const. art. XVIII, § 16(2)(c).

Even if Amendment A did cement the administration of marijuana within the Department of Revenue, the circuit court never explained how

this would enact a far-reaching change to the nature of South Dakota's basic system of government. Such a change would only apply to the regulation and taxation of marijuana, and would not impact any other administrative agency or any other functioning of the governor's office. This single provision did not create a sweeping change in South Dakota's governmental structure, much less a fundamental change that is plain and palpable.

4. Amendment A did not improperly create a new cause of action.

Section 12 of Amendment A states that if the department fails to promulgate the rules required by Amendment A or adopts rules inconsistent with Amendment A, a resident "may commence a mandamus action in circuit court to compel performance by the department in accordance with this article." (App.3.) The circuit court concluded that this established a new cause of action, and that only the legislature could direct the manner in which the State may be sued. (App.15.) This conclusion is wrong.

First, a writ of mandamus is not a new cause of action. It is long-established in South Dakota, and exists to compel the performance of a definite legal obligation when a petitioner has a clear right to that performance. *See, e.g.*, *Sorrels v. Queen of Peace Hosp.*, 1998 S.D. 12, ¶ 6, 575

N.W.2d 240, 242. Thus, Amendment A did not establish anything new, it simply recognized the application of an existing remedy. The legislature has already prescribed the means by which a mandamus action is available. S.D.C.L. ch. 21-29. Moreover, a writ of mandamus is already available against the state and public officers. *See, e.g.*, *S.D. Trucking Ass'n, Inc. v. S.D. Dep't of Transp.*, 305 N.W.2d 682, 684-87 (S.D. 1981) (discussing mandamus standards and affirming the issuance of a writ of mandamus against the state Department of Transportation). Thus, Amendment A did not include a new waiver of sovereign immunity. It simply recognized the proposition that compliance with the Constitution by state officials is mandatory.

Second, the people do not infringe on the power of the legislature when they exercise their reserved power to legislate by initiative. *See Brendtro*, 2006 S.D. 71 at ¶ 35, 720 N.W.2d at 682 (holding that the power of the people to initiate law is concurrent with the power of the legislature); *Byre*, 362 N.W.2d at 79. The people simply exercised their reserved legislative power. If the legislature could authorize mandamus, or waive sovereign immunity, then the people can do so also.

Finally, Amendment A's specific reference to the availability of a writ of mandamus does not alter the fundamental structure of South

Dakota's government. Writs of mandamus already exist. S.D.C.L. ch. 21-29. State officers and departments are already bound to follow the law and act according to the Constitution. The circuit court erred when it found that Amendment A fundamentally changed South Dakota's system of government.

5. The voters may decide what to put in their constitution.

The voters could have enacted Amendment A as an initiated statute, but they were not required to do so. South Dakota's Constitution expressly reserves to the voters the ability to change the Constitution. S.D. Const. art. XXIII, § 1 (authorizing constitutional amendments by initiative). When exercising their right to initiate ballot measures and amendments, the people may make policy determinations, just as the Legislature itself may do. *See Byre*, 362 N.W.2d at 79.

The decision of South Dakota's voters to place legalized marijuana in their Constitution is understandable, and is the best way to ensure that the rights they want to secure to themselves are not immediately undone by a state government hostile to those rights. For example, in 2016, voters adopted Initiated Measure 22, which enacted certain campaign finance and

ethics reforms.[5] The legislature promptly repealed that law, and included an emergency clause in the repeal so that the voters could not refer the repeal to another vote. 2017 S.D. Sess. Laws, HB 1069. Voters could reasonably have feared that Amendment A would share the same fate if enacted only as a statute. If the initiative process is to remain an effective vehicle through which voters can enact policies that the legislature is unwilling or unable to enact, the voters must be able to enshrine those laws in their Constitution, if they so desire.

Enshrining rights relating to marijuana in a state constitution is also consistent with the approach in other states. Six other states (Colorado, Missouri, Florida, New Jersey, Arkansas, and Mississippi) have amended their constitutions to include either recreational or medical marijuana—or in Colorado's case, both. The example of Colorado in particular, which added medical marijuana to its Constitution in 2000 and recreational marijuana to its Constitution in 2012, illustrates that Amendment A is not the type of government-altering document that Thom and Miller suggested, or that the circuit court found.

[5] S.D. Sec'y of State, *Past South Dakota ballot question titles and election returns from 1890 – 2016*, page 25, *available at* https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/general-ballot-question-information.aspx (last accessed March 3, 2021).

Courts do not, and should not, overturn enacted constitutional amendments lightly. A challenged enactment must plainly and palpably violate the law before it can be struck down. *See Barnhart*, 222 N.W.2d at 136. Court challenges are not an opportunity for public officials like Thom and Miller to substitute their judgment for the judgment of the voters.

6. Overturning Amendment A as a constitutional revision would have serious ramifications for other constitutional amendments, both past and future.

Accepting the circuit court's determination here causes long-term policy problems. First, under the guise of protecting the constitution, the circuit court's decision hamstrings the ability of the voters to initiate constitutional amendments. There is no reason to limit one of the foundational rights the voters enjoy.

Second, it will call into serious question the validity of past amendments that implemented much more far-reaching changes to the structure of government than Amendment A did. For example, in 1972, South Dakota voters significantly overhauled the state constitution. They did so in a series of four amendments, rather than a constitutional revision. One amendment altered the entirety of Article IV, relating to the executive department, by reorganizing it, deleting sections, and making "numerous" other substantive changes throughout. S.D. Const. art. IV, Historical Note;

1972 S.D. Session Laws, ch. 1. Another amendment that same year made significant changes to Article V, relating to South Dakota's judicial system. It established a unified judicial system, reorganized the entire article, and made other substantive changes to more than a dozen sections. S.D. Const. art. V, Historical Note; 1972 S.D. Session Laws, ch. 2. A third amendment in 1972 combined Article IX and Article X into a new Article IX—which addresses the organization of local government—and repealed Article X in full. S.D. Const. art. X, Historical Note; 1972 S.D. Session Laws, ch. 3. And the fourth rewrote Article XXIII, splitting up one section into two, adding a provision for proposal of amendments by initiative, and making other substantive changes to the law regarding constitutional amendments and revisions. S.D. Const. art. XXIII, § 1, Historical Note; 1972 S.D. Session Laws, ch. 4.

Separately and together, the 1972 amendments made changes far more significant to the structure of government, separation of powers, and rights of the people of South Dakota than Amendment A—all without a constitutional convention. If this Court affirms the decision of the circuit court, it would create precedent that would almost certainly invalidate the 1972 amendments. The Court should not, and need not, open the door to such challenges.

VI. Even if Amendment A is unconstitutional, the circuit court erred when it failed to separate and sever the unconstitutional provisions.

After determining that Amendment A involved multiple subjects (which conclusion is wrong for the reasons stated above), and that Amendment A made sweeping changes to South Dakota's governmental plan (which it did not, for the reasons stated above), the circuit court concluded that it did not "have authority to assume which subject the voters intended to adopt" and accordingly declined to reach the issue of separability. (App.16.) Even assuming that Amendment A was unconstitutional, the circuit court erred when it did not address separability.

Separability of a voter-initiated constitutional amendment is a matter of first impression in South Dakota. But this Court has routinely addressed separability, sometimes referred to as severability, in the legislative context. "The 'doctrine of separability' requires this court to uphold the remaining sections of a statute if they can stand by themselves and if it appears that the legislature would have intended the remainder to take effect without the invalidated section." *S.D. Educ. Ass'n/NEA v. Barnett*, 1998 S.D. 84, ¶ 32, 582 N.W.2d 386, 394 (quoting *Simpson v. Tobin*, 367 N.W.2d 757, 768 (S.D. 1985)).

This Court favors separability over non-separability, and the burden to establish non-separability is on the party challenging the enactment. *Id.* at ¶ 33, 582 N.W.2d at 394 ("[T]he burden to show that the legislature would not have enacted the statute without the severed portion is on the shoulders of the person arguing against severability."). In *Dakota Systems, Inc. v. Viken*, 2005 S.D. 27, ¶ 20, 694 N.W.2d 23, 32, this Court reaffirmed that the proper remedy for violation of the South Dakota constitution's single-subject rule is to separate and sever any unconstitutional provisions.

Here, the Court did not make an attempt to separate and sever any provisions it found unconstitutional. Instead, it concluded that it did not have the authority to determine which portions of Amendment A should be separated. (App.16.) That conclusion is contrary to the holding in *Viken*. Not only did the circuit court have the authority to separate any unconstitutional portions of Amendment A, it was required to do so if possible, and Thom and Miller bore the burden of proving non-separability. The circuit court erred when it did not consider whether to separate any unconstitutional portions of Amendment A.

South Dakota voters explicitly included a separability provision in Amendment A:

> This article shall be broadly construed to accomplish its purposes and intents. . . . If any provision in this article . . . is

> held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

(App.3 § 15.) The intent of the voters is clear and undisputed. Therefore, the only question remains whether different sections of Amendment A can stand by themselves.

When considering whether sections of a law can stand by themselves, this Court has looked at whether the provisions require the existence of others to function properly or to be effective. *See Viken*, 2005 S.D. 27, ¶ 21, 694 N.W.2d 23, 32 ("The non-appropriation provisions in no way require the co-existence of the appropriations provisions in order to function properly or be effective. Thus, the first prong of the separability test is easily met."). Each of the alleged constitutional infirmities identified by the circuit court could be severed.

Here, the circuit court found that the subject of Amendment A was the legalization of marijuana, including its possession, use, growth, consumption, and regulation. (App.11.) It then found that various portions of Amendment A—specifically, the definition of hemp, professional licensing, and taxation—were so unrelated that their inclusion plainly and palpably violated the Constitution. (App.11-12.) That holding compels the

conclusion that Amendment A can function properly without those purportedly separate subjects. Thus, each provision the circuit court identified could be separated and severed without impairing the effective functioning of the provisions of Amendment A that legalize marijuana.

The circuit court concluded that Amendment A implemented a fundamental and sweeping change to South Dakota's government based on a single use of the word "exclusive" in Section 6 of Amendment A, the civil penalties established in Section 5, and the acknowledgement of the mandamus remedy in Section 12. (App.14-15.) As above, those provisions (or words) could also be separated and severed without impacting the functioning of the provisions legalizing marijuana.

The circuit court was "required" to separate the extra material in Amendment A. *See Barnett*, 1998 S.D. 84 at ¶ 32, 582 N.W.2d at 394. The circuit court erred when it failed to carry out this step. If this Court concludes that Amendment A violated the Constitution, the proper remedy is for this Court to separate the unconstitutional words or provisions from the remainder of Amendment A, thereby preserving to the maximum extent possible the will of the voters.

CONCLUSION

In order to rule in favor of Thom and Miller, this Court must find (1) that they had standing to sue the State in their official capacities; (2) that pre-election procedural challenges are barred as a matter of law; and (3) that Amendment A plainly and palpably violated the Constitution. Each step of that process is contrary to the law and would create damaging precedent going forward.

South Dakotans have the fundamental power to amend their Constitution. When they adopt an amendment, it may not be overturned unless no other result is possible. Here, it is plainly possible to uphold the will of the voters. This Court should reverse the ruling of the circuit court and remand for entry of judgment in favor of the Proponents.

Appellants respectfully request oral argument.

Respectfully,

DATED: March 10, 2021

ROBINS KAPLAN LLP

By: */s/ Timothy W. Billion* .

Brendan V. Johnson (3263)
Timothy W. Billion (4641)
140 North Phillips Avenue, Suite 307
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
Email: TBillion@RobinsKaplan.com

Attorneys for Proponents

Certificate of Compliance

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court's February 26, 2021 order. This brief was prepared and printed in a proportionally spaced typeface using Microsoft Word 2016 in Book Antiqua font, size 13. This brief contains 14,681 words, including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, and certificates of counsel.

Dated this 10th day of March, 2021

/s/ Timothy W. Billion
Timothy W. Billion

Certificate of Service

The undersigned hereby certifies that on March 10, 2021, the foregoing brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

and a true and correct copy of the foregoing brief was provided by electronic mail and U.S. Mail to:

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Defendant Steve Barnett, in his official capacity as South Dakota Secretary of State

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave., Ste. 402
Sioux Falls, SD 57101
Attorneys for Plaintiff/Appellee Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Plaintiff/Appellee Sheriff Kevin Thom, in his official capacity as Pennington County Sheriff

/s/ Timothy W. Billion
Timothy W. Billion

APPENDIX

Tab	Document	Page
A.	Initiated Constitutional Amendment Petition	1
B.	Memorandum Decision	5
C.	Notice of Entry of Judgment and Judgment	17
D.	Order	21
E.	Complaint for Declaratory Relief	23
F.	Plaintiffs' Joint Statement of Undisputed Material Facts	57
G.	Affidavit of Matthew S. McCaulley	62
H.	Response to Statement of Undisputed Material Facts by South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentel.	103
I.	Declaration of Timothy W. Billion in Opposition to Contestants' Motion for Summary Judgment	107
J.	Executive Order	110
K.	South Dakota Constitution Article 23, Sections 1-3	112
L.	South Dakota Constitution Article 4, Section 3	113

INITIATED CONSTITUTIONAL AMENDMENT PETITION

WE, THE UNDERSIGNED qualified voters of the state of South Dakota, petition that the following section or sections and article or articles of the South Dakota Constitution be amended and that this proposal be submitted to the voters of the state of South Dakota at the general election on November 3, 2020 for their approval or rejection.

Title: **An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.**

Attorney General Explanation:

This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.

The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.

The Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.

Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law.

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

§ 1. Terms used in this article mean:

(1) "Department," the Department of Revenue or its successor agency;

(2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;

(3) "Local government," means a county, municipality, town, or township;

(4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;

(5) "Marijuana accessory," any equipment, product, material, which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

§2. Notwithstanding the provisions of this article, this article does not limit or affect laws that prohibit or otherwise regulate:

(1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;

(2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;

(3) Consumption of marijuana by a person younger than twenty-one years of age;

(4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;

(5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;

(8) Smoking marijuana in a location where smoking tobacco is prohibited;

(9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;

(10) Consumption of marijuana as part of a criminal penalty or a diversion program;

(11) Conduct that endangers others;

(12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or

(13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

§3. Notwithstanding the provisions of this article, this article does not:

(1) Require that an employer permit or accommodate conduct allowed by this article;

(2) Affect an employer's ability to restrict the use of marijuana by employees;

(3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this article on or in that property; or

(4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this article within a building owned, leased, or occupied by the state or the local government.

§4. Subject to the limitations in this article, the following acts are not unlawful and shall not be an offense under state law or the laws of any local government within the state or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;

(2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided:

(a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;

(b) Not more than six plants are kept in or on the grounds of a private residence at one time; and

(c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this article.

(3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

§5.

(1) A person who, pursuant to §4 of this article, cultivates marijuana plants that are visible by normal, unaided vision from a public place is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(2) A person who, pursuant to §4 of this article, cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(3) A person who, pursuant to §4 of this article, cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store is subject to a civil penalty not exceeding two-hundred and fifty dollars, unless the cultivation of marijuana plants is allowed through local ordinance or regulation pursuant to §10.

(4) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the department, is subject to a civil penalty not exceeding one-hundred dollars.

(5) A person who is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories is subject to a civil penalty not to exceed one-hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine.

§ 6. The department shall have the exclusive power, except as otherwise provided in § 10, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article. The department shall accept applications for and issue, in addition to any other types of licenses the department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

§ 7. Not later than April 1, 2022, the department shall promulgate rules and issue regulations necessary for the implementation and enforcement of this article. The rules shall be reasonable and shall include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this article;

(3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety

and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;

(12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and

(13) Civil penalties for the failure to comply with rules adopted pursuant to this article.

§ 8. In determining the appropriate number of licenses to issue, as required under this article, the department shall:

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

§ 9. Actions and conduct by a licensee, a licensee's employee, and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and shall not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law. A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

§10. A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this article. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this article.

§11. An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana sold by a person licensed by the department pursuant to this article to a consumer. The Legislature may adjust this rate after November 3, 2024. The department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section shall be appropriated to the department to cover costs incurred by the department in carrying out its duties under this article. Fifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund.

§ 12. Any rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws. Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws. If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

§13. The department shall publish an annual report that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement or disciplinary action taken against licensees, a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this article, and a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

§14. Not later than April 1, 2022, the Legislature shall pass laws to:

(1) Ensure access to marijuana beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana; and

(2) Regulate the cultivation, processing, and sale of hemp.

§15. This article shall be broadly construed to accomplish its purposes and intents. Nothing in this article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this article or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.

2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.

3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.

4. Abbreviations of common usage may be used. Ditto marks may not be used.

5. Failure to provide all information requested may invalidate the signature.

NAME	RESIDENCE	DATE/COUNTY
SIGN 1 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 2 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 3 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 4 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 5 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 6 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 7 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 8 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 9 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 10 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION

RECEIVED
SEP 11 2019
S.D. SEC. OF STATE

Filed this 17th day of September 2019
Steve Barnett
SECRETARY OF STATE

VERIFICATION BY PERSON CIRCULATING PETITION

INSTRUCTIONS TO CIRCULATOR: This section **must** be completed following circulation and before filing.

Print name of the circulator | Residence Address | City | State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, that I am not attesting to any signature obtained by any other person, that I am a resident of South Dakota, that I made reasonable inquiry and to the best of my knowledge each person signing the petition is a qualified voter in the county indicated on the signature line, that no state statute regarding petition circulation was knowingly violated, and that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration.

Signature of Circulator

Sworn to before me this _____ day of _____, _____.
(Seal)

Signature of Officer Administering Oath

My Commission Expires _____

Title of Officer Administering Oath

Form Revised 2018 - 5:02:08:07

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238

CHRISTINA KLINGER
CIRCUIT COURT JUDGE
Phone: (605) 773-4014
Fax: (605) 773-6492
Christina.Klinger@ujs.state.sd.us

JESSICA PAULSEN
COURT REPORTER
Phone: (605) 773-8227
Jessica.Paulsen@ujs.state.sd.us

STEPHEN GEMAR
SIXTH CIRCUIT LAW CLERK
Stephen.Gemar@ujs.state.sd.us

February 8, 2021

Lisa Prostrollo, Matthew S. McCaulley,
and Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave STE #402
P.O. Box 1535
Sioux Falls, SD 57101-1535
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com

Grant M. Flynn and
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
grant.flynn@state.sd.us
matthew.templar@state.sd.us

Brendan Johnson and Timothy Billion
Robins Kaplan LLP
140 N. Phillips Ave STE 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com

Bob L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Bobmorris@westriverlaw.com

RE: 32CIV20-187: Kevin Thom, Pennington County Sheriff, Rick Miller, Superintendent of the South Dakota Highway Patrol vs. Steve Barnett, Secretary of State

FACTUAL BACKGROUND

The facts surrounding this matter are uncontested.

Amendment A was a proposed constitutional amendment that was voted on in the General Election, held November 3, 2020. The ballot text described Amendment A as: "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." The amendment contains fifteen primary sections and numerous subsections. The plain language of Amendment A includes: legalizing marijuana, taxing of marijuana, regulating marijuana, enacting civil penalties for marijuana, and allocating power to the Department of Revenue to "administer and enforce" the licensing and regulation of marijuana, among other things. In addition, § 14 compels the Legislature to pass laws regarding multiple

aspects of hemp. Marijuana and hemp are specifically defined as two different terms in § 1 of Amendment A.

Amendment A was timely submitted to the South Dakota Secretary of State for validation on November 4, 2019. The South Dakota Secretary of State announced on January 6, 2020 that Amendment A had received a sufficient number of signatures and would be placed on the ballot for the 2020 General Election. Amendment A passed with 225,260 votes while 190,477 voters opposed it. The 2020 General Election returns were officially canvassed on November 10, 2020.

Kevin Thom, Pennington County Sheriff (Sheriff Thom), and Colonel Rick Miller, South Dakota Highway Patrol Superintendent (Colonel Miller) (together, referred to as Plaintiffs), filed this declaratory judgment action in their official capacities on November 20, 2020. South Dakotans for Better Marijuana Laws, Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker (Intervenors) officially intervened in this action on December 8, 2020. Plaintiffs filed a Joint Motion for Summary Judgment on December 23, 2020. Defendant and Intervenors each filed a separate Motion for Judgment on the Pleadings on December 23, 2020. A Motions Hearing on the above matters was held on January 27, 2021.

ISSUES

1. **Whether Plaintiffs have standing to commence this action.**
2. **Whether Plaintiffs timely commenced this action.**
3. **Whether Amendment A violates the South Dakota Constitution.**

STANDARD OF REVIEW

A motion for judgment on the pleadings provides an "expeditious remedy to test the legal sufficiency, substance, and form of pleadings." *Burlington N. R. Co. v. Strackbein*, 398 N.W.2d 144, 145 (S.D. 1986) (further citations omitted). "It is a proper remedy only when no issue of fact is raised" and deals with "only questions of law arising from the pleadings." *Id.*

A motion for summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The standard for a motion for summary judgment is clear:

> Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We will affirm only when no genuine issues of material fact exist and the law was applied correctly. We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party.

Stromberger Farms, Inc. v. Johnson, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258. When additional evidence outside of the pleadings is considered without objection, a motion for judgment on the pleadings is considered as a motion for summary judgment. *Tiede v. CorTrust Bank, N.A.*, 2008 S.D. 31, ¶¶ 5-6, 748 N.W.2d 748, 750. The Court has considered evidence outside of the

pleadings in this matter. At the hearing, the parties agreed they received notice the Motions for Judgment on the Pleadings would be considered as Motions for Summary Judgment.

"Constitutional interpretation is a question of law." *Steinkruger v. Miller*, 2000 S.D. 83, ¶ 8, 612 N.W.2d 591, 595. "When considering a constitutional amendment after its Adoption by the people, the question is not whether it is possible to Condemn the amendment, but whether it is possible to Upheld [sic] it." *Barnhart v. Herseth*, 88 S.D. 503, 512, 222 N.W.2d 131, 136 (1974). An amendment has a strong presumption of constitutionality after it is passed by the people. *Id.* A constitutional amendment passed by the people should be sustained unless it "plainly and palpably appear(s) to be invalid." *Id.* "Legislative action is accorded a presumption in favor of validity and propriety and should not be held unconstitutional . . . unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt." *Meierhenry v. City of Huron*, 354 N.W.2d 171, 176 (S.D. 1984).

ANALYSIS

a. Standing

Intervenors argue neither Plaintiff has standing to commence this action because they brought this action in their official capacities. Plaintiffs contend they are able to sue in their official capacities. Sheriff Thom cites the fact that in his oath of office, he swore to uphold the South Dakota Constitution. Colonel Miller argues he has standing because of Governor Noem's issuance of Executive Order 2021-02[1] as well as having sworn to uphold the South Dakota Constitution.

"The real party in interest rule is satisfied 'if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action.'" *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d 99, 101 (quoting *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 27, 621 N.W.2d 592, 600). When Sheriff Thom took his oath of office, he swore to uphold the South Dakota Constitution.[2] A sheriff's duties include enforcing the laws of the State of South Dakota. SDCL 7-12-4. This naturally includes making DUI stops as well as enforcement of other laws on the roads and highways. Commencing an action on Amendment A, on the grounds it is unconstitutional, falls within Sheriff Thom's duty to uphold the South Dakota Constitution. In addition, Amendment A affects Sheriff Thom's ability to carry out his duties in enforcing the laws and keeping intoxicated drivers off of roads. Based on this, Sheriff Thom has standing because he has a "real, actual, material or substantial interest" in the subject matter of the current action. *Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d at 101.

Colonel Miller has a "substantial" and "real" interest in this suit. *Id.* Amendment A § 6, vests the "exclusive power" in the Department of Revenue to "administer and enforce" rules

[1] S.D. Exec. Order No. 2021-02 (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.pdf.

[2] All law enforcement officers must take an oath of office as required by SDCL 9-14-7 or 3-1-5. ARSD 02:01:02:01(8). SDCL 3-1-5 provides, in relevant part, "Every person elected or appointed to any civil office shall, before entering upon the duties thereof, qualify by taking an oath or affirmation to support the Constitution of the United States and of this state, and faithfully discharge the duties of his office, naming it; ...".

regarding marijuana. This is contrary to authority given to the Division of Highway Patrol by the Legislature under SDCL 32-2-1, 32-2-1.1 and 32-2-7. SDCL 32-2-7 vests the Department of Public Safety with the authority to assist in the enforcement of all laws, police regulations, and rules governing motor vehicles and motor carriers over and upon the highways of this state."[3] Amendment A gives the Department of Revenue the "exclusive" authority to enforce regulations that govern the transport of marijuana in § 6. This directly interferes with the Division of Highway Patrol's ability to carry out its duty under South Dakota law.

In addition, Colonel Miller took an oath as a law enforcement officer to support the South Dakota Constitution. This duty to support the South Dakota Constitution includes commencing an action against Amendment A on the grounds it is unconstitutional. The consequences Amendment A would have for the Division of Highway Patrol to carry out its duties under the law, as well as Colonel Miller's duty to support South Dakota's Constitution, give him a "real, actual" interest in this suit. *Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d at 101.

Under the Uniform Declaratory Judgment Act, South Dakota courts are permitted to declare legal rights or relation before an actual injury happens. *Boever v. S. Dakota Bd. of Accountancy*, 526 N.W.2d 747, 749 (S.D. 1995). However, four jurisdictional requirements must be met:

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. at 749-750 (citing *Danforth v. City of Yankton*, 25 N.W.2d 50, 53 (S.D. 1946) (further citations omitted)). These four elements are satisfied in the case at hand. Plaintiffs have a claim of right in assuring the Constitution is not violated by Amendment A and have asserted that claim against a proper party: the Secretary of State. The interests of the parties are adverse. Plaintiffs also have a legally protectible interest in the case: their interests in upholding the South Dakota Constitution. Finally, the controversy is ripe. Amendment A has been passed by the voters and will become effective on July 1, 2021. Since standing exists for both Sheriff Thom and Colonel Miller, the parties' remaining arguments on standing are moot and will not be addressed by this court.

b. Timeliness

Intervenors argue Plaintiffs did not timely commence this action. They argue this action was required to have been brought prior to the election. Plaintiffs and Defendant both assert timeliness was not an issue for Plaintiffs, stating courts cannot enjoin the submission of a constitutional amendment to the people of South Dakota.

---

[3] Under SDCL 32-2-1 and SDCL 32-2-1.1, the Division of Highway Patrol is within the Department of Public Safety.

Intervenors first argue SDCL 2-1-17.1 and 2-1-18 require challenges to Amendment A to have been brought by February 5, 2020. SDCL 2-1-17.1 details the procedure to challenging deficiencies of the petition that was submitted to the Secretary of State. Plaintiffs are not challenging the sufficiency of the petition itself, but rather are challenging provisions of the petition as unconstitutional.[4] SDCL 2-1-17.1 does not address constitutional challenges to the substantive provisions of the petition and is therefore, not applicable to this case.

SDCL 2-1-18 likewise is not applicable to this case. SDCL 2-1-18 addresses challenges to the signatures on a petition, the "veracity of the petition circulator's attestation, or any other information required on a petition." Plaintiffs are not challenging matters related to the signatures, the petition circulator's attestation, or other required information. They are challenging whether provisions of Amendment A are constitutional, not the sufficiency of items on the petition.

The South Dakota Supreme Court has stated challenges to the adoption of a constitutional amendment may not be heard until after it has been voted on. *State ex rel. Cranmer v. Thorson*, 9 S.D. 149, 68 N.W. 202, 202–03 (1896); *State ex rel. Evans v. Riiff*, 73 S.D. 348, 42 N.W.2d 887, 889 (1950). In *State ex. rel. Evans v. Riiff*, the Court opined:

> We think the delay incident to the requirement that litigation await the completion of the legislative process is a small price to pay to maintain inviolate the vital principle of separation of powers peculiar to our polity. And we think this principle of noninterference is as valid when applied to lawmaking at the highest level, viz., in the constitutional field, and in lawmaking under the powers reserved to the people by the initiative provisions of the constitution, as it is when applied to the functions of the legislature.

Riiff, 73 S.D. 348, 352, 42 N.W.2d at 889 (further citations omitted). Further, South Dakota's courts do not answer hypothetical questions, nor do they provide advisory opinions. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 16, 851 N.W.2d 753, 758 (further citations omitted).

Based on the South Dakota Supreme Court's precedent, courts could not hear a pre-election challenge on the constitutionality of Amendment A. It would have violated the "principle of noninterference" in the initiative process. *Riiff*, 73 S.D. at 352, 42 N.W.2d at 889. Further, there was no guarantee that Amendment A would be approved by South Dakota voters. Any litigation on the constitutionality of Amendment A prior to the 2020 General Election would have required a court to provide what would amount to an advisory opinion or to answer hypothetical questions on the constitutionality of Amendment A. South Dakota courts are not allowed to provide these advisory opinions. *Ricard*, 2014 S.D. 54, ¶ 16, 851 N.W.2d at 758. Accordingly, Plaintiffs' current challenge was timely.

---

[4] An election contest, according to South Dakota Supreme Court precedent, is the proper procedure with which to challenge procedural issues in an election, including statutory requirements of a petition. *See* the court's memorandum decision in 32CIV20-186.

c. *Constitutionality*

i. *History*

South Dakota adopted its original constitution on October 1, 1889. *State v. Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d 513, 516. Between 1889 and 1970, the South Dakota Constitution was amended seventy-nine times, each amendment adding more complexity to it. *Id.* These amendments created inconsistencies within the Constitution and often addressed minor problems, leaving larger issues untouched. *Id.* (further citations omitted). The Legislature created a Constitutional Revision Commission in 1969 to study the Constitution and "determine ways and means to improve and simplify the constitution." *Id.* (further citations omitted). In drafting the 1972 Constitution, the commission sought to avoid any inconsistencies between provisions. *In re Daugaard*, 2011 S.D. 44, ¶ 13, 801 N.W.2d 438, 442.

A new version of Article XXIII was adopted in November of 1972. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 135 n.16. Article XXIII was most recently amended in 2018, when South Dakota voters passed Constitutional Amendment Z.[5] The effect of Amendment Z was to amend Article XXIII § 1, making it so proposed amendments to the South Dakota Constitution cannot "embrace more than one subject." S.D. Const. Art. XXIII, § 1; *see also*, 2018 General Election Canvass, 20 (explaining the purpose of Amendment Z). Single subject rules for proposed constitutional amendments are often adopted in part to prevent logrolling. *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 253 (Neb. 2020). "Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's propositions." *Id.*

ii. *Single Subject Rule*

The single subject rule as it applies to Article XXIII, § 1 of the South Dakota Constitution is an issue of first impression in South Dakota. Although other states have interpreted their own versions of the single subject rule, this Court will rely upon the guidance of the South Dakota Supreme Court in approaching this question.[6] The South Dakota Supreme Court has interpreted Article III, § 21 of the South Dakota Constitution, which contains a single subject rule pertaining to legislative enactments. It states: "No law shall embrace more than one subject, which shall be expressed in its title." S.D. Const. Art. III, § 21. Counties have a similar statutory rule for ordinances. "An ordinance shall embrace only one subject, which shall be expressed in its title." SDCL 7-18A-3. Article XXIII, § 1 of the South Dakota Constitution states, in relevant part: "A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment;

---

[5] *2018 General Election Canvass*, 20. South Dakota Secretary of State (November 13, 2018) https://sdsos.gov/elections-voting/assets/2018GeneralElectionCanvassPDF.pdf.

[6] Other states that have interpreted their own single subject rule include Nebraska (*State ex rel. Wagner v. Evnen*, 163, 948 N.W.2d 244, 260 (2020) (holding that a proposed amendment to the Nebraska constitution violated the Nebraska single subject rule)), Florida (*In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 797 (Fla. 2014) (holding that a proposed Constitutional amendment did not violate Florida's single subject rule)), and Oklahoma (*Oklahoma Indep. Petroleum Ass'n v. Potts*, 414 P.3d 351, 360, as amended (Mar. 21, 2018) (holding a proposed amendment violated Oklahoma's single subject rule)).

however, no proposed amendment may embrace more than one subject." S.D. Const. Art. XXIII, § 1.

One of the purposes of a single subject rule is to "'minimize[s] the risk of voter confusion and deception' by requiring that a petition has only one subject." *Baker v. Atkinson*, 2001 S.D. 49, ¶ 24, 625 N.W.2d 265, 273 (citing *Amador Val. Joint Union H. Sch. Dist. v. State Bd. Of Equalization*, 583 P.2d 1281, 1291 (Cal. 1978)). The *Baker* Court noted that the single subject rule "has its foundation in both the South Dakota Constitution and statutory law." *Baker,* 2001 S.D. 49, ¶ 24, 625 N.W.2d at 273. A single subject provision should not be construed narrowly or technically in all cases; it is to be given a liberal construction to uphold proper legislation, '*all parts of which are reasonably germane* . . . Numerous provisions, having *one general object*, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a *single scheme* may be properly included within a single act." *Id.* at ¶ 25 (citing *Amador*, 583 P.2d at 1290) (italics in original). The subject of a law is the public or private concern for which it is enacted, and "all provisions of the Act must relate directly to the same subject, have a natural connection, and not be foreign to the subject as stated in the title." *Meierhenry*, 354 N.W.2d at 182 (citing *McMacken v. State,* 320 N.W.2d 131, 138 (S.D. 1982)) (internal quotations omitted).

"Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn." *S. Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 697 (S.D. 1981) (internal quotations omitted) (further citations omitted). Given the similarities between the three "single subject" provisions (Article XXIII, § 1, Article III, § 21, and SDCL 7-18A-3) and the South Dakota Supreme Court's guidance on the application of those provisions, this Court will apply the "reasonably germane" standard as adopted in *Baker. Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. Provisions of an act are "reasonably germane" if they are "governing projects so related and interdependent as to constitute a *single scheme* may be properly included within a single act." *Id.* (citing *Amador,* 583 P.2d at 1290).

The subject of Amendment A is: the legalization of marijuana. When applying the reasonably germane test, the question is whether the provisions of Amendment A are related and interdependent as to constitute a single scheme. The provisions of Amendment A that are related and interdependent as to constitute a single scheme with legalization of marijuana are: being able to possess and use marijuana, as defined in § 1 of Amendment A, at any point from its growth through consumption. Regulation of marijuana is also covered under this subject.

The title of Amendment A contains two distinct subjects: the legalization of marijuana and hemp. Amendment A defines marijuana and hemp as separate terms in § 1. Within Amendment A, § 14(2) provides "Not later than April 1, 2022, the Legislature shall pass laws to: . . . Regulate the cultivation, processing, and sale of hemp." Defendant and Intervenors argue Amendment A's main subject is cannabis, which would encompass both marijuana and hemp. However, neither the title of Amendment A nor the Attorney General's Explanation mention the word "cannabis." The only time "cannabis" appears in the entirety of Amendment A is in the definitions of "marijuana" and "hemp" in § 1. Although marijuana and hemp both originate from the cannabis plant, Amendment A clearly defines them as different subjects. "Cannabis" cannot

be retroactively inserted as the main subject of Amendment A. Based on Amendment A's definition, marijuana and hemp are two distinct subjects. Thus, hemp is not reasonably germane to the subject of legalization of marijuana. *Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273.

Amendment A contains several sections related to marijuana which are not "reasonably germane" to the legalization of marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d 265, 273. Amendment A, § 5 sets civil penalties for violations included in § 4. These penalties range from monetary fines to an option for a person under twenty-one years of age to attend drug education or counseling. Specific penalties, such as those set forth in § 5 of Amendment A are not reasonably germane to the legalization of marijuana. *Id.*

Amendment A addresses discipline of professional or occupational licenses. Amendment A, § 9 mandates an individual "with a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law." Amdt. A, § 9. Mandating what various professions can and cannot discipline their members for is not a part of the "general object" of legalizing marijuana. *Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d 265, 273.

Amendment A addresses taxation. Amendment A, § 11 imposes a fifteen percent excise tax on the "gross receipts of all sales of marijuana sold by a person licensed by the Department pursuant to this article to a consumer." This section also allocates the revenue from said excise tax. The Department of Revenue is to receive the revenue necessary to cover the costs of administering Amendment A. *Id.* The remaining revenue is to be allocated evenly between supporting South Dakota public schools and being allocated to the state's general fund. Imposing a tax on marijuana sales and allocating the revenue derived from that tax are not "reasonably germane" to the overall topic of legalizing marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. Allocating revenue from an excise tax on marijuana sales is not part of the same "single scheme" as legalizing marijuana and does not constitute the same "scheme" as legalizing marijuana. *Id.*

While there may be more subjects contained within Amendment A, the identification of multiple subjects above is sufficient to determine the subjects contained within Amendment A are not reasonably germane to the legalization of marijuana. Allocating revenue from an excise tax of marijuana sales, forbidding differing professions from disciplining their members, and including a provision compelling the legislature to pass hemp, which is different than marijuana, are not part of the "single scheme" of legalizing marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. As a result, Amendment A violates the single subject provision of Article XXIII § 1 of the South Dakota Constitution and is invalid. *See Barnhart*, 88. S.D. 503, 222 N.W.2d at 135 (discussing a proposed amendment's potential invalidity under Article XXIII § 1). Despite the strong presumption of constitutionality and presumption in favor of validity and propriety Amendment A receives, the infringement of the single subject rule in Article XXIII, § 1 is so plain and palpable as to admit no reasonable doubt Amendment A is invalid. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 136; *Meierhenry*, 354 N.W.2d at 176 (further citations omitted).

Although this finding invalidates the amendment, this court will consider further argument on the issue of whether Amendment A was an amendment or revision in the interest of efficiency and the public importance.

iii. *Amendment/Revision*

Article XXIII outlines the procedures for both amendments and revisions to the South Dakota Constitution. S.D. Const. art. XXIII, §§ 1, 2. "A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject." S.D. Const. art. XXIII, § 1. An amendment can be proposed either through the initiative process, or by a majority vote of the Legislature. *Id.* What constitutes a constitutional "amendment" is not specifically defined. *Id.*

A revision requires a constitutional convention, which must be approved by three fourths of both houses of the Legislature. S.D. Const. art. XXIII, § 2. The revision itself must be approved by a majority of both houses of the Legislature as well as the electorate. *Id.* The revision "shall be submitted to the electorate at a special election in a manner to be determined by the convention." *Id.* The term "revision" is not specifically defined. *Id.*

Plaintiffs argue an amendment to the South Dakota Constitution may not incorporate a new article to the constitution, pursuant to Article XXIII, § 1. "In the absence of ambiguity, the language in the constitution must be applied as it reads . . .." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 34, 720 N.W.2d 670, 681 (further citations omitted). A court is "obligated to apply its plain meaning." *Id.* (internal quotations omitted). Under the "plain meaning" of the text of Article XXIII, § 1, a proposed amendment is not barred from creating a new article of the Constitution. *Id.* As Intervenors state: "The plain language of Article XXIII does not limit amendments to only amending one or more existing articles of the Constitution." (Intervenors' Reply Br., 10).

Plaintiffs next contend that Amendment A is a revision to the Constitution, rather than an amendment. They argue Amendment A would result in substantial changes to certain functions of South Dakota's three branches of government. Defendants and Intervenors argue Amendment A does not drastically change functions of the branches of government and does not make extensive changes to the constitution.

The South Dakota Supreme Court has never directly ascertained the difference between an amendment and a revision. The two are clearly distinct terms; it is presumed that there is no surplusage inserted into constitutional provisions. *Wilson*, 2000 S.D. 133, ¶ 13, 618 N.W.2d at 518. To gain a better understanding of these terms, outside authority will be examined. An amendment to the constitution implies "such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Amador*, 583 P.2d at 1285 (internal quotations omitted).

A revision may be "an enactment which is so extensive in its provisions as to change directly the substantial entirety of the Constitution by the deletion or alteration of numerous existing provisions . . .." *Amador*, 583 P.2d at 1286. A revision may also be a simpler enactment,

as long as the enactment "may accomplish such far reaching changes in the nature of our basic governmental plan . . .." *Id.* In determining whether a constitutional enactment is a revision or an amendment, a court must examine both the quantitative and qualitative aspects of the enactment. *Amador*, 583 P.2d at 1286.

In *McFadden v. Jordan*, the Supreme Court of California dealt with the question of whether a proposed constitutional amendment was an amendment or a revision. 196 P.2d 787, 788 (Cal. 1948). The proposed amendment was nearly half as big as the California Constitution itself. *Id.* at 790. One of the sections of the proposed amendment created a "California Pension Commission." *Id.* The commission was to be delegated "far reaching and mixed powers" which were almost entirely "unchecked." *Id.* at 798. The California court considered the amendment a revision of their constitution. *Id.* at 799. In its reasoning, the court discussed the implications of what having a commission with such power would mean for the system of checks and balances that characterized California's governmental plan. *Id.* at 798.

Amendment A is not a drastic rewrite of the South Dakota Constitution. It is also not as extensive as the proposed amendment in *McFadden*. *McFadden*, 196 P.2d at 793-96. Amendment A does not make any written changes to the existing provisions of the South Dakota Constitution. However, it does institute "far reaching changes in the nature of our basic governmental plan." *Amador*, 583 P.2d at 1286. "The doctrine of separation of powers has been a fundamental bedrock to the successful operation of our state government since South Dakota became a state in 1889." *Gray v. Gienapp*, 2007 S.D. 12, ¶ 19, 727 N.W.2d 808, 812. Amendment A proposes far reaching changes that would change the nature of this governmental plan. *Amador*, 583 P.2d at 1286.

Under Article III, § 1, the "legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives." S.D. Const. art. III, § 1. "The Legislature cannot abdicate its essential power to enact basic policies into law or delegate such power to any other department." *State v. Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d 598, 606 (citing *State v. Moschell*, 2004 S.D. 35, ¶ 15, 677 N.W.2d 551, 558). Once broad policy is created by the legislature, it may delegate certain powers to executive agencies, but it must adopt standards to "guide those officers or agencies in the exercise of such powers." *Outka,* 2014 S.D. 11, ¶ 25, 844 N.W.2d at 606. The Department of Revenue was established in 2011 through Executive Order, with approval from the Legislature. SDCL 10-1-1.

Amendment A, § 6 grants the Department of Revenue the "exclusive power" to license and regulate aspects of marijuana and to "administer and enforce" the rest of the article. Defendants and Intervenors argue this still leaves the Legislature with some power. "Exclusively" has been defined by the South Dakota Supreme Court as "only, solely, purely, wholly, to the exclusion of other things" and "to the exclusion of all others." *Volk*, 305 N.W.2d at 700 (internal citations omitted). Constitutions "should receive a consistent and uniform interpretation, so that they shall not … be taken to mean one thing at one time and another thing at another time, even though the circumstances may have changed as to make a different rule seem desirable. *Id.* (further citations omitted). Being as the South Dakota Supreme Court has defined the word "exclusively" in Article XI, § 8, this Court will apply that meaning to Amendment A. *Id.* The word "exclusive," as used in § 6, gives the Department of Revenue the

exclusive power to license and regulate aspects of marijuana. This means it has the sole authority to do so. Amendment A removes the Legislature's ability to create broad policy relating to the regulation of and licensing of marijuana and their ability to delegate authority over these matters to any other agency. This is a "far reaching" change to the "nature" of South Dakota's "governmental plan." *Amador*, 583 P.2d at 1286.

Amendment A, § 5 also removes power from the Legislature; it removes the ability of the Legislature to enact civil penalties to regulate § 4. The Legislature is not able to "abdicate its essential power to enact basic policies into law or delegate such power to any other department." *Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d at 606. § 5 removes the ability of the legislature to implement civil penalties into law to regulate § 4, because there are already penalties in the Amendment. Further, the penalties in § 5 cannot be changed by anything other than another proposed constitutional amendment. If the Legislature wanted to reduce or increase the civil penalty for an individual who smokes marijuana in a public place, they would not be allowed to do so. Even the Department of Revenue is not able to change the penalties, as they are part of Amendment A. This changes the nature of the "basic governmental plan," as the Legislature now cannot delegate authority to the Department of Revenue to enact penalties pertaining to marijuana use. *Amador*, 583 P.2d at 1286.

Amendment A alters and removes the power of the Executive Branch to reallocate authority over the licensing and regulation of marijuana. Under Article IV, § 8 of the South Dakota Constitution, the Governor has the ability to make "changes in organization of the offices, boards, commission, agencies, and instrumentalities, and in *allocation of their functions, powers and duties*, as he considers necessary for efficient administration." (Italics added). Amendment A, § 6 gives the Department of Revenue the "exclusive" authority over licensing and regulating aspects of marijuana. This removes the ability of the Governor to transfer this authority to another agency, one that may be better fit for these tasks. Amendment A's § 6 is in direct conflict with the duties given to the Governor by the South Dakota Constitution under Article IV, § 8, and is a far-reaching change in the "nature of our basic governmental system." *Amador*, 583 P.2d at 1286.

Amendment A, § 12 establishes a new cause of action against the Department of Revenue. If the Department of Revenue fails to promulgate rules consistent with or required by Amendment A by April 1, 2022, any South Dakota resident would be able to commence a mandamus action to compel the department to do so. "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. art. III, § 27. "The [S]tate may ... waive sovereign immunity by legislative enactment identifying the conditions under which lawsuits of a specified type would be permitted." *Hallberg v. S. Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 12, 937 N.W.2d 568, 573 (further citations omitted). Amendment A unconstitutionally waives the State's sovereign immunity. This is in direct conflict with Article III, § 27, which specifically gives the Legislature the power to direct in what manner and court the State may be sued.

Although it does not make any written changes to other Articles of the South Dakota Constitution, Amendment A provides far-reaching changes to the nature of South Dakota's governmental plan and is therefore a revision. Several provisions of Amendment A implement

"far reaching changes" in the basic nature of South Dakota's governmental system by taking authority given to the Legislative and Executive branches and allocating it to the Department of Revenue. *Amador*, 583 P.2d at 1286. Despite the strong presumption of constitutionality that Amendment A has been given, its infringement of restrictions placed in Article XXIII is so "plain and palpable" that there is no reasonable doubt. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 136; *Meierhenry*, 354 N.W.2d at 176 (further citations omitted).

iv. *Severance*

The Intervenors argued that if Amendment A was found to be unconstitutional, the proper remedy was to sever the unconstitutional sections. Despite this argument, the Intervenors failed to cite valid legal authority supporting the theory that this court has the authority to sever an amendment, effectively choosing which sections of the amendment it believes the voters intended to adopt. Due to the intermingling of multiple subjects within Amendment A, it is not possible for this court to ascertain which sections of the amendment the South Dakota voters supported. For example, the title itself contains two separate subjects – marijuana and hemp. Article XXIII, § 1 of the South Dakota Constitution prohibits a proposed amendment from embracing more than on subject. When more than one subject is included in an amendment, this court does not have authority to assume which subject the voters intended to adopt. As a result, this court cannot sever Amendment A in a manner that assures compliance with the intentions of the South Dakota voters.

CONCLUSION

Based on the analysis set forth above, Amendment A is unconstitutional as it includes multiple subjects in violation of Article XXIII, § 1and it is therefore void and has no effect. Furthermore, Amendment A is a revision as it has far-reaching effects on the basic nature of South Dakota's governmental system. As a result, Amendment A was required to be submitted to the voters through the constitutional convention process set forth in Article XXIII, § 2. The failure to submit Amendment A through the proper constitutional process, voids the amendment and it has no effect. Accordingly, Plaintiffs' Motion for Summary Judgment in this matter is granted.

BY THE COURT

Christina Klinger

Christina Klinger
Circuit Court Judge

Filed on:02/08/2021 Hughes County, South Dakota 32CIV20-000187

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, and COLONEL RICK MILLER, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL, Plaintiffs, v. STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants.	32CIV20-000187 **NOTICE OF ENTRY OF JUDGMENT**

Notice is hereby given that a Judgment, a true and correct copy of which is attached hereto and by this reference made a part hereof as fully as if set forth at length and in detail herein, was entered and filed by the Court on the 10th day of February, 2021, in the office of the Clerk of Courts of Hughes County.

Dated this 11th day of February, 2021.

Filed: 2/11/2021 2:36 PM CST Hughes County, South Dakota 32CIV20-000187

REDSTONE LAW FIRM LLP

/s/ Christopher D. Sommers
Matthew S. McCaulley
Lisa M. Prostrollo
Christopher D. Sommers
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
(605) 331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Colonel Rick Miller

CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 11th day of February, 2021, I caused the foregoing document to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that a copy of the same will be served electronically upon the following:

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
grant.flynn@state.sd.us
matthew.templar@state.sd.us
Attorneys for Defendant Steve Barnett

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com
Attorneys for SDBML, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
bobmorris@westriverlaw.com
Attorney for Plaintiff Kevin Thom

/s/ Christopher D. Sommers
Christopher D. Sommers

Filed: 2/11/2021 2:36 PM CST Hughes County, South Dakota 32CIV20-000187

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, and COLONEL RICK MILLER, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL, Plaintiffs, v. STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants.	32CIV20-000187 **JUDGMENT**

This Court, having previously entered its Order granting Plaintiffs' Motion for Summary Judgment, and denying the separate motions for judgment on the pleadings filed by the Defendants,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Constitutional Amendment A was submitted to the South Dakota electorate in violation of Article XXIII of the South Dakota Constitution.

Filed: 2/11/2021 2:36 PM CST Hughes County, South Dakota 32CIV20-000187

2. Constitutional Amendment A is not part of the South Dakota Constitution and is void and of no effect.

3. The Court's Memorandum Decision and Order dated February 8, 2021 is incorporated herein.

Dated this ____ day of February, 2021.

BY THE COURT:

Signed: 2/10/2021 3:15:15 PM

Christina Klinger

Honorable Christina Klinger
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

Filed on: 02/10/2021 Hughes County, South Dakota 32CIV20-000187
Filed on: 02/10/2021 2:36 PM CST Hughes County, South Dakota 32CIV20-000187

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

KEVIN THOM, PENNINGTON COUNTY SHERIFF and RICK MILLER, SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL,	)	32CIV20-187
PLAINTIFFS	)	
vs.	)	
STEVE BARNETT, SECRETARY OF STATE,	)	**ORDER**
DEFENDANT.	)	

On the 27th day of January 2021, a Motions Hearing was held on Defendant's and Intervenors' separate Motions for Judgment on the Pleadings and Plaintiffs' Motion for Summary Judgment. Bob Morris appeared on behalf of Kevin Thom, Pennington County Sherriff. Lisa Prostrollo and Matthew McCaulley appeared on behalf of Rick Miller, South Dakota Highway Patrol Superintendent. Grant Flynn and Matthew Templar appeared on behalf of Defendant Jason Ravnsborg, Attorney General. Brendan Johnson and Timothy Billion appeared on behalf of Intervenors Melissa Mentele, Charles Parkinson, Randolph Seiler, South Dakotans for Better Marijuana Laws and William Stocker. Randolph Seiler personally attended the hearing. All parties were allowed to attend the hearing via audio Zoom. The Court, having considered the written submissions of the parties, the pleadings in this matter, the argument of counsel, and being fully advised, it is hereby

ORDERED that Amendment A is unconstitutional in violation of Article XXIII, § 1 of the South Dakota Constitution and therefore is void and has no effect; it is further

ORDERED that Amendment A is a revision and submitted through an improper constitutional process and is therefore void and has no effect; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment in this matter is GRANTED; it is further

ORDERED that the Memorandum Decision of even date with this Order is incorporated herein.

Dated this 8th day of February 2021.

BY THE COURT:

Christina Klinger

Hon. Christina L. Klinger
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
FEB 08 2021
Kelli Sitzman Clerk
By TDC Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, and COLONEL RICK MILLER, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL, Plaintiffs, v. STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE, Defendant.	32CIV20- **COMPLAINT FOR DECLARATORY RELIEF**

COMES NOW, Plaintiffs Kevin Thom, in his official capacity as the Pennington County Sheriff, and Colonel Rick Miller, in his official capacity as the Superintendent of the South Dakota Highway Patrol (collectively, "Plaintiffs"), by and through their counsel of record, and for their Complaint for Declaratory Relief, state and allege as follows:

INTRODUCTION AND CASE SUMMARY

The South Dakota Constitution can only be revised or amended in the manner prescribed in the Constitution itself. A purported amendment or revision that fails to adhere to the requirements set forth in the Constitution is void and of no effect. Constitutional Amendment A, as submitted to the South Dakota electorate on November 3, 2020, proposed a drastic revision to the Constitution that could not be proposed by

initiative under Article XXIII because it addressed multiple subjects and purported to add an entirely new article to the Constitution. Constitutional Amendment A was therefore void at its inception and could never be ratified by South Dakota voters. No challenge is made to Initiated Measure 26 (marijuana for medical purposes).

PARTIES

1. Plaintiff Kevin Thom is an individual who resides in Pennington County, South Dakota, is registered to vote in the state of South Dakota, was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020, and is the duly elected Sheriff of Pennington County, South Dakota.

2. Colonel Rick Miller is an individual who resides in Hughes County, South Dakota, is registered to vote in the state of South Dakota, was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020, and is the duly appointed superintendent of the South Dakota Highway Patrol.

3. Sheriff Thom and Colonel Miller bring this action in their official capacities in connection with a separate election contest to provide for full, complete, and expedited relief.

JURISDICTION AND VENUE

4. This Court has the jurisdiction and authority to declare Amendment A unconstitutional and void pursuant to SDCL chapter 21-24.

5. Venue is proper because Defendant is a State official located in Hughes County, South Dakota.

BACKGROUND

6. On or about September 11, 2019, Brendan Johnson filed with Defendant a

form for an "Initiated Constitutional Amendment Petition" ("Petition"), seeking approval to circulate a Petition proposing a change to the South Dakota Constitution entitled, "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." A copy of the Petition is attached hereto as Exhibit 1.

7. On or about November 4, 2019, Brendan Johnson submitted petitions to Defendant for validation.

8. On or about January 6, 2020, Defendant announced that the Petition received 36,707 valid signatures, which allowed the Petition to be validated and submitted to South Dakota voters for approval. The Petition was titled Constitutional Amendment A ("Amendment A") and was certified by Defendant to be placed on the 2020 General Election ballot to be conducted on November 3, 2020.

9. Amendment A, as it was submitted to South Dakota voters, purports to add a new article to the South Dakota Constitution. The first page of the Amendment A Petition states, in part, as follows:

> That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

10. The new Article is comprised of 15 sections and 55 subsections prescribing detailed and extensive rules and regulations across a multitude of different subjects, including:

a. Decriminalizing the possession, use, ingestion, inhalation, processing, transporting, delivery of without consideration, or distribution of without consideration less than 1 ounce of marijuana or less than 8 grams of marijuana in a concentrated form;

b. Decriminalizing the possession, planting, cultivation, harvesting, drying, processing, or manufacturing of up to 3 marijuana plants, subject to certain

specific restrictions;

c. Imposing civil penalties for various violations of certain portions of Amendment A;

d. Granting the Department of Revenue the exclusive power "to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," and requiring the Department of Revenue to promulgate specific rules and regulations to implement Amendment A;

e. Decriminalizing actions of a licensee pursuant to a license;

f. Granting political subdivisions the authority to regulate certain operations of licensees or prohibit the establishment of licensees entirely;

g. Precluding political subdivisions from prohibiting the transportation of marijuana;

h. Imposing a 15% excise tax on all commercial sales of marijuana, appropriating tax revenue to the Department of Revenue to cover its costs related to marijuana, requiring the Legislature to appropriate 50% of the remaining revenue to support public schools, and appropriating the remainder to the general fund;

i. Creating a civil cause of action for any resident to compel the Department of Revenue to promulgate rules;

j. Requiring the Department of Revenue to publish annual reports relative to licenses, enforcement, disciplinary actions, revenues, and expenses;

k. Requiring the Legislature to pass laws ensuring access to medical marijuana; and

l. Requiring the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

11. At least five separate subjects are identified in the title alone, which describes Amendment A as "An amendment to the South Dakota Constitution to": (a) "legalize marijuana"; (b) "regulate recreational marijuana"; (c) "tax marijuana"; (d) "require the Legislature to pass laws regarding hemp"; and (e) "require the Legislature to pass laws . . . ensuring access to marijuana for medical use."

12. According to the official canvass dated November 10, 2020, Amendment A was approved by a majority of voters during the 2020 general election, receiving a total

of 225,260 "Yes" votes and 190,477 "No" votes. A copy of the official canvass is attached hereto as Exhibit 2.

13. Amendment A will purportedly go into effect on July 1, 2021.

14. For historical context, prior to the 2020 general election, South Dakotans rejected separate initiated measures that addressed some of the many subjects that were packaged together in Amendment A. For example:

a. Initiated Measure 1 regarding Hemp was rejected by South Dakota voters in 2002;

b. Initiated Measure 4 regarding Medical Marijuana was rejected by South Dakota voters in 2006; and

c. Initiated Measure 13 regarding Medical Marijuana was rejected by South Dakota voters in 2010.

15. Since the right to amend the Constitution by the initiative process was granted to voters in 1972, the voters have not ratified any proposed initiated constitutional amendment that purported to create an entirely new article.[1]

Count I: Declaratory Judgment

16. Plaintiffs reallege the allegations of each of the above paragraphs as though fully set forth herein and incorporate the same by reference.

17. Article XXIII of the South Dakota Constitution provides that the Constitution may be changed by (1) amendments or (2) revisions. The South Dakota Constitution makes a substantive distinction between "amendments" and "revisions," and it sets forth an entirely separate procedure for adopting each type of constitutional change.

18. Purported revisions or amendments that fail to adhere to the procedures for ratification as set forth in the Constitution are void and of no effect.

[1] In 2018, the South Dakota voters rejected proposed Amendment W, which attempted to amend the Constitution to add a new article.

19. Amendments to the Constitution may be proposed either by initiative or by the Legislature. Article XXIII, § 1 of the Constitution describes the requirements that must be met for a constitutional change to qualify as an "amendment." It states that a "proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject."

20. While an amendment can be used to change existing articles of the Constitution, it cannot be used to adopt an entirely new article, effectuate broad changes to the Constitution, or make changes that address entirely new subjects not encompassed within pre-existing articles.

21. Only a proposed amendment that meets the requirements of Article XXIII, § 1 can be submitted to the South Dakota electorate for ratification.

22. Constitutional changes that do not qualify as "amendments" may be "revisions" to the Constitution. Revisions are separately addressed under Article XXIII, § 2 of the Constitution. Because revisions involve more comprehensive changes to the Constitution that often have obscure implications, Article XXIII, § 2 imposes a more stringent procedure for presenting them to the public for a vote. This procedure, which is both public and transparent, is designed to ensure that revisions are properly scrutinized and the integrity of the Constitution is preserved.

23. While an amendment may be proposed by initiative through a petition signed by the requisite number of qualified voters, a revision cannot be adopted unless it is approved by members of a constitutional convention in accordance with Article XXIII, § 2 of the Constitution.

24. Specifically, Article XXIII, § 2 states that a convention to "revise" the Constitution may be called by "a three-fourths vote of all the members of each house," or it may be "initiated and submitted to the voters in the same manner as an amendment." Once a constitutional convention has been called, its members must be elected "on a nonpolitical ballot in the same districts and in the same number as the house of representatives." Article XXIII, § 2. The elected members of the constitutional convention must then approve proposed revisions "by a majority" before the proposed revision can be "submitted to the electorate at a special election in a manner to be determined by the convention." Article XXIII, § 2.

25. Approval of constitutional revisions through a constitutional convention preserves the integrity of the Constitution and the system of government that it creates by promoting transparency, public input, and informed debate and discussion.

Amendment A was not Constitutionally Ratified

26. Plaintiffs reallege the allegations of each of the above paragraphs as though fully set forth herein and incorporate the same by reference.

27. Amendment A is a revision to the Constitution and does not qualify as an amendment under Under Article XXIII, § 1 for the following reasons:

a. It embraces more than one subject;

b. It establishes an entirely new article of the Constitution, rather than amending an existing article or articles;

c. It addresses new subjects that are not related to the subjects of any existing article;

d. It imposes broad and comprehensive changes to the Constitution that will have vast implications for our system of government; and

e. It results in a fundamental alteration to the structure of the Constitution and

the powers afforded to each respective branch of government.

28. Amendment A is a drastic revision of the Constitution with implications that extend far beyond the legalization of marijuana.

29. The 15 sections and 55 subsections that comprise Amendment A set forth a complicated web of rules and regulations covering an array of subjects that voters were forced to consider as a whole.

30. The provisions of Amendment A are so pervasive that even certain fines are constitutionally decreed, meaning that even a minor adjustment to the amount of these fines could not be made without the ratification of yet another Constitutional amendment.

31. Rather than embracing the separate powers afforded to the legislative and executive branches of our government under the Constitution, Amendment A grants the Department of Revenue the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," with only limited exceptions applicable to local governments. Not only is the Department of Revenue granted the exclusive power to "promulgate rules and issue regulations," it is also granted sole authority to "administer and enforce" those rules. If Amendment A is upheld, it will result in a fundamental alteration of the governmental structure previously defined by the Constitution.

32. Because Amendment A was a revision to the Constitution submitted in violation of Article XXIII, Amendment A could not have been initiated and submitted to the voters when it bypassed the constitutionally required convention. Proponents of Amendment A failed to follow the proper constitutional procedure and deprived South

Dakota voters of the opportunity to have a substantial revision to the Constitution properly scrutinized and presented for ratification. Therefore, the election as to Amendment A is a nullity, did not result in a free and fair expression of the will of the voters, and must be stricken from the South Dakota Constitution.

Amendment A Violates the One-Subject Rule

33. Plaintiffs reallege the allegations of each of the above paragraphs as though fully set forth herein and incorporate the same by reference.

34. In 2018, South Dakota voters ratified Amendment Z, which amended Article XXIII, § 1 of the Constitution. Amendment Z provides as follows (excerpt below from the Senate Engrossed version of 2018 HJR 1006):[2]

> articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject. If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately.

35. With the ratification of Amendment Z, the South Dakota Constitution now prohibits proposed amendments from embracing more than one subject, regardless of whether the amendment is proposed by the Legislature or by initiative. A proposed amendment that embraces more than one subject violates Article XXIII, § 1, and cannot be approved by the electorate.

36. This rule, known as the "one-subject rule," was approved by South Dakota voters through Amendment Z and became part of the Constitution in 2018. A major purpose of the one-subject rule is to avoid requiring voters to accept part of a proposed amendment that they oppose in order to obtain a change in the constitution that they

[2] https://mylrc.sdlegislature.gov/api/Documents/50375.pdf

support, resulting in votes that do not accurately reflect the electorate's approval of the proposed amendment.

37. The one-subject rule ensures that the voters are able to express their will in one vote as to only one subject.

38. Amendment A violates the one-subject rule because it embraces at least five separate subjects, including, but not limited to:

a. Legalization of recreational marijuana;

b. Regulation, licensing, and taxation of the commercial sale of recreational marijuana;

c. Regulation and licensing of recreational marijuana by political subdivisions;

d. Regulation of marijuana for strictly medicinal use as prescribed by a medical professional; and

e. Regulation of hemp.

39. Amendment A purports to confer personal rights upon individuals to use medical and recreational marijuana, while simultaneously conferring property rights upon private entities to grow and sell marijuana to others. These personal and private rights are fundamentally distinct.

40. Amendment A was submitted to the electorate in violation of Article XXIII, § 1 because it embraced multiple subjects that should have been presented as separate amendments that voters could evaluate separately.

41. Because Amendment A was submitted in violation of Article XXIII, § 1, Amendment A could never be initiated and submitted to the voters for approval. Therefore, the election as to Amendment A is a nullity, did not result in a free and fair expression of the will of the voters, and must be stricken from the South Dakota Constitution.

WHEREFORE, Petitioners pray that the Court enter a judgment as follows:

1. Declaring that Constitutional Amendment A was unconstitutionally submitted to the South Dakota electorate and is void and of no effect;
2. Declaring that Amendment A has not been ratified and is not part of the South Dakota Constitution; and
3. Such other and further relief as the Court deems just and equitable.

Dated this 20th day of November, 2020.

REDSTONE LAW FIRM LLP

Matthew S. McCaulley
Lisa M. Prostrollo
Christopher D. Sommers
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
(605) 331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com

MORRIS LAW FIRM, PROF. LLC
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717
(605) 723-7777
bobmorris@westriverlaw.com

Exhibit 1

INITIATED CONSTITUTIONAL AMENDMENT PETITION

WE, THE UNDERSIGNED qualified voters of the state of South Dakota, petition that the following section or sections and article or articles of the South Dakota Constitution be amended and that this proposal be submitted to the voters of the state of South Dakota at the general election on November 3, 2020 for their approval or rejection.

Title: **An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.**

Attorney General Explanation:

This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.

The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.

The Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.

Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law.

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

§ 1. Terms used in this article mean:

(1) "Department," the Department of Revenue or its successor agency;

(2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;

(3) "Local government," means a county, municipality, town, or township;

(4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;

(5) "Marijuana accessory," any equipment, product, material, which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

§2. Notwithstanding the provisions of this article, this article does not limit or affect laws that prohibit or otherwise regulate:

(1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;

(2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;

(3) Consumption of marijuana by a person younger than twenty-one years of age;

(4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;

(5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;

(8) Smoking marijuana in a location where smoking tobacco is prohibited;

(9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;

(10) Consumption of marijuana as part of a criminal penalty or a diversion program;

(11) Conduct that endangers others;

(12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or

(13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

§3. Notwithstanding the provisions of this article, this article does not:

(1) Require that an employer permit or accommodate conduct allowed by this article;

(2) Affect an employer's ability to restrict the use of marijuana by employees;

(3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this article on or in that property; or

(4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this article within a building owned, leased, or occupied by the state or the local government.

§4. Subject to the limitations in this article, the following acts are not unlawful and shall not be an offense under state law or the laws of any local government within the state or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;

(2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided:

(a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;

(b) Not more than six plants are kept in or on the grounds of a private residence at one time; and

(c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this article.

(3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

§5.

(1) A person who, pursuant to §4 of this article, cultivates marijuana plants that are visible by normal, unaided vision from a public place is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(2) A person who, pursuant to §4 of this article, cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(3) A person who, pursuant to §4 of this article, cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store is subject to a civil penalty not exceeding two-hundred and fifty dollars, unless the cultivation of marijuana plants is allowed through local ordinance or regulation pursuant to §10.

(4) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the department, is subject to a civil penalty not exceeding one-hundred dollars.

(5) A person who is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories is subject to a civil penalty not to exceed one-hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine.

§ 6. The department shall have the exclusive power, except as otherwise provided in § 10, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article. The department shall accept applications for and issue, in addition to any other types of licenses the department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

§ 7. Not later than April 1, 2022, the department shall promulgate rules and issue regulations necessary for the implementation and enforcement of this article. The rules shall be reasonable and shall include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this article;

(3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety

and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;

(12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and

(13) Civil penalties for the failure to comply with rules adopted pursuant to this article.

§ 8. In determining the appropriate number of licenses to issue, as required under this article, the department shall:

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

§ 9. Actions and conduct by a licensee, a licensee's employee, and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and shall not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law. A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

§10. A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this article. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this article.

§11. An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana sold by a person licensed by the department pursuant to this article to a consumer. The Legislature may adjust this rate after November 3, 2024. The department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section shall be appropriated to the department to cover costs incurred by the department in carrying out its duties under this article. Fifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund.

§ 12. Any rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws. Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws. If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

§13. The department shall publish an annual report that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement or disciplinary action taken against licensees, a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this article, and a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

§14. Not later than April 1, 2022, the Legislature shall pass laws to:

(1) Ensure access to marijuana beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana; and

(2) Regulate the cultivation, processing, and sale of hemp.

§15. This article shall be broadly construed to accomplish its purposes and intents. Nothing in this article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this article or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.

2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.

3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.

4. Abbreviations of common usage may be used. Ditto marks may not be used.

5. Failure to provide all information requested may invalidate the signature.

NAME	RESIDENCE	DATE/COUNTY
SIGN 1 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 2 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 3 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 4 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 5 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 6 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 7 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 8 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 9 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION
SIGN 10 PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER CITY OR TOWN	DATE OF SIGNING COUNTY OF REGISTRATION

RECEIVED
SEP 11 2019
S.D. SEC. OF STATE

Filed this 17th day of September 2019
Steve Barnett
SECRETARY OF STATE

VERIFICATION BY PERSON CIRCULATING PETITION

INSTRUCTIONS TO CIRCULATOR: This section **must** be completed following circulation and before filing.

Print name of the circulator | Residence Address | City | State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, that I am not attesting to any signature obtained by any other person, that I am a resident of South Dakota, that I made reasonable inquiry and to the best of my knowledge each person signing the petition is a qualified voter in the county indicated on the signature line, that no state statute regarding petition circulation was knowingly violated, and that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration.

Signature of Circulator

Sworn to before me this _____ day of _____, _____.
(Seal)

Signature of Officer Administering Oath

My Commission Expires _____

Title of Officer Administering Oath

Form Revised 2018 - 5:02:08:07

Exhibit 2

STATE OF SOUTH DAKOTA)
)
COUNTY OF HUGHES)

CERTIFICATE

We, Steve Barnett, Shirley Jameson-Fergel, Katie Hruska and Jeff Tronvold, the Board of Canvassers in the State of South Dakota for the General Election held in said state on November 3, 2020, hereby certify that the attached is a true and correct record of the votes for the candidates as shown by returns certified to the Secretary of State of South Dakota.

Steve Barnett
Secretary of State

Shirley Jameson-Fergel
for the Supreme Court

Katie Hruska
for the Governor

Jeff Tronvold
for the Attorney General

Sworn to before me this 10th day of November, 2020.

Christine Lehrkamp
Notary Public

My commission expires 1.21.21

CHRISTINE LEHRKAMP NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

County	Presidential Electors		
	Donald J. Trump and Michael R. Pence - REP	Jo Jorgensen and Jeremy "Spike" Cohen - LIB	Joseph R. Biden and Kamala Harris - DEM
Aurora	1,052	36	317
Beadle	4,808	166	2,107
Bennett	694	23	466
Bon Homme	2,235	45	721
Brookings	8,000	457	6,110
Brown	10,580	429	6,538
Brule	1,750	67	673
Buffalo	183	14	352
Butte	3,731	132	939
Campbell	747	9	117
Charles Mix	2,552	54	1,177
Clark	1,373	40	437
Clay	2,456	159	3,083
Codington	8,958	366	3,837
Corson	647	14	622
Custer	3,852	170	1,522
Davison	5,613	193	2,618
Day	1,869	43	1,052
Deuel	1,699	42	609
Dewey	790	45	1,131
Douglas	1,468	23	216
Edmunds	1,538	30	417
Fall River	2,878	111	1,053
Faulk	964	20	198
Grant	2,618	71	1,056
Gregory	1,771	32	455
Hanlon	1,026	6	105
Hamlin	2,372	64	647
Hand	1,433	30	373
Hanson	1,793	38	557
Harding	748	16	49
Hughes	5,522	248	2,953
Hutchinson	2,944	61	762
Hyde	564	10	136
Jackson	738	18	359
Jerauld	721	15	270
Jones	498	11	90
Kingsbury	1,904	56	819
Lake	3,681	124	2,068
Lawrence	8,753	538	4,537
Lincoln	19,617	798	11,981
Lyman	1,042	30	525
Marshall	1,287	33	858
McCook	2,068	63	769
McPherson	1,075	27	222
Meade	9,875	510	3,285
Mellette	449	22	298
Miner	787	31	320
Minnehaha	49,249	2,595	40,482
Moody	1,951	76	1,179
Oglala Lakota	297	74	2,879
Pennington	35,063	1,849	20,606
Perkins	1,401	29	239
Potter	1,139	14	227
Roberts	2,404	75	1,828
Sanborn	905	23	257
Spink	2,104	61	998
Stanley	1,203	28	421
Sully	726	19	185
Todd	532	44	1,963
Tripp	2,161	40	495
Turner	3,290	119	1,139
Union	5,944	186	2,725
Walworth	1,966	49	565
Yankton	6,581	303	4,016
Ziebach	404	21	481
Total	**261,043**	**11,095**	**150,471**

	United States Senator	
County	Mike Rounds - REP	Dan Ahlers - DEM
Aurora	1,002	403
Beadle	5,104	1,986
Bennett	729	437
Bon Homme	2,156	834
Brookings	8,792	5,746
Brown	11,168	6,283
Brule	1,735	756
Buffalo	223	322
Butte	3,809	961
Campbell	745	172
Charles Mix	2,542	1,259
Clark	1,397	450
Clay	2,857	2,807
Codington	9,479	3,626
Corson	681	583
Custer	3,973	1,483
Davison	5,893	2,540
Day	1,895	1,069
Deuel	1,714	620
Dewey	884	1,062
Douglas	1,469	235
Edmunds	1,539	448
Fall River	3,009	993
Faulk	975	213
Grant	2,723	1,026
Gregory	1,766	488
Haakon	1,032	106
Hamlin	2,413	657
Hand	1,480	378
Hanson	1,796	564
Harding	727	73
Hughes	6,217	2,546
Hutchinson	2,982	772
Hyde	568	143
Jackson	756	357
Jerauld	720	277
Jones	497	99
Kingsbury	1,970	809
Lake	3,816	2,069
Lawrence	9,385	4,358
Lincoln	21,221	11,013
Lyman	1,066	533
Marshall	1,334	853
McCook	2,072	835
McPherson	1,086	235
Meade	10,355	3,176
Mellette	468	303
Miner	807	339
Minnehaha	52,773	38,799
Moody	1,877	1,343
Oglala Lakota	510	2,691
Pennington	37,694	19,184
Perkins	1,395	249
Potter	1,160	224
Roberts	2,529	1,767
Sanborn	898	281
Spink	2,178	986
Stanley	1,274	378
Sully	759	168
Todd	706	1,796
Tripp	2,188	502
Turner	3,416	1,126
Union	6,364	2,407
Walworth	2,040	525
Yankton	6,994	3,848
Ziebach	450	458
Total	276,232	143,987

	United States Representative	
County	Dusty Johnson - REP	Randy "Ulah" Luallin - IIB
Aurora	1,224	144
Beadle	5,857	936
Bennett	807	288
Bon Homme	2,519	359
Brookings	10,741	2,791
Brown	13,706	2,841
Brule	2,073	338
Buffalo	306	196
Butte	3,977	672
Campbell	790	64
Charles Mix	2,921	703
Clark	1,571	222
Clay	3,750	1,378
Codington	10,685	1,881
Corson	755	365
Custer	4,336	902
Davison	7,101	1,069
Day	2,336	485
Deuel	2,005	294
Dewey	1,065	693
Douglas	1,568	186
Edmunds	1,741	184
Fall River	3,142	735
Faulk	1,065	90
Grant	3,164	462
Gregory	2,009	179
Haakon	1,061	59
Hamlin	2,644	359
Hand	1,647	159
Hanson	1,938	275
Harding	747	48
Hughes	7,148	1,276
Hutchinson	3,301	351
Hyde	678	68
Jackson	809	253
Jerauld	847	115
Jones	528	65
Kingsbury	2,314	361
Lake	4,717	834
Lawrence	10,481	2,521
Lincoln	25,298	5,290
Lyman	1,228	312
Marshall	1,670	364
McCook	2,479	369
McPherson	1,181	114
Meade	10,983	2,178
Mellette	548	198
Miner	964	133
Minnehaha	65,473	19,600
Moody	2,425	631
Oglala Lakota	855	1,865
Pennington	41,987	11,679
Perkins	1,427	176
Potter	1,255	102
Roberts	3,100	934
Sanborn	1,016	129
Spink	2,645	400
Stanley	1,399	180
Sully	807	92
Todd	961	1,247
Tripp	2,360	267
Turner	3,885	541
Union	6,862	1,345
Walworth	2,222	267
Yankton	8,404	1,887
Ziebach	531	297
Total	**321,984**	**75,748**

	Public Utilities Commissioner		
County	Gary Hanson - REP	Devin Saxon - LIB	Reml W. B. Bald Eagle - DEM
Aurora	1,073	55	207
Beadle	5,131	301	1,372
Bennett	631	51	429
Bon Homme	2,193	137	491
Brookings	8,523	735	4,389
Brown	11,118	814	4,531
Brule	1,774	174	486
Buffalo	174	15	340
Butte	3,577	294	737
Campbell	734	26	75
Charles Mix	2,532	97	1,036
Clark	1,382	95	275
Clay	2,778	252	2,299
Codington	9,285	646	2,352
Corson	605	33	605
Custer	3,692	301	1,243
Davison	6,010	406	1,631
Day	1,999	127	666
Deuel	1,704	115	416
Dewey	694	63	1,149
Douglas	1,475	36	171
Edmunds	1,533	71	280
Fall River	2,789	254	836
Faulk	942	39	133
Grant	2,721	163	671
Gregory	1,732	60	358
Haakon	1,015	18	62
Hamlin	2,384	113	421
Hand	1,485	58	245
Hanson	1,758	76	404
Harding	690	32	50
Hughes	6,155	337	2,002
Hutchinson	3,002	107	449
Hyde	559	19	105
Jackson	708	34	334
Jerauld	752	24	186
Jones	481	26	68
Kingsbury	2,034	91	541
Lake	4,014	234	1,347
Lawrence	8,818	916	3,433
Lincoln	21,904	1,460	7,421
Lyman	1,043	52	445
Marshall	1,422	85	555
McCook	2,140	117	486
McPherson	1,074	43	133
Meade	9,489	967	2,468
Mellette	437	32	275
Miner	836	52	200
Minnehaha	55,106	4,569	27,568
Moody	2,041	116	915
Oglala Lakota	257	78	2,824
Pennington	34,634	3,697	15,847
Perkins	1,302	85	191
Potter	1,155	37	133
Roberts	2,593	144	1,410
Sanborn	874	42	197
Spink	2,229	132	634
Stanley	1,234	48	308
Sully	735	29	133
Todd	479	68	1,915
Tripp	2,125	79	377
Turner	3,474	184	707
Union	6,013	375	1,941
Walworth	1,978	81	420
Yankton	6,737	573	2,748
Ziebach	361	52	473
Total	**272,378**	**20,022**	**107,494**

	State Senator District 01	
County	Michael H. Rohl - REP	Susan Wismer - DEM
Brown	1,130	672
Day	1,663	1,218
Marshall	1,117	1,043
Roberts	2,141	2,030
Total	**6,051**	**4,913**

	State Senator District 02
County	Brock L. Greenfield - REP
Brown	2,602
Clark	1,305
Hamlin	2,286
Spink	1,961
Total	**8,154**

	State Senator District 03
County	Al Novstrup - REP
Brown	7,496
Total	**7,496**

	State Senator District 04	
County	John Wiik - REP	Daryl Root - LIB
Brookings	3,365	774
Codington	1,405	250
Deuel	1,851	371
Grant	2,917	612
Total	**9,538**	**2,007**

	State Senator District 05	
County	Lee Schoenbeck - REP	Adam Jewell - LIB
Codington	8,272	2,193
Total	**8,272**	**2,193**

	State Senator District 06	
County	Herman Otten - REP	Nancy Kristeln - DEM
Lincoln	10,194	5,081
Total	**10,194**	**5,081**

	State Senator District 07
County	V. J. Smith - REP
Brookings	6,650
Total	**6,650**

	State Senator District 08
County	Casey Crabtree - REP
Lake	4,218
Miner	788
Moody	2,000
Sanborn	823
Total	**7,829**

	State Senator District 09	
County	Wayne H. Steinhauer - REP	Suzanne "Suzie" Jones Pranger - DEM
Minnehaha	7,694	5,552
Total	**7,694**	**5,552**

	State Senator District 10	
County	Maggie Sutton - REP	Nichole Cauwels - DEM
Minnehaha	7,205	4,261
Total	**7,205**	**4,261**

	State Senator District 11	
County	Jim Stalzer - REP	Tom Cool - DEM
Minnehaha	8,244	5,389
Total	**8,244**	**5,389**

	State Senator District 12	
County	R Blake Curd - REP	Jessica Meyers - DEM
Lincoln	3,219	2,178
Minnehaha	3,380	3,428
Total	**6,599**	**5,606**

	State Senator District 13	
County	Jack Kolbeck - REP	Elizabeth "Liz" Larson - DEM
Lincoln	3,969	2,017
Minnehaha	3,521	3,802
Total	**7,490**	**5,819**

	State Senator District 14	
County	Larry P. Zikmund - REP	Timothy Reed - DEM
Minnehaha	7,391	5,808
Total	**7,391**	**5,808**

	State Senator District 15	
County	Thor Bardon - REP	Reynold F. Nesiba - DEM
Minnehaha	3,411	4,127
Total	**3,411**	**4,127**

	State Senator District 16
County	Jim Bolin - REP
Lincoln	3,383
Union	6,582
Total	**9,965**

	State Senator District 17		
County	Arthur Rusch - REP	Gregory Baldwin - LIB	Alice Johns - DEM
Clay	3,065	218	2,250
Turner	3,220	216	872
Total	**6,285**	**434**	**3,122**

	State Senator District 18	
County	Jean Hunhoff - REP	Jordan Foos - DEM
Yankton	6,342	4,255
Total	**6,342**	**4,255**

	State Senator District 19
County	Kyle Schoenfish - REP
Bon Homme	1,395
Douglas	1,403
Hanson	1,750
Hutchinson	3,111
McCook	2,107
Total	**9,766**

	State Senator District 20	
County	Joshua Klumb - REP	Alexander Martin - LIB
Aurora	1,165	156
Davison	6,567	1,215
Jerauld	784	121
Total	**8,516**	**1,492**

	State Senator District 21	
County	Erin Tobin - REP	Dan Kerner Andersson - DFM
Bon Homme	892	208
Charles Mix	2,593	1,093
Gregory	1,874	335
Tripp	2,270	366
Total	**7,629**	**2,002**

	State Senator District 22
County	David Wheeler - REP
Beadle	5,417
Kingsbury	1,980
Total	**7,397**

	State Senator District 23	
County	Bryan J. Breitling - REP	CJ Abernathey - LIB
Campbell	756	57
Edmunds	1,679	170
Faulk	938	106
Hand	1,557	198
McPherson	1,117	117
Potter	1,166	110
Spink	266	45
Walworth	2,040	307
Total	**9,519**	**1,110**

	State Senator District 24
County	Mary Duvall - REP
Hughes	6,656
Hyde	565
Stanley	1,242
Sully	791
Total	**9,254**

	State Senator District 25		
County	Marsha Symens - REP	Seth William Van't Hof - IND	Rick W Knobe - IND
Minnehaha	7,580	1,093	4,205
Total	**7,580**	**1,093**	**4,205**

	State Senator District 26	
County	Joel Koskan - REP	Troy Heinert - DEM
Brule	1,505	898
Buffalo	158	381
Jones	457	133
Lyman	918	635
Mellette	404	357
Todd	504	2,012
Total	**3,941**	**4,416**

	State Senator District 27	
County	Judd W Schomp - REP	Red Dawn Foster - DLM
Bennett	618	511
Haakon	1,013	81
Jackson	713	361
Oglala Lakota	324	2,842
Pennington	310	34
Total	**2,978**	**3,829**

	State Senator District 28
County	Ryan M. Maher - REP
Butte	2,915
Corson	788
Dewey	1,071
Harding	743
Perkins	1,439
Ziebach	547
Total	**7,506**

	State Senator District 29	
County	Gary L. Cammack - REP	Kent Wilsey - LIB
Butte	811	171
Meade	7,919	2,177
Pennington	620	308
Total	**9,350**	**2,656**

	State Senator District 30	
County	Julie Frye-Mueller - REP	A. Gideon Oakes - LIB
Custer	3,506	1,542
Fall River	2,728	1,058
Pennington	3,809	1,446
Total	**10,043**	**4,046**

	State Senator District 31
County	Timothy R. Johns - REP
Lawrence	9,911
Total	**9,911**

	State Senator District 32	
County	Helene Duhamel - REP	Michael Calabrese - DEM
Pennington	7,397	4,143
Total	**7,397**	**4,143**

	State Senator District 33	
County	David Johnson - REP	Ryan A. Ryder - DEM
Meade	1,960	692
Pennington	9,409	4,625
Total	**11,369**	**5,317**

	State Senator District 34	
County	Michael G Diedrich - REP	George Nelson - DEM
Pennington	8,079	4,470
Total	**8,079**	**4,470**

	State Senator District 35	
County	Jessica Castleberry - REP	Brian Gentry - IND
Pennington	6,012	3,747
Total	**6,012**	**3,747**

	State Representative District 01		
County	Tamara St. John - REP	Jennifer Healy Keintz - DEM	Steven D. McCleerey - DEM
Brown	1,126	595	599
Day	1,607	1,304	1,031
Marshall	1,107	1,110	807
Roberts	2,310	1,493	1,812
Total	**6,150**	**4,502**	**4,249**

	State Representative District 02	
County	Kaleb W. Weis - REP	Lana Greenfield - REP
Brown	2,200	2,025
Clark	945	1,071
Hamlin	1,769	1,739
Spink	1,467	1,593
Total	**6,381**	**6,428**

	State Representative District 03			
County	Drew Deonnert - REP	Carl E Perry - REP	Leslie McLaughlin - DEM	Justin Roemmick - DEM
Brown	7,108	6,087	3,843	3,720
Total	**7,108**	**6,087**	**3,843**	**3,720**

	State Representative District 01		
County	Fred Deutsch - REP	John Mills - REP	Becky Holtquist - DEM
Brookings	2,842	2,800	1,369
Codington	1,201	865	460
Deuel	1,497	1,380	663
Grant	2,472	1,956	1,150
Total	**8,012**	**7,001**	**3,642**

	State Representative District 05	
County	Hugh M. Bartels - REP	Nancy York - REP
Codington	7,311	6,182
Total	**7,311**	**6,182**

	State Representative District 06		
County	Emile Otten - REP	Aaron Aylward - REP	Cody Ingle - DEM
Lincoln	9,504	6,504	5,084
Total	**9,504**	**6,504**	**5,084**

	State Representative District 07			
County	Timothy Reed - REP	Larry Tidemann - REP	Louise Snodgrass - DEM	Bill Adamson - DEM
Brookings	5,821	5,235	3,635	2,786
Total	**5,821**	**5,235**	**3,635**	**2,786**

	State Representative District 08			
County	Marli Wiese - REP	Randy Gross - REP	John P. Kessinger - DEM	Val Parsley - DEM
Lake	3,921	3,163	1,095	2,264
Miner	700	641	188	404
Moody	1,682	1,795	685	1,291
Sanborn	726	728	194	301
Total	**7,029**	**6,327**	**2,162**	**4,260**

	State Representative District 09			
County	Rhonda Milstead - REP	Bethany Soye - REP	Michael Saba - DEM	Toni Miller - DEM
Minnehaha	7,656	6,720	4,679	4,368
Total	**7,656**	**6,720**	**4,679**	**4,368**

	State Representative District 10		
County	Steven Haugaard - REP	Doug Barthel - REP	Michelle L. Hentschel - DEM
Minnehaha	6,527	6,188	4,736
Total	**6,527**	**6,188**	**4,736**

	State Representative District 11			
County	Mark Wilhelson - REP	Chris Karr - REP	Sheryl Johnson - DEM	Margaret M Kulpers - DEM
Minnehaha	7,172	7,253	5,900	4,429
Total	**7,172**	**7,253**	**5,900**	**4,429**

	State Representative District 12		
County	Greg Jamison - REP	Arch Beal - REP	Erin Royer - DEM
Lincoln	3,212	2,750	2,152
Minnehaha	3,587	2,871	3,403
Total	**6,799**	**5,621**	**5,555**

	State Representative District 13			
County	Richard L Thomason - REP	Sue Peterson - REP	Norman B. Bliss - DEM	Kelly A. Sullivan - DEM
Lincoln	3,346	3,605	1,766	2,078
Minnehaha	2,869	3,141	3,328	3,768
Total	**6,215**	**6,746**	**5,094**	**5,846**

	State Representative District 14			
County	Taylor Rae Rehfeldt - REP	Tom Holmes - REP	Mike Huber - DEM	Erin Healy - DEM
Minnehaha	6,933	5,782	5,228	6,388
Total	**6,933**	**5,782**	**5,228**	**6,388**

	State Representative District 15			
County	Matt Rosburg - REP	Cole Heisey - REP	Jamie Smith - DEM	Linda Duba - DEM
Minnehaha	2,943	2,987	3,727	3,918
Total	**2,943**	**2,987**	**3,727**	**3,918**

	State Representative District 16	
County	David L. Anderson - REP	Kevin D. Jensen - REP
Lincoln	2,784	2,253
Union	5,599	4,257
Total	**8,383**	**6,510**

	State Representative District 17			
County	Richard Vasgaard - REP	Sydney Davis - REP	Caitlin F. Collier - DEM	Al Leber - DEM
Clay	1,989	2,521	2,374	2,708
Turner	2,797	2,757	807	937
Total	**4,786**	**5,278**	**3,181**	**3,645**

	State Representative District 18	
County	Mike Stevens - REP	Ryan Cwach - DEM
Yankton	6,778	5,109
Total	**6,778**	**5,109**

	State Representative District 19	
County	Kent Peterson - REP	Marty Overweg - REP
Bon Homme	1,188	842
Douglas	991	1,249
Hanson	1,559	1,183
Hutchinson	2,695	1,953
McCook	2,070	1,337
Total	**8,503**	**6,564**

	State Representative District 20	
County	Paul R Miskimins - REP	Lance Koth - REP
Aurora	974	693
Davison	5,860	4,804
Jerauld	569	567
Total	**7,403**	**6,064**

	State Representative District 21		
County	Rocky Blare - REP	Caleb Finck - REP	Jessica Hegge - DEM
Bon Homme	615	794	260
Charles Mix	1,898	1,845	1,620
Gregory	1,595	1,226	537
Tripp	2,222	1,173	496
Total	**6,330**	**5,038**	**2,911**

	State Representative District 22			
County	Roger Chase - REP	Lynn Schneider - REP	Mark S Smith - DEM	C. John McEnelly - DEM
Beadle	4,409	4,310	1,910	1,734
Kingsbury	1,756	1,545	730	614
Total	**6,165**	**5,855**	**2,640**	**2,348**

	State Representative District 23	
County	Spencer Gosch - REP	Charlie Hoffman - REP
Campbell	729	566
Edmunds	1,337	1,211
Faulk	806	715
Hand	1,214	1,045
McPherson	907	989
Potter	1,032	837
Spink	212	186
Walworth	2,088	1,242
Total	**8,325**	**6,791**

	State Representative District 24		
County	Will D Mortenson - REP	Mike Weisgram - REP	Amanda Bachmann - DEM
Hughes	6,012	5,736	2,421
Hyde	526	401	155
Stanley	1,186	1,067	331
Sully	686	582	172
Total	**8,410**	**7,786**	**3,079**

	State Representative District 25			
County	Tom Pischke - REP	Jon Hansen - REP	Jeff Barth - DFM	Jared Nieuwenhuis - DFM
Minnehaha	7,784	7,826	4,460	3,720
Total	**7,784**	**7,826**	**4,460**	**3,720**

	State Representative District 26A
County	Shawn Bordeaux - DEM
Mellette	387
Todd	1,867
Total	**2,254**

	State Representative District 26B	
County	Rebecca I. Reimer - REP	Tim Feliciano - DEM
Brule	1,826	597
Buffalo	200	338
Jones	491	75
Lyman	1,061	492
Total	**3,578**	**1,502**

	State Representative District 27		
County	Liz May - REP	Ernest Weston Jr - DEM	Perl Pourier - DEM
Bennett	778	320	397
Haakon	1,013	104	92
Jackson	765	212	331
Oglala Lakota	448	1,814	7,380
Pennington	316	30	34
Total	**3,320**	**2,480**	**3,234**

	State Representative District 28A
County	Oven Lee Lesmeister - DEM
Corson	732
Dewey	1,215
Ziebach	638
Total	**2,585**

	State Representative District 28B
County	Sam Marty - REP
Butte	2,745
Harding	731
Perkins	1,371
Total	**4,847**

	State Representative District 29		
County	Dean Wink - REP	Kirk J. Chaffee - REP	Jade Addison - IND
Butte	679	571	194
Meade	6,911	5,356	2,634
Pennington	577	454	346
Total	**8,167**	**6,381**	**3,174**

	State Representative District 30	
County	Trish Ladner - REP	Tim R. Goodwin - REP
Custer	3,039	3,075
Fall River	2,372	2,156
Pennington	3,257	3,204
Total	**8,668**	**8,435**

	State Representative District 31		
County	Scott Odenbach - REP	Mary Fitzgerald - REP	Brooke Abdallah - DEM
Lawrence	8,104	6,920	4,590
Total	**8,104**	**6,920**	**4,590**

	State Representative District 32			
County	Chris Johnson - REP	Becky Drury - REP	Toni Diamond - DEM	James Preston - DEM
Pennington	6,391	5,587	3,826	3,932
Total	**6,391**	**5,587**	**3,826**	**3,932**

	State Representative District 33	
County	Phil Jensen - REP	Taffy Howard - REP
Meade	1,711	1,337
Pennington	8,540	6,565
Total	**10,251**	**7,902**

	State Representative District 34			
County	Mike Derby - REP	Jess Olson - REP	Nick Anderson - DEM	Rick Stracqualursi - DEM
Pennington	7,225	6,756	3,776	3,806
Total	**7,225**	**6,750**	**3,776**	**3,806**

	State Representative District 35			
County	Tina L. Mulally - REP	Tony Randolph - REP	David A. Hubbard - DEM	Pat Cromwell - DEM
Pennington	5,777	5,375	2,916	2,740
Total	**5,777**	**5,375**	**2,916**	**2,740**

	SUPREME COURT RETENTION: SHALL JUSTICE STEVEN JENSEN, REPRESENTING THE FIRST SUPREME COURT DISTRICT, WHOSE TERM EXPIRES JANUARY 1, 2021, BE RETAINED IN OFFICE?	
County	Yes	No
Aurora	1,074	181
Beadle	5,239	940
Bennett	726	294
Bon Homme	2,272	391
Brookings	10,069	1,957
Brown	12,450	2,517
Brule	1,860	381
Buffalo	308	179
Butte	3,611	675
Campbell	665	86
Charles Mix	2,670	744
Clark	1,368	226
Clay	3,935	1,053
Codington	9,161	1,716
Corson	759	383
Custer	3,882	852
Davison	6,466	1,138
Day	2,135	448
Deuel	1,718	307
Dewey	1,145	590
Douglas	1,330	159
Edmunds	1,474	274
Fall River	2,777	730
Faulk	897	128
Grant	2,743	500
Gregory	1,745	303
Haakon	872	126
Hamlin	2,261	335
Hand	1,450	184
Hanson	1,758	274
Harding	608	83
Hughes	7,019	1,019
Hutchinson	2,872	390
Hyde	564	71
Jackson	769	231
Jerauld	757	133
Jones	477	71
Kingsbury	2,098	293
Lake	4,363	746
Lawrence	9,685	2,308
Lincoln	23,388	4,650
Lyman	1,107	311
Marshall	1,576	317
McCook	2,163	393
McPherson	1,009	174
Meade	9,692	2,271
Mellette	536	145
Miner	846	126
Minnehaha	61,774	16,025
Moody	2,302	554
Oglala Lakota	1,397	1,537
Pennington	38,701	10,395
Perkins	1,232	185
Potter	1,098	143
Roberts	2,977	834
Sanborn	922	114
Spink	2,391	386
Stanley	1,337	173
Sully	729	116
Todd	1,259	1,012
Tripp	2,053	386
Turner	3,443	596
Union	6,681	1,169
Walworth	1,977	357
Yankton	7,746	1,668
Ziebach	526	265
Total	**296,824**	**67,717**

	James River Water Development District Director James River WDD 4	
County	Leroy Braun - NON	Robert J. Raeber - NON
Beadle	731	509
Spink	1,510	856
Total	**2,241**	**1,365**

	West Dakota Water Development District Director West Dakota WDD 6	
County	James A. Kammert Sr. - NON	Cheryl Rowe - NON
Pennington	1,266	2,370
Total	**1,266**	**2,370**

	Constitutional Amendment A: An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.	
County	Yes	No
Aurora	531	850
Beadle	3,432	3,536
Bennett	637	510
Bon Homme	1,269	1,647
Brookings	8,056	6,280
Brown	9,666	7,632
Brule	1,141	1,301
Buffalo	366	162
Butte	2,221	2,524
Campbell	344	507
Charles Mix	1,678	2,036
Clark	751	1,058
Clay	3,742	1,891
Codington	6,603	6,355
Corson	665	573
Custer	2,617	2,794
Davison	4,135	4,228
Day	1,419	1,479
Deuel	920	1,373
Dewey	1,222	685
Douglas	460	1,195
Edmunds	796	1,158
Fall River	2,065	1,881
Faulk	413	751
Grant	1,649	2,027
Gregory	876	1,337
Haakon	305	809
Hamlin	1,114	1,933
Hand	619	1,195
Hanson	1,037	1,245
Harding	251	541
Hughes	4,348	4,346
Hutchinson	1,267	2,408
Hyde	264	430
Jackson	515	578
Jerauld	392	594
Jones	220	376
Kingsbury	1,234	1,490
Lake	3,001	2,818
Lawrence	7,934	5,813
Lincoln	17,741	14,432
Lyman	808	777
Marshall	1,121	1,073
McCook	1,327	1,531
McPherson	475	810
Meade	6,998	6,525
Mellette	376	387
Miner	514	614
Minnehaha	54,663	36,018
Moody	1,667	1,579
Oglala Lakota	2,523	582
Pennington	32,991	23,367
Perkins	616	1,020
Potter	530	825
Roberts	2,297	1,916
Sanborn	535	620
Spink	1,349	1,724
Stanley	788	849
Sully	402	526
Todd	1,906	562
Tripp	999	1,651
Turner	1,975	2,512
Union	5,090	3,609
Walworth	1,032	1,478
Yankton	5,839	4,870
Ziebach	522	366
Total	**225,260**	**190,477**

	Constitutional Amendment B: An Amendment to the South Dakota Constitution authorizing the Legislature to allow sports wagering in Deadwood.	
County	Yes	No
Aurora	637	735
Beadle	3,627	3,251
Bennett	644	504
Bon Homme	1,456	1,426
Brookings	8,062	6,044
Brown	9,914	7,138
Brule	1,291	1,137
Buffalo	297	221
Butte	2,589	2,141
Campbell	411	419
Charles Mix	1,867	1,832
Clark	889	890
Clay	3,422	2,077
Codington	7,060	5,595
Corson	623	612
Custer	2,893	2,477
Davison	4,669	3,625
Day	1,491	1,374
Deuel	1,127	1,154
Dewey	1,124	765
Douglas	653	988
Edmunds	1,037	889
Fall River	2,224	1,696
Faulk	562	583
Grant	1,857	1,758
Gregory	1,031	1,158
Haakon	491	620
Hamlin	1,254	1,759
Hand	838	950
Hanson	1,194	1,062
Harding	423	367
Hughes	5,010	3,630
Hutchinson	1,714	1,947
Hyde	352	333
Jackson	581	505
Jerauld	477	499
Jones	265	320
Kingsbury	1,345	1,350
Lake	3,243	2,518
Lawrence	8,484	5,139
Lincoln	19,848	11,668
Lyman	938	633
Marshall	1,136	977
McCook	1,566	1,273
McPherson	538	730
Meade	8,092	5,280
Mellette	419	340
Miner	553	561
Minnehaha	55,388	33,472
Moody	1,845	1,310
Oglala Lakota	2,106	974
Pennington	33,966	21,609
Perkins	754	875
Potter	709	643
Roberts	2,217	1,955
Sanborn	629	516
Spink	1,648	1,414
Stanley	1,016	623
Sully	520	402
Todd	1,610	822
Tripp	1,332	1,315
Turner	2,409	2,035
Union	5,653	2,944
Walworth	1,269	1,228
Yankton	5,827	4,730
Ziebach	506	374
Total	**239,620**	**170,191**

	Initiated Measure 26: An initiated measure to legalize marijuana for medical use.	
County	Yes	No
Aurora	793	598
Beadle	4,577	2,409
Bennett	786	374
Bon Homme	1,749	1,180
Brookings	10,454	3,947
Brown	12,442	4,952
Brule	1,624	835
Buffalo	403	123
Butte	2,888	1,875
Campbell	466	381
Charles Mix	2,317	1,426
Clark	1,157	662
Clay	4,466	1,180
Codington	9,000	4,029
Corson	800	445
Custer	3,464	1,970
Davison	5,563	2,818
Day	1,916	998
Deuel	1,402	913
Dewey	1,431	489
Douglas	734	926
Edmunds	1,213	746
Fall River	2,472	1,385
Faulk	648	515
Grant	2,416	1,277
Gregory	1,260	961
Haakon	494	628
Hamlin	1,665	1,388
Hand	991	829
Hanson	1,480	824
Harding	361	433
Hughes	5,802	2,922
Hutchinson	1,977	1,770
Hyde	400	298
Jackson	635	464
Jerauld	589	404
Jones	324	269
Kingsbury	1,748	990
Lake	4,058	1,792
Lawrence	9,712	4,077
Lincoln	23,476	8,718
Lyman	1,070	519
Marshall	1,591	570
McCook	1,862	1,009
McPherson	672	619
Meade	8,952	4,571
Mellette	496	269
Miner	741	387
Minnehaha	69,052	22,036
Moody	2,734	973
Oglala Lakota	2,668	443
Pennington	40,732	15,813
Perkins	840	803
Potter	773	602
Roberts	3,035	1,202
Sanborn	751	417
Spink	1,956	1,147
Stanley	1,097	550
Sully	536	388
Todd	2,063	410
Tripp	1,472	1,194
Turner	2,939	1,571
Union	6,483	2,244
Walworth	1,432	1,095
Yankton	7,539	3,216
Ziebach	615	275
Total	**291,754**	**125,488**

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, and COLONEL RICK MILLER, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL, Plaintiffs, v. STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants.	32CIV20-000187 **PLAINTIFFS' JOINT STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to SDCL 15-6-56(c), Plaintiffs hereby submit this Joint Statement of Undisputed Material Facts in support of their Joint Motion for Summary Judgment. These facts are based upon the evidence in the record, along with the pleadings on file in this matter. These undisputed facts establish that Plaintiffs are entitled to judgment as a matter of law.

1. Kevin Thom is an individual who resides in Pennington County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on

Filed: 12/23/2020 5:56 PM CST Hughes County, South Dakota 32CIV20-000187

Amendment A in the South Dakota general election held on November 3, 2020. (Compl., ¶ 1.)

2. Kevin Thom is the duly elected Sheriff of Pennington County, South Dakota. (Compl., ¶ 1.)

3. Rick Miller is an individual who resides in Hughes County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Compl., ¶ 2.)

4. Rick Miller is the duly appointed superintendent of the South Dakota Highway Patrol. (Compl., ¶ 2.)

5. South Dakotans for Better Marijuana Laws ("SDBML") is a statewide ballot question committee based on Sioux Falls, South Dakota. (Motion to Intervene, ¶ 1).

6. Randolph Seiler is an individual who resides in Stanley County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Motion to Intervene, ¶ 2).

7. William Stocker is an individual who resides in Minnehaha County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Motion to Intervene, ¶ 3).

8. Charles Parkinson is an individual who resides in Pennington County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Motion to Intervene, ¶ 4).

Filed: 12/23/2020 5:56 PM CST Hughes County, South Dakota 32CIV20-000187

9. Melissa Mentele is an individual who resides in Hanson County South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Motion to Intervene, ¶ 5).

10. Brendan Johnson was the prime sponsor of an initiated constitutional amendment that came to be known as "Amendment A." (Compl., ¶ 8; McCaulley Aff., Ex. A).

11. In May 2019, Johnson submitted a version of Amendment A to the Director of the Legislative Research Council as required by SDCL 12-13-25. (McCaulley Aff., Ex. A).

12. On May 30, 2019, Jason Hancock, Director of the Legislative Research Council, provided written comments on the initiated constitutional amendment to Johnson, the Attorney General, and the Secretary of State. (McCaulley Aff., Ex. A)

13. On August 16, 2019, the Attorney General delivered the Attorney General's Statement and title of the initiated constitutional amendment to the Secretary of State. (McCaulley Aff., Ex. B).

14. On September 11, 2019, Johnson submitted the petition as it was to be circulated for Amendment A to the Secretary of State, which contained the full text of the initiated amendment, the date of the general election at which the amendment would be submitted, the title, and the Attorney General's Statement. (Compl., Ex. 1)

15. On January 6, 2020, the Secretary of State announced that the Petition received a sufficient number of signatures and validated it for placement on the 2020

Filed: 12/23/2020 5:56 PM CST Hughes County, South Dakota 32CIV20-000187

General Election Ballot with the designation "Constitutional Amendment A." (McCaulley Aff., Ex. D).

16. On May 11, 2020, the Attorney General delivered the Attorney General's Recitation for Constitutional Amendment A to the Secretary of State. (McCaulley Aff., Ex. C).

17. The Board of Canvassers conducted the official canvass and certified the election results on November 10, 2020. (Compl., Ex. 2).

18. According to the official canvass, Amendment A received 225,260 "Yes" votes and 190,477 "No" votes. (Compl., Ex. 2).

19. South Dakota voters have never before ratified an initiated constitutional amendment that added a new article to the Constitution. (McCaulley Aff., Ex. E).

Dated this 23rd day of December, 2020.

REDSTONE LAW FIRM LLP

/s/ Lisa M. Prostrollo

Matthew S. McCaulley
Lisa M. Prostrollo
Christopher D. Sommers
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
(605) 331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Plaintiff Rick Miller

Filed: 12/23/2020 5:56 PM CST Hughes County, South Dakota 32CIV20-000187

Dated this 23rd day of December, 2020.

MORRIS LAW FIRM, PROF. LLC



Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717
(605) 723-7777
bobmorris@westriverlaw.com
Attorneys for Plaintiff Kevin Thom

App. 61
Filed: 12/23/2020 5:56 PM CST Hughes County, South Dakota 32CIV20-000187

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	32CIV20-000186 **AFFIDAVIT OF MATTHEW S. MCCAULLEY**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

I, Matthew S. McCaulley, being first duly sworn on oath, deposes and states:

1. I am one of the attorneys for Contestant Rick Miller.

2. This Affidavit is submitted in support of Contestants' Joint Brief in Support of Motion for Summary Judgment.

3. Attached hereto as Exhibit A is a true and correct copy of the letter and comments regarding the proposed draft of Amendment A by the Legislative Research Council and filed with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

4. Attached hereto as Exhibit B is a true and correct copy of the Attorney General's Statement and cover letter submitted by the Attorney General's Office and filed

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

5. Attached hereto as Exhibit C is a true and correct copy of the Attorney General's Recitation and cover letter submitted by the Attorney General's Office and filed with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

6. Attached hereto as Exhibit D is a true and correct copy of the Press Release dated January 6, 2020 by the Secretary of State announcing the certification of Amendment A to be placed on the general election ballot. This document was obtained from the South Dakota Secretary of State's website.

7. Attached hereto as Exhibit E is a summary of proposed changes to the South Dakota Constitution from 1889 to 2018, including the title of the proposed changes, the vote totals for each proposed change, and the sources of the proposed changes. Affiant further states that to the best of his knowledge, Exhibit E is an accurate and complete representation of every proposed constitutional change submitted to South Dakota voters. Affiant further states that Exhibit E was prepared with the assistance of staff at Redstone Law Firm LLP using information available in the public records provided by the South Dakota Secretary of State, that such information is generally known within South Dakota, and that such information can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

Dated this 23rd day of December, 2020.

Matthew S. McCaulley

Subscribed and sworn to before me this 23rd day of December, 2020.

DIANE M. BURNS NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Diane M. Burns

Notary Public – State of South Dakota
My Commission Expires: 2-1-25

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

RECEIVED
MAY 30 2019
S.D. SEC. OF STATE

REPRESENTATIVE STEVEN G. HAUGAARD, CHAIR | SENATOR BROCK L. GREENFIELD, VICE CHAIR
JASON HANCOCK, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | DOUG DECKER, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV

SOUTH DAKOTA
LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

May 30, 2019

Mr. Brendan Johnson
Robins Kaplan LLP
140 North Phillips Ave., Ste 307
Sioux Falls, SD 57104

Dear Mr. Johnson:

This office is required by SDCL section 12-13-24 to review each initiated constitutional amendment for the purpose of determining whether the amendment is written in a clear and coherent manner that reflects the style and form of other legislation and for the purpose of ensuring that the amendment is not misleading or likely to cause confusion among the voters. In accordance with SDCL section 12-13-25, this office is required to provide written comments for the purpose of assisting the amendment's sponsor in meeting the requirements of SDCL section 12-13-24. This includes providing assistance regarding the substantive content of the measure in order to minimize any conflict with existing law and to ensure the amendment's effective administration. While there is no obligation to accept any of the suggestions contained in this letter, you are asked to keep in mind the legal standards established in sections 12-13-24 and 12-13-25.

As submitted, this constitutional amendment proposes to decriminalize small amounts of marijuana for one's personal use and rather than directing the Legislature to affect this outcome, it creates a statutory-type structure that it seeks to incorporate into the Constitution of this state. The purpose of a constitution is to provide a basic structure within which a government can function. The Constitution prescribes and limits the powers to be exercised by that government and sets forth the rights of the governed. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material. Therefore, this office recommends that the proposed measure be re-written so that it would amend the South Dakota Codified Laws, rather than the South Dakota Constitution. In the event that this recommendation is not accepted, there are a number of changes that this office encourages the sponsors to consider. The section numbers in our comments are based on the revised number we have provided.

As submitted, the amendment contained a section setting forth its title and a section setting forth its purpose. Both have been removed. SDCL section 12-13-25.1 requires the attorney general to prepare an accompanying "statement that consists of a title and explanation."

All catch lines to sections have been removed as that will be added by the code counsel if the amendment is approved.

SECTION 1

The Department of Revenue is not the best state agency to administer and regulate every aspect of activities encompassed by this amendment. The definition of "Department" has been broadened to allow the Legislature to match functions to state departments with the best mission fit.

EXHIBIT
A

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

SECTION 2

In section 2, the proposed language stated that the amendment "does not authorize" various activities. That language was found to be nebulous, in that it does not clearly prohibit the activities. The language has been changed to address this.

Section 2 includes various activities that are already addressed in state code, but uses language that is not consistent with the SDCL. SDCL section 42-8-45, for instance, prohibits the "operation" of a boat while one is under the influence of marijuana. This would be sufficient to include the prohibition on "navigation," as set forth in the measure. Likewise, the state code prohibits possession in, on, or within one thousand feet of a public or private elementary or secondary school or playground and within five hundred feet of a public or private youth center, public swimming pool, or video arcade. The proposed language would appear to prohibit possession or consumption only on the grounds of schools. This inconsistency with existing statutes could cause confusion. Reconciliation with the state code is encouraged.

Of greater concern is the reiteration of existing statutes. Operating a motor vehicle or a boat while under the influence of marijuana is already a statutorily prohibited activity. If the prohibition is the same, there is no need to have it repeated in the Constitution.

SECTION 4

In section 4, the proposed language articulates certain activities that are "not unlawful." It is not necessary to further indicate that those activities are therefore not offenses, not subject to penalties, and not to be used as the basis for judicial action.

Section 4 provides that it is not unlawful for a person to possess, plant, cultivate, harvest, dry, process, or manufacture not more than three marijuana plants. The reference to manufacturing is appropriate in the case of a pharmaceutical. Applying the term to a living plant is not appropriate verbiage use.

SECTION 5

As proposed, section 5 referenced civil infractions and proposed specific fines for various activities that would constitute such infractions. The phrase "civil infraction" is not, however, found in either the Constitution or the state code. The more widely accepted phrase is "civil penalty." Penalties rightfully belong in the state code, where the Legislature can appropriately make adjustments as inflation and circumstances require. Rather than including specific dollar amounts, it would be preferable to reference "civil penalty, as provided by law."

SECTION 6

As proposed, section 6 provided the Legislature with the authority to implement this amendment, provided such legislation is consistent with the intent and purposes of this measure and its stated requirements. This language has been removed. The Legislature is already constitutionally empowered to enact legislation, and is already required to legislate within the bounds of the Constitution.

SECTION 7

Section 7 enumerates the rules that the department is to promulgate. Among those are rules setting the application, licensing, and renewal fees. The language provides that any fees collected must go to the department to cover the cost of implementing and enforcing the article. Where fees are to go is not an appropriate concept for inclusion in a list of rules to be promulgated. Moreover, section 11 already provides for the department to receive revenues from the marijuana tax to cover costs it incurs in carrying out its duties under the article. The provision for reimbursement of costs was left in section 11 but removed from section 7.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

SECTION 8

Section 8 addresses the appropriate number of licenses and directs the department to issue "enough licenses to substantially reduce the illicit production and sale of marijuana" and to limit "the number of licenses . . . to prevent an undue concentration of licenses in any one community." Because terms such as "substantially" and "undue" are nebulous, it is suggested that language be inserted to either define their parameters or indicate that the determinations regarding what constitutes substantial or undue will be established by law.

The language of this section, as submitted, also referenced "communities." This is not a universally understood term. Therefore, it has been replaced by the term "municipality."

SECTION 11

As proposed, section 11 referenced marijuana sold by a "person or entity." The use of the term "person" in statutory drafting encompasses "non-natural" persons – i.e. "entities."

Section 11 proposes the imposition of a tax and its disbursement. In order to avoid any misconception regarding responsibility for the disbursal, it is recommended that the language include a reference to the legislative appropriations process.

SECTION 12

As proposed, section 12 contained language regarding the appeal of decisions made by the department. This has been removed. The procedures are already articulated in SDCL chapter 1-26.

SECTION 14

This section proposes to have the Legislature pass "medical marijuana" on or before November 3, 2021. If enacted this measure would not become effective until July 1, 2021. If the Legislature was unable to affect such a program during the forty day period of the 2021 session, this would trigger a special session and the expenditure of additional funds. In order to ensure that the Legislature has sufficient time to craft a viable program as envisioned, it is recommended that the November 3, 2021, date be extended to at least April 1, 2022, which would represent the approximate conclusion of the 2022 session. This same date has been changed in sections 7 and 12 to match section 14.

CONCLUDING SECTIONS

As proposed, the amendment concluded with several separately numbered and titled sections. The section entitled "Severability" has been removed. South Dakota courts have long recognized the doctrine of severability, also known as the doctrine of separability, and therefore the language is not necessary.

The section entitled "Effective" has likewise been removed. SDCL section 2-1-12 provides that "[e]ach constitutional amendment, initiated measure, or referred law that is approved by a majority of all votes cast is effective on the first day of July after the completion of the official canvass by the State Canvassing Board."

The final section of the proposed amendment included directives in the event that conflicting proposals are enacted. This possibility has already been addressed in statute and is also unnecessary:

> **2-14-16.2** If two or more initiated measures or amendments to the Constitution are approved by the voters at the same election, each initiated measure or amendment shall be given effect, unless the initiated measures or amendments conflict or a contrary intent plainly appears. For purposes of any conflict or the determination of intent under this section, the initiated measure or amendment receiving the greatest number of affirmative votes at the election shall be given effect.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

As recognized at the beginning of this letter, this amendment proposes to decriminalize the possession of a limited amount of marijuana for personal use. In so doing, it raises questions about a variety of issues including current drug testing requirements that are imposed as a condition of child placement or return [*see,* SDCL section 26-8A-34] and the parameters of 24/7 sobriety programs [*see,* SDCL section 1-11-17.] The Legislature or the Judiciary will have to address these, should the amendment pass. It should also be noted that the possession of marijuana would still be a crime under federal law.

Against this backdrop, we have prepared and attached a copy of the proposed amendment with our suggested form and style changes. Should you have any questions about these changes, or about the additional recommendations made in this letter, please feel free to contact this office.

It has been determined during this review that this proposed initiated amendment may have an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions. Please provide the Legislative Research Council a copy of the initiated amendment as submitted in final form to the Attorney General, so we can develop any fiscal note required by SDCL 2-9-30.

This letter constitutes neither an endorsement of the proposed amendment nor a guarantee of its sufficiency. It is a recognition that your responsibility to submit your draft to this office for review and comment, as required by SDCL section 12-13-25, has been fulfilled. If you proceed with your initiated amendment, please ensure neither your statements nor any advertising imply that this office has endorsed or approved the measure.

Sincerely,

Jason Hancock
Director

JH/DO/ct

Enclosure

CC: The Honorable Steve Barnett, Secretary of State
The Honorable Jason Ravsnborg, Attorney General

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

Brendan Johnson

RECEIVED
MAY 30 2019
S.D. SEC. OF STATE

~~Section 1. This Amendment shall be known as the Marijuana Legalization, Regulation, and Taxation Amendment.~~

~~Section 2. The purpose of this Amendment is to make marijuana legal under state and local law for adults twenty-one (21) years of age or older, and to control the commercial production and distribution of marijuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of limited amounts of marijuana by adults twenty-one (21) years of age or older; remove the commercial production and distribution of marijuana from the illicit market; prevent revenue generated from commerce in marijuana from going to criminal enterprises or gangs; prevent the distribution of marijuana to persons under twenty-one (21) years of age; prevent the diversion of marijuana to illicit markets; ensure the safety of marijuana and products containing marijuana; and ensure security of marijuana businesses. To the fullest extent possible, this Amendment shall be interpreted in accordance with the purpose and intent set forth in this section.~~

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

§ 1. ~~Definitions. As~~ Terms used in this ~~Article~~ article mean:

~~(a)~~ (1) "Department," ~~means the Department of Revenue or its successor agency.~~ a state governmental entity charged by the Legislature with carrying out the provisions of this article;

~~(b)~~ (2) "Hemp," ~~means~~ the plant of the genus cannabis, and any part of that plant, including the seeds ~~thereof~~, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent ~~(0.3%)~~ on a dry weight basis~~.~~;

~~(c)~~ (3) "Local ~~Government~~ government," ~~means~~ a county, municipality, town, or township~~.~~;

~~(d)~~ (4) "Marijuana," ~~means all parts of~~ the plant of the genus cannabis, and any part of that plant, including the seeds ~~thereof~~, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate~~, and includes~~. The term includes an altered state of marijuana absorbed into the human body. ~~"Marijuana" does~~ The term does not include hemp~~, nor does it include~~ or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products~~.~~;

~~(e)~~ (5) "Marijuana ~~accessories~~ accessory," ~~means~~ any equipment, product, or material, ~~or combination of equipment, products, or materials,~~ which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

§2. ~~Limitations~~

~~(a) This Article does not authorize~~ Notwithstanding the provisions of this article, no person may:

~~(1) Delivery or distribution of~~

(1) Deliver or distribute marijuana or marijuana accessories~~, with or without consideration,~~ to a person younger than twenty-one ~~(21) years of age.~~;

~~(2) A person younger than twenty-one (21) years of age to purchase~~

(2) Purchase, possess, use, or transport marijuana or marijuana accessories, ~~or to consume~~ unless the person is at least twenty-one;

(3) Consume marijuana~~.~~, unless the person is at least twenty-one;

~~(3) Operating, navigating, or being~~

(4) Operate or be in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana~~.~~;

~~(4) Consuming~~

(5) Consume marijuana while operating~~, navigating,~~ or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport~~, or smoking.~~;

(6) Smoke marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is ~~operating, being~~ operated;

~~(5) Possessing or consuming marijuana or possessing~~

(7) Possess or consume marijuana or possess marijuana accessories on the grounds of a public or private preschool, elementary school, or high school ~~where children attend classes in preschool programs, kindergarten programs, or grades 1 through 12,~~ in a school bus, or on the grounds of any correctional facility~~.~~;

~~(6) Smoking~~

(8) Smoke marijuana in a location where smoking tobacco is prohibited ~~or consuming.~~;

(9) Consume marijuana in a public place, other than in an area licensed by the ~~Department to allow~~ department for consumption ~~on the licensed premises.~~

~~(7) Undertaking;~~

(10) Undertake any task under the influence of marijuana ~~when~~, if doing so would constitute negligence or professional malpractice~~.~~; or

~~(8) Solvent based~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(11) Perform solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol ~~by a person not~~, unless licensed for this activity by the ~~Department~~ department.

~~(b)~~ §3. This ~~Article~~ article does not ~~require~~:

(1) Require that an employer ~~to~~ permit or accommodate conduct ~~otherwise~~ allowed by this ~~Article or to affect.~~ article;

(2) Affect an employer's ability to restrict the use of marijuana by employees~~.~~;

~~(c) This Article does not prohibit~~

(3) Limit the right of a person ~~or entity~~ who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct ~~permitting~~ permitted by this ~~Article~~ article on or in that property~~.~~; or

~~(d) This Article does not limit~~

(4) Limit the ability of ~~a~~ the state or a local government ~~agency~~ to prohibit or restrict ~~actions or~~ any conduct otherwise permitted under this ~~Article~~ article within a building owned, leased, or occupied by the state or the local government ~~agency~~.

~~§3. Lawful Personal Use of Marijuana~~

§4. ~~(a) Except as subject~~ Subject to the limitations in ~~§2 of~~ this ~~Article~~ article, the following acts are not unlawful ~~and shall not be an offense under South Dakota law or the laws of any local government within South Dakota or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under South Dakota law or the laws of any local government for persons~~, if the person is at least twenty-one ~~(21)~~ ~~years of age or older~~:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ~~(1)~~ ounce or less of marijuana, except that not more than eight ~~(8)~~ grams of marijuana may be in a concentrated form~~.~~;

(2) Possessing, planting, cultivating, harvesting, drying, or processing~~, or manufacturing~~ not more than three ~~(3)~~ marijuana plants ~~for the person's own personal use~~, and possessing the marijuana produced by the plants, provided ~~that~~:

~~(A)~~ (a) The plants and any marijuana produced by the plants in excess of one ~~(1)~~ ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place; and

~~(B)~~ (b) Not more than six ~~(6)~~ plants ~~may be~~ are kept in or on the grounds of a private residence at one time~~.~~;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(3) Assisting another person who is at least twenty-one ~~(21)~~ years of age ~~or older~~, or allowing property to be used, in any of the acts permitted by ~~subsection (a)(1) or (a)(2).~~ this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one ~~(21)~~ years of age or older marijuana accessories.

~~(b)~~ § 5. ~~The penalty for:~~

(1) A person who, pursuant to § 4 of this article, cultivates plants ~~pursuant to subsection (a)(2)~~ that are visible by normal, unaided vision from a public place ~~shall be guilty of not more than a civil infraction punishable by fine of not more than a two hundred~~ is subject to a civil penalty not exceeding two hundred and fifty dollars ~~($250)~~.

(2) A person who, pursuant to § 4 of this article, cultivates plants ~~pursuant to subsection (a)(2)~~ that are not kept in a locked space ~~shall be guilty of not more than a civil infraction punishable by fine of not more than a two hundred~~ is subject to a civil penalty not exceeding two hundred and fifty dollars ~~($250)~~.

(3) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the ~~Department, shall be guilty of not more than a civil infraction punishable by fine of not more than a~~ department, is subject to a civil penalty not exceeding one hundred dollars ~~($100)~~.

(4) A person ~~twenty (20)~~ who is under twenty-one years of age ~~or younger who~~ and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ~~(1)~~ ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories ~~shall be guilty of not more than a civil infraction with a fine of not more than one hundred~~ is subject to a civil penalty not exceeding one hundred dollars ~~($100.00)~~. The person shall be provided the option of attending up to four ~~(4)~~ hours of drug education or counseling in lieu of the fine.

~~§ 4.~~ § 6. ~~Regulation and Control of Marijuana~~

~~(a) The Legislature may enact legislation to implement this Article provided that the legislation is consistent with the intents and purposes of the Marijuana Legalization, Regulation, and Taxation Amendment and with the requirements set forth in this Article.~~

~~(b)~~ The ~~Department~~ department shall have the exclusive power, except as ~~herein~~ otherwise provided, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the ~~State of South Dakota~~ state and to administer and enforce this ~~Article~~ article.

~~(c)~~ The ~~Department~~ department shall accept applications for and issue ~~the following licenses,~~ in addition to any other types of licenses the ~~Department~~ department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana~~.~~;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

~~(d)~~ § 7. Not later than ~~November 3, 2021~~ April 1, 2022, the ~~Department~~ department shall ~~issue regulations~~ promulgate rules necessary for the implementation and enforcement of this ~~Article~~ article. ~~Such regulations~~ The rules shall ~~be reasonable and shall~~ include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses~~.~~;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the ~~Department~~ department of implementing and enforcing this ~~Article. The fees collected shall go to the Department to cover the cost of implementing and enforcing this Article.~~ article;

(3) Time periods, not to exceed ~~90~~ ninety days, by which the ~~Department~~ department must issue or deny an application~~.~~;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed~~.~~;

(12) Requirements to prevent the sale and diversion of marijuana to persons under the age of twenty-one ~~(21)~~ years~~.~~; and

(13) Civil penalties for the failure to comply with ~~regulations~~ rules adopted pursuant to this ~~Article~~ article.

~~(e)~~ § 8. In determining the appropriate number of licenses to issue, as required under this article, the ~~Department~~ department shall:

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the ~~State of South Dakota~~ state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one ~~community~~ municipality.

~~§ 5.~~ § 9. ~~Protections~~

~~(a)~~ Actions and conduct by a licensee, ~~its employees~~ a licensee's employee, and ~~its agents~~ a licensee's agent, as permitted pursuant to a ~~valid~~ license issued by the ~~Department~~ department, or by those who allow property to be used by a licensee, ~~its employees, and its agents~~ a licensee's employee, or a licensee's agent, as permitted pursuant to a ~~valid~~ license issued by the ~~Department~~ department, are not unlawful ~~and shall not be an offense under South Dakota law, or the laws of any local government within South Dakota, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under South Dakota law, or the laws of any local government within South Dakota~~.

~~(b)~~ No contract ~~shall be~~ is unenforceable on the basis that marijuana is prohibited by federal law.

~~(c)~~ A holder of a professional or occupational license ~~shall~~ is not ~~be~~ subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

~~§6.~~ § 10. ~~Local Governments~~

~~A local government may:~~

~~(a) Enact~~ A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction.

~~(b) Ban~~ A local government may ban the establishment of licensees or any category of licensee within its jurisdiction.

~~(c) Not~~ A local government may not prohibit the ~~transporting~~ transportation of marijuana through its jurisdiction on ~~the~~ public roads by ~~persons or entity~~ any person licensed to do so by the ~~Department~~ department.

~~§7.~~ §11. ~~Marijuana Tax~~

An excise tax of fifteen ~~(15)~~ percent ~~shall be~~ is imposed upon the gross receipts of all sales of marijuana sold by a person ~~or entity~~ licensed by the ~~Department~~ department pursuant to this ~~Article~~ article to a consumer. The Legislature ~~is authorized to~~ may adjust this rate after November 3, 2024.

The ~~Department~~ department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The ~~tax~~ revenue ~~shall~~ collected under this section shall be ~~disbursed~~ appropriated to the ~~Department~~ department to cover ~~reasonable~~ costs incurred by the ~~Department for~~ department in carrying out its duties under this ~~Article~~ article. ~~The remainder of the~~ Fifty percent of the remaining

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

revenue ~~collected~~ shall be ~~disbursed in equal portions to~~ appropriated by the Legislature for the support of South Dakota public schools and ~~to~~ the remainder shall be deposited into the state general fund.

~~§8.~~ §12. ~~Procedure~~

~~(a)~~ ~~All regulations~~ Any rule adopted by the ~~Department~~ department pursuant to this ~~Article~~ article must comply with ~~the South Dakota Administrative Procedure Act, S.D. § 1-26-2.1.~~ chapter 1-26 of the South Dakota Codified Laws.

~~(b) The Department shall establish a procedure for those persons and parties affected by decisions of the Department to protest and appeal those decisions. Any person or party affected by a final decision of the Department may commence a mandamus action in circuit court.~~

Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws.

~~(c)~~ If by April 1, 2022, the ~~Department~~ department fails to ~~adopt regulations to implement~~ promulgate rules required by this ~~Article by November 3, 2021~~ article, or if the department adopts ~~regulations~~ rules that are ~~unreasonable or that are not consistent~~ inconsistent with this ~~Article~~ article, any ~~citizen~~ resident of the state may commence a mandamus action in circuit court to compel ~~the Department to perform the actions mandated by~~ performance by the department in accordance with this ~~Article~~ article.

~~§9.~~ §13. ~~Annual Statement~~

The ~~Department~~ department shall ~~submit~~ publish an annual report ~~to the Governor that shall be made available to the public and shall include~~ that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement ~~and~~ or disciplinary ~~actions~~ action taken against licensees, a statement of revenues and expenses of the ~~Department~~ department related to the implementation, administration, and enforcement of this ~~Article, and~~ article, a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

~~§10.~~ §14. ~~Legislative Expansion~~

Not later than ~~November 3, 2021~~ April 1, 2022, the Legislature shall pass laws to:

~~(a)~~ (1) Ensure access to marijuana beyond what is set forth in this ~~Article by~~ article for persons who have been diagnosed by a ~~physician with~~ healthcare provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana~~.~~; and

~~(b)~~ (2) Regulate the cultivation, processing, and sale of hemp.

~~§11. Severability~~

~~This Article shall be broadly construed to accomplish its purposes and intents. Nothing in this Article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this Article or the application thereof to any person or circumstance is held invalid or unconstitutional,~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

~~such invalidity or unconstitutionality shall not affect other provisions or applications of the Article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this Article are severable.~~

~~§13. Effective~~

~~This Article is self-executing and shall take effect thirty (30) days after approval. Each provision shall be judiciable and enforceable by any circuit court.~~

~~Section 4. In the event that this measure and another initiated constitutional amendment concerning the legalization, control, regulation, or taxation of marijuana appear on the same statewide election ballot, the provisions of the other initiated constitutional amendment shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other initiated constitutional amendment shall be null and void.~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

HAND DELIVERED

August 16, 2019

Filed this 16th day of August 2019
Steve Barnett
SECRETARY OF STATE

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

Hon. Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

Re: **Attorney General's Statement for initiated constitutional amendment**

Dear Secretary Barnett,

This Office received a proposed initiated constitutional amendment that the sponsor may seek to place on the November 2020 ballot. Enclosed is a copy of the amendment, in final form, that the sponsor submitted pursuant to SDCL 12-13-25.1. In accordance with that statute, I hereby file the Attorney General's Statement for this amendment. By copy of this letter, I am providing the Attorney General's Statement to the sponsor as well.

Very truly yours,

JASON R. RAVNSBORG
Attorney General

JRR/lde

Enc.
cc/enc.: Brendan Johnson

EXHIBIT B

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

CONSTITUTIONAL AMENDMENT

ATTORNEY GENERAL'S STATEMENT

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

Title: An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.

Explanation:

This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.

The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.

The Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.

Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law.

Filed this 16th day of
August 2019
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

§ 1. Terms used in this article mean:

(1) "Department," the Department of Revenue or its successor agency;

(2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;

(3) "Local government," means a county, municipality, town, or township;

(4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;

(5) "Marijuana accessory," any equipment, product, material, which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

§2. Notwithstanding the provisions of this article, this article does not limit or affect laws that prohibit or otherwise regulate:

(1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;

(2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;

(3) Consumption of marijuana by a person younger than twenty-one years of age;

Filed this 16th day of
August 2019
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;

(5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;

(8) Smoking marijuana in a location where smoking tobacco is prohibited;

(9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;

(10) Consumption of marijuana as part of a criminal penalty or a diversion program;

(11) Conduct that endangers others;

(12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or

(13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

§3. Notwithstanding the provisions of this article, this article does not:

(1) Require that an employer permit or accommodate conduct allowed by this article;

(2) Affect an employer's ability to restrict the use of marijuana by employees;

(3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this article on or in that property; or

(4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this article within a building owned, leased, or occupied by the state or the local government.

§4. Subject to the limitations in this article, the following acts are not unlawful and shall not be an offense under state law or the laws of any local government within the state or be subject to a

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;

(2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided:

(a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;

(b) Not more than six plants are kept in or on the grounds of a private residence at one time; and

(c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this article.

(3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

§5.

(1) A person who, pursuant to §4 of this article, cultivates marijuana plants that are visible by normal, unaided vision from a public place is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(2) A person who, pursuant to §4 of this article, cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(3) A person who, pursuant to §4 of this article, cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store is subject to a civil penalty not exceeding two-hundred and fifty dollars, unless the

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

cultivation of marijuana plants is allowed through local ordinance or regulation pursuant to §10.

(4) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the department, is subject to a civil penalty not exceeding one-hundred dollars.

(5) A person who is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories is subject to a civil penalty not to exceed one-hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine.

§ 6. The department shall have the exclusive power, except as otherwise provided in § 10, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article. The department shall accept applications for and issue, in addition to any other types of licenses the department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

§ 7. Not later than April 1, 2022, the department shall promulgate rules and issue regulations necessary for the implementation and enforcement of this article. The rules shall be reasonable and shall include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this article;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;

(12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and

(13) Civil penalties for the failure to comply with rules adopted pursuant to this article.

§ 8. In determining the appropriate number of licenses to issue, as required under this article, the department shall:

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

§ 9. Actions and conduct by a licensee, a licensee's employee , and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and shall not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law. A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

§10. A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this article. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this article.

§11. An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana sold by a person licensed by the department pursuant to this article to a consumer. The Legislature may adjust this rate after November 3, 2024. The department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section shall be appropriated to the department to cover costs incurred by the department in carrying out its duties under this article. Fifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund.

§ 12. Any rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws. Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws. If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

§13. The department shall publish an annual report that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement or disciplinary action taken against licensees, a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this article, and a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

§14. Not later than April 1, 2022, the Legislature shall pass laws to:

(1) Ensure access to marijuana beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana; and

(2) Regulate the cultivation, processing, and sale of hemp.

§15. This article shall be broadly construed to accomplish its purposes and intents. Nothing in this article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this article or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

ATTORNEY GENERAL
2020 BALLOT "YES"/"NO" RECITATION
CONSTITUTIONAL AMENDMENT A

Vote "Yes" to adopt the amendment.

Vote "No" to leave the Constitution as it is.

RECEIVED
MAY 11 2020
S.D. SEC. OF STATE

Filed this 11th day of
May 2020
Steve Barnett
SECRETARY OF STATE

EXHIBIT
C

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

RECEIVED
MAY 11 2020
S.D. SEC. OF STATE

May 11, 2020

Hon. Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

Re: Attorney General's Yes/No recitations for Constitutional Amendment A and Initiated Measure 26

Dear Secretary Barnett:

Pursuant to SDCL 12-13-25.1, I hereby file the Attorney General's recitations of the effect of a "Yes" or "No" vote for the following measures certified to appear on the November general election ballot: Constitutional Amendment A and Initiated Measure 26.

Very truly yours,

Jason R. Ravnsborg
ATTORNEY GENERAL

JRR/lde

Enc.

Filed this 11th day of
May 2020
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

OFFICE OF THE SECRETARY OF STATE

STEVEN J. BARNETT, SECRETARY OF STATE
JASON LUTZ, DEPUTY SECRETARY OF STATE

PRESS RELEASE

FOR IMMEDIATE RELEASE

For further information, contact:
Secretary of State
Capitol Building
500 East Capitol Avenue, Ste. 204
Pierre, SD 57501-5070
605-773-3537

January 6, 2020

SECOND BALLOT QUESTION VALIDATED FOR 2020 GENERAL ELECTION

PIERRE – Secretary of State Steve Barnett announced a petition submitted for an amendment to the South Dakota Constitution was validated and filed by his office today. This ballot measure would legalize, regulate, and tax marijuana and require the Legislature to pass laws regarding hemp, including laws to ensure access to marijuana for medical use. The measure will be titled Constitutional Amendment A and will appear on the 2020 General Election ballot on November 3, 2020.

A constitutional amendment currently requires 33,921 valid signatures in order to qualify for the ballot. "As outlined in South Dakota Codified Law § 2-1-16, our office conducted a random sample of the petition signatures and found 68.74 percent to be valid," stated Secretary Barnett. Based on the results of the random sample, 36,707 signatures were deemed valid.

Upon the filing of a ballot measure, any citizen may challenge the Secretary of State's validation of the measure under South Dakota Codified Law § 2-1-17.1. Citizens challenging the validation shall submit an original, signed affidavit to the Office of the Secretary of State no more than 30 days after validation. Electronic submissions of affidavits will not be accepted. For this measure, the deadline to file a challenge is Wednesday, February 5, 2020 at 5:00 p.m. central time.

EXHIBIT D

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000130

This measure was the final ballot question submitted by the November 4, 2019 deadline. The South Dakota Legislature has the ability to include constitutional amendments on the 2020 Ballot and South Dakota citizens have the ability to submit a referendum petition concerning laws passed during the 2020 Legislative Session.

Detailed information on specific 2020 Ballot Questions may be found on the Secretary of State's website at https://sdsos.gov/elections-voting/upcoming-elections/general-information/2020-ballot-questions.aspx.

-30-

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1889	Minority Representation	24,161	34.34%	46,200	65.66%	Fail	1889 Constitutional Convention
1889	**Prohibition**	**40,234**	**53.83%**	**34,510**	**46.17%**	**Pass**	**1889 Constitutional Convention**
1890	Limiting State Debt	16,787	23.73%	50,742	76.27%	Fail	HB 295 (1890)
1890	Woman suffrage	22,972	33.46%	45,682	66.54%	Fail	HB 9 (1890)
1890	Restrict Indian voting	29,053	43.10%	38,382	56.90%	Fail	HJR 352 (1890)
1892	Legislators' mileage allowance	39,364	77.79%	11,236	22.21%	Pass	HB 81 (1891)
1894	Superintendent of Schools' term	11,241	28.86%	27,705	71.14%	Fail	HJR 71 (1893)
1894	Woman suffrage in school elections	17,010	42.85%	22,682	57.15%	Fail	SJR 52 (1893)
1894	Homesteads exempt from court orders	10,733	26.80%	29,315	73.20%	Fail	SJR 258 (1893)
1896	Increase local debt limit	28,490	65.83%	14,789	34.17%	Pass	SJR 5 (1895)
1896	Abolish Regents' Board of Trustees	31,061	72.66%	11,690	27.34%	Pass	SJR 11 (1895)
1896	Render monopolies illegal	36,763	80.10%	9,136	19.90%	Pass	SJR 14 (1895)
1898	Repeal prohibition	31,901	56.15%	24,910	43.85%	Pass	HJR 7 (1895)
1898	Woman suffrage	19,698	46.15%	22,983	53.85%	Fail	SJR 5 (1897)
1898	**State control of liquor**	**22,170**	**51.89%**	**20,557**	**48.11%**	**Pass**	**SJR 16 (1897)**
1898	Initiative and referendum	23,816	59.10%	16,483	40.90%	Pass	HJR 101 (1897)
1900	**Investment of school funds by counties**	**49,989**	**76.15%**	**15,653**	**23.85%**	**Pass**	**HJR 13 (1899)**
1900	Repeal state control of liquor	48,673	58.93%	33,927	41.07%	Pass	HJR 18 (1899)
1902	County seat relocation	36,436	71.38%	14,612	28.62%	Pass	SJR 13 (1901)
1902	Lower interest rate on school funds	46,472	83.77%	9,001	16.23%	Pass	HJR 2 (1901)
1902	Increase municipal debt for street railways and lighting	32,810	70.70%	13,599	29.30%	Pass	HJR 8 (1901)
1904	Attorney general's salary	32,328	42.37%	43,974	57.63%	Fail	HJR 3 (1903)
1904	Move state capitol to Mitchell	41,155	41.25%	58,617	58.75%	Fail	SJR 1 (1903)
1904	Investment of school money	38,681	64.36%	21,424	35.64%	Pass	HJR 1 (1903)
1906	Qualifications for Superintendent of Schools	35,808	69.16%	15,971	30.85%	Pass	HJR 7 (1905)
1906	Municipal courts in larger cities	29,417	61.07%	18,755	38.93%	Pass	HJR 11 (1905)
1906	Assessments for agricultural drainage	31,151	62.36%	18,799	37.64%	Pass	HJR 8 (1905)
1906	Twine plant at Penitentiary	33,285	62.59%	19,895	37.41%	Pass	SJR 12 (1905)
1908	Revise taxation articles	34,915	42.25%	47,732	57.75%	Fail	SJR 3 (1907)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.



Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1908	Attorney general's salary	43,908	45.57%	52,437	54.43%	Fail	SJR 22 (1907)
1910	School land use	48,152	52.13%	44,220	47.87%	Pass	HJR 6 (1909)
1910	Attorney general's salary	35,932	40.68%	52,397	59.32%	Fail	HJR 3 (1909)
1910	Woman suffrage	35,290	37.95%	57,709	62.05%	Fail	HJR 31 (1909)
1910	Add to debt for school construction	32,613	38.43%	52,243	61.57%	Fail	HJR 36 (1909)
1910	Change state tax structure	29,830	36.04%	52,943	63.96%	Fail	HJR 11 (1909)
1910	People must approve new institutions	36,128	43.14%	47,625	56.86%	Fail	HJR 33 (1909)
1912	Uniform taxation of corporations	70,686	69.44%	31,110	30.56%	Pass	HJR 12 (1911)
1914	Lengthen legislative term to four years	29,748	39.77%	45,051	60.23%	Fail	HJR 2 (1913)
1914	Call constitutional convention	34,832	40.31%	51,585	59.69%	Fail	SJR 5 (1913)
1914	Reduce interest on purchase of school lands	45,554	56.48%	35,102	43.52%	Pass	HJR 6 (1913)
1914	Superintendent of Schools' term	32,092	41.24%	45,733	58.76%	Fail	HJR 21 (1913)
1914	Initiative and referendum in municipalities	28,226	39.54%	43,162	60.46%	Fail	HJR 22 (1913)
1914	Changes in State Institutional Boards	29,601	40.16%	44,107	59.84%	Fail	SJR 22 (1913)
1914	Woman suffrage	39,605	43.46%	51,519	56.54%	Fail	SJR 3 (1913)
1914	Disqualification of Supreme Court judges	38,317	49.84%	36,543	50.16%	Fail	SJR 21 (1913)
1914	State control and promotion of irrigation	32,958	44.89%	40,457	55.11%	Fail	SJR 10 (1913)
1916	State construction and maintenance of irrigation	58,775	57.06%	44,238	42.94%	Pass	HJR 3 (1915)
1916	Increase certain state salaries	39,169	39.02%	61,223	60.98%	Fail	SJR 2 (1915)
1916	Prohibition	65,334	55.03%	53,380	44.97%	Pass	SJR 5 (1915)
1916	Abolish five-year lease limit on school lands	41,379	40.10%	61,798	59.90%	Fail	HJR 10 (1915)
1916	Allow rural credits system on real estate security	57,589	57.84%	41,957	42.16%	Pass	HJR 15 (1915)
1916	Woman suffrage	53,432	47.80%	58,350	52.20%	Fail	HJR 17 (1915)
1916	Change state revenue and finance structure	43,793	44.07%	55,568	55.93%	Fail	HJR 8 (1915)
1916	Change number of members in constitutional convention	35,377	38.53%	56,432	61.47%	Fail	SJR 6 (1915)
1916	Allow state to supply coal and build and maintain roads	75,922	69.37%	33,521	30.63%	Pass	SJR 2 (1916)
1918	Replacement of disqualified Supreme Court judges	41,646	62.70%	24,778	37.30%	Pass	HJR 11 (1917)
1918	Woman suffrage	49,318	63.02%	28,934	36.98%	Pass	SJR 4 (1917), SJR 7 (1918)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1918	Reduce down payment on sale of school lands	45,809	67.70%	21,855	32.30%	Pass	HJR 14 (1917)
1918	Graduated individual income tax	50,970	67.05%	25,047	32.95%	Pass	HJR 15 (1917)
1918	Allow state works of internal improvement	42,097	63.28%	24,424	36.72%	Pass	HJR 9 (1917)
1918	Allow state to go in debt for state development	34,821	55.53%	27,886	44.47%	Pass	SJR 16 (1917), SJR 6 (1918)
1918	Allow state to develop and supply water power	41,658	63.04%	24,429	36.96%	Pass	SJR 3 (1917), SJR 4 (1918)
1918	Allow state to manufacture and sell cement	38,108	59.72%	25,702	40.28%	Pass	SJR 5 (1917), SJR 3 (1918)
1918	Increase certain state salaries	26,784	38.50%	42,779	61.50%	Fail	HJR 6 (1917)
1918	Allow state to enter hail insurance business	41,162	61.38%	25,896	38.62%	Pass	HJR 13 (1917)
1918	**Allow state to build and operate grain elevators and warehouses and enter flour and meat-packing business**	**41,292**	**61.78%**	**25,545**	**38.22%**	**Pass**	**SJR 15 (1917)**
1918	Allow state to mine and sell coal	40,632	61.05%	25,922	38.95%	Pass	SJR 5 (1918)
1920	Replace State Board of Charities and Corrections	60,763	44.02%	77,285	55.98%	Fail	SJR 6 (1919)
1920	Allow Legislature to fix state salaries	70,831	47.60%	77,987	52.40%	Fail	SJR 3 (1919)
1920	Allow cities to incur added debt for street railways and lighting	66,734	48.02%	72,226	51.98%	Fail	SJR 2 (1920)
1920	Allow state credits for home-building	80,062	56.49%	61,674	43.51%	Pass	HJR 2 (1920)
1920	Provide soldiers' bonus	93,459	62.38%	56,366	37.62%	Pass	SJR 3 (1920)
1922	Increase signatures needed to invoke initiative or referendum	49,019	33.75%	96,201	66.25%	Fail	HJR 1 (1921)
1922	Allow legislature to organize counties	30,110	21.01%	113,170	78.99%	Fail	SJR 1 (1921)
1922	Allow special assessments on land subject to river drainage	33,937	24.23%	106,144	75.77%	Fail	SJR 7 (1921)
1922	Allow legislature to fix state salaries	41,343	27.28%	110,215	72.72%	Fail	SJR 11 (1921)
1924	Call constitutional convention	60,235	33.97%	117,086	66.03%	Fail	SJR 8 (1923)
1926	Increase state salaries	55,670	32.08%	117,866	67.92%	Fail	SJR 3 (1925)
1930	Permit suspension of sentence on first conviction	81,697	51.69%	76,358	48.31%	Pass	SJR 4 (1929)
1930	Give fines to county where collected	88,092	56.28%	68,434	43.72%	Pass	SJR 2 (1929)
1930	Allow legislature to classify property for school taxation	81,670	54.12%	69,414	45.88%	Pass	HJR 6 (1929)
1930	Local taxing districts may tax rural credit lands	101,527	64.82%	55,100	35.18%	Pass	SJR 5 (1929)
1930	Allow Legislature to fix state salaries	67,165	45.09%	81,797	54.91%	Fail	HJR 4 (1929)

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1932	Extend terms of superintendents of schools	98,033	41.41%	138,684	58.59%	Fail	HJR 6 (1931)
1932	Allow Legislature to fix state salaries	106,585	49.63%	108,184	50.37%	Fail	HJR 11 (1931)
1934	Prohibit state from extending credit or engaging in new works of internal improvement, excepting highways	113,717	48.26%	121,918	51.74%	Fail	SJR 2 (1933)
1934	Repeal Prohibition	142,853	56.80%	108,648	43.20%	Pass	SJR 1 (1933)
1936	Reduce Legislature's membership and provide for reapportionment	125,597	57.47%	92,961	42.53%	Pass	SJR 5 (1935)
1936	Limit State Treasurer to two terms and make election of Superintendent of Public Instruction non-partisan	137,247	62.43%	82,611	37.57%	Pass	HJR 4 (1935)
1936	Make election of Superintendents of Schools non-partisan and extend terms	134,636	62.00%	82,647	38.00%	Pass	HJR 3 (1935)
1936	Allow state to engage in internal improvements, with debt limit of 0.5 percent of state properties	109,703	53.70%	94,571	46.30%	Pass	SJR 3 (1935)
1936	Make state bank shareholders and stockholders individually responsible, unless bank is FDIC member	109,154	53.01%	96,760	46.99%	Pass	HJR 5 (1935)
1938	Increase Legislature's membership	60,428	26.65%	166,326	73.35%	Fail	HJR 9 (1937)
1940	Provide that motor vehicle and gasoline taxes go to highways	142,782	56.65%	109,259	43.35%	Pass	SJR 5 (1939)
1940	Allow governor to make appointments to fill legislative vacancies	97,748	41.02%	140,564	58.98%	Fail	HJR 5 (1939)
1940	Reduce interest required on county investment of permanent school funds	93,013	38.36%	149,486	61.64%	Fail	HJR 10 (1939)
1942	Increase salary of governor and judges	55,773	39.64%	84,920	60.36%	Fail	SJR 3 (1941)
1942	Change investment restriction on permanent school funds	40,951	32.28%	85,907	67.72%	Fail	SJR 6 (1941)
1942	Channel endowment land lease money to school districts in proportion to school tax	43,009	34.81%	80,556	65.19%	Fail	HJR 8 (1941)
1942	Channel lease money or land income to school districts in proportion to school tax	44,508	36.35%	77,922	63.65%	Fail	HJR 9 (1941)
1942	Increase salary of Supreme Court judges	39,969	31.93%	85,206	68.07%	Fail	HJR 10 (1941)
1944	Restrict loans on educational funds to one-third of value	77,021	45.34%	92,842	54.66%	Fail	SJR 2 (1943)
1944	Reclassify educational and charitable institutions	66,392	54.46%	72,253	45.54%	Pass	HJR 3 (1943)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1946	Allow Legislature to fix state salaries	86,496	63.88%	48,911	36.12%	Pass	HJR 9 (1945)
1946	Include Right to Work in Bill of Rights	93,035	70.33%	39,257	29.67%	Pass	HJR 3 (1945)
1946	Require only two readings before passage of legislative act	85,975	68.57%	39,404	31.43%	Pass	SJR 2 (1945)
1948	Grant World War II veterans' bonus	120,462	61.12%	76,636	38.88%	Pass	HJR 2 (1947)
1948	Provide legislative reapportionment in 1951 and every ten years thereafter	111,874	61.67%	69,402	38.33%	Pass	HJR 8 (1947)
1948	Allow governor to make appointments to fill legislative vacancies	103,396	56.84%	78,505	43.16%	Pass	HJR 6 (1947)
1948	Allow lessees of school and public lands an option on new lease	95,949	52.91%	85,378	47.09%	Pass	HJR 4 (1947)
1948	Allow local units on tax state public shooting areas	108,458	59.67%	71,942	40.33%	Pass	SJR 1 (1947)
1950	Provide legislative reapportionment in 1951 on basis of 1950 census	92,512	46.56%	106,203	53.44%	Fail	HJR 4 (1949)
1950	Limit school district indebtedness to ten percent of assessed property value	75,191	38.52%	120,032	61.48%	Fail	SJR 1 (1949)
1950	Transfer educational fund investments to Commissioner of School and Public Lands	84,804	44.69%	104,960	55.31%	Fail	HJR 3 (1949)
1950	Allow county officials to succeed themselves indefinitely	83,505	42.53%	112,851	57.47%	Fail	HJR 1 (1949)
1952	Reduce voting age to 18 years	128,231	49.87%	128,916	50.13%	Fail	SJR 3 (1951)
1952	Restrict investment of educational funds to governmental bonds	116,463	50.91%	112,290	49.09%	Pass	SJR 1 (1951)
1952	Change composition of Board of Pardons	110,213	49.12%	114,142	50.88%	Fail	SJR 2 (1951)
1954	Pooling of oil, gas and mineral lease money of school and public lands	122,804	65.59%	64,431	34.41%	Pass	SJR 3 (1953)
1954	Increasing school district debt limit to ten percent of assessed property value	96,370	52.48%	87,265	47.52%	Pass	HJR 1 (1953)
1954	Allow county sheriffs to succeed themselves	97,059	51.05%	93,073	48.95%	Pass	HJR 2 (1953)
1954	Assessment and taxation of agricultural lands	75,830	44.00%	96,499	56.00%	Fail	HJR 3 (1953)
1956	Allow county officials to succeed themselves indefinitely	128,447	49.08%	133,273	50.92%	Fail	HJR 4 (1955)
1958	Municipal home rule	94,599	47.60%	104,138	52.40%	Fail	SJR 2 (1957)

Bold Items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1958	Exempt public highway property from taxation	110,565	55.31%	89,347	44.69%	Pass	SJR 8 (1957)
1958	Change in gubernatorial succession	120,511	61.13%	76,628	38.87%	Pass	SJR 4 (1957)
1958	Reduce voting age to 18 years	71,033	33.99%	137,942	66.01%	Fail	HJR 1 (1957)
1958	Maintain old voting residence in state until new one acquired	127,541	64.02%	71,675	35.98%	Pass	HJR 6 (1957)
1960	Allow county officers to succeed themselves indefinitely	133,954	53.61%	115,915	46.39%	Pass	SJR 2 (1959)
1960	Allow no county more than two senators	112,573	47.49%	124,455	52.51%	Fail	SJR 8 (1959)
1960	Constitute a Board of Pardons and Paroles	131,185	56.79%	99,832	43.21%	Pass	HJR 1 (1959)
1960	Provide for continuity of state operations in event of emergency caused by enemy attack	165,290	71.77%	65,018	28.23%	Pass	SJR 1 (1959)
1962	Taking private property for public use	99,119	50.42%	97,456	49.58%	Pass	SJR 8 (1961)
1962	Annual legislative session	101,548	53.54%	88,118	46.46%	Pass	HJR 5 (1961)
1962	Home rule for municipalities	95,737	52.14%	87,888	47.86%	Pass	SJR 2 (1961)
1964	Amendment notification	117,317	48.72%	123,504	51.28%	Fail	HJR 5 (1963)
1964	County offices	120,998	50.42%	118,973	49.58%	Pass	SJR 4 (1963)
1964	Property classification	98,454	42.68%	132,235	57.32%	Fail	HJR 6 (1964)
1966	Reclassifying farm property	92,235	51.22%	87,833	48.78%	Pass	HJR 6 (1965)
1966	Allowing counties to eliminate county superintendent	101,090	56.29%	78,499	43.71%	Pass	SJR 2 (1966)
1966	Changing county court systems	105,554	60.34%	69,391	39.66%	Pass	HJR 8 (1966)
1968	School land sales	110,327	48.28%	118,202	51.72%	Fail	HJR 9 (1968)
1968	Building authority/debt limit	80,670	36.87%	138,153	63.13%	Fail	SJR 6 (1967)
1968	Powers of retired judges	109,065	49.03%	113,398	50.97%	Fail	SJR 2 (1968)
1968	Reinvestment of school funds	116,403	53.37%	101,884	46.63%	Pass	HJR 11 (1968)
1968	Appointive Superintendent of Public Instruction	72,514	32.79%	148,618	67.21%	Fail	SJR 9 (1968)
1970	Amendment A. Residency Requirements	110,266	54.42%	92,354	45.58%	Pass	HJR 502 (1969)
1970	Amendment B. Initiative and Referendum	58,605	30.59%	132,992	69.41%	Fail	HJR 505 (1969)
1970	Amendment C. Retired Judges	111,040	57.23%	82,980	42.77%	Pass	HJR 503 (1969)
1970	Amendment D. Games of Chance	117,269	58.92%	81,746	41.08%	Pass	SJR 502 (1970)
1970	Amendment E. 4 Year Terms	94,108	48.11%	101,497	51.89%	Fail	HJR 503 (1970)
1970	Amendment F. Voting Age	78,320	40.02%	117,367	59.98%	Fail	SJR 501 (1970)

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1970	Amendment G. Presidential Elections	115,292	60.74%	74,528	39.26%	Pass	HJR 513 (1970)
1970	Amendment H. School Lands	65,169	35.53%	118,306	64.47%	Fail	HJR 507 (1970)
1970	Amendment I. Constitutional Revision	69,459	38.40%	111,427	61.60%	Fail	HJR 514 (1970)
1972	Amendment A. Voting Age	206,170	73.13%	75,765	26.87%	Pass	SJR 1 (1971)
1972	Amendment B. Executive Reorganization	182,248	65.28%	96,914	34.72%	Pass	HJR 513 (1972)
1972	Amendment C. Judicial Reorganization	177,235	66.48%	89,358	33.52%	Pass	HJR 512 (1972)
1972	Amendment D. Local Government Reorganization	152,474	58.70%	107,296	41.30%	Pass	HJR 515 (1972)
1972	Amendment E. Constitutional Revision	173,541	67.14%	84,939	32.86%	Pass	HJR 514 (1972)
1974	Amendment A. Legislative Department	86,293	38.37%	138,590	61.63%	Fail	HJR 505 (1974)
1974	Amendment B. Elections & Right of Suffrage	132,120	59.88%	88,524	40.12%	Pass	HJR 507 (1974)
1976	Amendment A. Preamble Change	75,174	29.06%	183,548	70.94%	Fail	SJR 5 (1975)
1976	Amendment B. Bill of Rights	77,771	30.18%	179,936	69.82%	Fail	SJR 4 (1975)
1976	Amendment C. Legislative Article	56,538	22.17%	198,447	77.83%	Fail	HJR 502 (1975), HJR 502 (1976)
1976	Amendment D. Repeal Section 26	45,100	17.76%	208,909	82.24%	Fail	HJR 509 (1976)
1976	Amendment E. School and Public Lands	66,287	26.07%	188,012	73.93%	Fail	SJR 1 (1975)
1976	Amendment F. Arrangement of Constitution	57,710	22.92%	194,039	77.08%	Fail	HJR 507 (1976)
1978	Amendment A. 40 Day Legislative Session, etc.	104,367	46.02%	122,429	53.98%	Fail	HJR 1003 (1978)
1978	Amendment B. Flexibility in Investing School Money	106,461	48.35%	113,742	51.65%	Fail	SJR 5 (1978)
1978	Amendment C. Protects School Land Mineral Rights	115,871	52.64%	104,264	47.36%	Pass	SJR 6 (1978)
1978	Amendment D. Limits Legislature in Tax Increases	116,647	52.96%	103,621	47.04%	Pass	HJR 501 (1977)
1980	Amendment A. Relating to the appointment of Supreme Court justices and circuit court judges	158,490	53.99%	135,062	46.01%	Pass	SJR 4 (1979)
1980	Amendment B. Relating to real property taxation	113,863	37.21%	192,116	62.79%	Fail	Initiated
1980	Amendment C. Prohibiting Legislature from substantially changing or re-enacting any law enacted or defeated by vote of people	126,181	47.29%	140,632	52.71%	Fail	Initiated
1980	Amendment D. Relating to legislative prerogative to amend initiated or referred laws	77,225	35.48%	140,406	64.52%	Fail	HJR 1006 (1980)
1980	Amendment E. Relating to length of legislative session	156,630	56.48%	120,703	43.52%	Pass	HJR 1002 (1980)
1982	Amendment A. amended Sec. 5, Art. III to provide for single member Senate districts in the legislature	122,703	52.24%	112,184	47.76%	Pass	Initiated

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1982	Amendment B. Relating to remittance of fines and establishment of interest rates in Article VIII	130,637	55.57%	104,435	44.43%	Pass	HJR 1001 (1982)
1982	Amendment C. amended Sec. 7, Art. III relating to the opening day of legislature	137,262	58.10%	99,001	41.90%	Pass	SJR 2 (1982)
1982	Amendment D. amended Article III relating to the authorization of certain games of chance	107,552	42.23%	147,146	57.77%	Fail	HJR 1003 (1982)
1984	Amendment A. Amended Art. IV, VIII, XI, and XVIII to combine duties of the treasurer and the commissioner of school and public lands	142,985	49.95%	143,276	50.05%	Fail	HJR 1002 (1984)
1986	Amendment A. Amendment to Article IV, section 5 of the Constitution relating to the duties of the lieutenant governor	122,221	45.74%	144,976	54.26%	Fail	SJR 2 (1985)
1986	Amendment B. Amendment to Article III relating to the authorization of a state lottery	163,005	59.67%	110,153	40.33%	Pass	HJR 1001 (1986)
1986	Amendment C. Amendment to Article VIII relating to the loan of nonsectarian textbooks	148,813	53.85%	127,530	46.15%	Pass	SJR 3 (1986)
1988	Amendment A. Amend Article III, Section 1, relating to initiatives. Removes the legislature from the initiative process.	153,168	52.21%	140,188	47.79%	Pass	HJR 1001 (1987)
1988	Amendment B. Initiated amendment to Article III, section 25 to permit gambling in the city of Deadwood.	191,745	64.30%	106,444	35.70%	Pass	Initiated
1988	Amendment C. Initiated amendment to Article XI to add a section 14 relating to limitation on property taxes.	116,240	38.66%	184,452	61.34%	Fail	Initiated
1988	Amendment D. Amend Article XIV relating to charitable and penal institutions. Removes the Board of Charities and Corrections from the constitution and clears the way for reorganization of those departments.	171,282	58.52%	121,410	41.48%	Pass	HJR 1001 (1988)
1990	Amendment A. Amend Article VI, Section 13, relating to disposition of private property taken for public use.	104,973	43.99%	133,643	56.01%	Fail	SJR 1 (1989)
1990	Amendment B. Amend Article III, Section 12 relating to eligibility for Legislative office.	82,358	35.12%	152,175	64.88%	Fail	SJR 3 (1989)
1990	Amendment C. Adding a new section to Article XI relating to the imposition of an income tax.	114,215	48.97%	119,037	51.03%	Fail	HJR 1002 (1990)
1990	Amendment D. Adding a new section to Article III relating to sessions of Legislature.	117,969	51.64%	110,468	48.36%	Pass	SJR 1 (1990)

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1990	Amendment E. Adding a new section to Article XI relating to a limit on the growth of taxes on real property.	104,947	45.26%	126,940	54.74%	Fail	HJR 1001 (1990)
1992	Amendment A. Relating to Term Limitations	205,074	63.53%	117,702	36.47%	Pass	Initiated
1994	Amendment A. An amendment to section 9 of Article VIII of the Constitution of the state of South Dakota, relating to the taxation of leased school and public lands.	176,751	58.10%	127,464	41.90%	Pass	SJR 1 (1993)
1994	Amendment B. An amendment to section 2 of Article VII of the Constitution of the state of South Dakota, relating to the minimum age to vote.	76,921	25.19%	228,444	74.81%	Fail	HJR 1001 (1993)
1994	Amendment C. An amendment to section 11 of Article VIII of the Constitution of the state of South Dakota, relating to the investment of permanent educational funds.	130,785	43.74%	168,232	56.26%	Fail	SJR 2 (1993)
1994	Amendment D. An amendment to section 3 of Article III of the Constitution of the state of South Dakota, relating to the qualifications for legislative office.	51,458	16.78%	255,166	83.22%	Fail	HJR 1002 (1994)
1994	Amendment E. An amendment to section 25 of Article III of the Constitution of the state of South Dakota, relating to the state lottery and video games of chance.	165,185	52.80%	147,680	47.20%	Pass	SJR 1 (1994 Special)
1996	Amendment A. An amendment to Article VIII, section 11 of the Constitution of the State of South Dakota, relating to the investment of permanent education funds.	191,771	62.99%	112,659	37.01%	Pass	SJR 1 (1996)
1996	Amendment B. An amendment to Article XI of the Constitution of the State of South Dakota, relating to the vote required to impose or increase taxes.	229,580	74.28%	79,493	25.72%	Pass	HJR 1003 (1996)
1998	Amendment A. Initiated amendment to Article VIII, Section 15 of the South Dakota Constitution concerning the taxation of real property for school purposes.	56,957	22.32%	198,256	77.68%	Fail	Initiated
1998	Amendment B. An Amendment to Article III of the South Dakota Constitution concerning the authority of a special interim legislative committee to approve the transfer of appropriated funds.	81,976	33.01%	166,373	66.99%	Fail	HJR 1001 (1997)
1998	Amendment C. An Amendment to Article III, Section 12 of the South Dakota Constitution concerning legislative conflicts of interest.	53,020	21.40%	194,689	78.60%	Fail	HJR 1004 (1997)

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1998	Amendment D. An Amendment to Article IX of the South Dakota Constitution authorizing local initiatives to provide for the cooperation and organization of local government.	121,880	49.94%	122,184	50.06%	Fail	HJR 1009 (1997)
1998	Amendment E. Initiated amendment to Article XVII of the South Dakota Constitution concerning ownership and interest in farming.	149,470	58.67%	105,282	41.33%	Pass	Initiated
1998	Amendment F. An amendment to Article VIII of the South Dakota Constitution, concerning the classification of property for purposes of taxation.	92,447	37.63%	153,230	62.37%	Fail	HJR 1006 (1998)
1998	Amendment G. An Amendment to Article VIII of the South Dakota Constitution, permitting the investment of permanent school funds in certain stocks, bonds, mutual funds, and other financial instruments.	96,975	39.12%	150,907	60.88%	Fail	SJR 2 (1998)
1998	Amendment H. Amendments to Article III, Section 3 of the South Dakota Constitution, relating to age qualifications for legislative office, and to Article IV, Section 2 of the South Dakota Constitution, relating to the age qualifications for Governor and lieutenant governor.	150,680	60.15%	99,834	39.85%	Pass	HJR 1002 (1998)
2000	Amendment A. An amendment to Article VIII of the South Dakota Constitution relating to classification of property for purposes of taxation.	187,117	54.94%	137,081	45.06%	Pass	HJR 1005 (1999)
2000	Amendment B. An amendment to Article IX of the South Dakota Constitution authorizing local initiatives to provide for the cooperation and organization of local government.	165,346	55.28%	133,780	44.72%	Pass	HJR 1007 (1999)
2000	Amendment C. An initiated amendment to Article XI of the South Dakota Constitution, concerning the taxation of inheritances.	251,316	80.13%	62,334	19.87%	Pass	Initiated
2000	Amendment D. An initiated amendment to Article III, Section 25 of the South Dakota Constitution repealing the video lottery.	146,428	46.33%	169,642	53.67%	Fail	Initiated
2000	Amendment E. An amendment to Article VIII of the South Dakota Constitution, permitting the investment of permanent school funds in certain stocks, bonds, mutual funds, and other financial instruments and to use a certain portion of the interest and income to increase the principal in the fund.	168,896	56.10%	132,181	43.90%	Pass	SJR 1 (2000)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2001	Amendment A. An amendment to Article XIII of the South Dakota Constitution authorizing the creation and administration of a trust fund for proceeds of the sale of the State Cement Plant.	69,309	78.79%	18,657	21.21%	Pass	SJR 1 (2000 Special)
2001	Amendment B. An amendment to Article XII of the South Dakota Constitution authorizing the creation and administration of trust funds for health care and education.	63,484	72.50%	24,086	27.50%	Pass	SJR 4 (2001)
2002	Amendment A. An amendment to Article XVII of the South Dakota Constitution relating to restrictions on corporate farming.	83,320	46.01%	97,755	53.99%	Fail	HJR 1009 (2002)
2002	Amendment A. An initiated amendment to Article VI, Section 7 of the Constitution, relating to the rights of a criminal defendant.	68,659	21.81%	246,097	78.19%	Fail	Initiated
2002	Amendment B. An amendment to Article III, Section 5 of the Constitution to clarify the responsibility of the Legislature to provide for its own apportionment.	116,495	38.35%	187,242	61.65%	Fail	HJR 1007 (2002)
2002	Amendment C. An amendment to Article IV, Section 4 of the Constitution, extending the time allowed for the Governor's review of legislation passed by the Legislature.	166,969	54.16%	141,326	45.84%	Pass	HJR 1010 (2002)
2004	Amendment A. An amendment to Article V, section 7 of the South Dakota Constitution, providing for the merit selection of circuit court judges.	138,368	37.81%	227,577	62.19%	Fail	HJR 1003 (2003)
2004	Amendment B. An amendment to Article VIII, section 20 of the South Dakota Constitution to authorize the provision of certain services to all children of school age.	173,650	46.99%	195,936	53.01%	Fail	HJR 1003 (2004)
2006	Amendment C. An Amendment to Article XXI of the South Dakota Constitution, relating to marriage.	172,305	51.83%	160,152	48.17%	Pass	HJR 1001 (2005)
2006	Amendment D. An Amendment to Article XI, Section 2 of the South Dakota Constitution, relating to real property assessment for taxation.	65,903	20.20%	260,375	79.80%	Fail	Initiated
2006	Amendment E. An Amendment to Article VI of the South Dakota Constitution, relating to judicial decisions.	35,641	10.79%	294,734	89.21%	Fail	Initiated

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2006	Amendment F. An Amendment to Article III of the South Dakota Constitution, relating to the Legislature.	103,026	32.35%	215,458	67.65%	Fail	HJR 1003 (2006)
2008	Amendment G. An Amendment to the South Dakota Constitution, to repeal certain reimbursement restrictions for travel by legislators to and from a legislative session.	147,763	41.14%	211,413	58.86%	Fail	HJR 1003 (2008)
2008	Amendment H. An Amendment to the South Dakota Constitution, to repeal certain provisions relating to corporations.	103,172	30.97%	229,985	69.03%	Fail	HJR 1001 (2008)
2008	Amendment I. An Amendment to the South Dakota Constitution, to provide for a maximum of forty legislative days each year.	184,722	52.41%	167,751	47.59%	Pass	HJR 1004 (2008)
2008	Amendment J. An Amendment to the South Dakota Constitution, to eliminate term limits for legislators.	87,380	24.27%	272,635	75.73%	Fail	SJR 1 (2008)
2010	Amendment K. An Amendment to Article VI of the South Dakota Constitution relating to the right of individuals to vote by secret ballot.	241,896	79.13%	63,783	20.87%	Pass	SJR 3 (2010)
2010	Amendment L. An Amendment to Article XIII of the South Dakota Constitution relating to the trust fund created from the proceeds of the state cement enterprise sales.	114,321	40.55%	167,694	59.45%	Fail	HJR 1004 (2010)
2012	Amendment M. An Amendment to the South Dakota Constitution regarding certain provisions relating to corporations.	96,187	29.60%	228,720	70.40%	Fail	HJR 1001 (2012)
2012	Amendment N. An Amendment to the South Dakota Constitution repealing certain reimbursement restrictions for travel by legislators to and from a legislative session.	125,715	36.82%	215,675	63.18%	Fail	HJR 1002 (2012)
2012	Amendment O. An Amendment to the South Dakota Constitution changing the method for distribution from the cement plant trust fund.	186,958	56.76%	142,410	43.24%	Pass	HJR 1006 (2012)
2012	Amendment P. An Amendment to the South Dakota Constitution adding balanced budget requirements.	215,659	64.60%	118,165	35.40%	Pass	HJR 1007 (2012)
2014	Amendment Q. An Amendment to the South Dakota Constitution authorizing the Legislature to allow roulette, keno and craps in Deadwood.	152,265	56.69%	116,326	43.31%	Pass	HJR 1001 (2014)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2016	Amendment R. An Amendment to the South Dakota Constitution regarding postsecondary technical education institutes.	178,209	50.61%	173,945	49.39%	Pass	HJR 1003 (2015)
2016	Amendment S. An Initiated Amendment to the South Dakota Constitution to expand rights for crime victims.	215,585	59.61%	146,084	40.39%	Pass	Initiated
2016	Amendment T. An initiated Amendment to the South Dakota Constitution to provide for state legislative redistricting by a commission.	149,942	42.97%	198,982	57.03%	Fail	Initiated
2016	Amendment U. An initiated Amendment to the South Dakota Constitution limiting the ability to set statutory interest rates for loans.	130,627	36.74%	224,876	63.26%	Fail	Initiated
2016	Amendment V. An initiated Amendment to the South Dakota Constitution establishing nonpartisan elections.	157,870	44.51%	196,781	55.49%	Fail	Initiated
2018	Amendment W. An initiated Amendment to the South Dakota Constitution changing campaign finance and lobbying laws, creating a government accountability board, and changing certain initiative and referendum provisions.	142,769	45.06%	174,081	54.94%	Fail	Initiated
2018	Amendment X. An Amendment to the South Dakota Constitution increasing the number of votes needed to approve a constitutional amendment.	140,730	45.68%	167,362	54.32%	Fail	SJR 1 (2018)
2018	Amendment Y. An amendment to the South Dakota Constitution revising certain provisions relating to the rights of crime victims.	106,498	79.51%	27,448	20.49%	Pass	HJR 1004 (2018)
2018	Amendment Z. An Amendment to the South Dakota Constitution establishing that a proposed constitutional amendment may embrace only one subject, and requiring the proposed amendments to be presented and voted on separately.	195,790	62.41%	117,947	37.59%	Pass	HJR 1006 (2018)
2020	**Amendment A. An Amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use**	**225,260**	**54.18%**	**190,477**	**45.82%**	**Pass**	**Initiated**
2020	Amendment B. An Amendment to the South Dakota Constitution authorizing the Legislature to allow sports wagering in Deadwood.	239,620	58.47%	170,191	41.53%	Pass	SJR 501 (2020)

Bold Items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff, and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol,

Plaintiffs,

v.

STEVE BARNETT, in his official capacity as South Dakota Secretary of State,

Defendant,

and

SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE,

Intervenor Defendants.

32 CIV 20-000187

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS BY SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

Pursuant to S.D.C.L. § 15-6-56(c), Proponents South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele submit the following response to the Plaintiffs' Joint Statement of Undisputed Material Fact.

1. Proponents agree, but contend this fact is not material because Sheriff Thom brought suit in his official capacity only.

Filed: 1/8/2021 4:33 PM CST Hughes County, South Dakota 32CIV20-000187

2. Agree.

3. Proponents agree, but contend this fact is not material because Colonel Miller brought suit in his official capacity only.

4. Agree.

5. Agree.

6. Agree.

7. Agree.

8. Agree.

9. Agree.

10. Agree.

11. Agree.

12. Agree.

13. Agree.

14. Agree.

15. Agree.

16. Agree. On June 9, 2020 the South Dakota Legislative Research Council provided the required fiscal note for Amendment A. (Billion Decl., Ex. A.)

17. Agree.

18. Agree.

19. Proponents do not dispute Exhibit E. Proponents further state that, while South Dakota voters have not approved an *initiated* constitutional measure that has added a new article to the Constitution, voters have approved amendments prior to

Filed: 1/8/2021 4:33 PM CST Hughes County, South Dakota 32CIV20-000187

1972 that added or repealed whole articles. *See, e.g.*, S.D. Const. art. XXVIII, Historical Note; 1899 S.D. Session Laws, ch. 63; S.D. Const. art. XXIX § 1, Historical Note; 1917 S.D. Session Laws, ch. 168; S.D. Const. art. XXIV, Historical Note; S.D. Const. art. XXIV, Historical Note; 1915 S.D. Session Laws, ch. 231; S.D. Const. art. XXIV, Historical Note; 1933 S.D. Session Laws, ch. 128. Proponents further submit that South Dakota voters have approved of wide-ranging constitutional changes via amendment. *See* 1972 Session Laws, chs. 1-4; Ex. E p. 7. Proponents submit that these legislative records are publicly available records generally known within South Dakota and their accuracy can be readily determined from sources whose accuracy cannot be questioned.

Respectfully,

DATED: January 8, 2021

ROBINS KAPLAN LLP

By: */s/ Timothy W. Billion*

Brendan V. Johnson (3263)
Timothy W. Billion (4641)
140 North Phillips Avenue, Suite 307
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
Email: TBillion@RobinsKaplan.com

Attorneys for Proponents

Filed: 1/8/2021 4:33 PM CST Hughes County, South Dakota 32CIV20-000187

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021 I electronically filed and served the Proponents' foregoing response to the Plaintiffs' statement of undisputed material facts with the Clerk of the Court for the South Dakota Circuit Court for the Sixth Judicial Circuit by using the Odyssey File & Serve system, which constitutes service on:

Bob L. Morris
MORRIS LAW OFFICE
PO Box 370
117 5th Avenue
Belle Fourche, SD 57717
Tel: 605-723-7777
bobmorris@westriverlaw.com

Matthew S. McCaulley
Lisa M. Prostrollo
Christopher Sommers
REDSTONE LAW FIRM LLP
PO Box 1535
101 N. Phillips Ave, Suite 402
Sioux Falls, SD 5101-1535
Tel: 605-331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com

Attorneys for Plaintiffs Sheriff Kevin Thom and Colonel Rick Miller

Grant M. Flynn
Matthew W. Templar
Office of the SD Attorney General
1302 E Hwy 14 Suite 1
Pierre, SD 57501
Tel: 605-773-3215
grant.flynn@state.sd.us
matthew.templar@state.sd.us

Attorneys for Defendant Steve Barnett

By: */s/ Timothy W. Billion*
Timothy W. Billion

Filed: 1/8/2021 4:33 PM CST Hughes County, South Dakota 32CIV20-000187

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

32 CIV 20-000186

In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use.

DECLARATION OF TIMOTHY W. BILLION IN OPPPOSITION TO CONTESTANTS' MOTION FOR SUMMARY JUDGMENT

I, Timothy W. Billion, pursuant to S.D.C.L. ch. 18-7, hereby declare as follows:

1. I am an attorney representing the Proponents in this matter.

2. A true and correct copy of the fiscal note relating to Amendment A is attached hereto as Exhibit A.

I declare under penalty of perjury under the law of South Dakota that the foregoing is true and correct.

Executed on January 8, 2021, at Sioux Falls, South Dakota

By: _____
Timothy W. Billion

Filed: 1/8/2021 4:39 PM CST Hughes County, South Dakota 32CIV20-000186

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021 I electronically filed and served the foregoing declaration and referenced exhibit with the Clerk of the Court for the South Dakota Circuit Court for the Sixth Judicial Circuit by using the Odyssey File & Serve system, which constitutes service on:

Bob L. Morris
MORRIS LAW OFFICE
PO Box 370
117 5th Avenue
Belle Fourche, SD 57717
Tel: 605-723-7777
bobmorris@westriverlaw.com

Matthew S. McCaulley
Lisa M. Prostrollo
Christopher Sommers
REDSTONE LAW FIRM LLP
PO Box 1535
101 N. Phillips Ave, Suite 402
Sioux Falls, SD 5101-1535
Tel: 605-331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com

Attorneys for Contestants Kevin Thom and Rick Miller

Grant M. Flynn
Matthew W. Templar
Office of the SD Attorney General
1302 E Hwy 14 Suite 1
Pierre, SD 57501
Tel: 605-773-3215
grant.flynn@state.sd.us
matthew.templar@state.sd.us

Attorneys for Defendant Jason Ravnsborg

By: */s/ Timothy W. Billion*
Timothy W. Billion

Filed: 1/8/2021 4:39 PM CST Hughes County, South Dakota 32CIV20-000186

RECEIVED
JUN 09 2020
S.D. SEC. OF STATE

SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL

FISCAL NOTE

INITIATED CONSTITUTIONAL AMENDMENT

AN INITIATED AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION AUTHORIZING THE LICENSING, REGULATION, AND ENFORCEMENT OF CANNABIS IN SOUTH DAKOTA.

Legalizing cannabis would provide revenues from licensing fees, sales tax, and a 15% excise tax. After regulatory costs, the State would distribute 50% of net revenues annually to public schools and 50% to the general fund. Incarceration costs would decrease due to a decriminalization of several current laws.

Estimated Net Revenues:
FY2021: $355,705
FY2022: $10,765,004
FY2023: $19,589,466
FY2024: $29,372,397

Approved: Reed Holwegner Date: June 9, 2020

Director, Legislative Research Council

Filed this 9th day of June 2020

Steve Barnett
SECRETARY OF STATE

Filed: 1/8/2021 4:39 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER 2021-02

Whereas, as Governor of the Great State of South Dakota, I took an oath to uphold the freedoms and liberties of all South Dakotans guaranteed by the Constitutions of our state and of our country; and,

Whereas, Article IV Section 3 of the South Dakota Constitution sets forth some of my powers as Governor, and provides in relevant part:

> *"The Governor shall be responsible for the faithful execution of the law. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its civil divisions."*; and,

Whereas, my oath to support and defend the Constitution means ensuring that the Constitution is not violated, and it is part of my duty as Governor to defend it; and,

Whereas, on November 4, 2019, an Initiated Constitutional Amendment Petition was filed for validation with the Secretary of State, purporting to propose "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." The Secretary of State validated the proposed amendment, and it was placed on the ballot for a public vote; and,

Whereas, the initiative process used to place Constitutional Amendment A on the ballot was not proper and violated the procedures set forth in the South Dakota Constitution; and,

Whereas, pursuant to Article IV Section 3 of the South Dakota Constitution and my oath, I may restrain this violation of the Constitution by appropriate action or proceeding brought in the name of the state; and,

Whereas, upon my prior instruction, Colonel Rick Miller, Superintendent of the South Dakota Highway Patrol, commenced the following proceedings (collectively referred to hereinafter as the "Amendment A Litigation"):

> *In the Matter of Election Contest as to Amendment A*, Sixth Circuit Case No. 32CIV20-186;
>
> *Sheriff Kevin Thom, In His Official Capacity as Pennington County Sheriff, and Colonel Rick Miller, In His Official Capacity as Superintendent of the South Dakota Highway Patrol v. Steve Barnett, In His Official Capacity as South Dakota Secretary of State*, Sixth Circuit Case No. 32CIV20-187; and,

Whereas, the claims brought by both Sheriff Kevin Thom, in his official capacity as Sheriff of Pennington County, and Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol, are claims that the South Dakota Constitution expressly provides I may bring in the name of the State;

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and the laws of the State of South Dakota in my capacity as the duly elected Governor of South Dakota, by this Executive Order, I do hereby **order and declare the following**:

1. Commencement of the Amendment A Litigation is consistent with my executive power, described in Article IV Section 3 of the South Dakota Constitution, which is a power I may properly delegate.

2. On November 20, 2020, I directed Colonel Rick Miller to commence the Amendment A Litigation on my behalf in his official capacity. At all times thereafter, Colonel Rick Miller has acted as petitioner and plaintiff in the Amendment A Litigation under my direction and pursuant to a delegation of my Constitutional authority under Article IV Section 3.

3. Pursuant to SDCL 15-6-17(a), the commencement and continued prosecution of the Amendment A Litigation is hereby ratified and affirmed in all respects.

Dated in Pierre, South Dakota this 8th day of January, 2021.



Kristi Noem
Governor of South Dakota

ATTEST:

Steve Barnett
Secretary of State

ARTICLE XXIII

AMENDMENTS AND REVISIONS OF THE CONSTITUTION

1. Amendments.
2. Revision.
3. Ratification.

---

§ 1. Amendments. Amendments to this Constitution may be proposed by initiative or by a majority vote of all members of each house of the Legislature. An amendment proposed by initiative shall require a petition signed by qualified voters equal in number to at least ten percent of the total votes cast for Governor in the last gubernatorial election. The petition containing the text of the proposed amendment and the names and addresses of its sponsors shall be filed at least one year before the next general election at which the proposed amendment is submitted to the voters. A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject. If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately.
History: Amendment proposed by SL 1963, ch 342, rejected Nov. 3, 1964. Amendment proposed by SL 1970, ch 6, rejected Nov. 3, 1970. Amendment proposed by SL 1972, ch 4, approved Nov. 7, 1972. Amendment proposed by SL 2018, ch 4, § 2, approved Nov. 6, 2018.

---

§ 2. Revision. A convention to revise this Constitution may be called by a three-fourths vote of all the members of each house. The calling of a constitutional convention may be initiated and submitted to the voters in the same manner as an amendment. If a majority of the voters voting thereon approve the calling of a convention, the Legislature shall provide for the holding thereof. Members of a convention shall be elected on a nonpolitical ballot in the same districts and in the same number as the house of representatives. Proposed amendments or revisions approved by a majority of all the members of the convention shall be submitted to the electorate at a special election in a manner to be determined by the convention.
History: Amendment proposed by SL 1915, ch 236, rejected Nov., 1916; amendment proposed by SL 1972, ch 4, approved Nov. 7, 1972.

---

§ 3. Ratification. Any constitutional amendment or revision must be submitted to the voters and shall become a part of the Constitution only when approved by a majority of the votes cast thereon. The Legislature may provide for the withdrawal by its sponsors of an initiated amendment at any time prior to its submission to the voters.

History: 1889 Const., art. XXIII, § 1. Amendment proposed by SL 1963, ch 342, rejected Nov. 3, 1964. Amendment proposed by SL 1970, ch 6, rejected Nov. 3, 1970. Amendment proposed by SL 1972, ch 4, approved Nov. 7, 1972. Amendment proposed by SL 2018, ch 1, § 2, rejected Nov. 6, 2018.

§ 3. Powers and duties of the Governor. The Governor shall be responsible for the faithful execution of the law. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its civil divisions. This authority shall not authorize any action or proceedings against the Legislature.

He shall be commander-in-chief of the armed forces of the state, except when they shall be called into the service of the United States, and may call them out to execute the laws, to preserve order, to suppress insurrection or to repel invasion.

The Governor shall commission all officers of the state. He may at any time require information, in writing or otherwise, from the officers of any administrative department, office or agency upon any subject relating to the respective offices.

The Governor shall at the beginning of each session, and may at other times, give the Legislature information concerning the affairs of the state and recommend the measures he considers necessary.

The Governor may convene the Legislature or either house thereof alone in special session by a proclamation stating the purposes of the session, and only business encompassed by such purposes shall be transacted.

Whenever a vacancy occurs in any office and no provision is made by the Constitution or laws for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment.

The Governor may, except as to convictions on impeachment, grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

History: 1889 Const., art. IV, §§ 4, 5, 8; amendment of § 5 proposed by SL 1951, ch 294, rejected Nov., 1952; amendment of § 5 proposed by SL 1959, ch 316, approved Nov. 8, 1960; amendment proposed by SL 1972, ch 1, approved Nov. 7, 1972.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff, and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs/Appellees, v. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Intervenor Defendants/ Appellants.	Appeal No. 29546

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, THE DKT LIBERTY PROJECT, DUE PROCESS INSTITUTE, AND REASON FOUNDATION

Notice of Appeal filed on February 17, 2021

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

The Honorable Christina Klinger
Circuit Court Judge

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104
Attorneys for Intervenor Defendants/Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Defendant Steve Barnett, in his official capacity as South Dakota Secretary of State

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave., Ste. 402
Sioux Falls, SD 57101
Attorneys for Plaintiff Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Sheriff Kevin Thom, in his official capacity as Pennington County Sheriff

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
Tel: (612) 568-0132
patrick@ttlolaw.com

Attorney for Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. Over the Past Half-Century, Most States Rejected Federal Marijuana Policy in Favor of Their Own Approach 2

II. By Legalizing Marijuana Through the Citizen's Ballot, South Dakota Has Embraced Federalism and Joined the Long and Growing Procession of States Choosing to Refashion Marijuana Policies Tailored to and Reflective of State Circumstances 6

III. South Dakota's Voters Recognized That South Dakota Would Reap Myriad Benefits by Rewriting the State's Marijuana Laws 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Gonzales v. Raich, 545 U.S. 1 (2005)..... 9, 11, 12
Murphy v. Nat'l Collegiate Athl. Ass'n, 138 S. Ct. 1461 (2018) 10
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 6, 8
New York v. United States, 505 U.S. 144 (1992) 9, 12
Olmstead v. United States, 277 U.S. 438 (1928) 1
Printz v. United States, 521 U.S. 898 (1997) 9

Statutes

1952 Boggs Act, 65 Stat. 767 2
1956 Narcotics Control Act, 70 Stat. 567 2
1992 Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 .....10, 11
21 C.F.R. §§ 1308.11-12.....3
21 U.S.C. §§ 811-812 3
21 U.S.C. §§ 829, 841, 844.....3
Anti-Drug Abuse Act of 1986, 100 Stat. 3207 3
Controlled Substances Act, 84 Stat. 1236.....3, 6, 10, 11
Marihuana Tax Act, 50 Stat. 551 (Pub. Law 75-238).....2

U.S. Constitution

U.S. Const. amend X.....9, 11

Other Authorities

Anderson, D. Mark et al., "High on Life? Medical Marijuana Laws and Suicide," Cato Institute Research Briefs No. 17 (Jan. 2015) 13

Bier, David J., "How Legalizing Marijuana is Securing the Border," Cato Institute Policy Analysis No. 860 (Dec. 19, 2018).....13

Brenan, Megan, "Support for Legal Marijuana Inches Up to New High of 68%," Gallup (Nov. 9, 2020) https://bit.ly/3bknwnh.....16

Calhoun, Patricia, "John Hickenlooper, Three More Governors with Legal Pot Send Letter to Jeff Sessions," Westword, (Apr. 3, 2017) https://bit.ly/3kW4y9J.....16

California Department of Tax and Fee Administration, "Cannabis Tax Revenues," https://www.cdtfa.ca.gov/dataportal/charts.htm?url=CannabisTaxRevenues 15

Colorado Department of Revenue, "Marijuana Tax Reports," https://bit.ly/3sTfKXA 15

Confirmation Hearing on The Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Sen. Hrg. 116-65 (Jan. 15-16, 2019) https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm 11

Conklin, James et al., "Contact High: The External Effects of Retail Marijuana Establishments on House Prices," Cato Institute Research Briefs No. 122 (July 18, 2018) 13, 14

Dills, Angela et al., "The Effect of State Marijuana Legalizations: 2021 Update," Cato Institute Policy Analysis No. 908 (February 2, 2021).....13

Gettman, Jon B., Marijuana Arrests in South Dakota (2018) (compiling data from U.S. Department of Justice's Uniform Crime Reporting (UCR) Program), available at https://bit.ly/3eh1sf8 .....4, 5

Grant, Igor et al., "Medical Marijuana: Clearing Away the Smoke," Open Neurology Journal 6 (2012) 4

Hansen, Benjamin et al., "Early Evidence on Recreational Legalization and Traffic Fatalities," Cato Institute Research Briefs No. 125 (Aug. 8, 2018).....13

Hickenlooper, John & Coffman, Cynthia, "Letter to Hon. Jefferson B. Sessions re: Marijuana Legalization in Colorado" (Aug. 24, 2017) https://bit.ly/2MTorli.....14

Jaeger, Kyle, "Governors Across the U.S. Push for Marijuana Reform in 2021 Speeches and Budget Plans," Marijuana Moment, https://www.marijuanamoment.net/governors-across-u-s-push-for-marijuana-reform-in-2021-speeches-and-budget-plans/ 7

Joint Interim Committee on Marijuana Legalization, "Marijuana Tax Program Update," Oregon Department of Revenue, May 23, 2016 15

Joy, Janet E., Watson, Stanley J., and Benson Jr., John A. eds., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Washington: National Academies Press, 1999) 4

Killough, Ashley, "Fiery Senate Speech on Pot Spotlights GOP Sen. Cory Gardner," CNN (Jan. 5, 2018) https://cnn.it/30nsSaV 15

Ley, Ana, "Marijuana will be Legal in Virginia after Historic Cote, with Dispensaries Opening in 2024," The Virginia Pilot, https://bit.ly/3rldAQ9 7

Mikos, Robert A., "On the Limits of Supremacy: Marijuana and the States' Overlooked Power to Legalize Federal Crime," 62 Vand. L. Rev. 1421 (2009) 8, 10, 11, 16

Mikos, Robert, "The Evolving Federal Response to State Marijuana," 26 Widener L. Rev. 1, 2–3 (2020) 9

Murray, David W. and Walters, John P., "The Devastation That's Really Happening in Colorado," Weekly Standard, July 10, 2014.....13

Office on Drugs and Crime, "Traffic in Narcotics, Barbiturates and Amphetamines in the United States," United Nations, January 1, 1956, https://bit.ly/3rm8Ae1 2

Quinn, Thomas M. & McLaughlin, Gerald T., "The Evolution of Federal Drug Control Legislation," 22 Cath. U. L. Rev. 586, 593 (1973) 3

Sabet, Kevin A., "SABET: Colorado Will Show Why Legalizing Marijuana is a Mistake," Washington Times, January 17, 2014 13

"Seeing Green: Washington Rakes in Revenue from Marijuana Taxes," RT, July 13, 2015.....15

Shapiro, Ilya, "This is Your Constitution on Drugs," National Affairs, Summer 2020, https://bit.ly/3ef2XdY 3

South Dakota Secretary of State Website, https://sdsos.gov/elections-voting/ upcoming-elections/ballot-question-information/ general-ballot-question-information.aspx.....6

"State Medical Marijuana Laws," National Conference of State Legislatures, November 10, 2020, https://www.ncsl.org/ research/health/state-medical-marijuana-laws.aspx. 4

"State Policy, Idaho," Marijuana Policy Project, https://www.mpp.org/states/idaho/ 7

The Federalist No. 45 (James Madison) (C. Rossiter ed. 1961).....9

The Marijuana Policy Project ("MPP") website, https://www.mpp.org/states/.....4, 5, 7

Washington State Department of Revenue, "Recreational and Medical Marijuana Taxes," https://bit.ly/3uXMUqO 15

STATEMENT OF THE CASE

Before this Court is the issue of the state constitutionality of Amendment A, passed by South Dakota voters in November 2021.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review* and files *amicus* briefs.

The DKT Liberty Project is a non-profit organization based in Washington, D.C. Its mission is to protect and defend the civil liberties of citizens against overreaching by the government. Like Justice Brandeis, the Liberty Project believes that violations of civil liberties in the cause of law enforcement are especially worrying: "Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The **Due Process Institute** is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system.

And **Reason Foundation** is a nonpartisan and nonprofit public policy think tank,

founded in 1978 to advance a free society by developing, applying, and promoting libertarian principles, including individual liberty, free markets, and the rule of law.

Each *amicus curiae* has participated in cases presenting significant legal and constitutional issues involving government overreaching, including many of the leading cases concerning the advancement of individual liberties before the United States Supreme Court.

In enacting Amendment A, the voters of South Dakota broke with the federal orthodoxy of marijuana prohibition and followed many of its sister states by legalizing adult use of marijuana (also called "cannabis") and requiring the state to establish a comprehensive regulatory system for its manufacture, distribution, sale and taxation. This case arises from the efforts of state officials who, having vehemently disagreed with the substance of Amendment A but having failed to persuade the state's electorate to adopt their views, now seek to set aside the will of the voters and to overturn the constitutional provisions endorsed and enacted by South Dakotans. This case implicates matters of central concern to *amici*, not least the interests of all citizens to advance laws that indisputably increase their individual liberties and freedoms even when doing so diverges from the policies, preferences and practices of the federal government.

ARGUMENT

I. Over the Past Half-Century, Most States Rejected Federal Marijuana Policy in Favor of Their Own Approach.

In 1937, the U.S. Congress passed the Marihuana Tax Act, which effectively outlawed marijuana under federal law by imposing a prohibitive tax. Later, the 1952 Boggs Act and the 1956 Narcotics Control Act established mandatory sentences for drug-

related violations; a first-time offense for marijuana possession carried a minimum sentence of 2–10 years in prison and a fine of up to $20,000.00.[1] Although those penalties were largely repealed by the early 1970s, the Anti-Drug Abuse Act of 1986 reinstated stiff federal penalties for various marijuana offenses.

The possession, use, and distribution of marijuana is controlled at the federal level through the Controlled Substances Act ("CSA"), which classifies drugs into one of five "schedules" (i.e., categories) depending upon their medicinal value, potential for abuse, and psychological and physical effects on the body. *See* 21 U.S.C. §§ 811-812. Congress placed marijuana into Schedule I, which is the most severely restricted category. *Id.* at § 812(b)(1). To be listed on Schedule I, a drug must have "no currently accepted medical use and a high potential for abuse" as well as a risk of creating "severe psychological and/or physical dependence." 21 U.S.C. § 812(b)(1). Among those drugs listed on Schedule II, which are less restricted than marijuana, are cocaine, codeine, OxyContin and methamphetamine. 21 C.F.R. §§ 1308.11-12. The federal government bans the manufacture, distribution and possession of Schedule I drugs, including marijuana. *See* 21 U.S.C. §§ 829, 841, 844. Scholars have long observed that in enacting the CSA, Congress dramatically expanded federal powers, particularly those arising under Article I, Section 8 of the U.S. Constitution, and that various provisions of the CSA exceed the common-sense bounds of the Commerce Clause.[2]

---

[1] Office on Drugs and Crime, "Traffic in Narcotics, Barbiturates and Amphetamines in the United States," United Nations, January 1, 1956, https://bit.ly/3rm8Ae1.

[2] *See., e.g*., Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 Cath. U. L. Rev. 586, 593 (1973); Ilya Shapiro, *This is Your Constitution on Drugs*, National Affairs (Summer 2020) https://bit.ly/3ef2XdY.

Nevertheless, federal statutes tell only a small part of the story. Beginning about 50 years ago, individual states began to depart from the federal approach on marijuana. Between 1973 and 1978, 11 states decriminalized the possession or use of small amounts of marijuana. By the mid-1990s, in the face of mounting scientific evidence pointing to marijuana's medicinal benefits—including its efficacy in treating glaucoma, reducing pain, nausea, and seizures, and alleviating debilitating symptoms associated with various other medical conditions—many states began to legalize marijuana for medicinal purposes.[3] Since 1996, 33 states and the District of Columbia have authorized marijuana for medical use.[4]

South Dakota is a recent participant in this nationwide, state-by-state rethinking of and dissension from federal marijuana law and policy, both with respect to medical and adult use. And for sound reasons. Between 2009 to 2018, 31,883 people were arrested for marijuana in South Dakota, 95 percent of them for possession offenses.[5] In 2018, roughly one out of every ten arrests in South Dakota were for marijuana. What is more, the vast majority of marijuana arrests involved less than seven grams of the drug, and over 40

---

[3] *See, e.g.*, Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, Open Neurology J. 6 (2012): 18–25; Janet E. Joy, Stanley J. Watson, and John A. Benson Jr., eds., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Washington: National Academies Press, 1999). *See generally*, *State Medical Marijuana Laws*, Nat'l Conf. of State Leg., November 10, 2020, https://www.ncsl.org/ research/health/state-medical-marijuana-laws.aspx.

[4] A comprehensive listing and description of the state-level marijuana law reforms discussed herein can be found at the State Policy section of The Marijuana Policy Project ("MPP") website, https://www.mpp.org/states/.

[5] The statistics in this paragraph can be found in Jon B. Gettman, *Marijuana Arrests in South Dakota* (2018) (compiling data from U.S. Department of Justice's Uniform Crime Reporting (UCR) Program), available at https://bit.ly/3eh1sf8.

percent of all such arrests involved just one gram or less. Nor was marijuana possession by persons in South Dakota indicative of other criminal activity: 98.2 percent of marijuana violations in South Dakota from 2007 to 2016 were standalone offenses, meaning the individual was not charged with any other crime, and in 99.1 percent of marijuana arrests, no weapons were seized by police.

These and other metrics reveal the level to which state law enforcement resources were devoted to addressing a single type of low-level non-violent drug offense involving a plant-based controlled substance with no known potential for fatal overdose but proven therapeutic benefits across a broad panoply of illnesses and medical conditions.

To exacerbate matters, the state's enforcement of marijuana laws, and a constellation of negative consequences that afflict persons arrested for drug offenses, fell most heavily on South Dakota's youth. Persons under the age of 25 accounted for roughly 63 percent of all marijuana arrests. Further, the fiscal burdens on state taxpayers of the state's law enforcement practices were substantial. Based on the percentage of arrests made for marijuana compared to the overall law enforcement costs for South Dakota, each marijuana arrest cost the state of South Dakota an estimated $4,000.00.[6]

Like the majority of U.S. citizens, South Dakotans determined that they, their families, their communities and their pocketbooks would be better served by cannabis (i.e., marijuana) policies that departed from the federal government's commitment to marijuana prohibition. As of this writing, 15 states have legalized marijuana for adult use.[7] Nearly every state that has legalized marijuana for adult use has done so through a

---

[6] Gettman, *supra.*

[7] *See* MPP website, *supra*., https://www.mpp.org/states/.

citizen-led ballot initiative.

No state that has eliminated criminal and civil penalties for either the medicinal or general adult use of marijuana has reverted to re-criminalizing marijuana, even in part.

II. By Legalizing Marijuana Through the Citizen's Ballot, South Dakota Has Embraced Federalism and Joined the Long and Growing Procession of States Choosing to Refashion Marijuana Policies Tailored to and Reflective of State Circumstances.

As Justice Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

To be sure, the people of South Dakota are courageous. In 1898, South Dakota became the first state in the Union to provide for popular initiative and referenda for enacting and rejecting legislation. Ninety years later, South Dakota, through constitutional amendment, removed its legislature altogether from the initiative process.[8]

But when it comes to experimenting with marijuana law reform, the residents of South Dakota are neither singular nor unconventional. Or even risk-takers. Indeed, this particular terrain is well-trod, and the state of South Dakota follows a path paved by other states that have diverged from the federal CSA, bucked federally ordained policy, and reversed marijuana prohibition, often in sweeping and profound ways.

Beginning in 1996 with California's legalization of cannabis for medical use,

[8] *See* South Dakota Secretary of State Website, https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/general-ballot-question-information.aspx.

states across the country have advanced marijuana reforms nearly every year since. To date, 33 states and Washington, D.C., have legalized marijuana for medical use; 24 states along with Washington, D.C., have decriminalized marijuana possession;[9] and, at the time of writing, Virginia is on the cusp of becoming the 16th state to legalize adult use.[10] Moreover, the governors of no fewer than 11 states began 2021 by publicly advocating for some type of marijuana law reform.[11] All told, only one state (Idaho) lacks any kind of law easing criminal sanctions in recognition of marijuana's therapeutic value or the problems associated with penalizing adult use.[12]

Thirteen of the 15 states — 87 percent — that have changed their state laws to legalize the adult use of cannabis did so, like South Dakota, through a ballot initiative. And, like South Dakota, many states have enacted marijuana law reform by amending their state constitutions rather than rely exclusively on statutory code. Over the past two decades, six states have turned to their constitutions to establish the right to use medical marijuana within their borders,[13] and two states, aside from South Dakota, have chosen to

---

[9] *See* MPP website, *supra*., https://www.mpp.org/states/.

[10] Ana Ley, *Marijuana will be Legal in Virginia after Historic Vote, with Dispensaries Opening in 2024*, The Virginia Pilot, https://bit.ly/3rldAQ9.

[11] *See* Kyle Jaeger, *Governors Across the U.S. Push for Marijuana Reform in 2021 Speeches and Budget Plans*, Marijuana Moment, https://www.marijuanamoment.net/governors-across-u-s-push-for-marijuana-reform-in-2021-speeches-and-budget-plans/.

[12] *See State Policy, Idaho*, Marijuana Policy Project, https://www.mpp.org/states/idaho/.

[13] *See* Arkansas's Issue 6, a ballot initiative approved by 53 percent of state voters in 2016; Colorado's Amendment 20, an initiative passed with 54 percent of the vote in 2000; Florida's Amendment 2, approved by 71 percent of the electorate in 2016; Missouri's Amendment 2, enacted with 66 percent of the popular vote in 2018; Nevada's

embed in their constitutions the authority and bulwark for legalizing, regulating and taxing the adult use of marijuana.[14]

In short, South Dakota's Amendment A, while perhaps "experimental" in terms of its drug laws, from a national perspective is in no way "novel," in either subject matter or form. In seeing fit to secure marijuana law reform in the state's constitution, the voters of South Dakota embraced solid and long-standing precedent.

These experiments have met with considerable success. No state that has enacted marijuana law reforms has reversed course. Quite the opposite. Of the states that have legalized medical marijuana, many have enhanced the breadth and offerings of their systems. It has become commonplace for states to enact an initial law that establishes the boundaries of a medical and/or adult use scheme, and then for state agencies through regulatory rule making, state legislatures through hearings and follow-up legislation, or state executives through executive orders, to flesh out and build upon those laws in order to further promote public health and safety consistent with the will of the voters.[15]

Some may regard this state-led experiment with cannabis reform to be a "happy incident" of our federalist system. *New State Ice Co.*, 285 U.S. at 211 (Brandeis, J., dissenting). But it is no accident that the innovations in which South Dakota now partake got off the ground and have continued apace: the opportunity for states to serve as

---

Question 9, first endorsed by 65 percent of voters in 1998; and Initiative 65 which Mississippians passed in 2020.

[14] *See* Colorado Amendment 64 (2012); New Jersey Question 1 (2020).

[15] *See* Robert A. Mikos, *On the Limits of Supremacy: Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421 (2009) (describing methods states have used to legalize that which the federal government forbids.)

laboratories of marijuana policy experimentation is baked into our federal structure. *See Gonzalez v. Raich*, 545 U.S. 1, 42 (O'Connor, J., dissenting) (observing that a state's legalization of marijuana for medicinal purposes "*exemplifie*s the role of States as laboratories") (emphasis supplied). As the Tenth Amendment to the U.S. Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X; *see also* The Federalist No. 45, 292–93 (C. Rossiter ed. 1961) ("The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.")

It is within this constitutionally created space that the "revolution in marijuana law" has taken place, which has resulted in a "dramatic transformation" of how marijuana is possessed, manufactured and distributed within states. It is a revolution, moreover, that has occurred notwithstanding "the shadow of a strict federal ban on the drug."[16]

Our federalist structure, of which the Tenth Amendment is part, places restrictions on what the federal government can require of the states. For example, it is beyond dispute, and Supreme Court precedent makes clear, that federal law makers cannot "commandeer" states to jettison state-level reforms that fail to hew to federal prohibitionist practices. *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress

[16] Robert Mikos, *The Evolving Federal Response to State Marijuana*, 26 Widener L. Rev. 1, 2–3 (2020).

may not simply . . . commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (stating it is "fundamentally incompatible with our constitutional system of dual sovereignty" for the federal government to commandeer state or local government officials to "administer or enforce a federal regulatory program").[17]

The anticommandeering principle was recently reinforced by the U.S. Supreme Court in *Murphy v. Nat'l Collegiate Athl. Ass'n*, 138 S. Ct. 1461 (2018), the facts and holding of which are instructive. In 2011, 64 percent of New Jersey voters chose to amend the state constitution to allow sports gambling. The legislature then drafted and received voter approval of a sports-wagering constitutional amendment and repealed state laws banning sports gambling. Federal law, however, stood in the way. The 1992 Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq*., prohibited state-sanctioned sports gambling. *Murphy*, 138 S. Ct. at 1471. When sports leagues sued to enjoin New Jersey's legal scheme, the Supreme Court sided with the New Jersey electorate, holding that PASPA violates the anticommandeering rule because it "unequivocally dictates what a state . . . may and may not do." *Id*. at 1478. To the extent it is claimed that the CSA prevents South Dakotans from amending their state constitution to legalize that which federal statute prohibits, *Murphy*, addressing an analogous argument under PASPA, puts such a claim to rest, observing, "[j]ust as Congress lacks the power to order a state . . . not to enact a law authorizing sports

[17] *See also* Mikos, *On the Limits of Supremacy*, *supra*, at 1446.

gambling, it may not order a state . . . to refrain from enacting a law licensing sports gambling." *Id.* at 1483.

Relatedly, and consistent with the federalist anti-commandeering principle, state officials cannot be federally conscripted to enforce the federal CSA, which, by its own "vague and unspecific" terms, *Raich*, 545 U.S. at 55 (O'Connor, J., dissenting), does not compel state authorities to effectuate its provisions or embrace its principles.

To be sure, the federal government retains the authority and power to enforce federal laws against individuals who violate federal law even while acting in compliance with contrary state law.[18] And there is no question that the federal government remains free to publicly and vehemently criticize state policies that depart from federal orthodoxy. But it is surely out of respect for our federalism, as embodied by the Tenth Amendment, that federal authorities across political administrations have chosen not to argue that the many state experiments in marijuana law reform are preempted or supplanted by federal law. Thus, while using on occasion their bully pulpit to decry states' decisions to roll back marijuana prohibitions, federal officials consistently have allowed, if only through non-intervention, the wide diversity of reforms to proceed.[19]

---

[18] *Raich*, 545 U.S. at 12 (affirming the authority of federal officials to enforce the CSA); *see* Mikos, *On the Limits of Supremacy*, *supra*, at 5 (describing the "hostile" "first phase" federal response to early state reforms.)

[19] *See, e.g.*, *Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys* (Aug. 29, 2013) (setting forth federal enforcement restraints regarding state legalization laws); *Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys* (Oct. 19, 2009) (same); Confirmation Hearing on The Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Sen. Hrg. 116-65 (Jan. 15-16, 2019) (promising continued federal restraint) https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm.

Irrespective of the personal views, preferences or "wisdom" of elected officials, when the people of a state, out of "concer[n] for the[ir] lives and liberties," "experiment with medical marijuana" laws, "federalism principles . . . require that room for experiment be protected." *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting). The past quarter-century of steady marijuana law reform undertaken by virtually every state in the Union, often over and against the vocal disapproval of elected and appointed federal officials, underscores the depth and vibrancy of these bedrock principles upon which our nation was founded.

In sum, South Dakota is not now under, and has not previously shouldered, any constitutional obligation to divert its own resources to assist Congress in achieving federal objectives — "[n]o matter how powerful the federal interest involved," *New York,* 505 U.S. at 178. Amendment A rests squarely within a rich tradition of states pursuing important state interests, and eschewing long-standing federal interests, even with respect to the regulation and control of federally prohibited marijuana.

III. South Dakota's Voters Recognized That South Dakota Would Reap Myriad Benefits by Rewriting the State's Marijuana Laws.

Opponents of Amendment A, like their counterparts in other states that have engaged in marijuana reform, have trotted out a parade of horribles in support of maintaining punitive policies. These dire predictions have run the gamut, from an

imminent marijuana-related "drug use epidemic,"[20] to rampant marijuana-fueled crimes,[21] to an onslaught of marijuana-induced injuries and deaths.[22]

But these gloomy forecasts have not come to pass. Since the first state authorized the medical use of marijuana in 1996, through the openings of the first providers for medical use in 2007, the advent of retail outlets for adult cannabis use in 2014, and then the proliferation of such outlets in Oregon, Alaska, Nevada, Massachusetts, California, Michigan and Maine between 2015 and 2020, researchers have mined health and criminal law data to assess the impacts of cannabis policy reform on the physical and fiscal well-being of persons living in reform jurisdictions.[23] By November 2020, when South

---

[20] *See* David. W. Murray and John P. Walters, *The Devastation That's Really Happening in Colorado*, Weekly Standard, July 10, 2014.

[21] *See* James Conklin, *et al*., *Contact High: The External Effects of Retail Marijuana Establishments on House Prices*, Cato Institute Research Briefs No. 122 (July 18, 2018) (noting "a primary concern of [marijuana legalization] opponents is that legalizing marijuana will increase crime in local communities.")

[22] *See* Kevin A. Sabet, *SABET: Colorado Will Show Why Legalizing Marijuana is a Mistake*, Washington Times, January 17, 2014; D. Mark Anderson, *et al*., *High on Life? Medical Marijuana Laws and Suicide*, Cato Institute Research Briefs No. 17 (Jan. 2015) (noting opponents of marijuana legalization "argue that marijuana use increases the likelihood of depression, anxiety psychosis, and schizophrenia" [citations omitted]).

[23] *See, e.g.*, Angela Dills, *et al*., *The Effect of State Marijuana Legalizations: 2021 Update*, Cato Institute Policy Analysis No. 908 (February 2, 2021) (noting "[r]eviews of the literature on the first wave of marijuana decriminalizations in the 1970's" show that "marijuana use did not change in response to relaxed restrictions" [citation omitted]); Benjamin Hansen, *et al*., *Early Evidence on Recreational Legalization and Traffic Fatalities*, Cato Institute Research Briefs No. 125 (Aug. 8, 2018) (finding that "since legalizing marijuana, Colorado and Washington have not experienced significantly different rates of marijuana- or alcohol-related traffic fatalities"); D. Mark Anderson, *et al*., *supra*. (concluding that the legalization of medical marijuana "leads to few suicides among young adult males"); David J. Bier, *How Legalizing Marijuana is Securing the Border*, Cato Institute Policy Analysis No. 860 (Dec. 19, 2018) (finding "[s]tate-level marijuana legalization . . . has decreased the amount of drug smuggling into the United States across the southwest border.")

Dakota's voters were given the opportunity to consider Amendment A, there simply was no evidence to bolster claims that marijuana legalization caused more problems than it solved or created greater harms than it alleviated.[24]

To the contrary, a solid and growing body of research indicated that South Dakotans would reap tangible benefits by repudiating the state's punitive marijuana laws. At the very least, residents could put an end to expansive, costly and highly intrusive police practices directed at marijuana users and redirect limited and valuable law enforcement resources towards addressing serious crimes that cause real harm to others. Moreover, South Dakota voters did not have to look far for encouragement to replace marijuana prohibition with nuanced marijuana regulation.

In fact, all signs indicated that if South Dakota regulated and taxed the adult use of marijuana, it would swell state coffers with new revenues from marijuana sales to the tune of tens of millions of dollars each year. As South Dakotans were well-aware, the states of Colorado, Washington, Oregon, and California each impose excise taxes on adult-use marijuana within their borders, as well as standard state sales taxes, various local taxes and licensing fees. Colorado collects almost $20 million *per month* from

---

[24] *See, e.g.*, John Hickenlooper & Cynthia Coffman, *Letter to Hon. Jefferson B. Sessions re: Marijuana Legalization in Colorado* (Aug. 24, 2017) (summarizing the evidence of Colorado's ability to enforce violations of state and federal marijuana law; describing "multiple data sources" indicating that "youth marijuana use" has shown "no increase . . . following legalization;" highlighting published evidence that youth marijuana use has in fact decreased; reporting a "21 percent" drop in impaired driving in the first six months of 2017 compared to the same period one year earlier; and noting a steady decrease in marijuana-related emergency department visits due to effective consumer education campaigns and the state's tighter regulation of edibles), https://bit.ly/2MTorli; Conklin, et al., *supra*, (finding that retail marijuana sales have "a large positive effect on neighboring property values.")

regulating the non-medical adult-use of marijuana.[25] In Washington, taxation of adult-use marijuana generated approximately $70 million during the state's first year of sales—double the original revenue forecast.[26] For its part, Oregon, which began taxing adult-use marijuana in January 2016, reports revenues of $10 million per month, well above the initial estimate of $2 million to $3 million for the entire calendar year.[27] California collects more than one-half billion dollars in annual marijuana tax revenues.[28] Using Colorado as a reference, and after adjusting for the difference in population, it is reasonable for South Dakota's voters to expect that their state could consistently reap nearly $40 million in tax revenues each year after the successful implementation of Amendment A.

And there is further benefit that South Dakotans could reasonably expect to receive after the passage of Amendment A: that of increased societal consensus on a formerly divisive issue. In virtually every jurisdiction that has reformed its marijuana laws, those reforms have resulted in wider and deeper public acceptance of marijuana regulation and taxation, leading persons who once opposed or seriously questioned such change to rethink their positions and find common ground with reformers.[29] Put simply,

---

[25] "Marijuana Tax Reports," Colorado Department of Revenue, https://bit.ly/3sTfKXA.

[26] *Recreational and Medical Marijuana Taxes*, Wash. State Dep't. of Revenue, https://bit.ly/3uXMUqO; and *Seeing Green: Washington Rakes in Revenue from Marijuana Taxes*, RT (July 13, 2015).

[27] *Marijuana Tax Program Update*, Jt. Int. Cmte. on Marijuana Legalization, OR Dep't. of Revenue (May 23, 2016).

[28] *Cannabis Tax Revenues*, Cal. Dep't. of Tax and Fee Admin., https://www.cdtfa.ca.gov/dataportal/charts.htm?url=CannabisTaxRevenues.

[29] *See, e.g.*, Ashley Killough, *Fiery Senate Speech on Pot Spotlights GOP Sen. Cory*

legalization has shifted public opinion because plain evidence makes clear that the legal reforms, while perhaps not perfect, have resulted in improvements in the administration of justice, access to important medicine, the protection of personal liberties and respect for individual autonomy.

When South Dakotans went to the polls in November 2020, they had been exposed to the fiscal, policy and human costs of South Dakota's marijuana enforcement practices; indeed, many had felt the impact of those practices first-hand, or through the experiences of family, friends, neighbors and co-workers. Moreover, they had watched, over a series of years, the experiences of the many states, small and large, red, blue and purple, that have legalized marijuana and established robust and profitable regulatory systems for cultivating, packaging, selling, and taxing it. Against this backdrop, the voters of South Dakota voiced their strong support for Amendment A and, as is their legal right, chose to amend their state's constitution to fully effectuate their will.

CONCLUSION

For the reasons stated above, this Court should reject the challenge to Amendment A and honor the will of South Dakota's voters.

Gardner, CNN (Jan. 5, 2018) (noting Republican Senator Gardner of Colorado opposed legalizing marijuana in 2012 but now staunchly supports Colorado's law), https://cnn.it/30nsSaV; Patricia Calhoun, *John Hickenlooper, Three More Governors with Legal Pot Send Letter to Jeff Sessions*, Westword, (Apr. 3, 2017) (reporting the governors informed the U.S. Attorney General of their "apprehensions before our states adopted current laws," but voicing full support for those laws), https://bit.ly/3kW4y9J. *See generally* Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, Gallup (Nov. 9, 2020) (documenting the "stee[p]" rise since 2000 in public support for marijuana legalization across almost every demographic), https://bit.ly/3bknwnh. *See also* Mikos, *On the Limits of Supremacy*, *supra*, at 1477 (describing how state changes in marijuana laws not only reflect popular public opinion but further shift societal norms.)

Dated: March 9, 2021 By /s/ Patrick J. Lee-O'Halloran

THOMPSON TARASEK LEE-O'HALLORAN PLLC
Patrick J. Lee-O'Halloran (#4399)
7101 York Avenue S., Suite 255
Edina, MN 55435
Tel: (612) 568-0132
patrick@ttlolaw.com

ATTORNEY FOR *AMICI CURIAE*

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, and COLONEL RICK MILLER, IN HIS OFFICAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL,

Plaintiffs and Appellees,

v.

STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE,

Defendant,

and

SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE,

Defendants and Appellants.

Supreme Court No. 29546
Civil No. 32CIV20-000187

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief of *Amici Curiae* Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation complies with SDCL 15-26A-66(b). This brief was prepared and printed in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman font, size 12. This brief contains 4681 words, including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, and certificates of counsel.

Dated: March 10, 2021

By /s/ Patrick J. Lee-O'Halloran

THOMPSON TARASEK LEE-O'HALLORAN PLLC
Patrick J. Lee-O'Halloran (SD #4399)
7101 York Avenue S., Suite 255
Edina, MN 55435
Tel: (612) 564-6966
patrick@ttlolaw.com

ATTORNEYS FOR *AMICI CURIAE* CATO INSTITUTE, THE DKT LIBERTY PROJECT, DUE PROCESS INSTITUTE, AND REASON FOUNDATION

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

AFFIDAVIT OF SERVICE

Ed Motch, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **March 10, 2021**, he prepared the **Brief of Amicus Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation,** case number **29546** and filed same upon the following attorney(s) or responsible person by enclosing **1** copy of same in a properly addressed envelope for shipment via **Fedex 2nd Day Delivery or U.S. Mail postage Prepaid**

Fedex

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave., Ste. 402
Sioux Falls, SD 57101

US Mail

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717

Subscribed and sworn to before me on
March 10, 2021

Signed _____

Notary Public _____

KRISTI AUSTIN MOTCH
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2025

BACHMAN
LEGAL PRINTING

Phone (612) 339-9518 ■ (800) 715-3582
Fax (612) 337-8053 ■ www.bachmanprint.com
733 Marquette Avenue
Suite 109
Minneapolis, MN 55402

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

AFFIDAVIT OF MAILING

Ed Motch, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **March 10, 2021**, he prepared the **Brief of Amicus Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation,** case number **29546** and filed same upon the following attorney(s) or responsible person by enclosing **3** copies of same in a properly addressed envelope for shipment via **Fedex 2nd Day Delivery.**

Clerk of Courts
South Dakota Supreme Court
500 East Capitol Ave.
Pierre, SD 57501-5070

Subscribed and sworn to before me on
March 10, 2021

Signed _____

KRISTI AUSTIN MOTCH
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2025

Notary Public _____

BACHMAN
LEGAL PRINTING

Phone (612) 339-9518 ■ (800) 715-3582
Fax (612) 337-8053 ■ www.bachmanprint.com
733 Marquette Avenue
Suite 109
Minneapolis, MN 55402

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF MAILING

I, Melanie Davis, being duly sworn, say that on the 10th day of March, 2021, I filed the below-listed document for Supreme Court of South Dakota Appeal No. 29546:

1. **Motion for Leave to File Brief of Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation in Support of Appellants.**

With the following:

Clerk of Courts
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501

by placing three true and correct copies of the document in an envelope addressed to the party listed above, and depositing the envelopes, with sufficient postage, in the United States Mail at the Post Office located in the City of Edina in the State of Minnesota.

Melanie Davis

Notary Public

ALLEN ROBERT BRANDT
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2022

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE

I, Melanie Davis, being duly sworn, say that on the 10th day of March, 2021, I served a true and correct copy of the below-listed document for Supreme Court of South Dakota Appeal No. 29546:

1. **Motion for Leave to File Brief of Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation in Support of Appellants.**

upon the following:

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave., Ste. 402
Sioux Falls, SD 57101

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
3800 E. Highway 34
Hillsview Plaza
Pierre, SD 57501

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717

by placing a true and correct copy of the document in envelopes addressed to the parties listed above, and depositing the envelopes, with sufficient postage, in the United States Mail at the Post Office located in the City of Edina in the State of Minnesota.

Melanie Davis

Notary Public

ALLEN ROBERT BRANDT
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2022

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29546

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff, and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol,
Plaintiffs/Appellees,

v.

STEVE BARNETT, in his official capacity as South Dakota Secretary of State,
Defendant,

and

SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE,
Intervenor Defendants/Appellants.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

The Honorable Christina Klinger, Circuit Court Judge presiding.

BRIEF OF APPELLEE SHERIFF KEVIN THOM

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717-0370
Attorney for Plaintiff/Appellee Sheriff Kevin Thom

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm, LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Attorneys for Plaintiff/Appellee Colonel Rick Miller

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
Attorneys for Intervenor Defendants/Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Attorneys for Defendant Steve Barnett

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
patrick@ttlolaw.com
Attorney for Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation

NOTICE OF APPEAL FILED FEBRUARY 17, 2021

TABLE OF CONTENTS

Table of Cases and Authorities ii

Preliminary Statement 1

Jurisdictional Statement 1

Statement of Legal Issues 2

1. Whether the circuit court correctly concluded that Sheriff Thom had standing to bring this declaratory judgment action in his official capacity as the Pennington County Sheriff? 2

Statement of the Case 2

Statement of the Facts 3

Standard of Review 4

Argument 5

A. Sheriff Thom Has Standing to Challenge Constitutional Amendment A 5

B. Sheriff Thom is Challenging a Constitutional Amendment That Violates The South Dakota Constitution – Not a Statute That is Alleged to Be Unconstitutional 5

C. The Office of Pennington County Sheriff Was Not Created by the South Dakota Legislature 7

D. Sheriff Thom's Oath and SDCL 7-12-1 Give Him Real Party in Interest Status 7

Conclusion 9

Certificate of Service 10

Certificate of Compliance 11

TABLE OF CASES AND AUTHORITIES

Cases **Page(s)**

Bd. of Supervisors of Linn County v. Dept. of Rev.,
263 N.W.2d 227 (Iowa 1978) 6

Biegler v. Am. Family Mut. Ins. Co.,
2001 S.D. 13, 621 N.W.2d 592.....8

Collier v. Frierson,
24 Ala. 100 (1854) 5

Edgemont School Dist. 23-1 v. South Dakota Department of Revenue,
1999 SD 48, 593 N.W.2d 36.....2, 5, 6, 7

Ellingson v. Ammann,
2013 S.D. 32, 830 N.W.2d 99.....2, 8

Exira Community Sch. Dst. v. State,
512 N.W.2d 787 (Iowa 1994) 6

Hutterville Hutterian Brethren, Inc. v. Waldner,
2010 S.D. 86, 791 N.W.2d 169.....3

Polk County v. Iowa State Appeal Bd.,
330 N.W.2d 267 (Iowa 1983) 6

Vander Vorste v. Northwestern Nat'l Bank,
81 S.D. 566, 138 N.W.2d 411 (1965).....2, 8

Statutes

SDCL 7-12-1.....2, 4, 7, 8

SDCL 15–6–17(a).....2, 8

Constitutional Provisions

S.D. Const. art. XXI, § 3.....2, 7

S.D. Const. art. XXIII.....3, 4, 9

PRELIMINARY STATEMENT

Contemporaneous with this brief, Appellee Sheriff Kevin Thom, pursuant to SDCL 15-26A-67, will file a joinder and joins in the Brief of Appellee Colonel Rick Miller filed in Appeal No. 29546 as to all issues. Sheriff Thom files this brief to address the issue of his standing to contest the validity of Constitutional Amendment A.

Throughout this brief, Sheriff Kevin Thom is referred to as "Sheriff Thom." Appellants South Dakota for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are referred to as "Proponents." Constitutional Amendment A will be referred to as "Amendment A."

Citations to the settled record appear as "SR." References to the Proponents' Brief appear as "Proponents' Brief."

JURISDICTIONAL STATEMENT

Sheriff Thom agrees with the Jurisdictional Statement set forth in the Proponents' Brief. Proponents' Brief at 1.

STATEMENT OF LEGAL ISSUES

1. **Whether the circuit court correctly concluded that Sheriff Thom had standing to bring this declaratory judgment action in his official capacity as the Pennington County Sheriff?**

   The circuit court concluded that Sheriff Thom had standing in his official capacity as Pennington County Sheriff.

   Relevant Cases:

   Edgemont School Dist. 23-1 v. South Dakota Department of Revenue, 1999 SD 48, 593 N.W.2d 36;

   Ellingson v. Ammann, 2013 S.D. 32, 830 N.W.2d 99;

   Vander Vorste v. Northwestern Nat'l Bank, 81 S.D. 566, 138 N.W.2d 411 (1965).

   Relevant Statutes and Constitutional Provisions:

   S.D. Const. art. XXI, § 3;

   SDCL 7-12-1;

   SDCL 15-6-17(a).

2. **Sheriff Thom joins in Colonel Miller's presentment of the issues as to issues 2 through 6.**

STATEMENT OF THE CASE

Sheriff Thom joins in the Statement of the Case as outlined by Colonel Miller.

STATEMENT OF FACTS[1]

Sheriff Thom is the elected Sheriff of Pennington County. Pennington County was formed in 1875 and named for the then Governor of the Dakota Territory, John L. Pennington. The first Sheriff of Pennington County[2] was Frank P. Moulton, who served from 1877 to 1880.

Sheriff Thom was first elected Sheriff in 2010. He was re-elected in 2014 and 2018. After each election to the Office of Sheriff, he took an Oath that he would support the Constitution of the United States and the Constitution of the State of South Dakota. He brings his claims challenging Amendment A in his official capacity as the elected Sheriff of Pennington County and not on behalf of or in representation of Pennington County. No County funds are being expended on his behalf in pursuit of the claims made against Amendment A.

Sheriff Thom brought claims challenging Amendment A as the process to amend the South Dakota Constitution, as addressed in Article XXIII, was not followed by the Proponents/Appellants. He brought such claims in his official capacity as Sheriff, as he

---

[1] Sheriff Thom joins in the Statement of Facts of Colonel Miller. This Statement of Facts is particular to Sheriff Thom on the standing issue and is derived from Exhibit A, Affidavit of Sheriff Kevin Thom (SR 376-379), attached to the Affidavit of Robert L. Morris (SR 373-375). It is noted that at the Circuit Court level that the Proponents suggested that the Court should disregard Sheriff Thom's Affidavit. (SR 396). Proponents did not move to strike the Affidavit. The Proponents' standing challenge challenges subject matter jurisdiction. When subject matter jurisdiction is challenged on a factual basis, affidavits may be considered in resolving the dispute. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 175.

[2] As the Court is well aware, South Dakota did not become a State until November 2, 1889. As such, the Office of Sheriff of Pennington County was established prior to statehood and the adoption of the State Constitution.

took an oath to support the South Dakota Constitution. The Proponent/Appellants violated the South Dakota Constitution by failing to follow the requirements of Article XXIII.

As Sheriff, Sheriff Thom is statutorily required, pursuant to SDCL 7-12-1 to keep and preserve the peace within Pennington County. Decriminalization of marijuana presents challenges for law enforcement - one of which is highway safety. If marijuana use is legalized, highway safety is affected due to an increase in intoxicated or drugged driving. With an increase in drugged driving, is the need to test and confirm marijuana intoxication.

No marijuana test exists that is like an alcohol blood test. Marijuana testing that does exist is complicated in that traces of marijuana can remain in the body for days. This causes challenges to law enforcement who are trying to determine an individual's level of intoxication, even from the legal ingestion of marijuana.

Unless a drugged driver is so obviously impaired and a danger to the public, Sheriff Thom is concerned that law enforcement officers will be unable to detain and arrest drivers impaired by the legal use of marijuana. As such, his Office of Sheriff of Pennington County is affected by the increased cost of law enforcement and possible liability exposure to him as Sheriff and the Pennington County Sheriff's Office if marijuana is decriminalized in Amendment A in its present form.

STANDARD OF REVIEW

Sheriff Thom joins in the Standard of Review as outlined by Colonel Miller.

ARGUMENT

A. Sheriff Thom Has Standing to Challenge Constitutional Amendment A.

1. Summary of the Argument

The Constitution is the supreme and paramount law. The rules by which amendments are to be made under it is clearly defined. To what purpose do these rules serve if they can be dispensed with? To dispense with such rules violates the very instrument which grants the Proponents the right to attempt to amend the Constitution. "…. and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." *Collier v. Frierson*, 24 Ala. 100, 109 (Ala. 1854).

Sheriff Thom has standing to bring to the attention of the Court those very rules prescribed by the fundamental law which the Proponents of Amendment A violated in submitting Amendment A to the voters. His standing is conferred upon him in his official capacity as Sheriff, due to his oath of office and due to the requirement of statute that he keep and preserve the peace in Pennington County. He meets the requirement of a real party in interest and has standing to join Colonel Miller in challenging the validity of Amendment A.

B. Sheriff Thom is Challenging a Constitutional Amendment That Violates the South Dakota Constitution – Not a Statute That is Alleged to Be Unconstitutional.

In *Edgemont School Dist. 23-1 v. South Dakota Department of Revenue*, 1999 SD 48, 593 N.W.2d 36, the School District and County appealed the Circuit Court's decision claiming that the Circuit Court erred in interpreting SDCL 10-28-16, or in the alternative, that SDCL 10-28-16 was unconstitutional in violation of Article XI, Section 2 of the

South Dakota Constitution. *Edgemont*, 1999 SD 48, ¶4; 593 N.W.2d at 38. After upholding the Circuit Court's decision on the interpretation of SDCL 10-28-16, this Court turned to the constitutional challenge by the County and School. The Appellees claimed that the School District lacked standing to challenge the statute and this Court agreed. *Edgemont*, 1999 SD 48, ¶5; 593 N.W.2d at 39.

The Court noted that counties are political subdivisions of states and are not sovereign entities. Counties are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions. *Edgemont*, 1999 SD 48, ¶14; 593 N.W.2d at 40. The Court then concluded that the School District and County "are creations of the legislature and lack standing to challenge the constitutionality of SDCL 10-28-16." *Edgemont*, 1999 SD 48, ¶15; 593 N.W.2d at 40.

In support of its legal conclusion, the Court string cited to various Iowa cases as follows:

> *See Exira Community Sch. Dst. v. State,* 512 N.W.2d 787, 790 (Iowa 1994) (stating: "The well-settled rule in Iowa is that school districts, as political subdivisions of the state, ***lack standing to mount a constitutional attack against a state statute***."); *Polk County v. Iowa State Appeal Bd.*, 330 N.W.2d 267, 271 (Iowa 1983) (stating: "Our cases have held uniformly that ***a county lacks standing to challenge the constitutionality of state statutes.");*** *Bd. of Supervisors of Linn County v. Dept. of Rev.*, 263 N.W.2d 227, 234 (Iowa 1978) (stating: "A county and its ministerial officers ordinarily have no right, power, authority, or standing to question ***the constitutionality of a state statute.***").

Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40. [Emphasis supplied].

In *Edgemont* and the Iowa cases cited by the Court, the rule developed is that creations of the Legislature could not challenge the constitutionality of state statutes, which are created by the Legislature. *Edgemont* did not create a rule that a constitutional

amendment, alleged to be in violation of the South Dakota Constitution, could not be challenged by an instrumentality created by the Legislature.

C. The Office of Pennington County Sheriff Was Not Created by the South Dakota Legislature.

Even if one were to stretch the rule developed in *Edgemont* that creations of the Legislature could not challenge a constitutional amendment as being in violation of the South Dakota Constitution, such rule would be inapplicable to Sheriff Thom. The Office of Sheriff of Pennington County was first served by Frank P. Moulton, who served from 1877 to 1880. South Dakota became a State and adopted its Constitution in 1889, some 12 years after the Office of Sheriff of Pennington County was established. Sheriff Thom, having served as the elected Sheriff since 2010, serves in an office that was not created by the Legislature. As such, there exists nothing to prevent him, in his official capacity, from challenging a constitutional amendment he asserts is in violation of the South Dakota Constitution.

D. Sheriff Thom's Oath and SDCL 7-12-1 Give Him Real Party in Interest Status.[3]

South Dakota Constitution Article XXI, §3 provides:

> Every person elected or appointed to any office in this state, except such inferior offices as may be by law exempted, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States and of this state, and faithfully to discharge the duties of his office.

[3] It is noted that the Attorney General did not challenge the standing of Sheriff Thom at the Circuit Court. Only the Proponents challenged his standing. Proponents continued challenge ignores the Preamble to the Constitution which provides "We, the people of South Dakota, . . . establish this Constitution for the state of South Dakota." Sheriff Thom, whether in his official capacity or in any other capacity, as a citizen of South Dakota should be able to challenge the legality of Amendment A.

When Sheriff Thom was first elected Sheriff in 2010, he accepted this mandate required of his elected capacity as Sheriff. He has taken the oath to uphold the Constitution of the State of South Dakota each time since 2010, when he was re-elected as Sheriff. In addition to taking the Oath, as required by the South Dakota Constitution, SDCL 7-12-1 requires Sheriff Thom to keep and preserve the peace within Pennington County. No one can argue that such mandate does not include public safety in the County, in keeping Pennington County citizens and visitors to the County safe – whether on property or on the roadways in the County.

Sheriff Thom's oath and SDCL 7-12-1 give him real party in interest status. The law requires "[e]very action shall be prosecuted in the name of the real party in interest." SDCL 15–6–17(a). *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d 99, 101. The real party in interest rule is satisfied "if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action." *Vander Vorste v. Northwestern Nat'l Bank,* 81 S.D. 566, 572, 138 N.W.2d 411, 414 (1965). "The purpose of the real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party plaintiff and that such an action must be defended only once." (internal citations omitted). *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 27, 621 N.W.2d 592, 600.

Sheriff Thom is obligated to keep and preserve the peace in Pennington County. Decriminalization of marijuana raises public safety challenges for law enforcement. Sheriff Thom believes that his office will be personally affected by the increased cost of law enforcement. In addition, he has liability concerns pertaining to law enforcement being able to properly test marijuana intoxication in order to protect the public from

marijuana impaired drivers. Sheriff Thom has a real, actual, material, and substantial interest in whether Amendment A was a valid amendment to the South Dakota Constitution.

CONCLUSION

The South Dakota Constitution is the fundamental law of our State. The Proponents sought to amend the fundamental law. That is their right. But their right to amend is limited by the rules prescribed by Article XXIII. Sheriff Thom is within his rights, acting in his official capacity, to challenge the validity of Amendment A as not being in compliance with the rules prescribed by the fundamental law.

Sheriff Thom respectfully requests this Court affirm the Circuit Court's decision.

Dated this 24th day March, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorneys for Appellee Sheriff Kevin Thom

By: /s/ *Robert L. Morris*
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 24, 2021, the foregoing **Brief of Appellee Sheriff Kevin Thom** was filed with the Clerk of the South Dakota Supreme Court in Word and PDF format via electronic mail to the following address:

SCClerkBriefs@ujs.state.sd.us

and that the original and two copies of the same were filed by mailing the same to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070

and a true and correct copy of the foregoing brief was served electronically upon:

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm, LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Plaintiff/Appellee Colonel Rick Miller

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
grant.flynn@state.sd.us
matthew.templar@state.sd.us
Attorneys for Defendant Steve Barnett

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com
Attorneys for Intervenor Defendants/Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
patrick@ttlolaw.com
Attorney for Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation

/s/ *Robert L. Morris*
Robert L. Morris

CERTIFICATE OF COMPLIANCE

In compliance with SDCL 15-26A-66(b)(4), I hereby certify that the font size used in the **Brief of Appellee Sheriff Kevin Thom** is Times New Roman, 12 point. The total word count for the foregoing brief is 2,003, exclusive of the exempted portions identified in SDCL 15-26A-66(b)(3).

The undersigned is relying on the word-count utility in Microsoft Word 2016, the word processing system used to prepare the brief, consistent with SDCL 15-26A-66(b)(4).

Dated this 24th day of March, 2021.

/s/ *Robert L. Morris*
Robert L. Morris

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29546

SHERIFF KEVIN THOM, IN HIS OFFICIAL CAPACITY AS PENNINGTON COUNTY SHERIFF, AND COLONEL RICK MILLER, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE SOUTH DAKOTA HIGHWAY PATROL,

Plaintiffs and Appellees,

vs.

STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE,

and

SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT, HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE CHRISTINA KLINGER,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE COLONEL RICK MILLER

ATTORNEYS FOR APPELLANTS SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
Tel. (605) 335-1300

ATTORNEY FOR APPELLEE SHERIFF KEVIN THOM

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717-0370
Tel. (605) 723-7777

ATTORNEYS FOR STEVE BARNETT

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Tel. (605) 773-3215

ATTORNEYS FOR APPELLEE COLONEL RICK MILLER

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Tel. (605) 331-2975

ATTORNEY FOR AMICI CURIAE CATO INSTITUTE, THE DKT LIBERTY PROJECT, DUE PROCESS INSTITUTE, AND REASON FOUNDATION

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
Tel. (612) 568-0132

NOTICE OF APPEAL FILED FEBRUARY 17, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

I. Whether the circuit court correctly concluded that Sheriff Thom had standing to bring this declaratory judgment action in his official capacity as the Pennington County Sheriff. 1

II. Whether the circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action in his official capacity as Superintendent of the South Dakota Highway Patrol 2

III. Whether the circuit court correctly concluded that Sheriff Thom and Colonel Miller appropriately commenced this declaratory judgment action after the election. 2

IV. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it violated the one-subject rule in Article XXIII, § 1 of the South Dakota Constitution. 2

V. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it was a revision cloaked as an amendment and therefore could not be an initiated amendment under Article XXIII of the South Dakota Constitution. 3

VI. Whether the circuit court correctly concluded it could not sever Amendment A and decide which portions to retain. 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 5

STANDARD OF REVIEW 7

ARGUMENT 7

I. The circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action. 9

A. Colonel Miller has standing because Amendment A will have a direct and injurious effect on the Highway Patrol. 9

B. Colonel Miller had standing to bring this declaratory judgment action in his official capacity as an executive officer. 13

i. The Governor may delegate the prosecution of this action to Colonel Miller. 15

ii. The Governor ratified the commencement of this declaratory judgment action. 17

C. Colonel Miller has standing in this lawsuit because it presents a question of great public importance. 17

II. Colonel Miller has timely commenced this proceeding. 20

A. The pre-election procedures Proponents cite are inapplicable and irrelevant. 21

B. The doctrines of waiver and laches do not bar this proceeding. 23

C. The law does not preclude post-election challenges. 24

III. Amendment A violates the One-Subject Rule. 25

A. The standard that applies to the One-Subject rule is more exacting than the broad "reasonably germane" standard applicable to legislative acts. 27

i. The legislative history of Article XXIII, § 1 suggests a heightened standard must apply. 28

ii. Authorities from other jurisdictions require that subjects be "closely related" and have a "natural and necessary" connection. 31

iii. The scope of the subject must be specific enough to allow for meaningful review. 32

B. Amendment A violates the One-Subject Rule, regardless of what standard this Court applies. 34

C. Amendment A presents a classic case of logrolling..... 36

IV. Amendment A seeks to unconstitutionally "revise" the Constitution through the initiative process. 38

A. Amendment A is an unconstitutional revision because it adds a new article to the Constitution. 40

B. Amendment A is an unconstitutional revision because it fundamentally changes the Constitution and the governmental system it established. 44

i. Amendment A granted the Department of Revenue the "exclusive power" to perform certain functions. 45

ii. "Exclusive power" means "exclusive power." 46

iii. Vested constitutional powers are distinct from a delegation of legislative authority. 49

C. Amendment A is an unconstitutional revision because it imposes far-reaching and multifarious changes to the Constitution. 49

i. Amendment A precludes the Governor and Legislature from delegating tasks to executive agencies. 51

ii. Amendment A restricts this Court's authority to promulgate rules and discipline members of the Bar. 52

iii. Amendment A establishes an entirely new legal cause of action against the Department of Revenue. 53

iv. Amendment A would alter the Legislature's constitutional authority to assess taxes and appropriate revenue..... 55

v. Amendment A deprived the Legislature of the power to enact civil penalties. 56

V. Amendment A cannot be severed. 57

CONCLUSION..... 58

REQUEST FOR ORAL ARGUMENT..... 58

CERTIFICATE OF SERVICE 59

CERTIFICATE OF COMPLIANCE 60

APPENDIX..... 61

TABLE OF AUTHORITIES

CASES

Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) .....passim

Agar Sch. Dist. No. 58-1 Bd. of Educ. v. McGee, 527 N.W.2d 282 (S.D. 1995) 23

Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978) 28, 44

Andrews v. Governor of Maryland, 449 A.2d 1144, 1146 (Md. 1982) 7

Baker v. Atkinson, 2001 S.D. 49, 625 N.W.2d 265 ..... 27, 28, 35

Barnhart v. Herseth, 222 N.W.2d 131, 136 (S.D. 1974) 7, 24, 29

Bienert v. Yankton Sch. Dist. 63-3, 507 N.W.2d 88 (S.D. 1993) 23

Bowyer v. Ducey, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020) 24

Citizens Protecting Michigan's Constitution v. Secretary of State, 761 N.W.2d 210 (Mich. Ct. App. 2008)..... 39, 50

City of Burien v. Kiga, 31 P.3d 659 (Wash. 2001) 23

Clarkson & Co. v. Cont'l Res., Inc., 2011 S.D. 72, 806 N.W.2d 615 23

Dan Nelson, Auto., Inc. v. Viken, 2005 S.D. 109, 706 N.W.2d 239..... 2, 14

Danforth v. Egan, 119 N.W. 1021 (S.D. 1909)..... 2, 20

Davis v. Richland Cty. Council, 642 S.E.2d 740 (S.C. 2007) 18

Doe v. Nelson, 2004 S.D. 62, 680 N.W.2d 302..... 28

Duggan v. Beermann, 515 N.W.2d 788 (Neb. 1994) 21

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, 593 N.W.2d 36 .....passim

Fulton County v. City of Atlanta, 825 S.E.2d 142 (Ga. 2019)..... 23

Gooder v. Rudd, 160 N.W. 808 (S.D. 1916)..... 23

H & W Contracting, LLC v. City of Watertown, 2001 S.D. 107, 633 N.W.2d 167 ... 18

Hallberg v. S. Dakota Bd. of Regents, 2019 S.D. 67, 937 N.W.2d 568 54

Hass v. Wentzlaff, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96 7

Holmes v. Appling, 392 P.2d 636 (Or. 1964) 38

In re Daugaard, 2011 S.D. 44, 801 N.W.2d 438 42

In re Initiative Petition No. 314, 625 P.2d 595 (Okla. 1980) ..... passim

In re Tod, 81 N.W. 637 (S.D. 1900) 15

Jensen v. Lincoln Cty. Bd. of Comm'rs, 2006 S.D. 61, 718 N.W.2d 606 55

Kanaly v. State, 368 N.W.2d 819 (S.D. 1985) 35

Kneip v. Herseth, 214 N.W.2d 93 (S.D. 1974) 18

Legislature v. Eu, 816 P.2d 1309 (Cal. 1991) 44

Lehman v. Bradbury, 37 P.3d 989, 1000-01 (Or. 2002) ..... passim

Marshall v. State ex rel. Cooney, 975 P.2d 325 (Mont. 1999) 3, 58

McConkey v. Van Hollen, 783 N.W.2d 855 (Wis. 2010) 2, 19

McFadden v. Jordan, 196 P.2d 787 (Cal. 1948) 3, 39, 42

McLaughlin v. Bennett, 238 P.3d 619 (Ariz. 2010) 30

McMacken v. State, 320 N.W.2d 131 (S.D. 1981) 27

Meierhenry v. City of Huron, 354 N.W.2d 171 (S.D. 1984) 33

Montana Ass'n of Ctys. v. State by & through Fox, 404 P.3d 733 (Mont. 2017) ..... passim

Moore v. Brown, 165 S.W.2d 657, 659-60 (Mo. 1942) 9, 20

Olson v. Guindon 2009 S.D. 63, 771 N.W.2d 318 ..... 2, 10, 18

Op. of the Justices to the Council, 334 N.E.2d 604 (Mass. 1975) 16

Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) 23, 39

S.D. State Fed'n of Labor AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372 ... 2, 22

Sears v. Treasurer & Receiver General, 98 N.E.2d 621 (Mass. 1951) 23

Simpson v. Tobin, 367 N.W.2d 757 (S.D. 1985) 27

Sioux Falls Mun. Emp. Ass'n, Inc. v. City of Sioux Falls, 233 N.W.2d 306 (S.D. 1975) 18

Slota v. Imhoff and Associates, P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873 ... 7

Stander v. Kelley, 250 A.2d 474 (Pa. 1969) 2, 21, 24

State ex rel. Adams v. Herried, 72 N.W. 93 (S.D. 1897) .....passim

State ex rel. Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978 (Ind. 2003) 18

State ex rel. Cranmer v. Thorson, 68 N.W. 202 (S.D. 1896) 22

State ex rel. Dep't of Transp. v. Clark, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160 7

State ex rel. Evans v. Riiff, 42 N.W.2d 887, 888 (S.D. 1950) 47

State ex rel. Jensen v. Kelly, 274 N.W. 319 (S.D. 1937) 27

State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) 18

State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974) 18

State ex. rel. Wagner v. Evnen, 948 N.W.2d 244 (Neb. 2020) .....passim

State v. Morgan, 48 N.W. 314 (S.D 1891) 27

State v. Outka, 2014 S.D. 11, 844 N.W.2d 598 16

State v. Wilson, 2000 S.D. 133, 618 N.W.2d 513 ..... 3, 42, 43

Trump v. Biden, 951 N.W.2d 568 (Wisc. 2020) 24

United States v. Fletcher, 231 F. 326 (D.S.D. 1916) 14

Wagner v. Wagner, 2006 S.D. 31, 712 N.W.2d 653 55

Water Works v. Bd. of Water, 141 So. 3d 958, 964 (Ala. 2013) 8, 21, 23

Wilson v. Hogan, 473 N.W.2d 492 (S.D. 1991) 54

Woodard v. Rasmussen, 700 P.2d 675 (Or. 1985) 16

STATUTES

1972 S.D. Sess. Laws ch. 4 (H.J. Res. 514, approved November 7, 1972) 41

2011 S.D. Sess. Laws ch. 1, §§ 34-35 (Exec. Order 2011-01) 45

2018 S.D. Sess. Laws ch. 4, § 2 (H.J. Res. 1006, approved Nov. 6, 2018) 25
2020 S.D. Sess. Law ch. 176, 2020 HB 1008 49
Bess v. Ulmer, 985 P.2d 979 (Alaska 1999) ..... passim
SB 86, 96th S.D. Legis. Sess. (2021) 24
SDCL 10-1-1 45
SDCL 15-6-17(a) 2, 10, 17
SDCL 15-6-57 23
SDCL 1-8-2 15
SDCL 2-1-17.1 22
SDCL 2-1-18 22
SDCL 21-24-14 9
SDCL 32-2-7 11
SDCL 34-1-16 48
SDCL 34-48A-1 10
SDCL 39-1-1 48
SDCL 6-1-12 10
SDCL ch. 12-22 23
SDCL chs. 2-1, 12-13 15

CONSTITUTIONAL PROVISIONS

Neb. Const. art. III, § 2 31
S.D. Const. art. III, § 1 50
S.D. Const. art. III, § 21 3
S.D. Const. art. III, § 27 50
S.D. Const. art. III, § 30 50
S.D. Const. art. IV, § 1 50

S.D. Const. art. IV, § 3 ..... passim
S.D. Const. art. IV, § 4 50
S.D. Const. art. IV, § 8 ..... passim
S.D. Const. art. IV, § 9 ..... 10, 50
S.D. Const. art. V, § 1 50
S.D. Const. art. V, § 12 53
S.D. Const. art. V, § 4 50
S.D. Const. art. V, § 5 50
S.D. Const. art. VI, § 17 51
S.D. Const. art. VIII, § 15 51
S.D. Const. art. VIII, § 3 51
S.D. Const. art. XI, § 1 50
S.D. Const. art. XI, § 13 51
S.D. Const. art. XI, § 2 50
S.D. Const. art. XI, § 8 50
S.D. Const. art. XI, § 9 50
S.D. Const. art. XII, § 1 ..... 50, 56
S.D. Const. art. XII, § 2 ..... 50, 56
S.D. Const. art. XXIII ..... passim
S.D. Const. art. XXIII, § 1 ..... passim
S.D. Const. art. XXIII, § 2 ..... passim

OTHER AUTHORITIES

Black's Law Dictionary 1429 (Henry C. Black ed., 6th ed. 1990) 30

Hearing on H.J.R. 1006 before the S. Comm. on State Affairs, 93rd S.D. Legis. Sess. (2018) 25, 29, 30

Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 Nw. U. L. Rev. 65, 78 (2019) 44

Rule 1.2(d) of the South Dakota Rules of Professional Conduct 52

South Dakota Constitutional Revision Commission, Third Annual Report 1 (1972) 42

TREATISES

5A C. Wright & A. Miller, Federal Practice and Procedure § 1321, p. 388 (3d ed.2004) 14

PRELIMINARY STATEMENT

Throughout this brief, Colonel Rick Miller is referred to as "Colonel Miller." Sheriff Kevin Thom is referred to as "Sheriff Thom." Sheriff Thom and Colonel Miller are collectively referred to as "Thom and Miller." Appellants South Dakota for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are referred to as "Proponents." Defendant Steve Barnett, in his official capacity as the South Dakota Secretary of State, is referred to as "Secretary of State." The State of South Dakota is referred to as "State." Constitutional Amendment A will be referred to as "Amendment A."

Citations to the settled record appear as "SR." Citations to the Appendix appear as "Appx." Citations to the Proponents' Appendix appear as "Pr.App." Exhibits to documents within the record will be referred to as "Ex." followed by the exhibit number. References to the Proponents' Brief appear as "Proponents' Brief." References to the Circuit Court's Memorandum Decision on page 515 of the settled record appear as "Memorandum Decision."

JURISDICTIONAL STATEMENT

Colonel Miller agrees with the Jurisdictional Statement set forth in the Proponents' Brief. (Proponents' Brief, 1).

STATEMENT OF ISSUES

I. Whether the circuit court correctly concluded that Sheriff Thom had standing to bring this declaratory judgment action in his official capacity as the Pennington County Sheriff.

The circuit court concluded that Sheriff Thom had standing in his official capacity as Pennington County Sheriff.

II. Whether the circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action in his official capacity as Superintendent of the South Dakota Highway Patrol.

The circuit court concluded Colonel Miller had standing in his official capacity as Superintendent of the South Dakota Highway Patrol.

Relevant Cases:
Olson v. Guindon, 2009 S.D. 63, 771 N.W.2d 318;
Dan Nelson, Auto., Inc. v. Viken, 2005 S.D. 109, 706 N.W.2d 239;
McConkey v. Van Hollen, 783 N.W.2d 855 (Wis. 2010).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. IV, § 3;
S.D. Const. art. XXIII, §§ 1-2;
SDCL 15-6-17(a).

III. Whether the circuit court correctly concluded that Sheriff Thom and Colonel Miller appropriately commenced this declaratory judgment action after the election.

The circuit court concluded that the declaratory judgment action could be commenced after the election.

Relevant Cases:
S.D. State Fed'n of Labor AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372;
Danforth v. Egan, 119 N.W. 1021, 1022 (S.D. 1909);
Stander v. Kelley, 250 A.2d 474, 477 (Pa. 1969);
Mont. Ass'n of Counties v. State ex rel. Fox, 404 P.3d 733 (Mont. 2017).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, §§ 1-2

IV. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it violated the one-subject rule in Article XXIII, § 1 of the South Dakota Constitution.

The circuit court concluded that Amendment A encompassed multiple subjects and was therefore void and of no effect.

Relevant Cases:

State ex rel. Adams v. Herried, 72 N.W. 93, 96 (S.D. 1897);

Mont. Ass'n of Counties v. State ex rel. Fox, 404 P.3d 733 (Mont. 2017);
State ex. rel. Wagner v. Evnen, 948 N.W.2d 244 (Neb. 2020);
In re Initiative Petition No. 314, 625 P.2d 595 (Okla. 1980).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 1;
S.D. Const. art. III, § 21.

V. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it was a revision cloaked as an amendment and therefore could not be an initiated amendment under Article XXIII of the South Dakota Constitution.

The circuit court concluded that Amendment A was a revision with far-reaching effects on the basic nature of South Dakota's governmental system required to be submitted through a constitutional convention and was therefore void and of no effect.

Relevant Cases:
State v. Wilson, 2000 S.D. 133, 618 N.W.2d 513;
McFadden v. Jordan, 196 P.2d 787 (Cal. 1948);
Bess v. Ulmer, 985 P.2d 979, 983 (Alaska 1999).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 2.

VI. Whether the circuit court correctly concluded it could not sever Amendment A and decide which portions to retain.

The circuit court concluded it could not assume which of Amendment A's multiple subjects the voters approved and therefore ruled severability was not appropriate.

Relevant Cases:
Marshall v. State ex rel. Cooney, 975 P.2d 325, 332 (Mont. 1999)

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 1

STATEMENT OF THE CASE

Colonel Miller and Sheriff Thom commenced this declaratory judgment action by serving the Summons and Complaint on the Secretary of State and the South Dakota Attorney General. (SR 1-38). Colonel Miller and Sheriff Thom alleged in the Complaint that Amendment A was unconstitutionally submitted to the South Dakota electorate because it embraced more than one subject in violation of Article XXIII, § 1 of the South Dakota Constitution, and because it was a revision under Article XXIII, § 2 that could not be submitted as an initiated amendment. (SR 7-13). This declaratory judgment action was filed contemporaneously with a separate election contest seeking similar relief in the same court, which is the subject of Appeal No. 29547.

Proponents filed an uncontested motion to intervene, which the circuit court granted. (SR 39-41). The Secretary of State and Proponents filed separate answers to the Complaint denying the allegations. (SR 54, 63). Colonel Miller and Sheriff Thom thereafter filed a motion for summary judgment. (SR 143). The Secretary of State and Proponents filed separate motions for judgment on the pleadings. In support of their motion, Proponents presented arguments not raised by the Secretary of State, including that Colonel Miller and Sheriff Thom lacked standing, and that the declaratory judgment action should have been brought before the election. (SR 110-127). The Secretary of State took no position on standing and disagreed with Proponents' arguments regarding the timeliness of this action. (SR 288-292). A hearing was held on all pending motions before the Honorable Christina Klinger on January 27, 2021.

On February 8, 2021, the circuit court issued a Memorandum Decision and Order granting Colonel Miller's and Sheriff Thom's motion for summary judgment in its entirety. (SR 515-527). The circuit court rejected Proponents' procedural arguments and concluded that Amendment A was void because it embraced more than one subject and was a revision cloaked as an amendment. (*Id.*). Judgment was entered on February 10, 2021, and Notice of Entry was filed and served on February 11, 2021. (SR 535-538).

Proponents filed a Notice of Appeal on February 17, 2021. The Secretary of State did not appeal. Pursuant to the Stipulation and Joint Motion of the parties, this Court ordered expedited briefing and consolidated this appeal with Appeal No. 29546 for purposes of briefing and submission to the Court for decision.

STATEMENT OF THE FACTS

On September 11, 2019, counsel for Proponents, Brendan Johnson, filed a form for an "Initiated Constitutional Amendment Petition" ("Petition") with the South Dakota Secretary of State. (SR 4, 15-18; Pr.App.2). The Petition sought approval to circulate a Petition proposing a change to the South Dakota Constitution entitled, "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." (*Id.*). Mr. Johnson later submitted signed petitions to the Secretary of State for validation. (SR 5). On January 6, 2020, the Secretary of State announced that the Petition received 36,707 valid signatures, which allowed the Petition to be validated and submitted to South Dakota voters for approval. (SR 5; SR 176).

The Petition was entitled "Constitutional Amendment A" ("Amendment A") and was certified by the Secretary of State to be placed on the 2020 General Election ballot. (SR 5; SR 176; Pr.App.88). A "Yes" vote was a vote to adopt the amendment in its entirety. (SR 174). A "No" vote was to reject the amendment in its entirety and leave the Constitution as it was. (*Id.*). Amendment A ultimately received 225,260 "Yes" votes and 190,477 "No" votes. (SR 34).

Amendment A, as it was submitted to South Dakota voters, purports to add a new article to the South Dakota Constitution. The new article is comprised of 15 sections and 55 subsections that, among other things: decriminalizes the possession and use of small amounts of marijuana for personal recreational use; sets forth a comprehensive regulatory scheme governing the commercial manufacturing and sale of recreational marijuana and grants the Department of Revenue the exclusive power to govern all matters connected therewith; imposes a tax on marijuana sales and appropriates revenues; imposes various civil penalties; establishes a cause of action against the Department of Revenue; and mandates the Legislature to pass laws ensuring access to medical marijuana and regarding hemp (which, under Amendment A, is not marijuana) beyond the provisions of Amendment A. (SR 15-18; Pr.App. 1-3).

Colonel Miller and Sheriff Thom subsequently brought this action seeking to enforce Article XXIII of the South Dakota Constitution by requesting that the circuit court declare that Amendment A was unconstitutionally submitted to the voters. (SR 1-38). Governor Noem authorized Colonel Miller to bring the action in his official capacity as the Superintendent of the Division of Highway Patrol,

which was memorialized and ratified in Executive Order 2021-02. (Pr.App.110-111).

STANDARD OF REVIEW

Proponents' motion for judgment on the pleadings and Colonel Miller's motion for summary judgment both require de novo review of a constitutional amendment. *Slota v. Imhoff and Associates*, P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873; *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *State ex rel. Dep't of Transp. v. Clark,* 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). An amendment passed by the people "is accorded a presumption in favor of validity and propriety" and should be struck down only if it "plainly and palpably appear(s) to be invalid." *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (internal quotations omitted). However, this presumption must be applied in conjunction with the principle that when the Constitution sets forth specific procedures for its own amendment, "strict observance of every substantial requirement is essential to the validity of the proposed amendment." *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1146 (Md. 1982) (citation omitted).

ARGUMENT

Proponents claim this case is "about the future of the initiative process in South Dakota." (Proponents' Brief, 8). And that is true: This case presents the question whether private lawyers and special interest groups can use the initiative process to circumvent the requirements set forth in the South Dakota Constitution. These requirements exist for a reason—to ensure that our State's founding document cannot be revised without the transparency, public input,

and legislative debate that accompanies a constitutional convention. Proponents ignored these requirements when they placed Amendment A on the ballot. In doing so, they defied the self-imposed limitations voters have placed on their power of initiative through the Constitution and deprived them of the opportunity to have Amendment A properly scrutinized and presented for ratification.

The initiative process can only exist within the framework the Constitution establishes. The voters "cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed" by our State's Constitution. *Lehman v. Bradbury*, 37 P.3d 989, 1000-01 (Or. 2002) (citation omitted). Despite Proponents' hyperbolic claims, no "great damage" can be done to the "integrity of the initiative process" simply by enforcing the constitutional limitations that apply to it. (Proponents' Brief, 10). To the contrary, placing the outcome of an election on an initiated amendment above the Constitution would undermine the integrity of our entire democratic system of government.

Despite the many baseless procedural arguments Proponents have raised in an attempt to distract from the merits, Amendment A remains an unprecedented, multi-subject revision that was drafted in secret and placed on the ballot in violation of the Constitution itself. Because Amendment A was submitted to the voters in violation of the Constitution itself, it is void. *See Mont. Ass'n of Ctys. v. State by & through Fox*, 404 P.3d 733 (Mont. 2017); *Water Works v. Bd. of Water*, 141 So. 3d 958, 964 (Ala. 2013) (noting an amendment may be a nullity even if the electorate voted in favor of the amendment). "Any other course would be revolutionary[.]" *Moore v. Brown*, 165 S.W.2d 657, 659-60

(Mo. 1942) (citations omitted). Therefore, the circuit court's ruling should be affirmed.

I. The circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action.

Proponents have raised various standing arguments,[1] all of which are based upon the spurious proposition that the State has no business protecting the Constitution upon which it is formed; and that government officials (who took oaths to uphold the Constitution) have no right to challenge an invalid constitutional amendment, even when it would have a direct and injurious effect on the government entities they represent. The circuit court properly concluded that Colonel Miller had standing to bring this declaratory judgment action because "[t]he consequences Amendment A would have for the Division of Highway Patrol to carry out its duties under the law, as well as Colonel Miller's duty to support South Dakota's Constitution, give him a 'real, actual' interest in this suit." (Memorandum Decision, 4). As explained in more detail below, Colonel Miller's interest in this declaratory judgment action is more than sufficient to satisfy the liberal standards for establishing standing under SDCL 21-24-14. Therefore, Proponents' arguments to the contrary should be rejected.

A. Colonel Miller has standing because Amendment A will have a direct and injurious effect on the Highway Patrol.

Proponents mistakenly rely on *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, 593 N.W.2d 36, in support of their argument that Colonel Miller lacks standing to seek a declaratory judgment in his official capacity. In

[1] This brief will not separately address Sheriff Thom's Standing. However, Colonel Miller by this reference joins in Sheriff Thom's separate Appellee Brief.

Edgemont, this Court held that a school district and county lacked standing to challenge the constitutionality of a statute because, as a school district and political subdivision created by the Legislature, they were not a "real party in interest" under SDCL 15-6-17(a). *Id.*

The rule in *Edgemont* does not apply to Colonel Miller in his official capacity as Superintendent of the Division of Highway Patrol ("Highway Patrol"). The Highway Patrol is not a school district or political subdivision of the State. *See* SDCL 34-48A-1 (defining "political subdivision"); SDCL 6-1-12 (defining "local government"). Rather, it is part of an executive agency that is under the supervision and direction of the Governor, who has authorized and ratified this action. S.D. Const. art. IV, § 9; Exec. Order 2021-02 (Pr.App. 110-111).

Moreover, in *Olson v. Guindon*, this Court recognized an important exception to the general rule described in *Edgemont*. 2009 S.D. 63, 771 N.W.2d 318. In *Olson*, school district board members brought an action for declaratory relief against state officials to determine the constitutionality of South Dakota's public-school funding system. *Id.* This Court held that the school districts had standing to bring the declaratory judgment action because the South Dakota Constitution accorded school districts the right to certain funds under Article VIII. *Id.* ¶ 16. Consequently, the school districts were facing an "actual or threatened injury" to their rights under the Constitution, meaning their legal interest in the lawsuit was not based solely on their "status as representatives of constituent students and taxpayers." *Id.* ¶¶ 5, 16. The same logic applies in this case.

Amendment A purports to grant the Department of Revenue the *exclusive power* to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," as well as the *exclusive power* to "administer and enforce" those rules. (SR 16; Pr.App.2). If allowed to stand, then Amendment A would strip powers that the Legislature delegated to the Highway Patrol and transfer them to the Department of Revenue.

Specifically, the Legislature and Governor have granted the Highway Patrol the authority to enforce "all laws, police regulations, and rules governing the operation of motor vehicles and motor carriers over and upon the highways of this state." SDCL 32-2-7. The Highway Patrol's power to enforce "all laws" upon State highways includes the power to enforce laws regulating "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state." Yet if Amendment A is upheld, this power would be diverted to the Department of Revenue. This change would have a direct and injurious effect on Colonel Miller and the Highway Patrol because they would be forced to forsake their previously established duties and authority to comply with the contradictory provisions of Amendment A. *See Am. Fed'n of State, Cty., & Mun. Emps. v. State, Pub. Emp. Rels. Bd.*, 372 N.W.2d 786, 790 (Minn. Ct. App. 1985) (finding that county had standing because it was "not challenging a statute which charges it with the performance of a ministerial duty," but was, rather, challenging a statute that would adversely affect "its own rights").

Proponents claim that Colonel Miller and the Highway Patrol "can still legally enforce every law on the books," even if Amendment A is upheld. (Proponents' Brief, 16). This claim is simply inaccurate. By granting the

Department of Revenue the "exclusive power" to enforce laws and regulations governing the transport of marijuana in the State, Amendment A would alter the hierarchical structure of our governmental system and materially restrict the authority granted to the Highway Patrol.

Indeed, with respect to marijuana regulations, the Highway Patrol would be entirely subject to the dictates of the Department of Revenue, rather than the Legislature and Governor. The Department of Revenue would have the "exclusive power" to delegate the enforcement of marijuana laws and regulations however it saw fit. Thus, Colonel Miller's interest in this lawsuit is not based on his status as a representative of constituent taxpayers; it is based upon the infringement of the constitutional duties and authority that would result from Amendment A divesting authority from the Highway Patrol to the Department of Revenue.[2] Moreover, Colonel Miller took "an oath or affirmation to support the Constitution of the United States and of this state," which is expressly required under Article XXI, § 3 of the Constitution. As the circuit court recognized, this oath to "support the Constitution" justifies bringing an action to ensure that an unconstitutional amendment is not implemented in violation of the Constitution. (Memorandum Decision, 3).

---

[2] The Court's ruling in *Edgemont* was based, in part, upon the fact that the plaintiffs were a school district and political subdivision that were both subordinate to the state entity whose actions they were challenging. Colonel Miller is not challenging a statute enacted by the Legislature—or any other action of a principal State entity. Nor is he asking this Court to decide whether an act taken by one of the other branches of government was unconstitutional. Rather, he is challenging a revision to the South Dakota Constitution that would fundamentally alter the powers and functions of the state entity he represents.

Colonel Miller and the Highway Patrol have a direct interest in the outcome of this litigation and will suffer an adverse effect if Amendment A is upheld. Therefore, the general rule of *Edgemont* does not apply, and Colonel Miller has standing.

B. Colonel Miller had standing to bring this declaratory judgment action in his official capacity as an executive officer.

The circuit court correctly ruled that Colonel Miller had standing to bring this declaratory judgment action because of the effect Amendment A would have on the Highway Patrol, and because Colonel Miller took an oath to support the South Dakota Constitution. (Memorandum Decision, 4). Because Colonel Miller had a "substantial" and "real" interest in this lawsuit, the circuit court found it unnecessary to address the remaining grounds upon which Colonel Miller has standing. One of these grounds is based upon Colonel Miller's status as an executive officer subordinate to the Governor.

Article IV, § 3 of the South Dakota Constitution provides that the Governor

> may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its civil divisions.

S.D. Const. art. IV, § 3.

As an officer of the executive branch, Colonel Miller is under the Governor's supervision. By bringing this action in his official capacity, Colonel Miller has effectively brought the action in the name of the State pursuant to the constitutional authority vested in the Governor under Article IV, § 3.

Proponents argue that this action does not fall under Article IV, § 3 because it was not captioned in the name of the State. (Proponents' Brief, 19). This argument places form over substance. "[T]he caption is not determinative as to the identity of the parties to the action." 5A C. Wright & A. Miller, Federal Practice and Procedure § 1321, p. 388 (3d ed. 2004). "The court will look behind and through the nominal parties on the record, to ascertain who are the real parties in interest." *United States v. Fletcher*, 231 F. 326, 330 (D. S.D. 1916), *aff'd,* 242 F. 818 (8th Cir. 1917). Indeed, "it is well-settled that suits against officers of the state in their official capacity, are in reality suits against the State itself." *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 23, 706 N.W.2d 239, 247. The same reasoning applies to suits initiated by officers of the State in their official capacity.

Proponents note that Article IV, § 3 prohibits actions against the Legislature and then draw the strained conclusion that this prohibition would somehow "also apply to voters when they legislate via initiative." (Proponents' Brief, 19-20). There are two flaws in this argument. First, Colonel Miller has not brought an action against the Legislature or the voters. Second, by its plain terms, Article IV, § 3 does not bar an action challenging the constitutionality of an initiated amendment (or a legislatively enacted statute, for that matter). To the contrary, Article IV, § 3 states that the Governor is responsible for the "faithful execution of the law." Bringing a declaratory judgment action challenging the validity of an unconstitutional amendment is one method of ensuring "the faithful execution of the law." If this Court affirms the circuit court's declaratory judgment, then the effect will be to "restrain violation" of our

Constitution by "any officer, department or agency" that would otherwise have implemented an unconstitutional amendment.

In a final attempt to avoid a decision on the merits, Proponents argue that Amendment A is not subject to suit under Article IV, § 3 because "voters are not a state officer, department, or agency." (Proponents' Brief, 20). Again, the obvious flaw in this argument is that Colonel Miller has not initiated an action against the voters. Instead, he brought this declaratory judgment action against the Secretary of State – the executive official charged with custody of the "enrolled copy of the Constitution," SDCL 1-8-2; and overseeing and administering the initiative process, SDCL chs. 2-1, 12-13. Colonel Miller's claims that Amendment A was submitted to the voters in violation of the Constitution implicates both of these duties. Accordingly, this is an action to enforce compliance or restrain a violation of the Constitution "by any officer, department or agency of the state." *See* S.D. Const. art. IV, § 3. As an executive officer operating under the direction of the Governor, Colonel Miller had standing to bring this action under Article IV, § 3.

i. The Governor may delegate the prosecution of this action to Colonel Miller.

Proponents contend that the Governor cannot delegate her authority under Article IV, § 3 and, therefore, Colonel Miller cannot prosecute this action on her behalf. (Proponents' Brief, 20-21). To be sure, the *decision* to bring this action—like the decision to issue an extradition warrant in *In re Tod*, 81 N.W. 637 (S.D. 1900)—is a power personal to the Governor. However, to suggest that the Governor must be personally involved from start to finish in every action brought

under her constitutional authority is akin to saying that the Governor must also personally arrest and extradite a fugitive. The executive branch is tasked with executing and enforcing a vast array of laws touching nearly every facet of our state government. Delegation of authority within the executive branch is necessary to ensure the government can function appropriately. *See Woodard v. Rasmussen*, 700 P.2d 675, 692-93 (Or. 1985) (noting that governor "is not the only person who can exercise the state's executive authority" and that without delegation, "Governor's job would be impossible, thousands of state employees would be acting illegally and, as a practical matter, the state could not function").

"[T]he Governor has broad discretion to select the means [s]he will use in executing [her] constitutional duty." *See Op. of the Justices to the Council*, 334 N.E.2d 604, 609 (Mass. 1975). In exercising this discretion, the Governor may allocate the "functions, powers and duties" of "offices, agencies and instrumentalities" as "necessary for efficient administration." S.D. Const. art. IV, § 8. That is precisely what the Governor has done in authorizing Colonel Miller to initiate this lawsuit. Exec. Order 2021-02 (Pr.App. 110-111).

Proponents also contend the Governor needed to supply "intelligible standards" when authorizing Colonel Miller to bring this action. (Proponents' Brief, 21). Although intelligible standards are necessary when the Legislature delegates authority to the executive branch to avoid violating separation of powers, *State v. Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d 598, 606, Proponents have cited no authority that such standards are required when delegating authority *within* the executive branch.

ii. The Governor ratified the commencement of this declaratory judgment action.

Even if Colonel Miller himself is not a real party in interest, the Governor has ratified this action through her issuance of Executive Order 2021-02. SDCL 15-6-17(a) specifically prohibits the dismissal of an action "until a reasonable time has been allowed after objection for ratification of commencement of the action" by a real party in interest. This procedure for ratification exists "to assure that a defendant is required only to defend an action brought by a proper party plaintiff and that such an action must be defended only once." *Id*. (citation omitted). If the action is ratified, then it "shall have the same effect as if the action had been commenced in the name of the real party in interest." *Id.*

With the issuance of Executive Order 2021-02, the Governor expressly ratified Colonel Miller's commencement of this declaratory judgment action. The Governor's ratification has "the same effect as if the action had been commenced" in the name of the State or the Governor. SDCL 15-6-17(a). Thus, Proponents' argument is rendered entirely moot.

C. Colonel Miller has standing in this lawsuit because it presents a question of great public importance.

Even if the Court were to conclude that Colonel Miller had no standing to bring this action in his official capacity, that this was not an action brought pursuant to the Governor's authority under Article IV, § 3, and that the Governor could not delegate authority to prosecute this action to Colonel Miller, this Court should still hold that Colonel Miller has standing because this case presents a question of great public importance. This Court, like courts in many

jurisdictions,[3] may dispense with the technical requirements of standing if the case presents a question of great public importance. *See Olson*, 2009 S.D. 63, ¶ 15, 771 N.W.2d at 323 (holding that school districts had standing to challenge funding of public education based, in part, upon fact that "education is a matter of great public importance"); *H & W Contracting, LLC v. City of Watertown*, 2001 S.D. 107, ¶ 14, 633 N.W.2d 167, 172-73 (recognizing that bidder on public contract may have standing "based on the protection of public interests"); *Sioux Falls Mun. Emp. Ass'n, Inc. v. City of Sioux Falls*, 233 N.W.2d 306, 309 (S.D. 1975) (holding that municipal employees association had standing to challenge amendment to ordinance despite its failure to show that it suffered actual adverse consequences because "the case presents questions of significant public interest"). In fact, the Court has specifically declared that "the Declaratory Judgment Act . . . should allow . . . the decision of present rights or status which are based upon future events when a good-faith controversy is brought before the courts," and that this is particularly true when the case "presents matters involving the public interest in which timely relief is desirable." *Kneip v. Herseth*, 214 N.W.2d 93, 96-97 (S.D. 1974).

---

[3] *See, e.g.*, *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward,* 715 N.E.2d 1062, 1082 (Ohio 1999) ("This court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."); *accord State ex rel. Cittadine v. Ind. Dep't of Transp.,* 790 N.E.2d 978, 980 (Ind. 2003); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974); *Davis v. Richland Cty. Council*, 642 S.E.2d 740, 742 (S.C. 2007); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980).

In this case, the Court is presented with a question of significant public importance: Whether a constitutional amendment was validly adopted in compliance with the mandated procedure set forth under Article XXIII of the South Dakota Constitution. Given the impact Amendment A could have on our State's citizens and system of government, if this case were dismissed for lack of standing, then it is likely that another party will simply initiate an identical suit, which would be a waste of judicial resources. The plaintiff in that identical suit would not be in a better position to educate the Court on the issues than Colonel Miller is in this case. *See McConkey v. Van Hollen*, 783 N.W.2d 855, 860-61 (Wis. 2010) (finding that plaintiff had standing under public importance exception after considering several factors, including likelihood of identical suit and whether plaintiff had competently framed issues). In fact, Colonel Miller did not object to Proponents' Motion to Intervene because he recognized Proponents would be able to competently frame the issues and zealously argue their case, thus ensuring that this litigation contains "that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Id.* at 860 (citation omitted).

The citizens of South Dakota deserve to have this important issue of constitutional law resolved. A final decision from this Court will uphold the integrity of our Constitution and serve as guidance for citizen initiatives moving forward. Because this case presents a question of significant public importance, Colonel Miller has standing, and the circuit court properly adjudicated the merits of Colonel Miller's motion for summary judgment.

II. Colonel Miller has timely commenced this proceeding.

Proponents argue that this action is untimely because it was not brought before the election. (Proponents' Brief, 22-23). They claim that "[b]y waiting until after the results of the election went against them, Thom and Miller are belatedly seeking, in effect, to undermine the democratic process." (Proponents' Brief, 22-23). This incendiary accusation is inappropriate and entirely unfounded.

The South Dakota Constitution is the foundation of our State's democratic process. It is the ultimate expression of the will of the people. Within our State's foundational document, South Dakota citizens imposed constraints on their power of initiative. These self-imposed constraints must be given effect. *See State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 260 (Neb. 2020) ("The people's reserved power of the initiative and their self-imposed [requirements of procedure in exercising that power] are of equal constitutional significance."). "Any other course would be revolutionary." *Moore*, 165 S.W.2d at 659-60. Indeed, the surest way to "undermine the democratic process" is to disregard the constitutional principles upon which it is based. *See Danforth v. Egan*, 119 N.W. 1021, 1022 (S.D. 1909) ("While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limit of this, it is the duty of the court to interfere, and by judicial checks afford the people time for reason and reflection.").

Constitutional restraints on the amendment and initiative procedure cannot be overridden and rendered ineffectual through the passage of time. *See Lehman*, 37 P.3d at 1000-01 ("[T]he people cannot give legal effect to an

amendment which was submitted in disregard of the limitations imposed by the constitution."). The Pennsylvania Supreme Court has eloquently articulated the absurdity of such an argument:

> [T]he foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is justiciable if decided by the Courts one week or one day prior to the election, but is not justiciable one day after the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated.

Stander v. Kelley, 250 A.2d 474, 477 (Pa. 1969).

Voter approval cannot cure constitutional invalidity. *Water Works*, 141 So. 3d at 963; *Mont. Ass'n of Counties v. State ex rel. Fox*, 404 P.3d 733, 737 (Mont. 2017); *Duggan v. Beermann*, 515 N.W.2d 788, 794 (Neb. 1994); *Lehman*, 37 P.3d at 1000-01. If it could, then the constitutional mandates under Article XXIII would be meaningless. Any procedure could be invoked so long as it culminated in voter approval. Accordingly, Proponents' claims that this action was untimely are without merit and should be rejected.

A. The pre-election procedures Proponents cite are inapplicable and irrelevant.

Citing Article V, § 5 of the Constitution, Proponents claim that the Governor "could have asked the Supreme Court to issue an advisory opinion on the constitutionality of Amendment A before the November 2020 election." (Proponents' Brief, 23). Yet Proponents later contradict their own argument, stating that a judicial "decision before November 2020" would not "have amounted to an advisory opinion." (Id., 33). Accordingly, the suggestion that the

Governor should have requested an advisory opinion—a unilateral, non-adversarial process—before the election is without merit.

Proponents next argue that Colonel Miller could have challenged Amendment A under SDCL 2-1-17.1 or SDCL 2-1-18. However, proceedings under those statutes are limited to challenging the quality and quantity of signatures obtained on petitions, as both statutes reference "any interested person who has researched the signatures contained" in a petition. SDCL 2-1-17.1; SDCL 2-1-18. The statutes do not apply when challenging the legal sufficiency of a proposed amendment under Article XXIII.

Finally, Proponents argue that Colonel Miller could have "sought a writ preventing the Secretary of State from placing Amendment A on the ballot." (Proponents' Brief, 24). But this Court has been reluctant to engage in a pre-election analysis of the substance of proposed amendments. For example, in *S.D. State Federation of Labor AFL-CIO v. Jackley,* the Court concluded that matters such as deciding "whether any change in the constitution has been legally effected" are best left until after the election. 2010 S.D. 62, ¶¶ 11-12, 786 N.W.2d 372, 376-77 (quoting *State ex rel. Cranmer v. Thorson*, 68 N.W. 202, 203-204 (S.D. 1896)). Although Colonel Miller is not alleging that Amendment A is substantively unconstitutional, the nature of his claims are quasi-substantive because they require this Court to interpret the substance of Amendment A to ascertain whether it was submitted to the voters in violation of Article XXIII. That is fundamentally different from the analysis required to determine, for example, whether a petition was supported by enough signatures.

Even if Colonel Miller could have brought a pre-election challenge, nothing in South Dakota law suggests that this was his only available remedy, or that post-election challenges are precluded. Indeed, the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." SDCL 15-6-57; *Agar Sch. Dist. No. 58-1 Bd. of Educ. v. McGee*, 527 N.W.2d 282, 287 (S.D. 1995) (stating declaratory relief is appropriate to challenge legality of tax despite existence of payment and protest statutory remedy). In fact, this Court has repeatedly considered post-election challenges, even when the defects were known and could have been addressed before the election.[4] Accordingly, Proponents' claims that this action was untimely are without merit and should be rejected.

B. The doctrines of waiver and laches do not bar this proceeding.

Proponents next argue that the doctrines of waiver and laches bar this lawsuit. These are both equitable defenses. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 12, 806 N.W.2d 615, 619. Equitable defenses cannot be employed to override express constitutional mandates. *See Sears v. Treasurer & Receiver General*, 98 N.E.2d 621, 632 (Mass. 1951). If this Court were to allow

---

[4] *See Bienert v. Yankton Sch. Dist. 63-3*, 507 N.W.2d 88 (S.D. 1993) (recognizing, in post-election proceeding seeking injunctive relief, that post-election contest procedure under SDCL ch. 12-22 provided speedy remedy at law to address assertion that election did not meet statutory guidelines for bond elections); *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808 (S.D. 1916) (entertaining post-election injunction proceeding raising concerns that petition did not comply with statutory provisions). *See also Water Works*, 141 So. 3d 958; *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Fulton County v. City of Atlanta*, 825 S.E.2d 142 (Ga. 2019); *Lehman*, 37 P.3d at 1000-01; *City of Burien v. Kiga*, 31 P.3d 659, 662 (Wash. 2001) (en banc).

Amendment A to stand based on the doctrines of waiver or laches, then it would mean that any party could effectuate changes to the Constitution without regard for the requirements that are set forth in the Constitution itself. *See Stander*, 250 A.2d at 477. In effect, this Court would be establishing an alternative method of ratifying amendments based solely on the timing of litigation.[5]

C. The law does not preclude post-election challenges.

Proponents advance a number of arguments advocating that this Court should allow a party to bring a declaratory judgment action in a pre-election challenge. These arguments are completely irrelevant to the issues before this Court because the availability of pre-election challenges does not preclude post-election challenges.[6] Post-election challenges are already subject to heightened scrutiny. *Barnhart*, 222 N.W.2d at 136. Proponents' hypothetical parade of horribles simply will not come to fruition. (*See* Proponents' Brief, 34-35). To prohibit post-election challenges altogether would be to endorse disregarding the Constitution. *Cf. Egan*, 119 N.W. at 1022.

---

[5] Proponents' reliance on *Bowyer v. Ducey* and *Trump v. Biden* in support of their laches argument is wildly misplaced. Neither of these cases involved a post-election challenge to the validity of a proposed constitutional amendment. Instead, both cases involved attempts to alter the result of the presidential election by challenging the validity of specific groups of ballots. *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *16 (D. Ariz. Dec. 9, 2020); *Trump*, 951 N.W.2d 568, 570 (Wis. 2020).

[6] The Legislature has now established procedures for pre-election enforcement of Article XXIII by mandating that the Secretary of State make a determination of proposed amendments and granting an appeal of that decision directly to this Court. SB 86, 96th S.D. Legis. Sess. (2021). The Governor signed SB 86 into law on March 18, 2021.

Finally, the legislative committee hearings on H.J.R. 1006 (2018), which proposed amending the Constitution to add the one-subject and separate-vote rules to Article XXIII, § 1 (which was placed on the ballot as Amendment Z), all but confirm the propriety of post-election challenges. During the hearings, Representative Mark Mickelson, the prime sponsor, explicitly stated that court challenges would be brought *after* the election—even if doing so had the result of nullifying an election.[7] Despite this, the Legislature approved H.J.R. 1006 being placed on the ballot as Amendment Z, which was subsequently ratified by the voters. Accordingly, a post-election challenge such as this declaratory judgment action is proper.

III. Amendment A violates the One-Subject Rule.

In 2018, voters ratified Constitutional Amendment Z, which imposed new limitations on proposed constitutional amendments: First, "[N]o proposed amendment may embrace more than one subject" ("One-Subject Rule"); and second, "If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately" ("Separate-Vote Rule").

A nearly identical version of the Separate-Vote Rule existed in the South Dakota Constitution from its inception until 1972, when it was stricken from

[7] *Hearing on H.J.R. 1006 before the S. Comm. on State Affairs*, 93rd S.D. Legis. Sess. (2018), at 45:57 (statement of Rep. Mark Mickelson in response to questions from Sens. Jim Bolin & Al Novstrup), https://sdpb.sd.gov/SDPBPodcast/2018/sst33.mp3#t=2757.

Article XXIII, § 1.[8] With the ratification of Amendment Z in 2018, the Separate-Vote Rule was re-established, and the One-Subject Rule (which had never previously been part of the Constitution), was also added as an additional requirement under Article XXIII, § 1. *Id*. Although this Court has interpreted the prior version of the Separate-Vote Rule, the interpretation of the One-Subject Rule is a question of first impression in South Dakota.

The circuit court ruled that Amendment A violated the One-Subject Rule. In its ruling, the court relied on the "reasonably germane" standard applicable to legislative enactments under the "single-subject rule" in Article III, § 21 ("Single-Subject Rule"). (Memorandum Decision, 7-8). The circuit court concluded that the subject of Amendment A was "the legalization of marijuana," and that several sections of Amendment A were not "reasonably germane" to this subject. The circuit court explained: "Allocating revenue from an excise tax of marijuana sales, forbidding differing professions from disciplining their members, and including a provision compelling the legislature to pass hemp, which is different than marijuana, are not part of the 'single scheme' of legalizing marijuana." (Memorandum Decision, 8). The circuit court then declared that "the infringement of the [One-Subject Rule] is so plain and palpable as to admit no reasonable doubt Amendment A is invalid." (Memorandum Decision, 8).

[8] *See* S.D. Const. art. XXIII, § 1 (1889) (Appx. 1-2); 2018 S.D. Sess. Laws ch. 4, § 2 (H.J. Res. 1006, approved Nov. 6, 2018). The 1889 version of the Separate-Vote Rule provided: "[I]f more than one amendment be submitted they shall be submitted in such manner that the people may vote for or against such amendments separately." (Appx. 3).

Although the circuit court reached the correct result, it applied the wrong standard. As shall be explained, a more exacting standard must apply to proposed constitutional amendments under Article XXIII, § 1 to protect the integrity of our State's foundational document.

A. The standard that applies to the One-Subject rule is more exacting than the broad "reasonably germane" standard applicable to legislative acts.

While the circuit court correctly concluded that Amendment A was invalid, the standard that applies to the One-Subject Rule is more exacting than the "reasonably germane" standard described in *Baker*.[9] The Single-Subject Rule in Article III, § 21 applies only to *legislative acts*. Legislative acts are subject to debate, deliberation, and veto before enactment and, as such, are given liberal construction to "facilitate legislation." *State v. Morgan*, 48 N.W. 314, 318 (S.D. 1891). This rationale does not translate to initiated amendments that would fundamentally alter our State's system of government, and that must be either ratified or rejected as a whole. *See State ex rel. Adams v. Herried*, 72 N.W. 93, 96 (S.D. 1897); *accord Mont. Ass'n of Ctys.*, 404 P.3d at 739 ("Voters do not have

---

[9] It is important to note that *Baker* does not contain a complete recitation of the standard that this Court has applied when evaluating the Single-Subject Rule. For example, this Court has recognized that the purpose of the Single-Subject Rule is "to prevent the bringing together in one act subjects having no *necessary* connection or relation with each other[.]" *State v. Morgan*, 48 N.W. 314, 314 (S.D 1891) (emphasis added); *see State ex rel. Jensen v. Kelly*, 274 N.W. 319 (S.D. 1937) (same). This Court has also stated that "all provisions of the Act must *relate directly* to the same subject, have a *natural connection*, and not be foreign to the subject as stated in the title.'" *Simpson v. Tobin*, 367 N.W.2d 757, 768 (S.D. 1985) (quoting *McMacken v. State,* 320 N.W.2d 131 (S.D. 1981)) (emphasis added). This language is consistent with the test applied by the Nebraska Supreme Court in *State ex. rel. Wagner v. Evnen,* which is discussed in section III(A)(ii) of this brief. 948 N.W.2d 244, 253 (Neb. 2020).

the opportunity to consider, discuss, and potentially change constitutional amendments proposed by initiative in the same way the Legislature does those proposed by referendum.").

Moreover, the legislative Single-Subject Rule expressly states that the "subject" of a legislative act "shall be expressed in its title." In *Baker*, this Court considered whether the county referendum petition at issue had "one general object . . . fairly indicated in the title." 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273 (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1290 (Cal. 1978)). Article XXIII, § 1, by contrast, provides that amendments cannot "embrace more than one subject" and that separate amendments must be voted on separately. Thus, the One-Subject Rule must be separately interpreted in light of the distinct intent and legislative history behind Article XXIII, § 1.

i. The legislative history of Article XXIII, § 1 suggests a heightened standard must apply.

Because the One-Subject Rule was ratified concurrently with the Separate-Vote Rule, this Court must presume that it was intended to establish requirements for amendments that were greater to, or distinct from, the requirements established by the Separate-Vote Rule. *See Doe v. Nelson*, 2004 S.D. 62, ¶ 15, 680 N.W.2d 302, 308. This Court has described the standard that applies to the Separate-Vote Rule on more than one occasion.

For example, in *State ex rel. Adams v. Herried*, this Court explained that to constitute more than one amendment, "the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes,

not dependent upon or connected with each other." 72 N.W. at 97. In other words, each subject within a single amendment "must be incidental to and *necessarily connected* with the object intended." *Id*. (emphasis added). In *Barnhart v. Herseth*, this Court considered whether the amendment could be viewed as a single plan:

> If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment.

222 N.W.2d at 136 (citation omitted).

When the voters re-established the Separate-Vote Rule with the ratification of Amendment Z, they re-instituted the requirement that each provision within a single amendment "must be incidental to and necessarily connected with the object intended," and "logically viewed" as part of "a single plan." *Herried*, 10 S.D. 109, 72 N.W. 93; *Barnhart*, 222 N.W.2d 131. These standards were the minimum requirements imposed by the Separate-Vote Rule, which existed at a time when only the Legislature could propose constitutional amendments. Therefore, the One-Subject Rule must be interpreted as placing some *additional* requirement on amendments, or else its inclusion in Article XXIII, § 1 would be rendered entirely superfluous.

This conclusion is consistent with statements made during the legislative hearings on Amendment Z. These hearings reveal that the drafters of Amendment Z recognized that voters do not have the opportunity to consider and debate an initiated amendment in the same way that legislators consider and debate proposed legislation. *Hearing on H.J.R. 1006, supra*, at 31:38 (statement

of Rep. Mark Mickelson). For this reason, the One-Subject Rule was intended to place a more stringent standard upon initiated amendments than the Single-Subject Rule places on legislative acts.

In discussing the standard that applies to the One-Subject Rule, proponents of Amendment Z cited a test that the Supreme Court of Montana has applied when interpreting Montana's separate-vote requirement.[10] Under the Montana test, courts consider "whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related." *Mont. Ass'n of Ctys.*, 404 P.3d at 742. Changes are "substantive" if they are "[a]n essential part of constituent or relating to what is essential." *Id.* (citing *Black's Law Dictionary* 1429 (Henry C. Black ed., 6th ed. 1990)). In determining whether the provisions are "closely related," the following factors are considered:

> [W]hether various provisions are facially related, whether all the matters addressed by [the proposition] concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

Id. (quoting *McLaughlin v. Bennett*, 238 P.3d 619, 622 (Ariz. 2010)) (additional quotation omitted). As explained below, the Montana test is similar to the test applied by other courts that have interpreted comparable provisions in their respective state constitutions.

---

[10] *Hearing on H.J.R. 1006*, *supra*, at 31:38 (statement of Rep. Mark Mickelson), https://sdpb.sd.gov/SDPBPodcast/2018/sst33.mp3#t=1890.

ii. Authorities from other jurisdictions require that subjects be "closely related" and have a "natural and necessary" connection.

Because the interpretation of the One-Subject Rule is a question of first impression in South Dakota, other courts' interpretations of comparable provisions in their respective state constitutions is instructive. For example, in *State ex. rel. Wagner v. Evnen*, the Nebraska Supreme Court struck down a voter-initiated constitutional amendment regarding medical marijuana because it violated the Nebraska one-subject rule applicable to initiated measures. 948 N.W.2d at 253; *see* Neb. Const. art. III, § 2 ("Initiative measures shall contain only one subject.").

In *Wagner*, the Court examined whether the various provisions of the challenged amendment had a "natural and necessary connection" to the constitutional right to produce and use medical marijuana. Defining "necessary" as "something 'on which another thing is dependent or contingent,'" the Court concluded that the amendment served impermissible secondary subjects not naturally and necessarily connected to the general subject, including:

> (1) The property right for private entities to legally grow and sell medical marijuana;
> (2) Civil and criminal immunity to private entities engaged in the production and sale of medical marijuana;
> (3) Provisions relative to the use of medical marijuana in public spaces, correctional facilities, motor vehicles, or other situations in which consumption would be negligent;
> (4) Not requiring employers to allow employees to work while impaired; and
> (5) Not requiring insurance coverage for medical marijuana.

Id. at 257-58.

Similarly, in *In re Initiative Petition No. 314*, the Oklahoma Supreme Court held that an initiated amendment related to the advertising, franchising, and sale of alcohol violated Oklahoma's one-subject rule. 625 P.2d 595 (Okla. 1980). In that case, the proponents argued that the detailed regulatory scheme within the initiated amendment was valid because the provisions related to the single subject of "control of alcoholic beverages." *Id.* at 600. The Court rejected this argument, noting that there was "no interdependence between proposals permitting advertising, franchising and liquor by the drink." Each of these proposals, the Court reasoned, had "its own purpose" and could "stand alone." *Id.* at 607.

Both the Oklahoma "interdependence test" and the Nebraska "natural and necessary connection test" focus on the interrelation between the separate provisions of an initiated amendment. For provisions to be considered part of one subject, there must be a necessary connection or interdependence among them. This is also true under the "substantive and closely related" test employed by the Montana Supreme Court, which requires provisions to be "essential" and "closely related." *Mont. Ass'n of Ctys.,* 404 P.3d at 742. Initiated amendments in South Dakota must be subject to the same minimum requirements in order to give effect to the One-Subject and Separate-Vote rules in Article XXIII, § 1.

iii. The scope of the subject must be specific enough to allow for meaningful review.

In keeping with their analogy to the legislative Single-Subject Rule, Proponents argue that there is no restriction on the "scope or magnitude" of the subject matter that can be addressed in an initiated amendment. (Proponents'

Brief, 40). Under Proponents' rationale, virtually any change to the Constitution could be "reasonably germane" so long as the general subject is framed broadly enough. For example, an initiated amendment could overhaul South Dakota's entire system of government by broadly framing "the scope or magnitude of the single subject" to be "an amendment to revise the constitution." *See Meierhenry*, 354 N.W.2d at 182. If this were permitted, then the One-Subject Rule would serve no meaningful purpose at all. Both the One-Subject Rule and the Single-Vote Rule would be stretched to the point of complete irrelevance.

In *Wagner*, the Nebraska Supreme Court addressed this issue when considering whether a voter-initiated constitutional amendment regarding medical marijuana violated Nebraska's single-subject rule. 948 N.W.2d 244. The Court noted that "a general subject must not be characterized too broadly when considering an amendment to the constitution." *Id*. at 254. "Instead, a general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the initiative's other purposes." *Id*. (internal citations omitted). The one-subject rule, the Court explained, "may not be circumvented" by selecting a general subject that is so broad as to evade a "meaningful constitutional check." *Id*. (citation omitted). The same rationale applies here.

The circuit court correctly identified Amendment A's general subject: legalizing the possession and ingestion of small amounts of marijuana (as defined by Amendment A). Amendment A violates both the One-Subject Rule and the Separate-Vote Rule because its provisions are not "reasonably germane" to this general subject, let alone "naturally and necessarily connected," *Wagner*, 948

N.W.2d at 253, "interdependent," *Initiative Petition No. 314*, 625 P.2d at 607, or "closely related," *Mont. Ass'n of Ctys.,* 404 P.3d at 742. Therefore, Amendment A is invalid as a matter of law.

B. Amendment A violates the One-Subject Rule, regardless of what standard this Court applies.

The expansive scope and effect of Amendment A is entirely unprecedented in our State's initiative history. Through its 15 sections, 55 subsections, and 2,280 words, Amendment A would (1) impose fundamental changes to the separate powers of the three branches of government; (2) elevate the Department of Revenue to a plenary agency with "exclusive power"; (3) create an entirely new legal cause of action against the Department of Revenue; (4) restrict this Court's authority to promulgate rules and discipline members of the South Dakota Bar; and (5) alter the Legislature's constitutional authority to assess taxes and appropriate revenue. Each of these subjects are separately addressed in Section IV(C) of this brief to illustrate the impact Amendment A will have on our State's Constitution and system of government. However, these subjects are equally relevant to this Court's analysis under the One-Subject Rule.

As the Montana Supreme Court has recognized, "if a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself." *Mont. Ass'n of Ctys.,* 404 P.3d at 742 (citing *Oregon v. Rogers*, 288 P.3d 544, 547 (Or. 2012)). Moreover, "if a measure has the effect of modifying an existing constitutional provision, it proposes at least one additional change to the constitution, whether that effect is express or implicit." *Id.* (citing *Rogers*, 288 P.3d at 548). In this case, Amendment A will

add at least five entirely new matters to the Constitution and impact at least 22 existing constitutional provisions. *See infra* Section IV(C). Such an extensive revision of our State's foundational document was certainly not "reasonably germane" to the legalization of marijuana. Nor was the public "fairly apprise[d]" of the content of Amendment A and the extensive impact it would have on our laws and governmental system. (*See* Proponents' Brief, 39 (noting that the intent of the One-Subject Rule is to "fairly apprise the public of what is in the measure") (citing *Kanaly v. State ex rel. Janklow*, 368 N.W.2d 819, 827 (S.D. 1985))).

The catalogue of subjects covered by Amendment A does not stop there. Even a cursory review of the text of Amendment A reveals at least five *additional* subjects:

(1) Creating an individual constitutional right to grow, possess, and use small amounts of marijuana (Section 4);

(2) Imposing civil penalties for failing to follow various restrictions on cultivating marijuana, for smoking marijuana illegally in a public place, and for the underage possession and use of marijuana (Section 5);

(3) Imposing a 15% excise tax on the commercial sale of marijuana, subject to change by the Legislature, and mandating how the revenue is appropriated (Section 10);

(4) Creating a constitutional right to medical marijuana "beyond what is set forth in" Amendment A by mandating that the Legislature pass laws ensuring access to medical marijuana (Section 14(1)); and

(5) Mandating that the Legislature pass laws regulating the cultivation, processing, and sale of hemp (Section 14(2)).

(SR 15-17; Pr.App.1-3).

None of the above subjects have a "natural and necessary connection with each other." *See Evnen*, 948 N.W.2d at 253. Nor are they "reasonably germane," *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 274, or "interdependent," *Initiative*

Petition No. 314, 625 P.2d 595, upon one another. Each of the above subjects has "its own purpose" and could "stand alone" as an entirely separate amendment. *See Initiative Petition No. 314*, 625 P.2d 595. For example, the *personal* right of possessing and ingesting marijuana, (SR 15; Pr.App.2, §4), is not reasonably germane or necessarily connected to licensing and taxing the *commercial* sale of marijuana, (SR 16-17; Pr.App.2-3, §§6-13). *Cf. Wagner*, 948 N.W.2d at 257-58. Nor is the taxation of marijuana, (SR 16; Pr.App.2, §10), reasonably germane or necessarily connected to its legalization. The same is true with respect to laws governing hemp, which is constitutionally distinct from marijuana under Amendment A, (SR 15; Pr.App.1, §§1, 14), as well as laws governing *medical* marijuana, which would extend "beyond what is set forth" in Amendment A itself, (SR 17; Pr.App.1, §14). There are countless other examples. Given the myriad of topics governed by Amendment A, it cannot be said that the voters were "fairly apprised" of its content or effects. (Proponents' Brief, 39).

C. Amendment A presents a classic case of logrolling.

Proponents acknowledge that one of the purposes of the One-Subject Rule is to "prevent logrolling," which is "a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." (Proponents' Brief, 50). Indeed, more than a century ago, this Court recognized that "nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter." *Herried*, 72 N.W. at 96. This Court has recognized that the reasons for preventing logrolling are even "more

forceful" when considering a constitutional amendment than when considering a legislative act. *Id.*; *accord Mont. Ass'n of Ctys.*, 404 P.3d at 739.

Given the multitude of subjects contained within Amendment A, it is likely that voters who sought to enact one provision of Amendment A tacitly accepted other provisions they disliked. For example, voters who supported securing tax funds for public schools may have grudgingly accepted the legalization of marijuana. Voters who supported the legalization of hemp or medical marijuana may have done the same. Even those voters who supported all of these subjects may have been reluctant to grant "exclusive power" to the Department of Revenue. Other provisions of Amendment A, including establishing an entirely new legal cause of action against the Department of Revenue and restricting this Court's authority to discipline members of the Bar, may have been reluctantly, or inadvertently, accepted by the voters with the litany of other subjects encompassed in Amendment A.

When considered as a whole, Amendment A was designed to aggregate the favorable votes from electors of many persuasions. *See Adams v. Gunter*, 238 So. 2d 824, 831 (Fla. 1970) ("Minorities favoring each proposition severally might, thus aggregated, adopt all."). In 2018, through the ratification of Amendment Z, South Dakota voters sought to preserve—not jeopardize—the sanctity of the initiative process by ensuring that they have the opportunity to cast a clear vote on each distinct subject put to them. *Initiative Petition No. 314*, 625 P.2d at 608. Under both the Separate-Vote Rule and the One-Subject Rule, Amendment A violates the self-imposed limitation voters placed on their power to amend their Constitution through the initiative process. Consequently, the circuit court

correctly ruled that Amendment A was unconstitutionally submitted to the voters and is void as a matter of law.

IV. Amendment A seeks to unconstitutionally "revise" the Constitution through the initiative process.

In South Dakota, the Constitution may only be changed by "amendments" or "revisions." The South Dakota Constitution recognizes substantive distinctions between these terms, and Article XXIII sets forth an entirely separate procedure for adopting each type of constitutional change. *See Holmes v. Appling*, 392 P.2d 636, 638 (Or. 1964) ("It is well established that when a constitution specifies the manner in which it may be amended or revised, it can be altered by those who favor amendments, revision, or other change only through the use of one of the specified means.") (citation omitted); *Adams v. Gunter,* 238 So. 2d 824, 831-32 (Fla. 1970) (discussing distinction between revisions and amendments and concluding that the terms, "if we follow elementary principles of statutory construction, must be understood to have a substantial field of application, not to be a mere alternative procedure in the same field").

A constitutional change that does not meet the narrow requirements of an "amendment" under Article XXIII, § 1, may be a "revision" to the Constitution under Article XXIII, § 2. Unlike an amendment, a revision requires a constitutional convention be called either by initiative or "a three-fourths vote of all the members of each house." S.D. Const. art. XXIII, § 2. Once a constitutional convention has been called, its members must be elected "on a nonpolitical ballot in the same districts and in the same number as the house of representatives."

Id. The elected members of the constitutional convention must then approve proposed revisions "by a majority" before the proposed revision can be "submitted to the electorate at a special election in a manner to be determined by the convention." *Id*.

The terms "revision" and "amendment" are not specifically defined in the South Dakota Constitution. However, this is not unusual. The constitutions of several other states recognize a distinction between a "revision" and "amendment" without expressly defining those terms.[11] Most courts have applied some variation of the following test for determining whether a proposed amendment should be deemed a revision:

> 1. What qualitative effect would the proposed amendment have on existing constitutional provisions and the governmental plan established by the Constitution as a whole?
>
>> A proposed amendment will be deemed a revision if it results in a fundamental change to the structure of the Constitution and the governmental system it established.[12]
>
> 2. What quantitative effect would the proposed amendment have on existing articles or sections of the Constitution it would affect?

[11] *See Bess v. Ulmer*, 985 P.2d 979 983-84 (Alaska 1999); *Adams*, 238 So. 2d at 831-32; (quoting *McFadden*, *v. Jordan*, 196 P.2d 787, 789 (Cal. 1948); *Raven*, 801 P.2d at 1085.

[12] *See Bess*, 985 P.2d at 987; *McFadden v. Jordan*, 196 P.2d at 789; *Strauss v. Horton*, 207 P.3d 48, 98 (Cal. 2009); *Op. of the Justices*, 264 A.2d 342, 346 (Del. 1970).

> A proposed amendment will be deemed a revision if it imposes far-reaching and multifarious changes to the Constitution.[13]

South Dakota's Constitution further limits proposed amendments in that "[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment." S.D. Const. art. XXIII, § 1. Thus, under the plain language of Article XXIII, § 1, a proposed amendment must amend existing articles in the Constitution—it cannot add an entirely new article.

As explained below, Amendment A is a revision to the Constitution for three reasons: (A) it purports to add an entirely new article to the Constitution, (B) it would result in a fundamental change to the structure of the Constitution and the governmental system it establishes; and (C) it imposes far-reaching and multifarious changes to the Constitution. Because Amendment A is a revision to the Constitution, it could not be initiated and submitted to the voters without the requisite approval of members at a constitutional convention. S.D. Const. art. XXIII, § 2. In short, Amendment A is invalid because it was submitted to the voters in violation of the Constitution itself.

A. Amendment A is an unconstitutional revision because it adds a new article to the Constitution.

Article XXIII, § 1 provides that "[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to

---

[13] *Citizens Protecting Mich.'s Constitution v. Secretary of State*, 761 N.W.2d 210, 229 (Mich. Ct. App. 2008), *aff'd in part, appeal denied in part*, 755 N.W.2d 157 (Mich. 2008); *Adams*, 238 So. 2d at 831-32; *McFadden*, 196 P.2d at 796-98.

accomplish the objectives of the amendment." This sentence limits the meaning of "amendment" under Article XXIII, § 1 and establishes that a constitutional change may only be ratified as an amendment if two conditions are met: (1) the changes proposed by the amendment are "necessary" to accomplish the amendment's "objectives"; and (2) the changes are made to "one or more articles and related subject matter in other articles." S.D. Const. art. XXIII, § 1.

Under the second requirement, an amendment can only change existing articles of the Constitution; it cannot create an entirely new article. In resisting this interpretation of Article XXIII, § 1, Proponents claim that the second requirement cannot be read to apply only to existing articles because the word "existing" is not expressly included. (Proponents' Brief, 53). But the drafters did not need to expressly include the word "existing" when they restricted amendments to "one or more articles"—the fact that those articles must "exist" is plainly implied.

Proponents also argue that Amendment A is valid because "South Dakota has adopted—and repealed—entire constitutional articles by amendment rather than constitutional convention throughout its history." (Proponents' Brief, 54). The obvious flaw in Proponents' argument is that the procedure for revising the Constitution under Article XXIII, § 2 did not exist until 1972, which is the same year that Article XXIII, § 1 was amended to require that proposed amendments "may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment." 1972 S.D. Sess. Laws ch. 4 (H.J. Res. 514, approved November 7, 1972); *compare* S.D. Const. art. XXIII, §§ 1-2 (1889) (Appx. 1-2) *with* S.D. Const. art. XXIII, §§ 1-2 (1973). These

changes were ratified following the Legislature's establishment of the Constitutional Revision Commission in 1969, which it established in response to a growing concern over inconsistencies that had resulted from numerous amendments to the Constitution over the years. *See State v. Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d 513, 516.

In fact, from 1889 to 1970, the South Dakota Constitution "was amended 79 times, each time adding more complexity to the document." *Id.* (citing *South Dakota Constitutional Revision Commission,* Third Annual Report 1 (1972)). The members of the Constitutional Revision Commission "were acutely aware of the inconsistencies caused throughout the years by heavily amending the 1889 Constitution." *In re Daugaard*, 2011 S.D. 44, ¶ 13, 801 N.W.2d 438, 442 (citation omitted). With this acute awareness, it is not surprising that the Constitutional Revision Commission recommended adding a sentence to Article XXIII, § 1 that allowed amendment by initiative only when changing existing articles, thereby forcing the drafter to carefully examine the existing structure of the Constitution to ensure that the proposed amendment does not irreconcilably conflict with other sections of the Constitution. *See McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948) (characterizing voter-approved amendment as improperly submitted revision that "went beyond the legitimate scope of a single amendatory article").

In a final effort to avoid the plain language of Article XXIII, § 1, Proponents note that Article XXI, titled "Miscellaneous," addresses various topics, including the State seal and coat of arms, the rights of married women, and hail insurance. (Proponents' Brief, 53). According to Proponents, "[i]t makes no sense to require that Amendment A be added as a new section to

Article XXI, for example, rather than stand on its own as a separate section." (*Id.*). To the contrary, there is sensible policy behind this requirement.

Allowing amendment by initiative only when changing an existing article forces the drafter to carefully examine the structure of the Constitution to ensure that the proposed amendment does not conflict with other articles of the Constitution or create undue complexity and disorganization. It also makes it easier for voters to evaluate the effect that the proposed amendment will have on other constitutional provisions. To promote these underlying policy objectives, Article XXIII, § 1 prohibits modifying or supplementing the Constitution, including Article XXI "Miscellaneous," with an amendment that establishes an entirely new article. This prohibition preserves the integrity of the Constitution and guards against the inconsistencies and complexity that once plagued it. *See Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516.

The drafters of the South Dakota Constitution devoted many long and arduous hours to scrutinizing constitutional provisions and eliminating inconsistencies to ensure that the State of South Dakota has a workable, accordant, and homogenous Constitution. *See Wilson,* 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516; *Adams,* 238 So. 2d at 832 ("The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogenous and up-to-date document."). New articles should not be added to such a venerated text without being properly analyzed and vetted in a constitutional convention. *See Bess v. Ulmer*, 985 P.2d 979, 983 (Alaska 1999); *see* Jonathan L. Marshfield, *Forgotten*

Limits on the Power to Amend State Constitutions, 114 Nw. U. L. Rev. 65, 78 (2019) ("Approval of constitutional revisions through a constitutional convention preserves the integrity of the Constitution and the system of government that it creates by promoting transparency, public input, and informed debate and discussion.").

B. Amendment A is an unconstitutional revision because it fundamentally changes the Constitution and the governmental system it established.

In determining whether a constitutional change is a revision, courts have considered the qualitative effect it would have on existing constitutional provisions and the governmental plan established by the constitution as a whole. As one court has explained, "a constitutional 'revision' need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions[.]" *Legislature v. Eu*, 816 P.2d 1309, 1317 (Cal. 1991) (citations omitted). To the contrary, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision[.]" *Id.* (citations omitted); *see Amador*, 583 P.2d at 1284-89.

In this case, the circuit court appropriately concluded that Amendment A was an unconstitutional revision because it would impose "far reaching changes in the nature of our basic governmental plan." (Pr.App.14). Indeed, if allowed to stand, Amendment A would impact at least 22 separate constitutional provisions; impose fundamental changes to the delicate separation of powers among the legislative, executive, and judicial branches; and undermine the system of checks and balances that the drafters of our Constitution worked tirelessly to establish.

Therefore, the circuit court's ruling that Amendment A is an unconstitutional revision should be affirmed.

i. Amendment A granted the Department of Revenue the "exclusive power" to perform certain functions.

The Department of Revenue is one of the executive agencies established under Article IV, § 8. *See* SDCL 10-1-1. The scope of the powers and duties of the Department of Revenue are defined by SDCL ch. 10-1 and can be modified by the Legislature or Governor as authorized by the Constitution. In fact, the Department of Revenue, as it exists today, is the result of a 2011 executive order that abolished and replaced the previously established "Department of Revenue and Regulation" and reorganized various agencies under the executive branch.[14]

Amendment A significantly alters the separate powers of the legislative and executive branches by granting the Department of Revenue broad constitutional powers. Not only is the Department of Revenue granted the "exclusive power" to "promulgate rules and issue regulations," but it is also granted sole authority to "administer and enforce" those rules. (Pr.App.2). Neither the Legislature nor the Governor can invade the Department of Revenue's authority. Thus, the Department of Revenue becomes a co-equal fourth branch of government vested with the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state" with only limited exceptions applicable to local governments. (*Id.*).

[14] 2011 S.D. Sess. Laws ch. 1, §§ 34-35 (Exec. Order 2011-01).

ii. "Exclusive power" means "exclusive power."

Despite Amendment A's broad grant of constitutional authority to the Department of Revenue, Proponents claim that the word "exclusive" only modifies the authority "to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article." (Proponents' Brief, 57). According to Proponents, the Department of Revenue would be "subject to the normal executive and judicial oversight as it would be in administering any other regulatory program." (Id., 56).

It is impossible to reconcile Proponents' argument with the plain language of Amendment A, which vests a constitutional and "exclusive power" in the Department of Revenue. Black's Law Dictionary defines "exclusive power" as "[a] power held by *only* one person or authoritative body." *Power*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *see also Constitutional Power*, Black's Law Dictionary (11th ed. 2019) ("A governmental authority or capacity that, in a government formed under a constitution, is enumerated or implied as being vested in a particular branch or official; a legislative, executive, or judicial power granted by or deriving from a constitution."). Applying this definition to the language of Amendment A, the "exclusive power" granted to the Department of Revenue cannot be exercised or overseen by any other governmental body, including the Legislature. The power is "exclusive" to the Department of Revenue

alone. Any other interpretation would require holding that "exclusive power" does not mean "exclusive power."[15]

Essentially, Proponents are urging this Court to judicially re-write Amendment A to state that the Department of Revenue is the exclusive *agency* to which power can be delegated. This is simply not the role of the judiciary. *State ex rel. Evans v. Riiff*, 42 N.W.2d 887, 888 (S.D. 1950) ("This court has power to determine . . . what the constitution contains, but not what it should contain."). Moreover, Proponents defeat their own argument by noting that "the responsibilities delegated to the Department of Revenue are not irrevocably placed there" because Amendment A defines "department" as "the Department of Revenue *or its successor agency*." (Proponents' Brief, 58). If the "exclusive power" of the Department of Revenue can be assigned to a "successor agency," then Amendment A obviously cannot be read as appointing the Department of Revenue as the exclusive *agency* to which power can be delegated.

Moreover, the assignment of "exclusive power" to the Department of Revenue was likely intentional, since Proponents claim Amendment A was purposefully designed to "ensure that the rights [voters] want to secure to themselves are not immediately undone by a state government hostile to those rights." (Proponents' Brief, 67). By vesting "exclusive power" in the Department

---

[15] For example, § 7(6) of Amendment A requires the Department of Revenue to issue regulations for "[t]esting, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information." (Pr.App.2-3). Because the Department of Revenue is granted the exclusive constitutional power to administer and enforce Amendment A, the Legislature has no authority to enact statutes setting, for example, labeling requirements or maximum THC levels.

of Revenue, Amendment A sought to remove the "hostile" Legislature from the realm of marijuana regulation.

Finally, Proponents argue that "[e]ven if Amendment A did cement the administration of marijuana within the Department of Revenue, . . . [s]uch a change would only apply to the regulation and taxation of marijuana, and would not impact any other administrative agency or any other functioning of the governor's office." (Proponents' Brief, 65). This argument is patently false. By granting the Department of Revenue the "exclusive power" to pass laws regulating "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," as well as the "administration and enforcement" of those laws, Amendment A threatens to impact several other administrative agencies, including the Department of Health,[16] the Department of Public Safety,[17] and the Department of Agriculture and Natural Resources,[18] all of which would see the scope of their duties and authority limited as a result of Amendment A. It would also impact several professional licensing boards, which would be barred from promulgating rules or disciplining their members to the extent it would conflict with the terms of Amendment A. The impact Amendment A would have on our Constitution, statutes, and state agencies is severe and far-reaching.

---

[16] SDCL 34-1-16 grants the Department of Health the power to make rules and regulations "as may be required in the interest of the public health."

[17] See *supra* Section I(A).

[18] SDCL 39-1-1, as recently amended, states that the Department of Agriculture and Natural Resources "shall have and may exercise all of its general powers and duties," including "rule and regulation making" and prosecution "for the purpose of administering and enforcing the provisions of" Title 39, which is entitled "Food and Drugs."

iii. Vested constitutional powers are distinct from a delegation of legislative authority.

Amendment A vests an exclusive, constitutional power in the Department of Revenue. Proponents attempt to equate this constitutional power to the delegation of legislative authority over the sale, purchase, distribution, and licensing of alcoholic beverages to the secretary of the Department of Revenue. (*Id.*). They also cite other pieces of legislation that have delegated "certain administrative authority to one agency and certain authority to another agency." *Id.* (citing 2020 S.D. Sess. Law ch. 176, 2020 HB 1008). According to Proponents, Amendment A is valid because "[l]egislation routinely delegates regulatory authority to agencies." (Proponents' Brief, 56).

Proponents' argument ignores the fundamental distinction between the Legislature's delegation of its own pre-existing constitutional power and the establishment of an entirely new constitutional power. Each of the pieces of legislation Proponents cite are examples of the Legislature delegating its own constitutional authority to a subordinate agency. Neither the Legislature nor the Constitution has ever granted a subordinate agency "exclusive power," nor has the Legislature ever relinquished final authority over rules promulgated by an executive or legislative agency. Doing so would violate the separation of powers doctrine and result in a drastic revision of our system of government.

C. Amendment A is an unconstitutional revision because it imposes far-reaching and multifarious changes to the Constitution.

When determining whether a proposed amendment is a revision to the Constitution, courts have considered not only the qualitative effect of the changes

it enacts, but also the quantity of existing articles or sections of the Constitution that it would disturb. *See Citizens Protecting Mich.'s Constitution v. Secretary of State*, 761 N.W.2d 210, 228-29 (Mich. Ct. App. 2008) (applying quantitative analysis to hold that proposal was impermissible revision to constitution, and noting that "the number of proposed changes and the proportion of current articles and sections affected by those proposed changes [were] very significant"); *Bess*, 985 P.2d at 987-88 (holding that proposed amendment was impermissible revision and noting that it "would potentially alter as many as eleven separate sections of our Constitution").

Here, by granting the Department of Revenue exclusive constitutional power, Amendment A would alter several constitutional provisions relating to the delegation of governmental powers.[19] Even more provisions would be altered by the establishment of an entirely new cause of action against the Department of Revenue and the restriction on the public's ability to obtain judicial review of the Department of Revenue's decisions (by requiring the public to seek relief through the administrative process).[20] Once the constitutional provisions impacted by Amendment A's alteration of the Legislature's constitutional authority to assess taxes and appropriate revenue are considered,[21] it becomes clear that

---

[19] *See* S.D. Const. art. II; S.D. Const. art. III, § 1; S.D. Const. art. IV, § 1; S.D. Const. art. IV, § 3; S.D. Const. art. IV, § 8; S.D. Const. art. IV, § 9; S.D. Const. art. IV, § 4; S.D. Const. art. III, § 30.

[20] S.D. Const. art. III, § 27; S.D. Const. art. V, § 1; S.D. Const. art. V, § 4; S.D. Const. art. V, § 5.

[21] *See* S.D. Const. art. XII, § 1; S.D. Const. art. XII, § 2; S.D. Const. art. XI, § 1; S.D. Const. art. XI, § 2; S.D. Const. art. XI, § 8; S.D. Const. art. XI, § 9; S.D. Const. art.

Amendment A will impact at least 22 separate constitutional provisions. Among the more significant changes are: (i) divesting the Governor and Legislature of their authority to delegate tasks among executive agencies; (ii) restricting this Court's authority to promulgate rules and discipline attorneys; (iii) establishing a new cause of action against the Department of Revenue; (iv) altering the Legislature's authority to levy taxes and appropriate revenue; and (v) restricting the Legislature's ability to impose criminal and civil penalties.

i. Amendment A precludes the Governor and Legislature from delegating tasks to executive agencies.

Under the Constitution, the Governor is "responsible for the faithful execution of the law" and may "enforce compliance with any constitutional or legislative mandate." S.D. Const. art. IV, § 3. The Governor is also vested with the authority to "make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as [s]he considers necessary for efficient administration." S.D. Const. art. IV, § 8. If Amendment A is upheld, however, then the Governor will be stripped of this constitutional authority.

Proponents contend that Amendment A did not deprive the Governor of her ability to reallocate powers among executive agencies because Amendment A defines "department" as "the Department of Revenue *or its successor agency*." (Pr.App.1, § 1(1)) (emphasis added). Thus, Proponents reason, the Governor

---

XI, § 13; S.D. Const. art. VI, § 17; S.D. Const. art. VIII, § 3; S.D. Const. art. VIII, § 15.

could still reassign the powers of the Department of Revenue to a successor agency. However, even under the language cited by Proponents, the Department of Revenue could only be replaced by one "successor agency." Neither the Legislature nor the Governor would have the authority to delegate tasks among several subordinate agencies, even if it were deemed "necessary for efficient administration." S.D. Const. art. IV, § 8. Thus, if Amendment A is upheld, then it will result in a constriction of the Legislature and Governor's powers to delegate among subordinate agencies.

Proponents note that "[o]ther portions of the South Dakota Constitution confer powers on specific entities." (Proponents' Brief, 64). However, both examples cited by Proponents assign specific duties to be conducted "as provided by law," i.e. with legislative direction. Neither provision grants an agency discretion to exercise an exclusive constitutional power of any kind.

Finally, Proponents note that the Colorado Constitution defines "Department" as "the department of revenue or its successor agency." (Proponents' Brief, 64). However, the Colorado Constitution does not grant the Colorado department of revenue "exclusive power" over marijuana. Nor does it distinguish between constitutional amendments and revisions. Thus, the fact that the Colorado Constitution references "the department of revenue or its successor agency" bears absolutely no relevance to this Court's analysis.

ii. Amendment A restricts this Court's authority to promulgate rules and discipline members of the Bar.

Rule 1.2(d) of the South Dakota Rules of Professional Conduct states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that

the lawyer knows is criminal or fraudulent[.]" Rule 1.2(d) is one of several rules established by this Court pursuant to its authority under Article V, § 12, which states:

> The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar. These rules may be changed by the Legislature.

S.D. Const. art. V, § 12.

Because marijuana remains illegal under federal law, the South Dakota Ethics Committee has concluded that under Rule 1.2(d), a lawyer "may not ethically provide legal services to assist a client in establishing, licensing, or otherwise operating a marijuana business." While this opinion is entirely consistent with Rule 1.2(d), it is incompatible with the express language of Amendment A, which states: "A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law."

Thus, if Amendment A is upheld, then it would specifically preclude this Court from disciplining attorneys for violating federal law under Rule 1.2(d) and more generally constrain this Court's authority to promulgate rules and discipline members of the South Dakota Bar.

iii. Amendment A establishes an entirely new legal cause of action against the Department of Revenue.

Amendment A establishes an entirely new cause of action that can be initiated against the Department of Revenue—a State agency:

> If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

(Pr.App.3, §12).

Under Article III, § 27 of the South Dakota Constitution, the State, its entities, and its employees are generally immune from suit, and *the Legislature* must "direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. art. III, 27; *see Hallberg v. S.D. Bd. of Regents*, 2019 S.D. 67, ¶ 12, 937 N.W.2d 568, 573 ("The [S]tate may . . . waive sovereign immunity by legislative enactment identifying the conditions under which lawsuits of a specified type would be permitted.") (quoting *Wilson v. Hogan*, 473 N.W.2d 492, 494 (S.D. 1991)). By establishing a new cause of action against a State agency, Amendment A unconstitutionally waives sovereign immunity—a function that our Constitution specifically reserves for the Legislature.

Proponents claim that "Amendment A did not establish anything new, it simply recognized the application of an existing remedy," because"a writ of mandamus is already available against the state and public officers." (Proponents' Brief, 65-66). This argument ignores the language of Amendment A, which expressly authorizes the public to bring a mandamus action against the Department of Revenue if it "fails to promulgate" the required rules by April 1, 2022. No such cause of action currently exists under South Dakota law. Indeed, if Amendment A were not establishing a new cause of action, there would be no reason to include language expressly authorizing a mandamus action against the Department of Revenue.

Moreover, Amendment A would confer standing upon "any resident" who desired to bring a mandamus action against the Department of Revenue, regardless of their interest in the lawsuit, and regardless of the availability of other "plain, speedy, and adequate" remedies. *Jensen v. Lincoln Cty. Bd. of Comm'rs*, 2006 S.D. 61, ¶ 5, 718 N.W.2d 606, 608 ("A writ of mandamus is appropriate only when there is not a plain, speedy, and adequate remedy in the ordinary course of law."); *Wagner v. Wagner*, 2006 S.D. 31, ¶ 10, 712 N.W.2d 653, 657 (noting that petitioner in mandamus proceeding "must have a clear legal right to performance of the specific duty sought to be compelled") (internal quotation omitted). This provision vastly expands the claims that could be brought under SDCL chapter 21-29, resulting in a waiver of sovereign immunity that the Legislature never authorized.

iv. Amendment A would alter the Legislature's constitutional authority to assess taxes and appropriate revenue.

Amendment A would also fundamentally alter the Legislature's constitutional authority to assess taxes and make appropriations. Specifically, Section 11 of Amendment A imposes "[a]n excise tax of fifteen percent . . . upon the gross receipts of all sales of marijuana sold by a person licensed by the [D]epartment[,]" and "[t]he Legislature has no authority to adjust this rate until after November 3, 2024." (Pr.App.3, §11). Article XI of the Constitution, however, specifically empowers *the Legislature* to levy taxes and to divide all property into separate classes for purposes of taxation.

By setting a fixed tax rate for marijuana sales, and by divesting the Legislature of its authority to adjust that tax rate for four years, Amendment A

alters Article XI's allocation of taxing authority to the Legislature. Indeed, to comply with Amendment A's tax provisions, the Legislature must either (1) tax all property in the same class as marijuana at 15%; or (2) create an entirely new class of property for marijuana sales.

In addition, Amendment A would alter the Legislature's constitutional authority to appropriate revenue by mandating that all revenue collected "shall be appropriated to the [Department of Revenue] to cover costs incurred by the [Department of Revenue] in carrying out its duties under this article, and that "[f]ifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund." (Pr.App.3). By setting forth a specific appropriation schedule, Amendment A impacts Article XII, § 1, which requires "appropriation by law" before money can be paid out of the treasury, as well as Article XII, § 2, which requires a two-thirds vote of all members of each branch of the Legislature before appropriations can be made for extraordinary expenses.[22]

v. Amendment A deprived the Legislature of the power to enact civil penalties.

The circuit court found that Section 5 of Amendment A, which set various civil penalties, deprived the Legislature of the power to enact civil penalties. (Pr.App.15). Proponents contend that Amendment A merely "sets a maximum civil penalty for certain enumerated violations," and that [n]othing in Amendment A prevents the [L]egislature from establishing a civil penalty lower

[22] *See* S.D. Const. art. XII, § 1; S.D. Const. art. XII, § 2.

than the maximum" or from "set[ting] civil penalties in any other area." (Proponents' Brief, 62).

Proponents' argument ignores the fact that Amendment A enshrines *specific* dollar figures in the Constitution for maximum penalties on an array of civil offenses, none of which bear any relevance to the decriminalization of marijuana. The Legislature would have no authority to adjust these figures through legislation. Even the slightest monetary adjustment would require an entirely separate constitutional amendment.

This illustrates the fundamental flaw underlying all the arguments Proponents have advanced in defense of Amendment A—they fail to appreciate the distinction between a legislative act that is codified into law and an amendment that is enshrined into the Constitution, our State's founding document. The Constitution is not the place for a comprehensive regulatory scheme with detailed rules covering a multitude of subjects, right down to the maximum dollar figure for civil penalties. By failing to follow the proper constitutional procedure, Proponents deprived South Dakota voters of the opportunity to have Amendment A properly scrutinized at a constitutional convention. Amendment A is a revision to our Constitution that was placed on the ballot in violation of established constitutional procedure. Therefore, Amendment A is invalid as a matter of law.

V. Amendment A cannot be severed.

Proponents finally contend that this Court can substitute its own judgment for what the voters thought they voted on by severing the portions of Amendment A that violated Article XXIII. The notion that Amendment A can somehow be

severed is antithetical to the One-Subject and Separate-Vote Rules and fails to recognize that "the defect lies in the *submission* of" Amendment A to the voters in violation of Article XXIII of the South Dakota Constitution. *See Marshall v. State ex rel. Cooney*, 975 P.2d 325, 332 (Mont. 1999). Amendment A was void at its inception and should never have been submitted to the voters, meaning the entire amendment is invalid—including the severability clause. Simply put, Amendment A cannot be severed because there is nothing to sever. It was submitted to the voters in violation of Article XXIII and is therefore void in its entirety. *Cf. id.*; *Mont. Ass'n of Ctys.*, 404 P.3d at 474.

CONCLUSION

Colonel Miller has timely commenced this proceeding and has standing because he is an executive officer who swore to uphold the Constitution, Amendment A will have a direct and injurious effect on the Highway Patrol, and this case presents a question of great public importance.

As the circuit court properly concluded, Amendment A is void because it violates the One-Subject Rule and constitutes an invalid revision and was not submitted to the voters through the constitutional convention process set forth under Article XXIII, § 2. Therefore, this Court should affirm the ruling of the circuit court.

REQUEST FOR ORAL ARGUMENT

Colonel Miller respectfully requests the privilege of appearing before this Court for oral argument.

Dated this 24th day of March, 2021.

/s/ Lisa M. Prostrollo

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
REDSTONE LAW FIRM LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Telephone: 605.331.2975
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com

Attorneys for Appellee Colonel Rick Miller

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellee Colonel Rick Miller, hereby certifies that a true and correct copy of the foregoing Brief of Appellee Colonel Rick Miller was served electronically upon:

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
grant.flynn@state.sd.us
matthew.templar@state.sd.us
Attorneys for Defendant Steve Barnett

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com
Attorneys for Defendants/Appellants SDBML, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
bobmorris@westriverlaw.com
Attorney for Plaintiff/Appellee Kevin Thom

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
patrick@ttlolaw.com
Attorney for Amici Curiae Cato Institute, The DKT Liberty Project, Due Process Institute, and Reason Foundation

/s/ Lisa M. Prostrollo
Lisa M. Prostrollo

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws and this Court's Order Consolidating Appeals, Expediting Briefs, and Granting Extra Pages, Words or Characters. This brief was prepared using Microsoft Word and contains 14,882 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Lisa M. Prostrollo
Lisa M. Prostrollo

APPENDIX

Tab	Description	Appendix Page
1.	S.D. Const. art. XXIII, § 1 (1967)	Appx. 1-3
2.	S.D. Const. art. XXIII, § 2 (1967)	Appx. 3

APPENDIX

Tab	Description	Appendix Page
1.	S.D. Const. art. XXIII, § 1 (1967)	Appx. 1-3
2.	S.D. Const. art. XXIII, § 2 (1967)	Appx. 3

and personal property used thereon. United States v. Rickert (1903) 188 US 432, 47 LEd 532, 23 SupCt 478.

The state is prohibited from taxing personal property issued by the United States to Indians under the Constitution of South Dakota providing that all Indian lands shall remain under the absolute control of the Congress of the United States and under an act of Congress providing that Indian lands shall be subject to the exclusive jurisdiction of the United States. United States v. Pearson (1916) 231 Fed 270.

Nonresident Tax Discrimination.

Property tax relief bill, which would reduce tax on property of resident owners only, violated the Constitution of the United States and the Constitution of the state providing that lands belonging to citizens of the United States residing without the state shall never be taxed at a higher rate than the lands belonging to residents of the state. Opinion of the Judges (1966) 81 SD 629, 140 NW 2d 34.

Special Assessment against Government Property.

Under the Constitution the property of the United States government within the state is exempt from a special assessment for a local improvement by a municipal corporation. Whittaker v. City of Deadwood (1909) 23 SD 538, 122 NW 590, 139 AmStRep 1076.

Opinions of Attorney General.

Distribution of Bibles to public schools authorized, Report 1965-66, p. 52.

Dual enrollment of students in public and nonpublic schools, Opinion September 29, 1967.

Free school privileges not available to nonresident children, Report 1929-30, p. 119.

Organization of townships within an Indian reservation, Report 1919-20, p. 637.

Payment of tuition from public school district funds for attendance of student at parochial school, Opinion April 7, 1967.

Law Reviews.

Federal Jurisdiction Over Criminal Matters Involving Indians, 2 SDLRev 48 (1957).

South Dakota Indian Jurisdiction, 11 SDLRev 101 (1966).

ARTICLE XXIII

AMENDMENTS AND REVISIONS OF THE CONSTITUTION

§ 1. Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the vote of the people at the next general election. And if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of this Constitution: provided, that the amendment or amendments so proposed shall be published for a period of twelve weeks previous to the date of said election, in such manner as the Legislature may provide; and provided, further, that if more than one amend-

ment be submitted they shall be submitted in such manner that the people may vote for or against such amendments separately.

History: Amendment proposed by SL 1963, ch 342, rejected Nov. 3, 1964.

Historical Note.

The 1963 proposal, rejected in 1964, would have deleted the twelve-week publication requirement.

Cross-References.

Elections on constitutional amendments proposed by Legislature, Chapter 12-13.

Publication to be made by director of purchasing and printing, § 12-13-1.

Multifarious Amendment.

Where proposed constitutional amendment was entered in full on journal of senate but by title only on journal of house, it had been entered on journal of both houses within meaning of constitutional requirement; fact that proposed amendment was not printed upon each ticket upon ballots voted at general election did not preclude amendment from taking effect; fact that no formal words directing submission of proposed amendment were found in joint resolution proposing the amendment did not prevent amendment from taking effect where people were given an opportunity to ratify or reject it; in order to constitute more than one amendment, for purposes of applying requirement in art. XXIII, § 1 that where more than one amendment is submitted they shall be submitted in such manner that people may vote for or against amendment separately, the provision submitted must relate to more than one subject, and have at least two distinct and separate purposes, not dependent upon or connected with each other; resolution proposing amendment of §§ 3 and 4 of art. XIV to abolish trustees and change number and powers of regents contained only one amendment relating to control of state educational institutions. State ex rel. Adams v. Herried (1897) 10 SD 109, 72 NW 93, see also 10 SD 16, 71 NW 319.

Requirements Respecting Form.

The two essential elements of an amendment to Constitution under provisions of art. XXIII, § 1 are (1) that a majority of the two houses shall have agreed to the proposed amendment, and (2) that the people shall have approved and ratified the same by their votes; action of the two houses and will of the people, as expressed by their vote, should not be set aside or disregarded upon purely technical grounds when no material requirement of Constitution has been omitted and where proceedings taken clearly manifest intention of those bodies and people to amend the fundamental law; although Constitution does not in terms require that a joint resolution have a title, it presupposes that such resolution will have a title; since title is necessarily a part of an act itself and is a very important guide to its rightful construction, the title to a joint resolution, when adopted after due consideration, may be referred to and considered by court for purpose of ascertaining the intention of the two houses in adopting resolution, if there is any doubt as to what that intention was; reading joint resolution proposing amendment to Constitution by repeal of art. XXIV relating to prohibition in connection with title, fact that amendment was proposed and agreed to by two houses was beyond question and mere informality in form of submission would not defeat will of people where it was clearly apparent that electors had not been deprived of any substantial right, thus proceedings taken by the two houses and by the people to amend Constitution were valid and Constitution was amended by striking art. XXIV therefrom. Lovett v. Ferguson (1897) 10 SD 44, 71 NW 765, adhered to in 10 SD 109, 72 NW 93.

Opinion of Attorney General.

Amendment of Constitution by initiative of electors not authorized, Report 1931-32, p. 123; 1937-38, p. 109; 1963-64, p. 356.

Collateral References.

Constitutional Law⊂⊃4-9.

16 AmJur 2d, Constitutional Law, §§ 2, 26-41.

16 CJS, Constitutional Law, §§ 7-10.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters, 6 ALR 2d 557.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision, 168 ALR 627.

Initiative or referendum powers, applicability of constitutional requirements as to legislation or constitutional amendments, to statutes or constitutional amendments under provision conferring, 62 ALR 1349.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on ground that proposed action would be unconstitutional, 19 ALR 2d 519.

Journals, construction of requirement that proposed constitutional amendment be entered in, 6 ALR 1227; 41 ALR 640.

Power of legislative body to amend, repeal, or abrogate initiative of referendum measure, or to enact measure defeated on referendum, 33 ALR 2d 1118.

Proposition submitted to people as covering one or more than one proposed constitutional amendment within contemplation of constitutional provision in that regard, 94 ALR 1510.

Repeal of constitutional provision or amendment, 86 ALR 1456.

§ 2. Whenever two-thirds of the members elected to each branch of the Legislature shall think it necessary to call a convention to revise this Constitution they shall recommend to the electors to vote at the next election for members of the Legislature, for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the Legislature shall, at their next session, provide by law for calling the same. The convention shall consist of as many members as the house of representatives of the Legislature, and shall be chosen in the same manner, and shall meet within three months after their election for the purpose aforesaid.

History: Amendment proposed by SL 1915, ch 286, rejected Nov., 1916.

Historical Note.

Constitutional conventions proposed by SL 1913, ch 137, and SL 1923, ch 125, were rejected by the electors.

The 1915 proposal, rejected in 1916, would have based representation in a constitutional convention on senatorial rather than house districts, would have extended the time for convening of the convention from three to five months after the election, and would have required the 1917 Legislature to call a convention.

Collateral Reference.

Power of state Legislature to limit the powers of a state constitutional convention, 158 ALR 512.

ARTICLE XXIV

PROHIBITION [REPEALED]

History and Repeal.

Former Article XXIV, relating to prohibition, was adopted by a separate vote of 40,234 for, and 34,510 against, at the time of adoption of the Constitution. It was repealed in November 1896 pursuant to amendment submitted by SL 1895, ch 38. The vote was 31,901 for, and 24,910 against.

Article XXIV as proposed by SL 1915, ch 231, adopted November, 1916, was repealed pursuant to the provisions of SL 1933, ch 128, adopted November, 1934.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs and Appellees, vs. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant and Appellee, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants and Appellants.	)	Appeal No. 29546

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	)	Appeal No. 29547

APPELLEE SHERIFF KEVIN THOM'S JOINDER
IN BRIEF OF APPELLEE COLONEL RICK MILLER

Appellee Sheriff Kevin Thom, by and through his undersigned counsel and pursuant to SDCL 15-26A-67, hereby joins in the Brief of Appellee Colonel Rick Miller filed in Appeal No. 29546 as to all issues.

Dated this 24th day of March, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorney for Appellee Sheriff Kevin Thom

By: /s/ *Robert L. Morris*
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **APPELLEE SHERIFF KEVIN THOM'S JOINDER IN BRIEF OF APPELLEE COLONEL RICK MILLER,** upon the persons herein next designated, on the date below shown, as follows:

Grant Flynn Matthew W. Templar Office of the Attorney General 1302 E. Hwy 14, Suite 1 Pierre, SD 57501-8501 grant.flynn@state.sd.us matthew.templar@state.sd.us	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Brendan V. Johnson Timothy W. Billion Robins Kaplan LLP 140 N. Phillips Ave., Suite 307 Sioux Falls, SD 57104 bjohnson@robinskaplan.com tbillion@robinskaplan.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Matthew S. McCaulley Lisa M. Prostrollo Christopher Sommers Redstone Law Firm, LLP P.O. Box 1535 101 N. Phillips Ave, Suite 402 Sioux Falls, SD 5101-1535 matt@redstonelawfirm.com lisa@redstonelawfirm.com chris@redstonelawfirm.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail

Patrick J. Lee-O'Halloran Thompson Tarasek Lee-O'Halloran PLLC 7101 York Avenue S., Suite 255 Edina, MN 55435 patrick@ttlolaw.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail

Dated this 24th day of March, 2021.

/s/ Robert L. Morris
Robert L. Morris

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff, and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs/Appellees, v. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Intervenor Defendants/ Appellants.	Appeal No. 29546

REPLY BRIEF OF APPELLANTS SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE

Notice of Appeal filed on February 17, 2021

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

The Honorable Christina Klinger
Circuit Court Judge

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104
Attorneys for Intervenor Defendants/Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
1300 W 57th Street, Suite 101
Sioux Falls, SD 57108
Attorneys for Plaintiff/Appellee Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Defendant Steve Barnett, in his official capacity as South Dakota Secretary of State

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Plaintiff/Appellee Sheriff Kevin Thom, in his official capacity as Pennington County Sheriff

Table of Contents

Page

INTRODUCTION 1

ARGUMENT 1

I. Thom does not have standing. 2

A. Thom falls squarely under the *Edgemont* rule. 2

B. Thom's oath of office does not give him standing. 3

II. Miller does not have standing. 5

A. *Edgemont* precludes Miller's lawsuit. 5

B. Miller's allegations about Amendment A's impact on the Highway Patrol do not establish standing. 6

C. Miller may not exercise the power of the governor to establish standing. 8

D. Public importance does not eliminate the standing requirement. 11

III. Miller and Thom—and the Governor—passed up multiple opportunities to challenge Amendment A prior to the election, and may not belatedly raise those arguments now. 13

IV. Miller and Thom have failed to show that Amendment A plainly and palpably involves subjects that have no relationship to each other. 17

A. This Court should not overrule *Barnhart* and impose a heightened single-subject test. 18

1. South Dakota law is clear: the single-subject rule only requires a "reasonably germane" connection. 19

2. This Court should not overrule Barnhart and others based on cases from other jurisdictions. 19

3. Miller's argument about the scope of the subject is a red herring. 23

B. Miller and Thom have not shown how or why Amendment A contains multiple unrelated subjects. 24

1. Miller has failed to show that the allegedly different subjects in Amendment A do not relate to each other. 24

2. Miller and Thom's contention that the voters did not understand Amendment A is contrary to the law. 26

V. Amendment A did not require a constitutional convention. 27

A. Amendments may add a new article to the Constitution. 28

B. The Department of Revenue is not a fourth branch of government. 28

C. The other "far-reaching and multifarious changes to the Constitution" Miller and Thom outline are imaginary. 30

D. South Dakotans—not Miller and Thom—get to decide what is in their Constitution. 32

VI. South Dakota law favors separability. 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Fed'n of State, Cnty., and Mun. Emps. v. State, Pub. Emp. Rels. Bd.,
372 N.W.2d 786 (Minn. Ct. App. 1985) 8

Barnhart v. Herseth,
222 N.W.2d 131 (S.D. 1974) ..... *passim*

Bd. of Supervisors of Linn Cnty. v. Dep't of Revenue,
263 N.W.2d 227 (Iowa 1978) 3

Brendtro v. Nelson,
2006 S.D. 71, 720 N.W.2d 670 31

Byre v. City of Chamberlain,
362 N.W.2d 69 (S.D. 1985) 31, 32

Cable v. Union Cnty. Bd. of Cnty. Comm'rs,
2009 S.D. 59, 769 N.W.2d 817 ..... 4, 12

Californians for an Open Primary v. McPherson,
134 P.3d 299 (Cal. 2006) 20

State ex rel. Cranmer v. Thorson,
68 N.W.2d 202 (S.D. 1896) 14

Dakota Sys., Inc. v. Viken,
2005 S.D. 27, 694 N.W.2d 23 ..... 33, 34

Danforth v. City of Yankton,
25 N.W.2d 50 (S.D. 1946) 12

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue,
1999 S.D. 48, 593 N.W.2d 36 ..... *passim*

H&W Contracting, LLC v. City of Watertown,
2001 S.D. 107, 633 N.W.2d 167 ..... 11, 12

Hensley v. Attorney Gen.,
53 N.E.3d 639 (Mass. 2016) 23

In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions,
132 So. 3d 786 (Fla. 2014) 23

In re Initiative Petition No. 314,
625 P.2d 595 (Okla. 1980) 22

In re Initiative Petition No. 420, State Question No. 804,
458 P.3d 1088 (Okla. 2020) 23

Johnson v. John Deere Co.,
306 N.W.2d 231 (S.D. 1981) 4

Kneip v. Herseth,
214 N.W.2d 93 (S.D. 1974) 12, 13

Kreisers Inc. v. First Dakota Title Ltd P'ship,
2014 S.D. 56, 852 N.W.2d 413 19

Larkin v. Gronna,
285 N.W.59 (N.D. 1939) 27

Legislature of Cal. v. Eu,
816 P.2d 1309 (Cal. 1991) 31, 34

Meierhenry v. City of Huron,
354 N.W.2d 171 (S.D. 1984) 18, 24

Montana Ass'n of Cntys. v. State,
404 P.3d 733 (Mont. 2017) 20, 21, 22

Noel v. Cunningham,
5 N.W.2d 402 (S.D. 1942) 14, 15

Olson v. Guindon,
2009 S.D. 63, 771 N.W.2d 318 6

Raven v. Deukmejian,
801 P.2d 1077 (Cal. 1990) 34

S.D. Educ. Ass'n/NEA v. Barnett,
1998 SD 84, 582 N.W.2d 386 33

Sioux Falls Mun. Emps. Ass'n, Inc. v. City of Sioux Falls,
233 N.W.2d 306 (S.D. 1975) 12

In re Tod,
81 N.W. 637 (S.D. 1900), *overruled on other grounds by Grogan v. Welch*, 227 N.W. 74 (1929) 10

State ex rel. Wagner v. Evnen,
948 N.W.2d 244 (Neb. 2020) 22

Watland v. Lingle,
85 P.3d 1079 (Haw. 2004) 17

Constitutions

S.D. CONST. art. V, § 5 13

S.D. CONST. art. XXIII, § 1 ..... 16, 21

Statutes

S.D.C.L. Chapter 1-26. (App.3, § 12.) 29

S.D.C.L. § 2-1-17.1 14

S.D.C.L. § 2-1-18 14

S.D.C.L. § 16-16-18 3

S.D.C.L. § 32-2-7 7

Other Authorities

Hearing on H.J.R. 1006, 93rd S.D. Legis. Sess. (2018) (Senate floor debate, statement of Sen. Rusch at 2:22:02-2:24:25), https://sdpb.sd.gov/SDPBPodcast/2018/sen34.mp3#t=8417 22

Hearing on H.J.R. 1006, 93rd S.D. Legis. Sess. (2018) (House floor debate, statements of Reps. Rosen and Lust at 1:48:04-1:50:07), https://sdpb.sd.gov/SDPBPodcast/2018/hou27.mp3#t=6230 22

INTRODUCTION

Miller and Thom's lawsuit does far more than simply enforce constitutional limitations on the initiative process, as they claim. Rather, their arguments warp constitutional and legal rules in an effort to strike down the results of a democratic election. Paradoxically, Miller and Thom ask this Court to uphold the people's right to sovereignty and self-government by dramatically limiting the people's sovereign right to govern themselves through constitutional amendments.

Miller and Thom offer no consistent or coherent rules of law that can meaningfully apply in future elections. That absence lays bare the reality that this lawsuit is not about the rule of law. It is about achieving a particular political goal—the defeat of Amendment A. If elections are to be decided by voters and not by courts, this Court should not follow the path Thom and Miller offer.

ARGUMENT

Miller's response brief is notable for three repeated failures.[1] First, Miller fails to engage with, or even directly acknowledge, the exceedingly high burden of proof required to overturn an amendment adopted by the

[1] For clarity, this reply brief will refer to Miller's brief and Thom's brief separately, although Thom joined Miller's arguments in their entirety.

voters. Second, Miller largely fails to defend the circuit court's decision or reasoning, a tacit admission that this Court should not follow the reasoning of the circuit court. Third, Miller fails to offer substantive analysis showing why Amendment A violates the law, instead relying on bare assertions, convenient interpretations, and frequent repetition of both.

For the reasons below, and the reasons set forth in the Proponents' opening brief, this Court should reverse the decision of the circuit court and uphold the voters' adoption of Amendment A.

I. Thom does not have standing.

Thom cannot bring this lawsuit in his official capacity because county officials cannot sue the state. Thom did not plead or prove any legally-protected interest to or adversarial relationship in this lawsuit related to his official capacity. (Prop. Br. pp.11-17.) Thom's arguments otherwise are unpersuasive.

A. Thom falls squarely under the *Edgemont* rule.

Thom's attempt to distinguish *Edgemont* misses the mark. (Thom Br. pp.5-7.) *Edgemont* did not turn on whether the challenged provision was statutory or constitutional. Instead, the core of the holding was that political subdivisions of the state, such as counties and their officials, may not sue the state because they are subordinate to the state. *Edgemont Sch.*

Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40; *see also Bd. of Supervisors of Linn Cnty. v. Dep't of Revenue,* 263 N.W.2d 227, 234 (Iowa 1978).

Edgemont itself disproves Thom's argument about the timing of Pennington County's creation. (Thom Br. p.7.) Fall River County—the county at issue in *Edgemont*—was founded in 1883, six years before South Dakota's statehood. The date a political subdivision or subordinate to the state was originally created is irrelevant to the rule set forth in *Edgemont*. The relevant inquiry focuses on the nature of the plaintiff's relationship with the state. *S*ubordinates of the state, including their officials like Thom, cannot sue the state.

B. Thom's oath of office does not give him standing.

Thom's oath of office does not establish standing. (Thom Br. p.7-9.) Thom has yet to explain why this Court should allow any person who takes an oath to later challenge a law or amendment. Nor has Thom addressed the fact that his duties do not involve enforcing the laws he claims Amendment A violated.

Every elected or appointed official in South Dakota takes an oath. (App.7 n.2.) Every attorney admitted to the bar in South Dakota takes a similar oath. *See* S.D.C.L. § 16-16-18. Can every attorney and every official

challenge any law, simply because they took oaths? If this Court finds that Thom has standing, it must also answer that question affirmatively.

Thom has no legally-protected interest in enforcing a certain set of laws. His job is to uphold the law, however the people or the legislature may enact it, and his office is not harmed by doing so. If sheriffs can challenge laws simply because it may require time and money to enforce them, sheriffs could challenge any law.

Amendment A explicitly allows Thom to continue enforcing all laws relating to driving under the influence of marijuana. (App.1.) In essence, Thom's argument suggests that, after Amendment A's passage, there might be more people driving under the influence of marijuana. This is quintessentially speculative, and insufficient to establish standing. *See Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825-26. In addition, Thom's office will not be investigating and making arrests for many low-level drug offenses, which will free up significant law enforcement time and resources. Furthermore, the relative degree of difficulty enforcing laws does not provide a sheriff with standing to challenge them.[2]

---

[2] Thom mentions, but does not attempt to explain, his reference to potential liability. (*See* Thom Br. p.8.) The Court need not address this undeveloped and speculative argument. *See, e.g., Johnson v. John Deere Co.,*

Finally, Thom's argument that he may have standing in his individual capacity is irrelevant. (Thom Br. p.7 n.3.) Whether he could have sued individually or not, Thom made the strategic choice to bring this lawsuit in his official capacity only. Whatever his tactical reason, he is bound to that decision. Thom may not claim standing for a hypothetical lawsuit he chose not to bring.

II. Miller does not have standing.

Miller initially brought this lawsuit in his official capacity. After the Proponents challenged his standing, he offered an executive order from Governor Noem, stating that Miller's lawsuit was really brought at her direction and under her authority. Miller continues to argue both positions, claiming that he is bringing this lawsuit, and at the same time claiming that he is merely the Governor's delegated agent. Both cannot be simultaneously true. Miller must pick one story and stick to it.

A. *Edgemont* precludes Miller's lawsuit.

Miller's efforts to distinguish *Edgemont* reinforce why *Edgemont's* holding bars him from suing the state in his official capacity. Miller first argues that the Highway Patrol is not a school district or a political

306 N.W.2d 231, 239 (S.D. 1981) (noting that issues not properly briefed or argued on appeal are abandoned).

subdivision, so *Edgemont* does not apply. (Miller Br. p.10.) Miller reads *Edgemont* too narrowly. The fact that the Highway Patrol is a subordinate agency within the executive branch itself underscores the reality that Miller's official capacity is subordinate to the state. Miller points to no case authorizing a suit similar to the one he purports to bring in this case. Accordingly, *Edgemont* bars his official-capacity suit.

Olson v. Guindon, 2009 S.D. 63, 771 N.W.2d 318, does not help Miller. (Miller Br. p.10.) The key to *Olson's* holding that a school district had standing was the fact that the Constitution itself created the school district. *Id.* ¶ 16, 771 N.W.2d at 323 (stating that "school districts are not mere creatures of statute. Instead, they are creations of the Constitution via Article VIII"). The Highway Patrol is not a constitutional entity like a school district, it is a subordinate agency within the executive branch. Furthermore, as discussed in the next section, Miller has never shown that the Highway Patrol will suffer a direct, material harm to a legally-protected right, as the school district did in *Olson*. *See id.* at ¶¶ 14-16, 771 N.W.2d at 322-23. *Olson* is too legally and factually distinct to help Miller.

B. Miller's allegations about Amendment A's impact on the Highway Patrol do not establish standing.

Miller only mentions his oath of office in passing. (Miller Br. p.12.) As with Thom, that oath does not give Miller standing.

Instead, Miller alleges infringement of the Highway Patrol's authority to enforce all laws on the highways under S.D.C.L. § 32-2-7. (Miller Br. pp.11-12.)[3] In fact, if Miller were to refuse to enforce marijuana laws on the highways, he would violate his oath of office.

Miller's argument is plainly contrary to the text of Amendment A itself, which explicitly states:

> [T]his article does not limit or affect laws that prohibit or otherwise regulate . . . [o]perating or being in physical control of [any vehicle] while under the influence of marijuana; [c]onsumption of marijuana while operating or being in physical control of [any vehicle] while it is being operated; [and s]moking marijuana within a [vehicle] while it is being operated.

(App.1 § 2.) Amendment A also does not limit or affect laws that prohibit or regulate conduct that endangers others. (*Id.*) Miller offers no response to this reality, other than to repeat—without further analysis or development—his assertion that the Department of Revenue will be a new, unchecked fourth branch of government. Miller's repetition of this argument does not make it true. (*See* Section V.B, *infra*.)

Miller's passing citation to *American Federation* also does not explain why he has standing in his official capacity. (Miller Br. p.11.) That case

---

[3] Miller's conclusion that he could not enforce any laws related to marijuana on the highways is contradicted by Thom's apparent intent to enforce those laws.

involved a collective bargaining agreement between a union and a county. *Am. Fed'n of State, Cnty., and Mun. Emps. v. State, Pub. Emp. Rels. Bd.*, 372 N.W.2d 786, 790 (Minn. Ct. App. 1985). With little discussion, the court found the county had standing because "it questions its own rights in the collective bargaining agreement and stands to suffer an adverse effect if a statute is applied." *Id.* at 789-90. The dispute was between the bargaining unit on one hand, and the state public relations board and county, on the other. *American Federation* does not authorize an official like Miller to sue the state.

C. Miller may not exercise the power of the governor to establish standing.

Miller argues that his action is effectively brought in the name of the state, and that requiring the governor to actually bring this lawsuit in the name of the state elevates form over substance. (Miller Br. p.14.) Miller's position demonstrates why *Edgemont* prevents him, as a subordinate state official, from suing the state. His argument also ignores the point the Proponents made. If this is indeed a lawsuit brought by Governor Noem, she should have brought it. Miller never explains why the Governor needed his involvement. This Court should not condone a rule that would allow governors to conceal their exercises of constitutional authority by directing unelected subordinates to exercise those powers.

Miller next argues that he technically did not sue the legislature or the voters, so Article IV, § 3's limitation on claims against the legislature does not apply. (Miller Br. p.14.) But if Miller prevails, he will void the exercise of the people's retained legislative authority. The fact that he sued the Secretary of State to prevent the placement of Amendment A in the Constitution does not provide a workaround.[4] Otherwise, a governor could circumvent the express limitation in Article IV, § 3, and restrain the legislature's actions by suing the Secretary of State in each instance.

Most troublingly, Miller argues that the governor has an unlimited ability to farm out her constitutional duties. (Miller Br. pp.15-16.) That is not the law, and it is a dangerous untethering of power from accountability.

A governor need not personally perform every executive task. For example, the governor does not write the entire state of the state address, but the governor delivers it. The governor does not review every application for a judicial appointment, but the governor makes the appointment. Similarly, Governor Noem need not draft the pleadings or

[4] Miller's insistence that this suit under Article IV, § 3 is directed at the Secretary of State reinforces the conclusion that this lawsuit should have been brought well before the election, when the Secretary of State placed Amendment A on the ballot.

briefs in this lawsuit, but she must be the one exercising her power under Article IV, § 3.

Miller argues that a governor has broad authority to delegate tasks, citing *Opinion of the Justices to the Council*. (Miller Br. p.16.) In that case, a council proposed candidates for judicial nominations to the governor. 334 N.E.2d 604, 606 (Mass. 1975). Of course, that type of delegation is permissible, "as long as [the governor] does not surrender to them his responsibility to select a candidate and to make the nomination and appointment." *Id.* at 609. That case does not authorize the total delegation of a constitutional function, which is prohibited as recognized in *In re Tod*, 81 N.W. 637, 640 (S.D. 1900), *overruled on other grounds by Grogan v. Welch*, 227 N.W. 74 (1929). The Governor may not simply hand off a constitutional responsibility entirely to an unelected subordinate.

Compounding that deficiency, Miller argues that he may exercise Governor Noem's constitutional authority without any type of delegation or guidance from the Governor. (Miller Br. p.16.) That dramatic concession is at odds with established law requiring that delegations of authority be accompanied by intelligible standards to guide the exercise of delegated power. (*See* Prop. Br. p.21.) Notably, Miller does not argue that the Governor provided any type of guidance here. Rather, he argues that he

does not need any guidance because no authority specifically requires it. This Court should reject Miller's position.

Finally, Miller's ratification argument misses the point. (Miller Br. p.17.) If this is the Governor's lawsuit, then Miller and Thom are irrelevant and she indisputably could have brought it prior to the 2020 election. Any ratification does not solve the other infirmities: that this lawsuit is not permitted under Article IV, § 3 and it is an improper delegation of authority.

D. Public importance does not eliminate the standing requirement.

Miller may not avoid his burden to prove standing simply by claiming this is an issue of public importance. (Miller Br. pp.17-19.) The cases Miller cites do not eliminate the standing requirement simply because an issue is a matter of public importance.

H&W Contracting, LLC v. City of Watertown, 2001 S.D. 107, ¶ 9, 633 N.W.2d 167, 171, recognized that a plaintiff must ordinarily show some actual or threatened injury. It noted the exception that in certain circumstances a taxpayer can institute an action to protect public rights. *Id.* ¶ 11, 633 N.W.2d at 171-72. The case also recognized a limited exception for disappointed bidders on public contracts, which does not apply here, and then found that the plaintiff did not fall under that exception. *Id.*

¶¶ 12, 15, 633 N.W.2d at 172-73.

Here, Miller did not bring this action as a taxpayer. And even if he did, he has not established any injury to himself as a taxpayer. In *Danforth v. City of Yankton*, a taxpayer did not have standing because "[t]he action of the commission will in no way increase the burden of taxation upon property within the municipality. This being true, plaintiff can not [sic] possibly be affected as a taxpayer." 25 N.W.2d 50, 54 (S.D. 1946). In other words, some type of injury is still required, even when challenging a public policy. *See also Cable*, 2009 S.D. 59 at ¶¶ 46-47, 769 N.W.2d at 831-832 (discussing standing and distinguishing *Sioux Falls Mun. Emps. Ass'n, Inc. v. City of Sioux Falls*, 233 N.W.2d 306, 307-09 (S.D. 1975)). Here, the only evidence in the record shows that Amendment A will provide significant additional tax revenue. (*See* R.284 (Amendment A fiscal note stating that Amendment A will generate revenue and decrease incarceration costs).) Miller has not established general taxpayer standing.

Miller's reference to *Kneip v. Herseth*, 214 N.W.2d 93 (S.D. 1974), fares no better. That lawsuit was brought by one of the candidates, who unquestionably had a personal interest in appearing on the ballot and associating with the political party and voters of his choice. *Id.* at 99. The Court found that a declaratory judgment could provide a pre-election

remedy to remove uncertainty and avoid disenfranchising voters—a far cry from allowing any person to challenge a law regardless of its impact on him or her. *See id.* at 97.

In a last-ditch effort, Miller suggests that this Court should overlook his lack of standing because someone else could bring the lawsuit instead. (Miller Br. p.19.) This Court need not address speculative future lawsuits now. And it makes no difference how well Miller presents his arguments—standing is jurisdictional and may not be waived simply because someone can afford the lawyers to make an argument.

III. Miller and Thom—and the Governor—passed up multiple opportunities to challenge Amendment A prior to the election, and may not belatedly raise those arguments now.

Miller never addresses why Governor Noem did not seek an opinion from this Court regarding Amendment A's constitutionality prior to the election, other than to incorrectly infer a contradiction that does not exist. (Miller Br. pp.21-22.) Article V, § 5 allows a governor to request an opinion from the Supreme Court. S.D. Const., art. V, § 5. As the Proponents pointed out, the Supreme Court will answer these questions, where otherwise appropriate, without regard to whether they present an "advisory" opinion, i.e., whether they are based on future occurrences. (Prop. Br. pp.23-24.) If Governor Noem felt that Amendment A violated

the Constitution, she could have asked for an opinion from this Court well before the election occurred. She did not, and she may not do so (or instruct subordinates to do so) now.

Miller claims that S.D.C.L. §§ 2-1-17.1 and 2-1-18 do not apply, but provides no explanation supporting his position. (Miller Br. p.22.) If the form of Amendment A's petition violated the Constitution, the Secretary of State should not have placed it on the ballot. Miller and Thom could have challenged the Secretary's decision to do so. Furthermore, if those statutes do not apply, then Miller and Thom could have sought injunctive or declaratory relief. (*See* Prop. Br. pp.24-25.) Either way, Miller and Thom could have alleged that Amendment A was void from the outset before the election. Having declined to raise that issue, they may not do so now. *See Noel v. Cunningham*, 5 N.W.2d 402, 404 (S.D. 1942).

The Proponents' brief explained why *State ex rel. Cranmer v. Thorson*, 68 N.W.2d 202 (S.D. 1896), does not preclude pre-election procedural challenges. (Prop. Br. pp.29-31.) Miller's brief only addresses this issue in a single paragraph, which is not responsive to any of the substantive arguments the Proponents put forth. (Miller Br. p.22.) Courts may hear pre-election procedural challenges.

Miller next argues that, even if he and Thom could have brought this

case prior to the election, nothing requires that they do so. (Miller Br. p.23.) The fact that declaratory relief is available as an alternative remedy does not mean that declaratory judgments can be sought at any time. Miller's argument that this Court routinely considers post-election challenges appears to be based on cases involving election contests. (*Id.*) Of course, courts can hear challenges to violations of the law relating to the manner in which an election is conducted after the election. But this lawsuit is not such a challenge. It could have been brought a year before the election.

Miller's assertion that equitable defenses do not apply to challenges such as his is also misplaced. (Miller Br. pp.23-24.) For example, *Noel* found that a challenge to a candidate's nomination was waived because it was brought after the election. *Noel*, 5 N.W.2d at 404. Other cases have applied the doctrine of laches in the election context. (*See* Prop. Br. pp.27-28.)[5] Miller's position would logically mean that a plaintiff could now challenge, for example, the procedures by which South Dakota's 1972

[5] Miller argues that the Proponents' citations to other cases stemming from the 2020 election are "wildly misplaced." (Miller Br. p.24 n.5.) The Proponents certainly do not accuse Miller or Thom of anything like fabricating claims of voter fraud. Relevant to this litigation, though, these cases illuminate (1) that challenges to election procedures must be timely brought, or they will be barred by laches, and (2) post-election litigation of pre-election claims disenfranchises voters.

constitutional amendments were adopted. This Court should not set such a rule.

Finally, Miller argues that the legislative history of Amendment Z (the single-subject rule now part of Article XXIII, § 1) indicates that the legislature intended for single-subject challenges to be brought after the election was over. (Miller Br. p.25.) Amendment Z is silent on the timing of challenges. The cited portion of the legislative history simply expressed, briefly and with no explanation, one individual's belief regarding ripeness of legal claims, to which this Court owes no deference.[6] Furthermore, the legislature has subsequently made clear that it did not intend for single-subject challenges to be raised post-election by enacting a statute requiring pre-election enforcement of Article XXIII, § 1. (Miller Br. p.24 n.6.)

Miller fails to address the numerous policy reasons counseling against permitting post-election litigation, other than offering unsupported reassurance that such a "hypothetical parade of horribles simply will not come to fruition." (Miller Br. p.24.) Respectfully, they already are occurring. The circuit court and this Court are placed in the exceedingly difficult (and unnecessary) position of deciding litigation after the results

[6] This opinion on judicial ripeness of claims is wrong, as explained in the Proponents' opening brief. (Prop. Br. pp.29-31.)

of the election are known. And if Miller and Thom prevail, the state will have unnecessarily incurred the costs of a void election and South Dakota voters will have their votes taken away from them. In addition, Miller never addresses the problem that courts will become an extraconstitutional mechanism for repealing adopted amendments and circumventing voters.

Ultimately, Miller never provides this Court with a reason not to follow the rule in *Watland v. Lingle*: "[t]he general rule is that[,] if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward." 85 P.3d 1079, 1087 (Haw. 2004) (alterations in original) (quoting *Lewis v. Cayetano,* 823 P.2d 738, 741 (Haw. 1992)). Because Miller and Thom could have raised these issues well before the election, they may not take a second bite at the apple after they were disappointed with the outcome of the election.

IV. Miller and Thom have failed to show that Amendment A plainly and palpably involves subjects that have no relationship to each other.

Throughout this litigation, Miller and Thom have ignored the extremely high burden placed on a plaintiff challenging an adopted constitutional amendment. Miller's response brief repeats its refrain that

Amendment A included a litany of unrelated subjects, but never makes an effort to explain *why* the allegedly different parts of Amendment A do not relate to each other, or *how* Miller and Thom meet the high threshold required to strike down Amendment A. Miller's bare assertions of his desired conclusion are not an acceptable substitute for meaningful analysis, nor do they gain additional force simply by repetition.

"When considering a constitutional amendment after its adoption by the people, the question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it." *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (cleaned up). An amendment passed by the people "should be sustained unless is 'plainly and palpably appear(s) to be invalid.' " *Id.* Miller and Thom have failed to meet that standard.

A. This Court should not overrule *Barnhart* and impose a heightened single-subject test.

The circuit court, citing *Baker v. Atkinson*, 2001 S.D. 49, 625 N.W.2d 265, and *Meierhenry v. City of Huron,* 354 N.W.2d 171, 192 (S.D. 1984), applied the well-established standard for single-subject challenges: Whether the parts of Amendment A were reasonably germane. (App.11.) Miller now argues that the circuit court should have applied a new, higher standard. (Miller Br. pp.27-34.)

As an initial matter, Miller and Thom did not present to the circuit

court any argument for a heightened standard, whether based on legislative history or Montana law. Instead, they pointed the circuit court to South Dakota cases addressing the legislative single-subject rule. Accordingly, they failed to fully present this issue to the circuit court and may not present it now. *See Kreisers Inc. v. First Dakota Title Ltd P'ship*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425 (declining to address an issue when it was not "fully presented" to the circuit court).

1. South Dakota law is clear: the single-subject rule only requires a "reasonably germane" connection.

Barnhart dealt with a single-subject challenge to a voter-approved constitutional amendment. The Court's holding was clear: the provisions in the amendment only had to be "rationally related to [the amendment's] general purpose." 222 N.W.2d at 135. That standard controls here.

The circuit court correctly relied on other cases applying the single-subject rule in the legislative context because those cases applied the same standard as *Barnhart*. (*See* Prop. Br. pp.37-40.) Although courts have used different terms to flesh out the contours of this rule, its application is straightforward. If the different parts of Amendment A rationally relate to Amendment A's general purpose, they do not run afoul of the single-subject rule.

2. This Court should not overrule Barnhart *and others based on*

cases from other jurisdictions.

Miller urges the Court to apply Montana law rather than South Dakota law, pointing the Court to *Montana Ass'n of Cntys. v. State*, 404 P.3d 733 (Mont. 2017). The Court should not follow *Montana Ass'n* for several reasons.

Montana Ass'n expressly found that the single-subject requirement does not apply in Montana to constitutional amendments. *Id.* at 193 ("We now directly consider whether the single-subject requirement applies to constitutional amendments proposed by initiative and decide that it does not."). Instead, *Montana Ass'n* applied a different rule: that state's version of the single-vote rule. Miller and Thom may not reframe their single-subject challenge as a single-vote challenge simply to try to take advantage of more favorable case law from other jurisdictions.

Montana Ass'n also represents a minority position described as "dormant." *See Californians for an Open Primary v. McPherson*, 134 P.3d 299, 322 (Cal. 2006) (describing the functional, closely-related test for the separate-vote requirement as "an essentially dormant minority position"). As far as the Proponents can tell, *Montana Ass'n* has not been followed by any court. By contrast, the "vast majority" of states interpret single-subject and single-vote requirements in the same manner. *McPherson*, 134 P.3d at

324.[7] This Court has followed California courts in the past, and should do so here. It should not overrule *Barnhart* or change course to follow *Montana Ass'n*.

Montana Ass'n's strict limitation and its "implied constitutional change" theory is contrary to Article XXIII, § 1, which recognizes that an amendment "may amend one or more articles and related subject matter in other articles . . . ." S.D. Const. art. XXIII, § 1. In addition, it is unclear how voters would ever be able to separately vote on every implied change that a challenger could later think up. Furthermore, it ignores the reality that, while the legislature may pass as many bills as it wants, or submit as many amendments to the voters as it wants, voter-initiated amendments each require tens of thousands of signatures simply to make it to the ballot. Requiring sponsors to place every arguably separate change—explicit and implicit—on the ballot separately is not feasible, and would only serve to increase voter confusion. Effectively, the *Montana Ass'n* rule squeezes initiated amendments into nonexistence.[8] This Court should not interpret

---

[7] *Montana Ass'n* itself recognizes great variance among states, and concedes that many states do not meaningfully distinguish between the single-subject and single-vote rule. 404 P.3d at 741.

[8] *Montana Ass'n* dealt with Marsy's Law, a subject of two different constitutional amendments in South Dakota. Adopting *Montana Ass'n* would likely also invalidate both of those past constitutional amendments.

initiated amendments out of South Dakota's Constitution.

Miller argues that the legislature intended to create a heightened standard similar to that used in *Montana Ass'n* when it submitted Amendment Z to the voters. (Miller Br. pp.29-30.) The legislative history Miller cites resoundingly rejects Miller's conclusion. Legislators repeatedly stated that Amendment Z merely extended the existing single-subject limit on legislative action already found in Article III, § 21 to initiated constitutional amendments.[9] That rule is the permissive "reasonably germane" test that Miller and Thom seek to avoid.

Nor should this Court follow *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244 (Neb. 2020) or *In re Initiative Petition No. 314*, 625 P.2d 595 (Okla. 1980). *Wagner* involved a pre-election challenge, and the subject of the proposed amendment was narrower than Amendment A. Its holding is inapplicable, and its test differs from established South Dakota law. The Oklahoma Supreme Court clarified that the test set forth in *In re Initiative Petition No. 314* applies only when the amendment at issue does not

---

[9] *See, e.g.*, *Hearing on H.J.R. 1006*, 93rd S.D. Legis. Sess. (2018) (Senate floor debate, statement of Sen. Rusch at 2:22:02-2:24:25), https://sdpb.sd.gov/SDPBPodcast/2018/sen34.mp3#t=8417; *Hearing on H.J.R. 1006*, 93rd S.D. Legis. Sess. (2018) (House floor debate, statements of Reps. Rosen and Lust at 1:48:04-1:50:07), https://sdpb.sd.gov/SDPBPodcast/2018/hou27.mp3#t=6230.

propose a new article. *In re Initiative Petition No. 420, State Question No. 804*, 458 P.3d 1088, 1098 (Okla. 2020). When an amendment by article is proposed, its provisions need only be germane to the same general subject matter. *Id.*

If this Court wants to look to out-of-state decisions, it should look to *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014). There, the Florida Supreme Court addressed a proposed constitutional amendment that would have legalized medical marijuana and required regulations regarding the production and distribution of marijuana. The Court held the proposed amendment did not violate the single-subject rule because it had "a logical and natural oneness of purpose." *Id.* at 796; *see also Hensley v. Attorney Gen.*, 53 N.E.3d 639, 647 (Mass. 2016). Miller and Thom never distinguish these cases or their reasoning.

Miller and Thom need this Court to apply out-of-state law because Amendment A clearly meets the "reasonably germane" test. This Court should decline that invitation to rewrite established South Dakota law.

3. Miller's argument about the scope of the subject is a red herring.

Miller's argument that the scope of the subject must be narrowly drawn is contrary to the law. (Miller Br. pp.32-34.) "The constitution does

not restrict the scope or magnitude of the single subject of a legislative act." *Meierhenry*, 354 N.W.2d at 182 (citing *Morgan*, 48 N.W. at 317).

Miller invites the Court to describe Amendment A's general purpose in granular terms, but he never rebuts the numerous cases where South Dakota courts have used broad language to define a law's general purpose. In *Barnhart*, for example, this Court upheld a multi-part constitutional amendment with the strikingly general goal of "making the executive branch of state government more efficient and responsible." *Barnhart*, 222 N.W.2d at 135-36; *see also* Prop. Br. pp.37-38 (collecting cases). In addition, Miller never rebuts the liberal interpretation afforded to petitions and the strong presumption in favor of constitutionality. (*See* Prop. Br. pp.37-40.) Again, Miller and Thom fall short of proving that Amendment A plainly and palpably violates the Constitution.

B. Miller and Thom have not shown how or why Amendment A contains multiple unrelated subjects.

Miller's response brief barely touches on why the parts of Amendment A he identifies do not relate to each other. (Miller Br. pp.34-36.) Nor does Miller even mention the circuit court's conclusions in pages 34 to 36, much less defend them.

1. Miller has failed to show that the allegedly different subjects in Amendment A do not relate to each other.

Amendment A legalizes and regulates adult marijuana use in South Dakota. (App.1-3; App.11.) Civil penalties and taxes are rationally related to regulating adult marijuana use—they directly relate to the legalized activity, and are necessary components of effective regulation. Amendment A also distinguished between recreational marijuana on one hand and medical marijuana and hemp on the other hand to ensure that regulations meant for one did not inadvertently apply to the others. (*See* Prop. Br. pp.41-49.) Miller never rebuts any of this reasoning.

Miller argues that a "myriad" of different subjects in Amendment A do not relate to each other. (Miller Br. p. 36.) But this single paragraph, consisting of only three examples with no analysis, is devoid of any real reasoning or authority showing why his position is right.

The alleged subjects Miller identifies are, in fact, connected.[10] For example, the personal right to use marijuana depends on the ability to acquire marijuana. Amendment A provides a structure for the commercial sale of marijuana, or alternatively, personal growth of marijuana. Marijuana use could not occur without those provisions. Similarly, the taxation of marijuana directly relates to its regulation—the taxation funds

[10] Miller makes passing reference to "countless other examples" but never provides any. This Court need not hunt through Amendment A to find support for Miller and Thom's argument.

the regulation. As the Proponents previously explained, Amendment A's references to medical marijuana and hemp are not separate subjects. (Prop. Br. pp.42-45.)

Miller never attempts to distinguish or argue against other cases that have found marijuana measures to be single subjects. (*See* Prop. Br. pp.50-51.) This Court should follow those well-reasoned opinions.

2. Miller and Thom's contention that the voters did not understand Amendment A is contrary to the law.

Miller again calls Amendment A "a classic case of logrolling." (Miller Br. pp.36-37.) Despite having invoked that phrase repeatedly, Miller has yet to explain why or how, beyond speculating that hypothetical voters may have weighed portions of Amendment A differently. Voters are free to weigh pros and cons of any measure however they choose. This speculation is unsupported, irrelevant, and falls short of Miller and Thom's burden to prove that Amendment A is plainly and palpably unconstitutional.

Amendment A is not logrolling because all of its parts relate to its general subject, for the reasons set forth above. There is also no indication whatsoever that voters were confused, misled, or fooled by Amendment A. "The people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications,

and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people." *Larkin v. Gronna*, 285 N.W.59, 63 (N.D. 1939).

Finally, Miller and Thom's characterization of Amendment A as a scheme by "private lawyers and special interest groups" fundamentally overlooks a reality that Miller and Thom repeatedly choose to ignore: *South Dakotans voted for Amendment A*. In fact, 32,991 of Sheriff Thom's constituents voted in favor of Amendment A, and only 23,367 voted against it. (App.42.) Amendment A was not a scheme; no one was tricked or forced into voting for it. The people of South Dakota chose to adopt Amendment A, and that choice should be respected.

V. Amendment A did not require a constitutional convention.

Miller argues that constitutional conventions provide transparency, public input, and debate. He overlooks that Amendment A had all of those features. The draft of Amendment A was reviewed by the Legislative Research Council, as required by law. Amendment A was available to voters for over a year before the election, was circulated and received sufficient signatures to be placed on the ballot. Supporters and opponents debated Amendment A over a year-long campaign. Amendment A was not some secret foisted upon an unsuspecting public.

A. Amendments may add a new article to the Constitution.

Miller's brief continues to press the argument that amendments may not add new articles to the Constitution. (Miller Br. pp.40-44.) Miller maintains his contention that constitutional conventions did not exist until 1972. (*Id.* p.41.) As both the Attorney General and the Proponents pointed out before the circuit court, that is mistaken. (*See, e.g.*, R.297-98 (Attorney General's Jan. 8, 2021 Br. at pp.12-13).) Indeed, Miller's appendix, at page 3, includes the 1967 version of Article XXIII, § 2—which provides for constitutional revisions by convention prior to 1972.

The remainder of Miller's arguments are addressed in the Proponents' opening brief. (Prop. Br. pp.53-54.) The circuit court correctly rejected this argument, and Miller never explains why that determination should be reversed.

B. The Department of Revenue is not a fourth branch of government.

The majority of Miller and Thom's laundry list of implicit changes to South Dakota's government derive from their repeated reference to a single appearance of the word "exclusive" in Amendment A. While Miller glibly argues that "exclusive means exclusive," his argument takes the word entirely out of context and ignores other sections of Amendment A. Furthermore, Miller's argument avoids any engagement with the

exceedingly high standard of proof he bears: if there is any way to interpret Amendment A in a more favorable manner than Miller presents, his challenge must fail.

As the Proponents pointed out, Amendment A designates the Department of Revenue, or its successor agency, as the exclusive agency charged with administering the various licensing and regulatory requirements of Amendment A. Amendment A provides clear and specific guidance as to what the Department of Revenue must do. All of the Department's actions are subject to review under S.D.C.L. ch. 1-26. (App.3, § 12.) Amendment A never gives the Department of Revenue the power to legislate, as Miller suggests. (*See* Miller Br. p.48 (claiming the Department has the exclusive power "to pass laws").)

Miller never answers many of the arguments the Proponents put forth in their opening brief. For example, the Proponents pointed out that the Legislative Research Council advised the sponsors of Amendment A to remove language relating to the legislature because it was unnecessary. (Prop. Br. p.60.) Furthermore, there is simply no need to decide future hypothetical questions of whether legislation or other action may conflict with Amendment A. Miller and Thom's recasting of the Department of Revenue as a fourth branch of government is unsupportable.

C. The other "far-reaching and multifarious changes to the Constitution" Miller and Thom outline are imaginary.

Miller largely recycles his previous arguments, but in so doing he never meaningfully addresses the various reasons the Proponents provided that his concerns are unfounded. (*See* Prop. Br. pp.54-67.)

Amendment A did not deprive the legislature of the power to establish civil penalties. (Prop. Br. pp.62-63.) Amendment A did not limit the power of the executive branch to reassign functions internally. (Prop. Br. pp.64-65.) Amendment A did not establish a new cause of action. (Prop. Br. pp.65-66.)

Miller incorrectly assumes that Amendment A deprives this Court of the power to discipline attorneys. (Miller Br. p.52-53.) It does not. This Court still regulates the practice of law in South Dakota. Amendment A simply clarifies that one previously illegal activity is no longer illegal. This furthers the purpose of Amendment A. (Prop. Br. pp.46-47.) Furthermore, Miller never explains how or why this amounts to a fundamental restructuring of the government. It does not rise to the level of a plain and palpable constitutional violation.

Amendment A also does not infringe on the legislature's authority to tax and appropriate revenue. Again, Miller fails to acknowledge that the people may exercise this power—their power is concurrent with the power

of the legislature. *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 35, 720 N.W.2d 670, 682 ("Indeed, while article III, § 1 gives the legislature power in areas excluded from the scope of the referendum, the power is not exclusive. It is concurrent with the people's right to initiate measures."); *Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985) ("The purpose of the initiative is not to curtail or limit legislative power to enact laws, but rather to compel enactment of measures desired by the people, and to empower the people, in the event the legislature fails to act, to enact such measures themselves.").

Miller's brief also never addresses the fact that, if this Court adopts his theory on amendments versus revisions, it will in effect invite the repeal of the 1972 amendments, among others. Miller and Thom may only seek to strike down Amendment A, but a ruling in their favor would actually constitute a fundamental change in the state constitution and structure of government.

Miller and Thom deserve credit for creativity. They have scoured Amendment A to conjure up every possible fear and doubt they can manage, a tactic that should be rejected. *See Legislature of Cal. v. Eu*, 816 P.2d 1309, 1315 (Cal. 1991) ("We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged

measure, and that their 'fears and doubts' are not highly authoritative in construing the measure." (citation omitted)). The thin nature of their arguments only reinforces the conclusion that Amendment A is simple and straightforward: it legalizes and regulates marijuana. It does not fundamentally reform the structure of South Dakota's government. They simply cannot carry their burden to demonstrate that Amendment A plainly and palpably violated the constitution.

D. South Dakotans—not Miller and Thom—get to decide what is in their Constitution.

Miller makes the assertion that the constitution is not the place for Amendment A because it should be a statute instead. (Miller Br. p.57.) The people get to decide what goes into their constitution. In so doing, they may make policy determinations, just as the Legislature itself may do. *See Byre*, 362 N.W.2d at 79. Other states have also put marijuana policies into their constitutions. (Prop. Br. p.68.) South Dakotans voted to put Amendment A in the Constitution to protect those rights from legislative repeal. That choice is the peoples' to make.

VI. South Dakota law favors separability.

Miller essentially ignored the separability issue, providing only a single paragraph directing this Court to Montana law while ignoring South Dakota precedent. (Miller Br. pp.57-58.)

As the Proponents explained in their opening brief, South Dakota law favors separability, and requires courts to separate unconstitutional material where possible. (Prop. Br. pp.71-74.) In fact, this Court has held that the proper remedy for violation of the legislative single-subject rule is to separate and sever any unconstitutional provisions. *Dakota Sys., Inc. v. Viken*, 2005 S.D. 27, ¶ 20, 694 N.W.2d 23, 32.

Miller never addresses that case, or South Dakota's preference for separability. Miller never raises an argument about the factors courts weigh when considering separability. In short, Miller made no effort to carry his burden to show that Amendment A is not separable. *See S.D. Educ. Ass'n/NEA v. Barnett*, 1998 SD 84, ¶ 33, 582 N.W.2d 386, 394.

This Court should not create a new rule that voter-initiated constitutional amendments are outside the doctrine of separability, as Miller urges based on Montana law. Miller's position is contrary to South Dakota's preference for separability. *See S.D. Educ. Ass'n*, 1998 S.D. 84 at ¶ 33, 582 N.W.2d at 394 (noting that other states that strike an entire enactment are "clearly at odds with our own precedent on this issue").

Miller's argument that Amendment A rises or falls as a whole because that is how it was submitted to voters would apply equally to the legislature, contrary to established South Dakota law set forth above.

Furthermore, Miller's reasoning would only apply to the single-subject argument; it would not apply in the event this Court affirms only on the constitutional revision issue.

Courts need not strike down amendments as a whole. For example, in *Legislature of the State of Cal. v. Eu*, the California Supreme Court severed unconstitutional provisions of a voter-initiated constitutional amendment that imposed term limits on incumbent legislators. 816 P.2d 1309, 1335-36 (Cal. 1991). Similarly, the California Supreme Court severed one provision of a constitutional amendment that should have been a constitutional revision, while upholding the remainder of the initiative. *See Raven v. Deukmejian*, 801 P.2d 1077, 1089-90 (Cal. 1990).

Given the circuit court's finding about the primary purpose of Amendment A, it could have separated and severed any unrelated matters, as instructed in *Viken*. 2005 S.D. 27, ¶ 20, 694 N.W.2d at 32. If this Court determines that Amendment A violated the Constitution, it should preserve as much of the voters' intent as it can.

CONCLUSION

Amendment A involves a single subject, and is not a constitutional revision. Longstanding judicial policy requires resolving all doubts in favor of preserving Amendment A. Miller and Thom's speculations,

implications, and unfounded assertions fall short of showing a plain and palpable constitutional violation.

The power to initiate constitutional amendments is a precious part of South Dakota's democratic process. The result urged by Miller and Thom would severely restrict that fundamental right. This Court should let stand the choice made by the voters of South Dakota.

Respectfully,

DATED: April 5, 2021

ROBINS KAPLAN LLP

By: */s/ Timothy W. Billion* .

Brendan V. Johnson (3263)
Timothy W. Billion (4641)
140 North Phillips Avenue, Suite 307
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
Email: TBillion@RobinsKaplan.com

Attorneys for Proponents

Certificate of Compliance

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court's February 26, 2021 order. This brief was prepared and printed in a proportionally spaced typeface using Microsoft Word 2016 in Book Antiqua font, size 13. This brief contains 7,449 words, including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, and certificates of counsel.

Dated this 5th day of April, 2021

/s/ Timothy W. Billion
Timothy W. Billion

Certificate of Service

The undersigned hereby certifies that on April 5, 2021, the foregoing brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

and a true and correct copy of the foregoing brief was provided by electronic mail and U.S. Mail to:

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Defendant Steve Barnett, in his official capacity as South Dakota Secretary of State

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
1300 W 57th Street, Suite 101
Sioux Falls, SD 57108
Attorneys for Plaintiff/Appellee Colonel Rick Miller, in his official capacity as Superintendent of the South Dakota Highway Patrol

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Plaintiff/Appellee Sheriff Kevin Thom, in his official capacity as Pennington County Sheriff

/s/ Timothy W. Billion
Timothy W. Billion

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs and Appellees, vs. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant and Appellee, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants and Appellants.	)	Appeal No. 29546

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	)	Appeal No. 29547

APPELLANT SHERIFF KEVIN THOM'S JOINDER
IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER

Contestant/Appellant Sheriff Kevin Thom, by and through his undersigned counsel and pursuant to SDCL 15-26A-67, hereby joins in the Reply Brief of Appellant Colonel Rick Miller filed in Appeal No. 29547 as to all issues. In addition, particular to the issue of Sheriff Thom's standing raised by Appellants in their Reply Brief in Appeal No. 29547, Sheriff Thom hereby adopts by reference the arguments and authorities he set forth in the Response Brief that he filed in Appeal No. 29546 on March 24, 2021.

Dated this 5th day of April, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorney for Appellant Sheriff Kevin Thom

By: */s/ Robert L. Morris*
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **APPELLANT SHERIFF KEVIN THOM'S JOINDER IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER,** upon the persons herein next designated, on the date below shown, as follows:

Grant Flynn Matthew W. Templar Office of the Attorney General 1302 E. Hwy 14, Suite 1 Pierre, SD 57501-8501 grant.flynn@state.sd.us matthew.templar@state.sd.us	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Brendan V. Johnson Timothy W. Billion Robins Kaplan LLP 140 N. Phillips Ave., Suite 307 Sioux Falls, SD 57104 bjohnson@robinskaplan.com tbillion@robinskaplan.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Matthew S. McCaulley Lisa M. Prostrollo Christopher Sommers Redstone Law Firm, LLP P.O. Box 1535 101 N. Phillips Ave, Suite 402 Sioux Falls, SD 5101-1535 matt@redstonelawfirm.com lisa@redstonelawfirm.com chris@redstonelawfirm.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail

Dated this 5th day of April, 2021.

/s/ Robert L. Morris
Robert L. Morris

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29547

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE

APPEAL FROM THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT, HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE CHRISTINA KLINGER,
CIRCUIT COURT JUDGE

BRIEF OF APPELLANT COLONEL RICK MILLER

ATTORNEYS FOR APPELLANT COLONEL RICK MILLER

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Tel. (605) 331-2975

ATTORNEY FOR APPELLANT SHERIFF KEVIN THOM

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717-0370
Tel. (605) 723-7777

ATTORNEYS FOR APPELLEES RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
Tel. (605) 335-1300

ATTORNEYS FOR THE STATE OF SOUTH DAKOTA

Jason R. Ravnsborg
Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Tel. (605) 773-3215

NOTICE OF APPEAL FILED FEBRUARY 17, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

REQUEST FOR ORAL ARGUMENT 1

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW 2

I. Whether an election contest is an appropriate cause of action to challenge whether a proposed constitutional amendment was submitted to voters in violation of Article XXIII of the South Dakota Constitution? 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

CONCLUSION 17

CERTIFICATE OF SERVICE 19

CERTIFICATE OF COMPLIANCE 19

APPENDIX 20

TABLE OF AUTHORITIES

Cases

Abbott v. Hunhoff
491 N.W.2d 450 (S.D. 1992) 9, 10

Andrews v. Governor of Maryland
449 A.2d 1144 (Md. 1982) 8, 15

Beals v. Pickeral Lake Sanitary Dist.
1998 S.D. 42, 578 N.W.2d 134 7

Brown v. Dakota Public Serv. Co.
299 N.W. 569 (S.D. 1941) 11

Coleman v. Pross
246 S.E.2d 613 (Va. 1978) 16

Danforth v. Egan
119 N.W. 1021 (S.D. 1909) 11, 12, 15, 17

Erickson v. Simmons
65 N.W.2d 198 (Minn. 1954) 11

Fulton County v. City of Atlanta
825 S.E.2d 142 (Ga. 2019) 14, 15

Glaser v. LeBus
274 P.3d 114 (N.M. Ct. App. 2011) 13, 14, 17

Gooder v. Rudd
160 N.W. 808 (S.D. 1916) 11, 12, 13

Green v. Ind. Consolidated Sch. Dist. No. 1
89 N.W.2d 12 (Minn. 1958) 9, 10, 11

Hurley v. Corsey, 265 N.W. 4 (S.D. 1936) 11, 12, 17

In re Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999, 2001 S.D. 62, 628 N.W.2d 336 ..... 9, 10, 14, 15

In re Estate of Flaws
2016 S.D. 60, 855 N.W.2d 336 7

In re Estate of Lester
2014 S.D. 73, 855 NW.2d 876 7

Korstad-Tebben, Inc. v. Pope Architects, Inc.
459 N.W.2d 565 (S.D. 1990) 7

Larson v. Locken
262 N.W.2d 752 (S.D. 1978) 9, 10

Lehman v. Bradbury
37 P.3d 989 (Or. 2002) 16

Loesch v. City of Huron
2006 S.D. 93, 723 N.W.2d 694 ..... 6, 7

McWhirter v. Bridges
155 S.E.2d 897 (S.C. 1967) 16

Moore v. Brown
165 S.W.2d 657 (Mo. 1942) 15, 16

M.S. v. Dinkytown Day Care Ctr., Inc.
485 N.W.2d 587 (S.D. 1992) 7

People v. Hallet
1 Colo. 352 (Colo. 1871) 12

Slota v. Imhoff and Assocs., P.C.
2020 S.D. 55, 949 N.W.2d 869 7

Sorenson v. Rickman
486 N.W.2d 259 (S.D. 1992) 16

State ex rel. Adams v. Herried
72 N.W. 93 (S.D. 1897) 15

State ex rel. Pryor v. Axness
139 N.W. 791 (S.D. 1913) 12

State ex rel. Wagner v. Evnen
948 N.W.2d 244 (Neb. 2020) 15

Water Works & Sewer Bd. v. Bd. of Water & Sewer Comm'rs
141 So. 3d 958 (Ala. 2013) 15

Watland v. Lingle
85 P.3d 1079 (Haw. 2004) 8, 13, 14, 17

Statutes

Haw. Rev. Stat. § 11-172 (1993) 14

SDCL § 15-26A-3(1) 1

SDCL § 12-22-1 ..... 7, 8, 16, 17

SDCL § 12-22-3 ..... 2, 7

SDCL § 12-22-5 16

SDCL § 12-22-10 16

SDCL § 12-22-18 16

SDCL § 12-22-25 ..... 1, 16

Constitutional Provisions

S.D. Const. art. XXIII, § 1 ..... 2, 7, 8, 15, 17

S.D. Const. art. XXIII, § 2 ..... 2, 7, 8

S.D. Const. art. XXIII, § 3 8

PRELIMINARY STATEMENT

Throughout this brief, Contestant and Appellant Colonel Rick Miller is referred to as "Colonel Miller." Contestant and Appellant Sheriff Kevin Thom is referred to as "Sheriff Thom." Colonel Miller and Sheriff Thom are collectively be referred to as "Contestants." Appellees Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are referred to as "Proponents." The State of South Dakota is referred to as "State." Attorney General Jason R. Ravnsborg is referred to as "Attorney General." Constitutional Amendment A will be referred to as "Amendment A."

Citations to the settled record appear as "SR." Citations to the Appendix appear as "Appx." Exhibits to documents within the record will be referred to as "Ex." followed by the exhibit number.

JURISDICTIONAL STATEMENT

Colonel Miller appeals from the circuit court's Memorandum Decision and Order dated February 8, 2021, granting Proponents' and the State's motions for judgment on the pleadings and dismissing Contestants' election contest. Notice of entry of order was filed on February 11, 2021. Contestants timely filed a Joint Notice of Appeal on February 17, 2021. This Court has jurisdiction pursuant to SDCL 15-26A-3(1) and SDCL 12-22-25.

REQUEST FOR ORAL ARGUMENT

Colonel Miller respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

I. Whether an election contest is an appropriate cause of action to challenge whether a proposed constitutional amendment was submitted to voters in violation of Article XXIII of the South Dakota Constitution?

The circuit ruled that an election contest is not the appropriate cause of action to challenge whether a proposed constitutional amendment was placed on the ballot in violation of Article XXIII of the South Dakota Constitution, and it therefore dismissed the election contest.

Relevant Cases:

Danforth v. Egan, 119 N.W. 1021 (S.D. 1909)
Hurley v. Corsey, 265 N.W. 4 (S.D. 1936)
Larson v. Locken, 262 N.W.2d 752 (S.D. 1979)
Watland v. Lingle, 85 P.3d 1079 (Haw. 2004)

Relevant Statutes and Constitutional Provisions:

S.D. Const. art. XXIII, §§ 1-2
SDCL 12-22-1
SDCL 12-22-3

STATEMENT OF THE CASE

Colonel Miller and Sheriff Thom commenced this election contest upon the filing of a Summons and Verified Complaint, endorsed as required by SDCL 12-22-3, in the circuit court, Sixth Judicial Circuit, Hughes County, South Dakota. (SR 1-3). Contestants alleged in the Verified Complaint that Amendment A was unconstitutionally submitted to the South Dakota electorate because it embraced more than one subject in violation of Article XXIII, § 1 of the South Dakota Constitution, and because it was a revision under Article XXIII, § 2 that could not be submitted as an initiated amendment. This election contest was filed contemporaneously with a separate declaratory judgment action seeking similar relief in the same court, entitled *Thom & Miller v. Barnett*, et al., which is

the subject of Appeal No. 29546. Proponents filed an uncontested motion to intervene, which was granted by the circuit court. (SR 41, 50).

The State and Proponents each filed answers to the Verified Complaint denying the allegations. (SR 54, 68). Contestants filed a joint motion for summary judgment. (SR 153; Appx. 13-19). The State and Proponents filed separate motions for judgment on the pleadings, arguing, *inter alia*, that an election contest was not an appropriate cause of action. (SR 85, 113). A hearing was held on all motions before the Honorable Christina Klinger on January 27, 2021. (SR 248). On February 8, 2021, the circuit court issued a Memorandum Decision and Order granting the State's and Proponents' motions for judgment on the pleadings, and dismissing the election contest in its entirety, which effectively denied Contestants' motion for summary judgment. (SR 493-497; Appx. 1-5). The court concluded that an election contest was not the appropriate cause of action because Contestants' allegations were not related to the "electoral process." (SR 497, Appx. 5). Notice of entry of order was filed on February 11, 2021.

Contestants thereafter timely filed a joint notice of appeal on February 17, 2021. Pursuant to the Stipulation and Joint Motion of the parties, this Court ordered expedited briefing and consolidated this appeal with Appeal No. 29546 for purposes of briefing and submission to the Court for decision.

STATEMENT OF THE FACTS

On September 11, 2019, counsel for the Proponents, Brendan Johnson, filed a form for an "Initiated Constitutional Amendment Petition" ("Petition") with the South Dakota Secretary of State. (SR 3, Ex. 1; Appx. 61-64). The

Petition sought approval to circulate a Petition proposing a change to the South Dakota Constitution entitled, "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." (SR 3, Ex. 1; Appx. 61). Mr. Johnson later submitted signed petitions to the Secretary of State for validation. (SR 4). On January 6, 2020, the Secretary of State announced that the Petition received 36,707 valid signatures, which allowed the Petition to be validated and submitted to South Dakota voters for approval. (*Id.*; SR 160, Ex. D; Appx. 46-47).

The Petition was titled Constitutional Amendment A ("Amendment A") and was certified by the Secretary of State to be placed on the 2020 General Election ballot scheduled for November 3, 2020. (SR 4; SR 160, Ex. D; Appx. 46-47). A "Yes" vote was a vote to adopt the amendment in its entirety. (SR 160, Ex. C; Appx. 44). A "No" vote was to reject the amendment in its entirety and leave the Constitution as it was. (SR 160, Ex. C; Appx. 44). The official canvass was completed on November 10, 2020. (SR 3, Ex. 2; Appx. 65, 79). Amendment A ultimately received 225,260 "Yes" votes and 190,477 "No" votes. (SR 3, Ex. 2; Appx. 79).

Amendment A, as it was submitted to South Dakota voters, unambiguously purports to add a new article to the South Dakota Constitution. The new Article is comprised of 15 sections and 55 subsections prescribing detailed and extensive rules and regulations across a multitude of different subjects:

1. Section 1 sets forth definitions for the terms Department, hemp, local government, marijuana, and marijuana accessory.

2. Section 2 enumerates various exceptions to the rights created by Amendment A by stating it "does not limit or affect laws that prohibit or otherwise regulate" certain activities, such as driving while under the influence of marijuana.

3. Section 3 clarifies that employers may restrict an employee's use of marijuana; that private property owners may prohibit marijuana on their property; and that state and local governments may prohibit marijuana in government-owned property.

4. Section 4 generally decriminalizes the individual possession and use of small amounts of marijuana, the individual cultivation and processing of up to three marijuana plants subject to certain restrictions, and the individual possession and use of marijuana paraphernalia.

5. Section 5 imposes specific civil penalties for failing to follow various restrictions on cultivating marijuana under section 4, for smoking marijuana illegally in a public place, and for the underage possession and use of marijuana.

6. Section 6 grants the Department of Revenue the "exclusive power . . . to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," and it mandates that the Department accept applications and issue licenses for commercial production of marijuana, for testing of marijuana, for wholesaling marijuana, and for retail sales.

7. Section 7 mandates that the Department of Revenue promulgate rules and issue regulations "necessary for the implementation and enforcement of" Amendment A, such as procedures for the issuance or revocation of licenses; license qualifications; testing, packaging, and labeling requirements; health and safety requirements; restrictions on advertising; and creating civil penalties; among others.

8. Section 8 sets forth guidance on how many licenses the Department of Revenue may issue.

9. Section 9 decriminalizes actions and conduct of licensees under the provisions of Amendment A, precludes voiding contracts related to

marijuana on the basis of federal law, and precludes professional discipline for advice or services related to marijuana on the basis of federal law.

10. Section 10 grants local governments the right to regulate licenses within their jurisdictions, including banning them altogether.

11. Section 11 imposes a 15% excise tax on all sales of marijuana that may not be changed until November 3, 2024; requires that revenue be first used to fund the Department's costs in implementing and enforcing Amendment A; and mandates that 50% of the remaining revenue be appropriated for the support of public schools, with the remainder being deposited into the general fund.

12. Section 12 requires administrative rules to be adopted in accordance with SDCL chapter 1-26; creates a right to appeal Department decisions; and allows any resident to commence an action for a writ of mandamus if the Department fails to promulgate rules by April 2022.

13. Section 13 requires the Department to publish annual reports related to the implementation and enforcement of Amendment A.

14. Section 14 mandates that the Legislature pass laws:

    a. Ensuring access to marijuana "beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana"; and

    b. Regulating the cultivation, processing, and sale of hemp.

(SR 3, Ex. 1; Appx. 61-64). Section 15 provides that Amendment A is to be broadly construed; that it does not purport to supersede federal law; and that its provisions are severable. (SR 3, Ex. 1; Appx. 61-64).

STANDARD OF REVIEW

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Loesch v. City of Huron*,

2006 S.D. 93, ¶ 3, 723 N.W.2d 694, 695 (quoting *M.S. v. Dinkytown Day Care Ctr., Inc.*, 485 N.W.2d 587, 588 (S.D. 1992)). A judgment on the pleadings is "an appropriate remedy to resolve issues of law when there are no remaining issues of fact." *In re Estate of Lester*, 2014 S.D. 73, ¶ 3, 855 N.W.2d 876, 878 (quoting *Korstad-Tebben, Inc. v. Pope Architects, Inc.*, 459 N.W.2d 565, 567 (S.D. 1990)). This Court reviews "a ruling granting a motion for judgment on the pleadings de novo." *Slota v. Imhoff and Assocs., P.C.*, 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873. Constitutional and statutory interpretation are questions of law reviewed de novo. *In re Estate of Flaws*, 2016 S.D. 60, ¶ 18, 885 N.W.2d 336, 342; *Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 7, 578 N.W.2d 134, 135.

ARGUMENT

An election contest is a statutorily created cause of action. As such, the scope of an election contest is governed by statute. South Dakota's statutes on election contests are broad and do not specify the particular grounds for bringing a contest. An election contest is defined as "a legal proceeding, other than a recount, instituted to challenge the determination of any elections" in South Dakota. SDCL 12-22-1. By the statute's plain language, a contest is any challenge to the determination of an election other than a recount. A contestant may bring an election contest to challenge the determination of an election on a proposed constitutional amendment. SDCL 12-22-3.

Article XXIII of the South Dakota Constitution sets forth certain requirements for amendments and revisions to the Constitution. An amendment to the Constitution may be proposed through a citizen initiative or by resolution of the Legislature. S.D. Const. art. XXIII, § 1. All proposed amendments,

however, cannot embrace more than one subject. *Id.* More significant changes that amount to a revision of the Constitution cannot be proposed by initiative or by resolution of the Legislature, but rather are subject to the more stringent process of a convention outlined in Article XXIII, § 2. These requirements to amend the Constitution are mandatory, not directory, and strict compliance is necessary to the validity of any amendment. *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1148 (Md. 1982).

Each and every proposed amendment to the South Dakota Constitution must be voted on in an election. S.D. Const. art. XXIII, §§ 1, 3. It follows that Article XXIII, § 1 is a mandatory election law that must be complied with for an election on a proposed amendment to be valid. When the Constitution, as approved by the people, sets forth a specific procedure for its own amendment, the people are bound by that procedure, and "strict observance of every substantial requirement is essential to the validity of the proposed amendment." *Andrews*, 449 A.2d at 1148. In other words, the requirements of Article XXIII, § 1 are conditions precedent to ratification of an amendment in an election. A proposed amendment that violates Article XXIII, § 1 is void *ab initio*, and should never be placed on the ballot in the first instance. If Amendment A was placed on the ballot in violation of the Constitution such that no votes could ever be cast in favor or against it, then this action is a "legal proceeding . . . instituted to challenge the determination of any election." SDCL 12-22-1. "This is not, therefore, a typical election contest . . . ." *See Watland v. Lingle*, 85 P.3d 1079, 1087 (Haw. 2004).

The circuit court, relying on relatively recent precedents from this Court, adopted a much narrower view of election contests and concluded that a contestant must allege particularized voting irregularities regarding the conduct of the election that were so egregious that the will of the voters was suppressed. (SR 497; Appx. 4-5). The court ultimately concluded that Contestants' allegations that Amendment A was placed on the ballot in violation of Article XXIII was not an "irregularity" in the election process that suppressed the will of the voters, and therefore an election contest was not an appropriate cause of action. (SR 497; Appx. 4-5).

No doubt the vast majority of election contests are concerned with whether the departure from statutory procedures governing the conduct of an election were so egregious as to suppress the will of the voters. *See, e.g.*, *In re Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999* ("*Watertown I*"), 2001 S.D. 62, 628 N.W.2d 336 (long lines and inadequate parking); *Abbott v. Hunhoff*, 491 N.W.2d 450 (S.D. 1992) (illegal votes in primary election). The more recent opinions issued by this Court addressing an election-contest appeal recite an oft-quoted phrase: "The basic question in an election contest is whether the election, despite irregularities in its conduct, resulted in a free and fair expression of the will of the voters on the merits." *Larson v. Locken*, 262 N.W.2d 752, 753 (S.D. 1978) (citing *Green v. Ind. Consolidated Sch. Dist. No. 1*, 89 N.W.2d 12, 17-18 (Minn. 1958)). However, cases dealing only with election-day irregularities do not delimit the scope of an election contest under SDCL chapter 12-22.

Because these cases concerned only irregularities in the conduct of an election, it should come as no surprise that the law of such opinions were limited to election contests alleging irregularities in the conduct of the election. It does not follow that these cases define the parameters of an election contest under SDCL chapter 12-22 to foreclose Contestants' allegations in this case. In *Larson*, the issue before the Court was whether the failure to follow statutes governing absentee ballots required a new election. *Larson*, 262 N.W.2d at 752. This Court, acknowledging that the violations of law found by the circuit court were mandatory, concluded that the irregularities were sufficient to order a new election. *Id.* at 755-56. In *Watertown I*, the issue before the Court was whether long lines and insufficient parking were adequate grounds for an election contest. *Watertown I*, 2001 S.D. 62, ¶ 6, 628 N.W.2d at 338. This Court noted that the contestants failed to allege any violation of election statutes or ordinances and failed to prove any alleged irregularities at trial. *Id.* ¶¶ 8-9. In *Abbott*, the issue before the Court was whether illegal votes cast by registered Republicans in the then-closed Democratic primary election should be counted. *Abbott*, 491 N.W.2d at 453. Because the Contestant failed to call the Republican voters as witnesses to prove how the votes could have been cast, there was insufficient evidence to show that the outcome of the election would have been different. *Id.*

Indeed, even the Minnesota case from which *Larson's* oft-quoted language was derived did not take such a narrow view of election contests. In *Green v. Ind. Consolidated Sch. Dist. No. 1*, the Minnesota Supreme Court explicitly noted that a constitutional violation can invalidate an otherwise procedurally valid election: "[I]n the absence of fraud or bad faith or *constitutional violation*, an election

which has resulted in a fair and free expression of the will of the legal voters upon the merits will [generally] not be invalidated because of a departure from the statutory regulations governing the conduct of the election . . . ." *Green*, 89 N.W.2d at 16-17 (emphasis added) (quoting *Erickson v. Simmons*, 65 N.W.2d 198, 202 (Minn. 1954)); *see also Brown v. Dakota Public Serv. Co.*, 299 N.W. 569, 572 (S.D. 1941) (stating that irregularities will not invalidate an election "where such irregularities have not prevented a free and fair popular vote, or where the *substance of no essential requirement of the law has been violated*" (emphasis added)).

Indeed, this Court has allowed or endorsed election contests when a mandatory law has been violated or when the office for an elected position did not exist. *See Danforth v. Egan*, 119 N.W. 1021 (S.D. 1909); *Hurley v. Corsey*, 265 N.W. 4, 7-8 (S.D. 1936); *Gooder v. Rudd*, 160 N.W. 808, 808-09 (S.D. 1916). In *Danforth*, the defendant George Egan ran for and won the election for state's attorney in Minnehaha County. *Danforth*, 119 N.W. at 1022. Less than a month before the election, he was disbarred and his license to practice law was revoked. *Id.* Following the election, the plaintiff filed an election contest challenging Egan's right to hold the office of state's attorney. This Court held that the election was invalid because Egan was disqualified from office. *Id.* In so holding, the Court highlighted the importance of complying with constitutional and statutory requirements:

> It is strongly urged in this case that the electors of Minnehaha County should not be denied their free choice to select whom they wish to serve them, and they should not, and cannot, be denied this right of choice, unless they, together with the other people of this state, have limited such right of choice by the laws they have enacted. The

> people have enacted laws declaring that in order for the people to hold certain offices they must be possessed of certain qualifications or belong, in the case of certain offices, to certain classes, and the people have thus limited their own rights. The people have also delegated to the courts of our state the duty to administer the laws of the state, including the restrictions upon the elective franchise, and it becomes the duty of the courts to fearlessly perform this work be it ever so unpleasant. . . . "While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limit of this, it is the duty of the court to interfere, and by judicial checks afford the people time for reason and reflection."

Id. (quoting *People v. Hallet*, 1 Colo. 352, 354-55 (Colo. 1871)).

In *Hurley*, the contestant filed an election contest following the election of a municipal judge in Rapid City, alleging that a municipal court had not been validly established in a previous election. *Hurley*, 265 N.W. at 7-8. This Court, in comparing election contests to common law actions in the nature of quo warranto, concluded that an election contest was the proper cause of action for challenging an otherwise valid election when the elected position was never legally established. *Id.* at 8-9; *see also State ex rel. Pryor v. Axness*, 139 N.W. 791, 793-94 (S.D. 1913) (noting an election contest could be proper to challenge existence of office). The Court agreed that the Rapid City municipal court had never been properly established, and therefore the entire election of a municipal judge was invalid. *Hurley*, 265 N.W. at 8-9.

This Court has also allowed parties who failed to timely commence an election contest to obtain equitable relief and set aside an election. In *Gooder*, the plaintiffs sought to enjoin the township of Orient from issuing liquor licenses, arguing that the election approving the sale of liquor was invalid because the election petition received an insufficient number of signatures. 160 N.W. at 808-

09. After noting that no election contest was commenced, the Court held equitable relief was proper months after the election because the township had no jurisdiction to conduct the election and upheld the injunction precluding the township from issuing licenses. *Id.* at 810. The Court noted that due to the jurisdictional defect in not obtaining enough signatures, an election contest was not the exclusive remedy to effectively invalidate an election. *Id.* at 809. Ultimately, *Danforth*, *Hurley*, *Axness*, and *Gooder* all stand for the proposition that an election contest may be used to challenge the validity of an election without regard to whether there were procedural irregularities relative to the conduct of the election.

Other state courts have also recognized that an election contest encompasses challenges to the validity of an election based on violations of constitutional or other statutory provisions. *See, e.g.*, *Glaser v. LeBus*, 274 P.3d 114 (N.M. Ct. App. 2011), *op. adopted* 276 P.3d 959 (N.M. 2012); *Watland*, 85 P.3d 1079. In *Glaser*, the plaintiffs filed a complaint for declaratory relief alleging that an election to form a public improvement district was invalid and that, therefore, the district did not exist. *Glaser*, 274 P.3d at 116. The trial court dismissed the complaint as an untimely election contest, and the New Mexico Court of Appeals affirmed, concluding that the plaintiff's complaint constituted an election contest. *Id.* at 120.[1] The court specifically held that an election contest could challenge "the result of an election, as well as the inherent validity

1. The New Mexico Supreme Court adopted the Court of Appeals' opinion with one correction not relevant here. *Glaser v. LeBus*, 276 P.3d 959, 962 (N.M. 2012).

of an election when the challenge would necessarily require overturning the results of the election" based on violations of statutory or constitutional provisions. *Id.*

Similarly, in *Watland v. Lingle*, the Hawaii Supreme Court invalidated a constitutional amendment that was placed on the ballot in violation of the Hawaii Constitution. *Watland*, 95 P.3d at 1092. In so doing, the court acknowledged that that the contest at issue did not meet Hawaii's narrow statutory scope of election contests, which limits contests to factual allegations of errors, mistake, or fraud. *Id.* at 1085-86 (citing Haw. Rev. Stat. § 11-172 (1993)). The Hawaii Supreme Court nevertheless concluded it had jurisdiction to decide the important constitutional question before it, recognizing that the case was "not, therefore, a typical election contest in that the plaintiffs, in challenging the validity of the amendment, essentially question the propriety of the Office of Elections placing the amendment on the ballot in the first instance." *Id.* at 1087.

And so it is here. The circuit court recognized that Contestants challenged the propriety of placing Amendment A on the November 2020 general election ballot. (SR 493; Appx. 4). Contestants argued—and the circuit court agreed in the declaratory judgment action—that Amendment A was placed on the ballot in violation of Article XXIII because it embraced more than one subject and because it was a revision cloaked as an amendment.

Moreover, a violation of the one-subject rule itself establishes as a matter of law that the election did not reflect the will of the voters. *See Watertown I*, 2001 S.D. 62, ¶ 7, 628 N.W.2d at 338. The purpose of the one-subject rule is to prevent "logrolling" in constitutional amendments. *Fulton County v. City of*

Atlanta, 825 S.E.2d 142, 146 (Ga. 2019). "Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's propositions." *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 253 (Neb. 2020); *see State ex rel. Adams v. Herried*, 72 N.W. 93, 96 (S.D. 1897) (noting the elector "must either ratify or reject the entire proposition as presented). If Amendment A violated Article XXIII, § 1 by embracing more than one subject, there is no way to ascertain which subject the voters chose to approve, and the election cannot be said to be "a free and fair expression of the will of the voters." *See Watertown I*, 2001 S.D. 62, ¶ 7, 628 N.W.2d at 338.

The people of South Dakota placed the limitations in Article XXIII upon themselves, and their failure to adhere to these self-imposed limitations renders the November 2020 election a nullity as to Amendment A. *See Danforth*, 119 N.W. at 1022; *see also Water Works & Sewer Bd. v. Bd. of Water & Sewer Comm'rs*, 141 So. 3d 958, 964 (Ala. 2013) ("[T]he prescribed amendment procedures must be strictly followed and . . . any deviation from the procedure renders the proposed amendment a nullity. This rule applies notwithstanding a vote by the electorate in favor of the amendment."); *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1148 (Md. 1982) ("Provisions of a constitution regulating its own amendment, otherwise than by a convention, are not merely directory, but are mandatory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment."); *Moore v. Brown*, 165 S.W.2d 657, 659-60 (Mo. 1942) ("[I]t is fundamental that the people, themselves, are bound by their own Constitution . . . . Where they have provided

therein a method for amending it, they must conform to that procedure. Any other course would be revolutionary . . . ."); *Lehman v. Bradbury*, 37 P.3d 989, 1000-01 (Or. 2002) ("[T]he people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the constitution."); *McWhirter v. Bridges*, 155 S.E.2d 897, 899 (S.C. 1967) ("[S]trict compliance with every substantial requirement relating to the amendatory procedure is essential to the validity of any proposed amendment."); *Coleman v. Pross*, 246 S.E.2d 613, 620 (Va. 1978) (stating that the "processes specified in the [state] Constitution must be followed if a valid amendment is to be effected").

Finally, one of the purposes of election contest proceedings is to provide a speedy resolution to disputed elections. *Sorenson v. Rickman*, 486 N.W.2d 259, 261-62 (S.D. 1992). This purpose is reflected in the statutory scheme, which is designed to allow for expedited decisions. *See* SDCL 12-22-5 (requiring contests be commenced within ten days of canvass); SDCL 12-22-10 (allowing expedition of proceedings immediately upon commencement); SDCL 12-22-18 (requiring court to proceed "as expeditiously as reasonably possible" and allowing assigned judge to be relieved from other duties); SDCL 12-22-25 (requiring appeals be filed within twenty days of judgment and allowing for expedited appeals). This purpose is all the more important when the disputed election involves an unconstitutionally submitted constitutional amendment, which may significantly alter South Dakota's form of government or the rights of its citizens. If such questions are not resolved quickly, then government officials and citizens alike would have no choice but to stand by in uncertainty for months or even years waiting for a final judgment. Although the parties here amicably agreed to

expedited proceedings in the declaratory judgment action both before the circuit court and this Court, such stipulations are not always possible or even feasible. Public policy therefore supports a broad reading of SDCL 12-22-1 with respect to proposed constitutional amendments, as election contests grant the judiciary the ability to resolve these disputed elections in a manner that preserves the public's confidence in our elections.

Because Amendment A was submitted to the voters in violation of Article XXIII, § 1, the election was void as to Amendment A. No votes could or should have been cast for or against adoption of Amendment A. Accordingly, this is a legal proceeding brought to challenge the determination of the election as to Amendment A. *See* SDCL 12-22-1. Contestants were not required to allege particular factual irregularities with the voting process when Amendment A was unconstitutionally placed on the ballot as a matter of law. *Danforth*, 119 N.W. at 1022; *Hurley*, 265 N.W. at 8-9; *Watland*, 95 P.3d at 1087; *Glaser*, 274 P.3d at 120.

CONCLUSION

Colonel Miller's allegations that Amendment A was submitted to the voters in violation of Article XXIII, § 1 of the South Dakota Constitution was a challenge to the determination of an election and is therefore properly classified as an election contest within the meaning of SDCL 12-22-1. Due to the constitutional violation, Colonel Miller was not required to identify particular irregularities with the election process or the conduct of the election in order to bring an election contest. Accordingly, the circuit court erred in granting the State's and Proponents' motions for judgment on the pleadings. Colonel Miller

respectfully requests that this Court reverse the circuit court's order and remand with directions to enter judgment in favor of Colonel Miller consistent with the decision of this Court in Appeal No. 29546.

Respectfully submitted this 10th day of March, 2021.

/s/ Christopher D. Sommers
Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
REDSTONE LAW FIRM LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Telephone: 605.331.2975
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Contestant/Appellant Rick Miller

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant Colonel Rick Miller, hereby certifies that a true and correct copy of the foregoing Brief of Appellant Colonel Rick Miller was served electronically upon:

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
grant.flynn@state.sd.us
matthew.templar@state.sd.us
Attorneys for the State of South Dakota

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com
Attorneys for Proponents/Appellees Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
bobmorris@westriverlaw.com
Attorney for Contestant/Appellant Kevin Thom

/s/ Christopher D. Sommers
Christopher D. Sommers

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4631 words and 28,911 characters from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Christopher D. Sommers
Christopher D. Sommers

APPENDIX

Tab	Description	Appendix Page
1.	Order dated February 8, 2021	Appx. 1
2.	Memorandum Decision dated February 8, 2021	Appx. 2-5
3.	Notice of Entry of Order dated February 11, 2021	Appx. 6-8
4.	Motion for Judgment on the Pleadings Under SDCL 15-6-12(c) filed by the State of South Dakota	Appx. 9-10
5.	Motion for Judgment on the Pleadings by Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele	Appx. 11-12
6.	Contestants' Joint Motion for Summary Judgment	Appx. 13-14
7.	Contestants' Joint Statement of Undisputed Material Facts	Appx. 15-19
8.	Affidavit of Matthew S. McCaulley	Appx. 20-60
9.	Initiated Constitutional Amendment Petition	Appx. 61-64
10.	Official canvass dated November 10, 2020	Appx. 65-81

APPENDIX

Tab	Description	Appendix Page
1.	Order dated February 8, 2021	Appx. 1
2.	Memorandum Decision dated February 8, 2021	Appx. 2-5
3.	Notice of Entry of Order dated February 11, 2021	Appx. 6-8
4.	Motion for Judgment on the Pleadings Under SDCL 15-6-12(c) filed by the State of South Dakota	Appx. 9-10
5.	Motion for Judgment on the Pleadings by Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele	Appx. 11-12
6.	Contestants' Joint Motion for Summary Judgment	Appx. 13-14
7.	Contestants' Joint Statement of Undisputed Material Facts	Appx. 15-19
8.	Affidavit of Matthew S. McCaulley	Appx. 20-60
9.	Initiated Constitutional Amendment Petition	Appx. 61-64
10.	Official canvass dated November 10, 2020	Appx. 65-81

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE	)	32CIV20-186 **ORDER**

On the 27th day of January 2021, a Motions Hearing was held on Defendant's and Intervenors' separate Motions for Judgment on the Pleadings and Plaintiffs' Motion for Summary Judgment. Bob Morris appeared on behalf of Kevin Thom, Pennington County Sherriff. Lisa Prostrollo and Matthew McCaulley appeared on behalf of Rick Miller, South Dakota Highway Patrol Superintendent. Grant Flynn and Matthew Templar appeared on behalf of Defendant Jason Ravnsborg, Attorney General. Brendan Johnson and Timothy Billion appeared on behalf of Intervenors Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker. Randolph Seiler personally attended the hearing. All parties were allowed to attend the hearing via audio Zoom. The Court, having considered the written submissions of the parties, the pleadings in this matter, the argument of counsel, and being fully advised, it is hereby

ORDERED that Defendant's and Intervenors' Motions for Judgment on the Pleadings in this matter are GRANTED and this matter is dismissed; it is further

ORDERED that the Memorandum Decision of even date with this Order is incorporated herein.

Dated this 8th day of February 2021.

BY THE COURT:

Christina Klinger

Hon. Christina L. Klinger
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
FEB 08 2021
Kelli Stroman Clerk
By TDC Deputy

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238

CHRISTINA KLINGER
CIRCUIT COURT JUDGE
Phone: (605) 773-4014
Fax: (605) 773-6492
Christina.Klinger@ujs.state.sd.us

JESSICA PAULSEN
COURT REPORTER
Phone: (605) 773-8227
Jessica.Paulsen@ujs.state.sd.us

STEPHEN GEMAR
SIXTH CIRCUIT LAW CLERK
Stephen.Gemar@ujs.state.sd.us

February 8, 2021

Lisa Prostrollo, Matthew S. McCaulley,
and Christopher Sommers
Redstone Law Firm, LLP
101 N. Phillips Ave STE #402
P.O. Box 1535
Sioux Falls, SD 57101-1535
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com

Grant M. Flynn and
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
grant.flynn@state.sd.us
matthew.templar@state.sd.us

Brendan Johnson and Timothy Billion
Robins Kaplan LLP
140 N. Phillips Ave STE 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com

Bob L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Bobmorris@westriverlaw.com

RE: 32CIV20-186: In the Matter of Election Contest as to Amendment A, An Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as well as Laws Ensuring Access to Marijuana for Medical Use

FACTUAL BACKGROUND

The facts surrounding this matter are uncontested.

Amendment A was a proposed constitutional amendment voted on in the General Election on November 3, 2020. The title described Amendment A as: "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." The amendment contains fifteen different primary sections and numerous subsections. These sections relate to the legalization of marijuana, taxation of marijuana, regulation marijuana, implementation of civil penalties for marijuana, and the allocation of power to the Department of

Revenue to "administer and enforce" the licensing and regulation of marijuana. The Department of Revenue is also given the power to implement and enforce rules consistent with the requirements of § 7. In addition, § 14 compels the Legislature to pass laws regarding hemp and ensure access to medical marijuana.

A petition initiating Amendment A was timely submitted to the South Dakota Secretary of State for validation on November 4, 2019. The South Dakota Secretary of State announced on January 6, 2020 that Amendment A had received a sufficient number of signatures and would be placed on the ballot for the 2020 General Election. Amendment A passed with 225,260 votes while 190,477 voters opposed it. The 2020 General Election returns were officially canvassed on November 10, 2020.

Kevin Thom, Pennington County Sheriff, and Colonel Rick Miller, South Dakota Highway Patrol Superintendent (Contestants), filed this election contest action in their individual and official capacities on November 20, 2020. Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker (Intervenors) officially intervened in this action on December 1, 2020. Contestants filed a Joint Motion for Summary Judgment on December 23, 2020. South Dakota Attorney General Jason Ravnsborg (Defendant) and Intervenors filed separate Motions for Judgment on the Pleadings on December 23, 2020. A Motions Hearing was held on January 27, 2021.

ISSUES

1. **Whether an election contest was the proper procedure with which to bring this lawsuit.**

STANDARD OF REVIEW

A motion for judgment on the pleadings provides an "expeditious remedy to test the legal sufficiency, substance, and form of pleadings." *Burlington N. R. Co. v. Strackbein*, 398 N.W.2d 144, 145 (S.D. 1986) (further citations omitted). "It is a proper remedy only when no issue of fact is raised" and deals "only with questions of law arising from the pleadings." *Id*. A motion for summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c).

ANALYSIS

Election Contest

Defendant and Intervenors argue an election contest is not the proper cause of action. Contestants respond that the placement of a proposed amendment to the South Dakota Constitution on a general election ballot constitutes an "election," subject to South Dakota's election contest procedures and therefore an election contest is the proper procedure with which to bring this action.

A "contest," as used in SDCL ch. 12-22-1 to 12-22-28, is defined as "a legal proceeding, other than a recount, instituted to challenge the determination of any election under the provisions of this title, or any municipal, school, or township election." SDCL 12-22-1. The definition of "election," as used in SDCL ch. 12, is "any election held under the laws of this state." SDCL 12-1-3(2). An election contest as to a submitted question may be instituted by "any registered voter who was entitled to vote on a referred or submitted question." SDCL 12-22-3. However, anybody contesting a submitted question must have the permission of a judge of the court where the action is filed. *Id*. An election contest is a "challenge of the election process itself." *Larson v. Locken,* 262 N.W.2d 752, 753 n.1 (S.D. 1978).

"The basic question in an election contest is whether the election, despite irregularities, resulted in a free and fair expression of the will of the voters." *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338 (further citations omitted). The purpose of bringing an election contest is to determine whether the "election, despite irregularities, resulted in a free and fair expression of the will of the voters on the merits, and to obtain a new election if it did not." *In re Petition for Writ of Certiorari as to Determination of Election on Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, 585 (citing *Locken*, 262 N.W.2d at 753 (S.D.1978)). In bringing a successful election contest, the contestants must show "not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed." *Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338.

Here, Contestants make no mention of any alleged voting irregularities during the 2020 General Election. Instead, they argue Amendment A was placed on the ballot in violation of the South Dakota Constitution. They urge the mere placement of Amendment A on the ballot is an "election" which would be subject to an election contest. The fact Amendment A may have been placed on the ballot in violation of South Dakota's Constitution does not mean there were "egregious" voting irregularities with the election process. *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338. There were also no allegations of irregularities in how the 2020 General Election was conducted. *Locken*, 262 N.W.2d at 753. Contestants have not shown how placing Amendment A on the 2020 General election ballot suppressed the "will of the voters." *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338. Contestants' substantive arguments are directed at whether Amendment A violated the South Dakota Constitution, not at alleged irregularities that took place during the 2020 electoral process.

Contestants cite to *Bienert v. Yankton School Dist., 63-3* as authority that an election contest is an appropriate cause of action. 507 N.W.2d 88, 90 (S.D. 1993). In *Bienert*, plaintiffs commenced an action which sought an injunction to void the results of an election concerning the construction of a new high school. *Bienert*, 507 N.W.2d at 89. Plaintiffs alleged the election did not meet the statutory guidelines (due to faulty notice and ballot) for a bond election. *Id*. at 90. The Court held equitable relief was not proper in this situation because a legal basis for holding the election still existed. *Id*.

In its reasoning, the Court held no authority exists to legally hold an election when a petition is invalid. *Id*. In a situation where an election could not have legally been held, equitable relief is proper. *Id*. The South Dakota Supreme Court has stated that a petition lacking the requisite number of qualified signatures is one such situation where an election may be voided. *Id*. (discussing *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808 (1916)). Another situation where an election could be voided would be if the office being voted on does not legally exist. *Bienert*, 507 N.W.2d at 90 (discussing *Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4 (1936)). These cases support the concept that in an election contest cause of action pursuant to SDCL ch. 12-2, the focus of whether a petition is valid depends upon compliance with the election procedures to determine whether a legal basis existed to hold the election.

In the current case, Contestants argue Amendment A was in violation of the South Dakota Constitution when it was placed on the ballot. Based on South Dakota Supreme Court precedent, the legal basis for an election does not depend on the substance of the petition, but on compliance with the election process. There are no allegations of defective signatures or an otherwise defective petition. The signatures in this case were valid and the number adequate. In fact, there is no allegation that the election process or requirements for a petition were not followed. Thus, there was no irregularity in the process complained of. An election contest's purpose is to determine whether an election resulted in a "free and fair expression of the will of the voters on the merits . . .." *In re Petition for Writ of Certiorari as to Determination of Election on Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, 585.

An election contest is not the appropriate cause of action based on the Contestants' allegations. Contestants' allegations are not related to the "electoral process" surrounding the 2020 General Election as it relates to Amendment A. Rather, their claims center around whether Amendment A is constitutional and whether it should have been on the ballot to begin with. Contestants have not alleged any irregularities during the 2020 General Election, much less shown anything suggesting the will of the voters was suppressed. As a result, the issues alleged are not appropriately resolved in an election contest cause of action. Therefore, the election contest is dismissed and all other issues identified by the parties are moot.

CONCLUSION

Defendant's and Intervenors' Motions for Judgment on the Pleadings are granted, and this matter is dismissed. This Court's Order of even date shall incorporate this memorandum decision.

BY THE COURT

Christina Klinger

Christina Klinger
Circuit Court Judge

Filed on:02/08/2021 Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA COUNTY OF HUGHES	)) SS.)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCCESS TO MARIJUANA FOR MEDICAL USE.	)	32 CIV 20-186 NOTICE OF ENTRY OF ORDER

You will hereby take notice that on the 8th day of February 2021, the above Court made and entered its Order herein. Said Order was filed on the 8th day of February 2021, with the Hughes County Clerk of Courts. A true, correct and complete copy of the Order is hereunto annexed and herewith served upon you and made a part of this notice the same as if fully and completely set forth herein.

Dated this 11th day of February 2021.

/s/ Grant Flynn
Grant Flynn
Matthew W. Templar
Assistant Attorneys General
Office of Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

Filed: 2/11/2021 8:20 AM CST Hughes County, South Dakota 32CIV20-000186

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Entry of Order in the above-captioned matter was served electronically through the Odyssey File and Serve System upon Matthew S. McCaulley, at matt@redstonelawfirm.com; Robert Morris, at bobmorris@westriverlaw.com; Lisa Prostrollo, at lisa@redstonelawfirm.com; Christopher Sommers, at Chris@redstonelawfirm.com; Timothy W. Billion, tbillion@robinskaplan.com; and Brendan Johnson, Bjohnson@robinskaplan.com, this 11th day of February 2021.

/s/ Grant Flynn
Grant Flynn
Assistant Attorney General

pld_Amendment A._NOE (jm)

Filed: 2/11/2021 8:20 AM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE	)	32CIV20-186 **ORDER**

On the 27th day of January 2021, a Motions Hearing was held on Defendant's and Intervenors' separate Motions for Judgment on the Pleadings and Plaintiffs' Motion for Summary Judgment. Bob Morris appeared on behalf of Kevin Thom, Pennington County Sherriff. Lisa Prostrollo and Matthew McCaulley appeared on behalf of Rick Miller, South Dakota Highway Patrol Superintendent. Grant Flynn and Matthew Templar appeared on behalf of Defendant Jason Ravnsborg, Attorney General. Brendan Johnson and Timothy Billion appeared on behalf of Intervenors Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker. Randolph Seiler personally attended the hearing. All parties were allowed to attend the hearing via audio Zoom. The Court, having considered the written submissions of the parties, the pleadings in this matter, the argument of counsel, and being fully advised, it is hereby

ORDERED that Defendant's and Intervenors' Motions for Judgment on the Pleadings in this matter are GRANTED and this matter is dismissed; it is further

ORDERED that the Memorandum Decision of even date with this Order is incorporated herein.

Dated this 8th day of February 2021.

BY THE COURT:

Christina Klinger

_____

Hon. Christina L. Klinger
Circuit Court Judge

Attest:

_____

Clerk/Deputy

Filed: 2/11/2021 8:20 AM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA) SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCCESS TO MARIJUANA FOR MEDICAL USE.	)	32 CIV 20-186 MOTION FOR JUDGMENT ON THE PLEADINGS UNDER SDCL 15-6-12(c)

COMES NOW, the State of South Dakota, by and through Assistant Attorneys General Grant Flynn and Matthew W. Templar, and hereby moves this Court for a judgment on the pleadings under SDCL 15-6-12(c). Specifically, the State requests an Order dismissing Kevin Thom and Rick Miller's Election Contest for failure to state a claim upon which relief can be granted (SDCL 15-6-12(b)(5)). In the alternative, the State requests an Order and Judgment concluding that Amendment A was appropriately presented to the electorate during the November 2020 election and that Amendment A is a valid and enforceable constitutional amendment.

Dated this 23rd day of December, 2020.

/s/ Grant Flynn

Grant Flynn
Matthew W. Templar
Assistant Attorneys General
Office of Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Motion for Judgment on the Pleadings Under SDCL 15-6-12(c) in the above-captioned matter was served electronically through the Odyssey File and Serve System upon Matthew S. McCaulley, at matt@redstonelawfirm.com; Robert Morris, at bobmorris@westriverlaw.com; Lisa Prostrollo, at lisa@redstonelawfirm.com; Christopher Sommers, at Chris@redstonelawfirm.com; Timothy W. Billion, tbillion@robinskaplan.com; and Brendan Johnson, Bjohnson@robinskaplan.com, this 23rd day of December, 2020.

/s/ *Grant Flynn*
Grant Flynn
Assistant Attorney General

pld_Amendment A_Motion for Judgment on the Pleadings (jm)

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

32 CIV 20-000186

In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use.

MOTION FOR JUDGMENT ON THE PLEADINGS BY RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

Proponents Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele hereby move this Court for judgment on the pleadings under S.D.C.L. § 15-6-12(c). Proponents request an Order dismissing this election contest. This motion is supported by the memorandum filed concurrently herewith, the arguments of counsel at the hearing on this motion, and all pleadings filed in this matter.

Respectfully,

DATED: December 23, 2020

ROBINS KAPLAN LLP

By: */s/ Brendan V. Johnson*
Brendan V. Johnson (3263)
Timothy W. Billion (4641)
140 North Phillips Avenue, Suite 307
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
Email: TBillion@RobinsKaplan.com

Attorneys for Proponents

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020 I electronically filed and served the Proponents' foregoing Motion for Judgment on the Pleadings with the Clerk of the Court for the South Dakota Circuit Court for the Sixth Judicial Circuit by using the Odyssey File & Serve system, which constitutes service on:

Bob L. Morris
MORRIS LAW OFFICE
PO Box 370
117 5th Avenue
Belle Fourche, SD 57717
Tel: 605-723-7777
bobmorris@westriverlaw.com

Matthew S. McCaulley
Lisa M. Prostrollo
Christopher Sommers
REDSTONE LAW FIRM LLP
PO Box 1535
101 N. Phillips Ave, Suite 402
Sioux Falls, SD 5101-1535
Tel: 605-331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com

Attorneys for Contestants Kevin Thom and Rick Miller

Grant M. Flynn
Matthew W. Templar
Office of the SD Attorney General
1302 E Hwy 14 Suite 1
Pierre, SD 57501
Tel: 605-773-3215
grant.flynn@state.sd.us
matthew.templar@state.sd.us

Attorneys for Defendant Jason Ravnsborg

By: */s/ Brendan V. Johnson*
Brendan V. Johnson

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	32CIV20-000186 **CONTESTANTS' JOINT MOTION FOR SUMMARY JUDGMENT**

Contestants Kevin Thom and Rick Miller, by and through their undersigned counsel of record, and respectfully move the Court for entry of summary judgment in their favor pursuant to SDCL 15-6-56. This motion is based upon all the pleadings and records filed herein and is supported by Contestants' Joint Statement of Undisputed Material Facts, the accompanying Joint Brief in Support of Contestants' Joint Motion for Summary Judgment, and the Affidavit of Matthew S. McCaulley, which are incorporated herein by reference. Contestants further move the Court, pursuant to SDCL 19-19-201, to take judicial notice of the history of amendments and proposed amendments to the South Dakota Constitution, a summary of which is attached as Exhibit E to the Affidavit of Matthew S. McCaulley, as such history is generally known within this Court's jurisdiction and can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

Dated this 23rd day of December, 2020.

REDSTONE LAW FIRM LLP

*/s/ Lisa M. Prostrollo*_____
Matthew S. McCaulley
Lisa M. Prostrollo
Christopher D. Sommers
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
(605) 331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Contestant Rick Miller

Dated this 23rd day of December, 2020.

MORRIS LAW FIRM, PROF. LLC



_____
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717
(605) 723-7777
bobmorris@westriverlaw.com
Attorneys for Contestant Kevin Thom

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	32CIV20-000186 **CONTESTANTS' JOINT STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to SDCL 15-6-56(c), Contestants Kevin Thom and Rick Miller, by and through their undersigned counsel, and hereby submit this Joint Statement of Undisputed Material Facts in support of their Joint Motion for Summary Judgment. These facts are based upon the evidence in the record, along with the pleadings on file in this matter. These undisputed facts establish that Contestants are entitled to judgment as a matter of law.

1. Kevin Thom is an individual who resides in Pennington County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Compl., ¶ 1.)

2. Kevin Thom is the duly elected Sheriff of Pennington County, South Dakota. (Verified Compl., ¶ 2.)

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

3. Rick Miller is an individual who resides in Hughes County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Compl., ¶ 3.)

4. Rick Miller is the duly appointed superintendent of the South Dakota Highway Patrol. (Verified Compl., ¶ 4.)

5. Randolph Seiler is an individual who resides in Stanley County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Motion to Intervene, ¶ 1).

6. William Stocker is an individual who resides in Minnehaha County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Motion to Intervene, ¶ 2).

7. Charles Parkinson is an individual who resides in Pennington County, South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Motion to Intervene, ¶ 3).

8. Melissa Mentele is an individual who resides in Hanson County South Dakota, is registered to vote in the state of South Dakota, and was entitled to vote on Amendment A in the South Dakota general election held on November 3, 2020. (Verified Motion to Intervene, ¶ 4).

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

9. Brendan Johnson was the prime sponsor of an initiated constitutional amendment that came to be known as "Amendment A." (Verified Compl., ¶ 8; McCaulley Aff., Ex. A).

10. In May 2019, Johnson submitted a version of Amendment A to the Director of the Legislative Research Council as required by SDCL 12-13-25. (McCaulley Aff., Ex. A).

11. On May 30, 2019, Jason Hancock, Director of the Legislative Research Council, provided written comments on the initiated constitutional amendment to Johnson, the Attorney General, and the Secretary of State. (McCaulley Aff., Ex. A)

12. On August 16, 2019, the Attorney General delivered the Attorney General's Statement and title of the initiated constitutional amendment to the Secretary of State. (McCaulley Aff., Ex. B).

13. On September 11, 2019, Johnson submitted the petition as it was to be circulated for Amendment A to the Secretary of State, which contained the full text of the initiated amendment, the date of the general election at which the amendment would be submitted, the title, and the Attorney General's Statement. (Verified Compl., Ex. 1)

14. On January 6, 2020, the Secretary of State announced that the Petition received a sufficient number of signatures and validated it for placement on the 2020 General Election Ballot with the designation "Constitutional Amendment A." (McCaulley Aff., Ex. D).

15. On May 11, 2020, the Attorney General delivered the Attorney General's Recitation for Constitutional Amendment A to the Secretary of State. (McCaulley Aff., Ex. C).

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

16. The Board of Canvassers conducted the official canvass and certified the election results on November 10, 2020. (Verified Compl., Ex. 2).

17. According to the official canvass, Amendment A received 225,260 "Yes" votes and 190,477 "No" votes. (Verified Compl., Ex. 2).

18. Contestants filed their Verified Complaint on November 20, 2020.

19. Contestants served the Summons and Verified Complaint on the Attorney General, and the Attorney General admitted service on November 23, 2020.

20. South Dakota voters have never before ratified an initiated constitutional amendment that added a new article to the Constitution. (McCaulley Aff., Ex. E).

Dated this 23rd day of December, 2020.

REDSTONE LAW FIRM LLP

/s/ Lisa M. Prostrollo
Matthew S. McCaulley
Lisa M. Prostrollo
Christopher D. Sommers
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
(605) 331-2975
matt@redstonelawfirm.com
lisa@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Contestant Rick Miller

Dated this 23rd day of December, 2020.

MORRIS LAW FIRM, PROF. LLC

Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717
(605) 723-7777

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

bobmorris@westriverlaw.com
Attorneys for Contestant Kevin Thom

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	32CIV20-000186 **AFFIDAVIT OF MATTHEW S. MCCAULLEY**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

I, Matthew S. McCaulley, being first duly sworn on oath, deposes and states:

1. I am one of the attorneys for Contestant Rick Miller.

2. This Affidavit is submitted in support of Contestants' Joint Brief in Support of Motion for Summary Judgment.

3. Attached hereto as Exhibit A is a true and correct copy of the letter and comments regarding the proposed draft of Amendment A by the Legislative Research Council and filed with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

4. Attached hereto as Exhibit B is a true and correct copy of the Attorney General's Statement and cover letter submitted by the Attorney General's Office and filed

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

5. Attached hereto as Exhibit C is a true and correct copy of the Attorney General's Recitation and cover letter submitted by the Attorney General's Office and filed with the South Dakota Secretary of State. This document was obtained from the South Dakota Secretary of State's website.

6. Attached hereto as Exhibit D is a true and correct copy of the Press Release dated January 6, 2020 by the Secretary of State announcing the certification of Amendment A to be placed on the general election ballot. This document was obtained from the South Dakota Secretary of State's website.

7. Attached hereto as Exhibit E is a summary of proposed changes to the South Dakota Constitution from 1889 to 2018, including the title of the proposed changes, the vote totals for each proposed change, and the sources of the proposed changes. Affiant further states that to the best of his knowledge, Exhibit E is an accurate and complete representation of every proposed constitutional change submitted to South Dakota voters. Affiant further states that Exhibit E was prepared with the assistance of staff at Redstone Law Firm LLP using information available in the public records provided by the South Dakota Secretary of State, that such information is generally known within South Dakota, and that such information can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

Dated this 23rd day of December, 2020.

Matthew S. McCaulley

Subscribed and sworn to before me this 23rd day of December, 2020.

DIANE M. BURNS NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Diane M. Burns

Notary Public – State of South Dakota
My Commission Expires: 2-11-25

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

RECEIVED
MAY 30 2019
S.D. SEC. OF STATE

REPRESENTATIVE STEVEN G. HAUGAARD, CHAIR | SENATOR BROCK L. GREENFIELD, VICE CHAIR
JASON HANCOCK, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | DOUG DECKER, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV

SOUTH DAKOTA
LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

May 30, 2019

Mr. Brendan Johnson
Robins Kaplan LLP
140 North Phillips Ave., Ste 307
Sioux Falls, SD 57104

Dear Mr. Johnson:

This office is required by SDCL section 12-13-24 to review each initiated constitutional amendment for the purpose of determining whether the amendment is written in a clear and coherent manner that reflects the style and form of other legislation and for the purpose of ensuring that the amendment is not misleading or likely to cause confusion among the voters. In accordance with SDCL section 12-13-25, this office is required to provide written comments for the purpose of assisting the amendment's sponsor in meeting the requirements of SDCL section 12-13-24. This includes providing assistance regarding the substantive content of the measure in order to minimize any conflict with existing law and to ensure the amendment's effective administration. While there is no obligation to accept any of the suggestions contained in this letter, you are asked to keep in mind the legal standards established in sections 12-13-24 and 12-13-25.

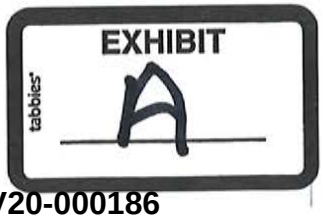
As submitted, this constitutional amendment proposes to decriminalize small amounts of marijuana for one's personal use and rather than directing the Legislature to affect this outcome, it creates a statutory-type structure that it seeks to incorporate into the Constitution of this state. The purpose of a constitution is to provide a basic structure within which a government can function. The Constitution prescribes and limits the powers to be exercised by that government and sets forth the rights of the governed. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material. Therefore, this office recommends that the proposed measure be re-written so that it would amend the South Dakota Codified Laws, rather than the South Dakota Constitution. In the event that this recommendation is not accepted, there are a number of changes that this office encourages the sponsors to consider. The section numbers in our comments are based on the revised number we have provided.

As submitted, the amendment contained a section setting forth its title and a section setting forth its purpose. Both have been removed. SDCL section 12-13-25.1 requires the attorney general to prepare an accompanying "statement that consists of a title and explanation."

All catch lines to sections have been removed as that will be added by the code counsel if the amendment is approved.

SECTION 1

The Department of Revenue is not the best state agency to administer and regulate every aspect of activities encompassed by this amendment. The definition of "Department" has been broadened to allow the Legislature to match functions to state departments with the best mission fit.



Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

SECTION 2

In section 2, the proposed language stated that the amendment "does not authorize" various activities. That language was found to be nebulous, in that it does not clearly prohibit the activities. The language has been changed to address this.

Section 2 includes various activities that are already addressed in state code, but uses language that is not consistent with the SDCL. SDCL section 42-8-45, for instance, prohibits the "operation" of a boat while one is under the influence of marijuana. This would be sufficient to include the prohibition on "navigation," as set forth in the measure. Likewise, the state code prohibits possession in, on, or within one thousand feet of a public or private elementary or secondary school or playground and within five hundred feet of a public or private youth center, public swimming pool, or video arcade. The proposed language would appear to prohibit possession or consumption only on the grounds of schools. This inconsistency with existing statutes could cause confusion. Reconciliation with the state code is encouraged.

Of greater concern is the reiteration of existing statutes. Operating a motor vehicle or a boat while under the influence of marijuana is already a statutorily prohibited activity. If the prohibition is the same, there is no need to have it repeated in the Constitution.

SECTION 4

In section 4, the proposed language articulates certain activities that are "not unlawful." It is not necessary to further indicate that those activities are therefore not offenses, not subject to penalties, and not to be used as the basis for judicial action.

Section 4 provides that it is not unlawful for a person to possess, plant, cultivate, harvest, dry, process, or manufacture not more than three marijuana plants. The reference to manufacturing is appropriate in the case of a pharmaceutical. Applying the term to a living plant is not appropriate verbiage use.

SECTION 5

As proposed, section 5 referenced civil infractions and proposed specific fines for various activities that would constitute such infractions. The phrase "civil infraction" is not, however, found in either the Constitution or the state code. The more widely accepted phrase is "civil penalty." Penalties rightfully belong in the state code, where the Legislature can appropriately make adjustments as inflation and circumstances require. Rather than including specific dollar amounts, it would be preferable to reference "civil penalty, as provided by law."

SECTION 6

As proposed, section 6 provided the Legislature with the authority to implement this amendment, provided such legislation is consistent with the intent and purposes of this measure and its stated requirements. This language has been removed. The Legislature is already constitutionally empowered to enact legislation, and is already required to legislate within the bounds of the Constitution.

SECTION 7

Section 7 enumerates the rules that the department is to promulgate. Among those are rules setting the application, licensing, and renewal fees. The language provides that any fees collected must go to the department to cover the cost of implementing and enforcing the article. Where fees are to go is not an appropriate concept for inclusion in a list of rules to be promulgated. Moreover, section 11 already provides for the department to receive revenues from the marijuana tax to cover costs it incurs in carrying out its duties under the article. The provision for reimbursement of costs was left in section 11 but removed from section 7.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

SECTION 8

Section 8 addresses the appropriate number of licenses and directs the department to issue "enough licenses to substantially reduce the illicit production and sale of marijuana" and to limit "the number of licenses . . . to prevent an undue concentration of licenses in any one community." Because terms such as "substantially" and "undue" are nebulous, it is suggested that language be inserted to either define their parameters or indicate that the determinations regarding what constitutes substantial or undue will be established by law.

The language of this section, as submitted, also referenced "communities." This is not a universally understood term. Therefore, it has been replaced by the term "municipality."

SECTION 11

As proposed, section 11 referenced marijuana sold by a "person or entity." The use of the term "person" in statutory drafting encompasses "non-natural" persons – i.e. "entities."

Section 11 proposes the imposition of a tax and its disbursement. In order to avoid any misconception regarding responsibility for the disbursal, it is recommended that the language include a reference to the legislative appropriations process.

SECTION 12

As proposed, section 12 contained language regarding the appeal of decisions made by the department. This has been removed. The procedures are already articulated in SDCL chapter 1-26.

SECTION 14

This section proposes to have the Legislature pass "medical marijuana" on or before November 3, 2021. If enacted this measure would not become effective until July 1, 2021. If the Legislature was unable to affect such a program during the forty day period of the 2021 session, this would trigger a special session and the expenditure of additional funds. In order to ensure that the Legislature has sufficient time to craft a viable program as envisioned, it is recommended that the November 3, 2021, date be extended to at least April 1, 2022, which would represent the approximate conclusion of the 2022 session. This same date has been changed in sections 7 and 12 to match section 14.

CONCLUDING SECTIONS

As proposed, the amendment concluded with several separately numbered and titled sections. The section entitled "Severability" has been removed. South Dakota courts have long recognized the doctrine of severability, also known as the doctrine of separability, and therefore the language is not necessary.

The section entitled "Effective" has likewise been removed. SDCL section 2-1-12 provides that "[e]ach constitutional amendment, initiated measure, or referred law that is approved by a majority of all votes cast is effective on the first day of July after the completion of the official canvass by the State Canvassing Board."

The final section of the proposed amendment included directives in the event that conflicting proposals are enacted. This possibility has already been addressed in statute and is also unnecessary:

> **2-14-16.2** If two or more initiated measures or amendments to the Constitution are approved by the voters at the same election, each initiated measure or amendment shall be given effect, unless the initiated measures or amendments conflict or a contrary intent plainly appears. For purposes of any conflict or the determination of intent under this section, the initiated measure or amendment receiving the greatest number of affirmative votes at the election shall be given effect.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

As recognized at the beginning of this letter, this amendment proposes to decriminalize the possession of a limited amount of marijuana for personal use. In so doing, it raises questions about a variety of issues including current drug testing requirements that are imposed as a condition of child placement or return [*see,* SDCL section 26-8A-34] and the parameters of 24/7 sobriety programs [*see,* SDCL section 1-11-17.] The Legislature or the Judiciary will have to address these, should the amendment pass. It should also be noted that the possession of marijuana would still be a crime under federal law.

Against this backdrop, we have prepared and attached a copy of the proposed amendment with our suggested form and style changes. Should you have any questions about these changes, or about the additional recommendations made in this letter, please feel free to contact this office.

It has been determined during this review that this proposed initiated amendment may have an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions. Please provide the Legislative Research Council a copy of the initiated amendment as submitted in final form to the Attorney General, so we can develop any fiscal note required by SDCL 2-9-30.

This letter constitutes neither an endorsement of the proposed amendment nor a guarantee of its sufficiency. It is a recognition that your responsibility to submit your draft to this office for review and comment, as required by SDCL section 12-13-25, has been fulfilled. If you proceed with your initiated amendment, please ensure neither your statements nor any advertising imply that this office has endorsed or approved the measure.

Sincerely,

Jason Hancock
Director

JH/DO/ct

Enclosure

CC: The Honorable Steve Barnett, Secretary of State
The Honorable Jason Ravsnborg, Attorney General

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

Brendan Johnson

RECEIVED
MAY 30 2019
S.D. SEC. OF STATE

~~Section 1. This Amendment shall be known as the Marijuana Legalization, Regulation, and Taxation Amendment.~~

~~Section 2. The purpose of this Amendment is to make marijuana legal under state and local law for adults twenty-one (21) years of age or older, and to control the commercial production and distribution of marijuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of limited amounts of marijuana by adults twenty-one (21) years of age or older; remove the commercial production and distribution of marijuana from the illicit market; prevent revenue generated from commerce in marijuana from going to criminal enterprises or gangs; prevent the distribution of marijuana to persons under twenty-one (21) years of age; prevent the diversion of marijuana to illicit markets; ensure the safety of marijuana and products containing marijuana; and ensure security of marijuana businesses. To the fullest extent possible, this Amendment shall be interpreted in accordance with the purpose and intent set forth in this section.~~

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

§ 1. ~~Definitions. As~~ Terms used in this ~~Article~~ article mean:

~~(a)~~ (1) "Department," ~~means the Department of Revenue or its successor agency.~~ a state governmental entity charged by the Legislature with carrying out the provisions of this article;

~~(b)~~ (2) "Hemp," ~~means~~ the plant of the genus cannabis, and any part of that plant, including the seeds ~~thereof~~, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent ~~(0.3%)~~ on a dry weight basis~~.~~;

~~(c)~~ (3) "Local ~~Government~~ government," ~~means~~ a county, municipality, town, or township~~.~~;

~~(d)~~ (4) "Marijuana," ~~means all parts of~~ the plant of the genus cannabis, and any part of that plant, including the seeds ~~thereof~~, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate~~, and includes~~. The term includes an altered state of marijuana absorbed into the human body. ~~"Marijuana" does~~ The term does not include hemp~~, nor does it include~~ or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products~~.~~;

~~(e)~~ (5) "Marijuana ~~accessories~~ accessory," ~~means~~ any equipment, product, or material, ~~or combination of equipment, products, or materials,~~ which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

§2. ~~Limitations~~

~~(a) This Article does not authorize~~ Notwithstanding the provisions of this article, no person may:

~~(1) Delivery or distribution of~~

(1) Deliver or distribute marijuana or marijuana accessories~~, with or without consideration,~~ to a person younger than twenty-one ~~(21) years of age.~~;

~~(2) A person younger than twenty-one (21) years of age to purchase~~

(2) Purchase, possess, use, or transport marijuana or marijuana accessories, ~~or to consume~~ unless the person is at least twenty-one;

(3) Consume marijuana~~.~~, unless the person is at least twenty-one;

~~(3) Operating, navigating, or being~~

(4) Operate or be in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana~~.~~;

~~(4) Consuming~~

(5) Consume marijuana while operating~~, navigating,~~ or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport~~, or smoking.~~;

(6) Smoke marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is ~~operating.~~ being operated;

~~(5) Possessing or consuming marijuana or possessing~~

(7) Possess or consume marijuana or possess marijuana accessories on the grounds of a public or private preschool, elementary school, or high school ~~where children attend classes in preschool programs, kindergarten programs, or grades 1 through 12~~, in a school bus, or on the grounds of any correctional facility~~.~~;

~~(6) Smoking~~

(8) Smoke marijuana in a location where smoking tobacco is prohibited ~~or consuming.~~;

(9) Consume marijuana in a public place, other than in an area licensed by the ~~Department to allow~~ department for consumption ~~on the licensed premises.~~

~~(7) Undertaking;~~

(10) Undertake any task under the influence of marijuana ~~when,~~ if doing so would constitute negligence or professional malpractice~~.~~; or

~~(8) Solvent-based~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(11) Perform solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol ~~by a person not~~, unless licensed for this activity by the ~~Department~~ department.

~~(b)~~ §3. This ~~Article~~ article does not ~~require:~~

(1) Require that an employer ~~to~~ permit or accommodate conduct ~~otherwise~~ allowed by this ~~Article or to affect.~~ article;

(2) Affect an employer's ability to restrict the use of marijuana by employees~~.~~;

~~(c) This Article does not prohibit~~

(3) Limit the right of a person ~~or entity~~ who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct ~~permitting~~ permitted by this ~~Article~~ article on or in that property~~.~~; or

~~(d) This Article does not limit~~

(4) Limit the ability of ~~a~~ the state or a local government ~~agency~~ to prohibit or restrict ~~actions or~~ any conduct otherwise permitted under this ~~Article~~ article within a building owned, leased, or occupied by the state or the local government ~~agency~~.

~~§3. Lawful Personal Use of Marijuana~~

§4. ~~(a) Except as subject~~ Subject to the limitations in ~~§2 of~~ this ~~Article~~ article, the following acts are not unlawful ~~and shall not be an offense under South Dakota law or the laws of any local government within South Dakota or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under South Dakota law or the laws of any local government for persons~~, if the person is at least twenty-one ~~(21)~~ ~~years of age or older~~:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ~~(1)~~ ounce or less of marijuana, except that not more than eight ~~(8)~~ grams of marijuana may be in a concentrated form~~.~~;

(2) Possessing, planting, cultivating, harvesting, drying, or processing~~, or manufacturing~~ not more than three ~~(3)~~ marijuana plants ~~for the person's own personal use~~, and possessing the marijuana produced by the plants, provided ~~that~~:

~~(A)~~ (a) The plants and any marijuana produced by the plants in excess of one ~~(1)~~ ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place; and

~~(B)~~ (b) Not more than six ~~(6)~~ plants ~~may be~~ are kept in or on the grounds of a private residence at one time~~.~~;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(3) Assisting another person who is at least twenty-one ~~(21)~~ years of age ~~or older~~, or allowing property to be used, in any of the acts permitted by ~~subsection (a)(1) or (a)(2).~~ this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one ~~(21)~~ years of age or older marijuana accessories.

~~(b)~~ § 5. ~~The penalty for:~~

(1) A person who, pursuant to § 4 of this article, cultivates plants ~~pursuant to subsection (a)(2)~~ that are visible by normal, unaided vision from a public place ~~shall be guilty of not more than a civil infraction punishable by fine of not more than a two hundred~~ is subject to a civil penalty not exceeding two hundred and fifty dollars ~~($250)~~.

(2) A person who, pursuant to § 4 of this article, cultivates plants ~~pursuant to subsection (a)(2)~~ that are not kept in a locked space ~~shall be guilty of not more than a civil infraction punishable by fine of not more than a two hundred~~ is subject to a civil penalty not exceeding two hundred and fifty dollars ~~($250)~~.

(3) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the ~~Department, shall be guilty of not more than a civil infraction punishable by fine of not more than a~~ department, is subject to a civil penalty not exceeding one hundred dollars ~~($100)~~.

(4) A person ~~twenty (20)~~ who is under twenty-one years of age ~~or younger who~~ and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ~~(1)~~ ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories ~~shall be guilty of not more than a civil infraction with a fine of not more than one hundred~~ is subject to a civil penalty not exceeding one hundred dollars ~~($100.00)~~. The person shall be provided the option of attending up to four ~~(4)~~ hours of drug education or counseling in lieu of the fine.

~~§ 4.~~ § 6. ~~Regulation and Control of Marijuana~~

~~(a) The Legislature may enact legislation to implement this Article provided that the legislation is consistent with the intents and purposes of the Marijuana Legalization, Regulation, and Taxation Amendment and with the requirements set forth in this Article~~.

~~(b)~~ The ~~Department~~ department shall have the exclusive power, except as ~~herein~~ otherwise provided, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the ~~State of South Dakota~~ state and to administer and enforce this ~~Article~~ article.

~~(c)~~ The ~~Department~~ department shall accept applications for and issue ~~the following licenses,~~ in addition to any other types of licenses the ~~Department~~ department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana~~.~~;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

~~(d)~~ § 7. Not later than ~~November 3, 2021~~ April 1, 2022, the ~~Department~~ department shall ~~issue regulations~~ promulgate rules necessary for the implementation and enforcement of this ~~Article~~ article. ~~Such regulations~~ The rules shall ~~be reasonable and shall~~ include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses~~.~~;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the ~~Department~~ department of implementing and enforcing this ~~Article. The fees collected shall go to the Department to cover the cost of implementing and enforcing this Article.~~ article;

(3) Time periods, not to exceed ~~90~~ ninety days, by which the ~~Department~~ department must issue or deny an application~~.~~;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed~~.~~;

(12) Requirements to prevent the sale and diversion of marijuana to persons under the age of twenty-one ~~(21)~~ years~~.~~; and

(13) Civil penalties for the failure to comply with ~~regulations~~ rules adopted pursuant to this ~~Article~~ article.

~~(e)~~ § 8. In determining the appropriate number of licenses to issue, as required under this article, the ~~Department~~ department shall:

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the ~~State of South Dakota~~ state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one ~~community~~ municipality.

~~§ 5.~~ § 9. ~~Protections~~

~~(a)~~ Actions and conduct by a licensee, ~~its employees~~ a licensee's employee, and ~~its agents~~ a licensee's agent, as permitted pursuant to a ~~valid~~ license issued by the ~~Department~~ department, or by those who allow property to be used by a licensee, ~~its employees, and its agents~~ a licensee's employee, or a licensee's agent, as permitted pursuant to a ~~valid~~ license issued by the ~~Department~~ department, are not unlawful ~~and shall not be an offense under South Dakota law, or the laws of any local government within South Dakota, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under South Dakota law, or the laws of any local government within South Dakota~~.

~~(b)~~ No contract ~~shall be~~ is unenforceable on the basis that marijuana is prohibited by federal law.

~~(c)~~ A holder of a professional or occupational license ~~shall~~ is not ~~be~~ subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

~~§6.~~ § 10. ~~Local Governments~~

~~A local government may:~~

~~(a) Enact~~ A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction.

~~(b) Ban~~ A local government may ban the establishment of licensees or any category of licensee within its jurisdiction.

~~(c) Not~~ A local government may not prohibit the ~~transporting~~ transportation of marijuana through its jurisdiction on ~~the~~ public roads by ~~persons or entity~~ any person licensed to do so by the ~~Department~~ department.

~~§7.~~ §11. ~~Marijuana Tax~~

An excise tax of fifteen ~~(15)~~ percent ~~shall be~~ is imposed upon the gross receipts of all sales of marijuana sold by a person ~~or entity~~ licensed by the ~~Department~~ department pursuant to this ~~Article~~ article to a consumer. The Legislature ~~is authorized to~~ may adjust this rate after November 3, 2024.

The ~~Department~~ department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The ~~tax~~ revenue ~~shall~~ collected under this section shall be ~~disbursed~~ appropriated to the ~~Department~~ department to cover ~~reasonable~~ costs incurred by the ~~Department~~ ~~for~~ department in carrying out its duties under this ~~Article~~ article. ~~The remainder of the~~ Fifty percent of the remaining

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

revenue ~~collected~~ shall be ~~disbursed in equal portions to~~ appropriated by the Legislature for the support of South Dakota public schools and ~~to~~ the remainder shall be deposited into the state general fund.

~~§8.~~ §12. ~~Procedure~~

~~(a)~~ ~~All regulations~~ Any rule adopted by the ~~Department~~ department pursuant to this ~~Article~~ article must comply with ~~the South Dakota Administrative Procedure Act, S.D. § 1-26-2.1.~~ chapter 1-26 of the South Dakota Codified Laws.

~~(b) The Department shall establish a procedure for those persons and parties affected by decisions of the Department to protest and appeal those decisions. Any person or party affected by a final decision of the Department may commence a mandamus action in circuit court.~~

Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws.

~~(c)~~ If by April 1, 2022, the ~~Department~~ department fails to ~~adopt regulations to implement~~ promulgate rules required by this ~~Article by November 3, 2021~~ article, or if the department adopts ~~regulations~~ rules that are ~~unreasonable or that are not consistent~~ inconsistent with this ~~Article~~ article, any ~~citizen~~ resident of the state may commence a mandamus action in circuit court to compel ~~the Department to perform the actions mandated by~~ performance by the department in accordance with this ~~Article~~ article.

~~§9.~~ §13. ~~Annual Statement~~

The ~~Department~~ department shall ~~submit~~ publish an annual report ~~to the Governor that shall be made available to the public and shall include~~ that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement ~~and~~ or disciplinary ~~actions~~ action taken against licensees, a statement of revenues and expenses of the ~~Department~~ department related to the implementation, administration, and enforcement of this ~~Article, and~~ article, a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

~~§10.~~ §14. ~~Legislative Expansion~~

Not later than ~~November 3, 2021~~ April 1, 2022, the Legislature shall pass laws to:

~~(a)~~ (1) Ensure access to marijuana beyond what is set forth in this ~~Article by~~ article for persons who have been diagnosed by a ~~physician with~~ healthcare provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana~~.~~; and

~~(b)~~ (2) Regulate the cultivation, processing, and sale of hemp.

~~§11. Severability~~

~~This Article shall be broadly construed to accomplish its purposes and intents. Nothing in this Article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this Article or the application thereof to any person or circumstance is held invalid or unconstitutional,~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

~~such invalidity or unconstitutionality shall not affect other provisions or applications of the Article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this Article are severable.~~

~~§13. Effective~~

~~This Article is self-executing and shall take effect thirty (30) days after approval. Each provision shall be judiciable and enforceable by any circuit court.~~

~~Section 4. In the event that this measure and another initiated constitutional amendment concerning the legalization, control, regulation, or taxation of marijuana appear on the same statewide election ballot, the provisions of the other initiated constitutional amendment shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other initiated constitutional amendment shall be null and void.~~

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

HAND DELIVERED

August 16, 2019

Filed this 16th day of August 2019
Steve Barnett
SECRETARY OF STATE

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

Hon. Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

Re: **Attorney General's Statement for initiated constitutional amendment**

Dear Secretary Barnett,

This Office received a proposed initiated constitutional amendment that the sponsor may seek to place on the November 2020 ballot. Enclosed is a copy of the amendment, in final form, that the sponsor submitted pursuant to SDCL 12-13-25.1. In accordance with that statute, I hereby file the Attorney General's Statement for this amendment. By copy of this letter, I am providing the Attorney General's Statement to the sponsor as well.

Very truly yours,

Jason R. Ravnsborg

JASON R. RAVNSBORG
Attorney General

JRR/lde

Enc.
cc/enc.: Brendan Johnson

EXHIBIT
tabbies
B

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

CONSTITUTIONAL AMENDMENT

ATTORNEY GENERAL'S STATEMENT

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

Title: An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.

Explanation:

This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.

The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.

The Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.

Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law.

Filed this 16th day of
August 2019
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

RECEIVED
AUG 16 2019
S.D. SEC. OF STATE

§ 1. Terms used in this article mean:

(1) "Department," the Department of Revenue or its successor agency;

(2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;

(3) "Local government," means a county, municipality, town, or township;

(4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;

(5) "Marijuana accessory," any equipment, product, material, which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

§2. Notwithstanding the provisions of this article, this article does not limit or affect laws that prohibit or otherwise regulate:

(1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;

(2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;

(3) Consumption of marijuana by a person younger than twenty-one years of age;

Filed this 16th day of
August 2019
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;

(5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;

(8) Smoking marijuana in a location where smoking tobacco is prohibited;

(9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;

(10) Consumption of marijuana as part of a criminal penalty or a diversion program;

(11) Conduct that endangers others;

(12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or

(13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

§3. Notwithstanding the provisions of this article, this article does not:

(1) Require that an employer permit or accommodate conduct allowed by this article;

(2) Affect an employer's ability to restrict the use of marijuana by employees;

(3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this article on or in that property; or

(4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this article within a building owned, leased, or occupied by the state or the local government.

§4. Subject to the limitations in this article, the following acts are not unlawful and shall not be an offense under state law or the laws of any local government within the state or be subject to a

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;

(2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided:

(a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;

(b) Not more than six plants are kept in or on the grounds of a private residence at one time; and

(c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this article.

(3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

§5.

(1) A person who, pursuant to §4 of this article, cultivates marijuana plants that are visible by normal, unaided vision from a public place is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(2) A person who, pursuant to §4 of this article, cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(3) A person who, pursuant to §4 of this article, cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store is subject to a civil penalty not exceeding two-hundred and fifty dollars, unless the

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

cultivation of marijuana plants is allowed through local ordinance or regulation pursuant to §10.

(4) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the department, is subject to a civil penalty not exceeding one-hundred dollars.

(5) A person who is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories is subject to a civil penalty not to exceed one-hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine.

§ 6. The department shall have the exclusive power, except as otherwise provided in § 10, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article. The department shall accept applications for and issue, in addition to any other types of licenses the department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

§ 7. Not later than April 1, 2022, the department shall promulgate rules and issue regulations necessary for the implementation and enforcement of this article. The rules shall be reasonable and shall include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this article;

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

(3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;

(12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and

(13) Civil penalties for the failure to comply with rules adopted pursuant to this article.

§ 8. In determining the appropriate number of licenses to issue, as required under this article, the department shall:

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

§ 9. Actions and conduct by a licensee, a licensee's employee , and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and shall not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law. A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

§10. A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this article. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this article.

§11. An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana sold by a person licensed by the department pursuant to this article to a consumer. The Legislature may adjust this rate after November 3, 2024. The department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section shall be appropriated to the department to cover costs incurred by the department in carrying out its duties under this article. Fifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund.

§ 12. Any rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws. Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws. If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

§13. The department shall publish an annual report that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement or disciplinary action taken against licensees, a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this article, and a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

§14. Not later than April 1, 2022, the Legislature shall pass laws to:

(1) Ensure access to marijuana beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana; and

(2) Regulate the cultivation, processing, and sale of hemp.

§15. This article shall be broadly construed to accomplish its purposes and intents. Nothing in this article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this article or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

ATTORNEY GENERAL
2020 BALLOT "YES"/"NO" RECITATION
CONSTITUTIONAL AMENDMENT A

Vote "Yes" to adopt the amendment.

Vote "No" to leave the Constitution as it is.

RECEIVED
MAY 11 2020
S.D. SEC. OF STATE

Filed this 11th day of
May 2020
Steve Barnett
SECRETARY OF STATE

EXHIBIT
tabbies
C

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

RECEIVED
MAY 11 2020
S.D. SEC. OF STATE

May 11, 2020

Hon. Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

Re: Attorney General's Yes/No recitations for Constitutional Amendment A and Initiated Measure 26

Dear Secretary Barnett:

Pursuant to SDCL 12-13-25.1, I hereby file the Attorney General's recitations of the effect of a "Yes" or "No" vote for the following measures certified to appear on the November general election ballot: Constitutional Amendment A and Initiated Measure 26.

Very truly yours,

Jason R. Ravnsborg
ATTORNEY GENERAL

JRR/lde

Enc.

Filed this 11th day of
May 2020
Steve Barnett
SECRETARY OF STATE

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

OFFICE OF THE SECRETARY OF STATE

STEVEN J. BARNETT, SECRETARY OF STATE

JASON LUTZ, DEPUTY SECRETARY OF STATE

PRESS RELEASE

FOR IMMEDIATE RELEASE

For further information, contact:
Secretary of State
Capitol Building
500 East Capitol Avenue, Ste. 204
Pierre, SD 57501-5070
605-773-3537

January 6, 2020

SECOND BALLOT QUESTION VALIDATED FOR 2020 GENERAL ELECTION

PIERRE – Secretary of State Steve Barnett announced a petition submitted for an amendment to the South Dakota Constitution was validated and filed by his office today. This ballot measure would legalize, regulate, and tax marijuana and require the Legislature to pass laws regarding hemp, including laws to ensure access to marijuana for medical use. The measure will be titled Constitutional Amendment A and will appear on the 2020 General Election ballot on November 3, 2020.

A constitutional amendment currently requires 33,921 valid signatures in order to qualify for the ballot. "As outlined in South Dakota Codified Law § 2-1-16, our office conducted a random sample of the petition signatures and found 68.74 percent to be valid," stated Secretary Barnett. Based on the results of the random sample, 36,707 signatures were deemed valid.

Upon the filing of a ballot measure, any citizen may challenge the Secretary of State's validation of the measure under South Dakota Codified Law § 2-1-17.1. Citizens challenging the validation shall submit an original, signed affidavit to the Office of the Secretary of State no more than 30 days after validation. Electronic submissions of affidavits will not be accepted. For this measure, the deadline to file a challenge is Wednesday, February 5, 2020 at 5:00 p.m. central time.



Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

This measure was the final ballot question submitted by the November 4, 2019 deadline. The South Dakota Legislature has the ability to include constitutional amendments on the 2020 Ballot and South Dakota citizens have the ability to submit a referendum petition concerning laws passed during the 2020 Legislative Session.

Detailed information on specific 2020 Ballot Questions may be found on the Secretary of State's website at https://sdsos.gov/elections-voting/upcoming-elections/general-information/2020-ballot-questions.aspx.

-30-

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1889	Minority Representation	24,161	34.34%	46,200	65.66%	Fail	1889 Constitutional Convention
1889	**Prohibition**	**40,234**	**53.83%**	**34,510**	**46.17%**	**Pass**	**1889 Constitutional Convention**
1890	Limiting State Debt	15,787	23.73%	50,742	76.27%	Fail	HB 295 (1890)
1890	Woman suffrage	22,972	33.46%	45,682	66.54%	Fail	HB 9 (1890)
1890	Restrict Indian voting	29,053	43.10%	38,362	56.90%	Fail	HJR 352 (1890)
1892	Legislators' mileage allowance	39,364	77.79%	11,236	22.21%	Pass	HB 81 (1891)
1894	Superintendent of Schools' term	11,241	28.86%	27,705	71.14%	Fail	HJR 71 (1893)
1894	Woman suffrage in school elections	17,010	42.85%	22,682	57.15%	Fail	SJR 52 (1893)
1894	Homesteads exempt from court orders	10,733	26.80%	29,315	73.20%	Fail	SJR 258 (1893)
1896	Increase local debt limit	28,490	65.83%	14,789	34.17%	Pass	SJR 5 (1895)
1896	Abolish Regents' Board of Trustees	31,061	72.66%	11,690	27.34%	Pass	SJR 11 (1895)
1896	Render monopolies illegal	36,763	80.10%	9,136	19.90%	Pass	SJR 14 (1895)
1896	Repeal prohibition	31,901	56.15%	24,910	43.85%	Pass	HJR 7 (1895)
1898	Woman suffrage	19,698	46.15%	22,983	53.85%	Fail	SJR 5 (1897)
1898	**State control of liquor**	**22,170**	**51.89%**	**20,557**	**48.11%**	**Pass**	**SJR 16 (1897)**
1898	Initiative and referendum	23,816	59.10%	16,483	40.90%	Pass	HJR 101 (1897)
1900	**Investment of school funds by counties**	**49,989**	**76.15%**	**15,653**	**23.85%**	**Pass**	**HJR 13 (1899)**
1900	Repeal state control of liquor	48,673	58.93%	33,927	41.07%	Pass	HJR 18 (1899)
1902	County seat relocation	36,436	71.38%	14,612	28.62%	Pass	SJR 13 (1901)
1902	Lower interest rate on school funds	46,472	83.77%	9,001	16.23%	Pass	HJR 2 (1901)
1902	Increase municipal debt for street railways and lighting	32,810	70.70%	13,599	29.30%	Pass	HJR 8 (1901)
1904	Attorney general's salary	32,328	42.37%	43,974	57.63%	Fail	HJR 3 (1903)
1904	Move state capitol to Mitchell	41,155	41.25%	58,617	58.75%	Fail	SJR 1 (1903)
1904	Investment of school money	38,681	64.36%	21,424	35.64%	Pass	HJR 1 (1903)
1906	Qualifications for Superintendent of Schools	35,806	69.15%	15,971	30.85%	Pass	HJR 7 (1905)
1906	Municipal courts in larger cities	29,417	61.07%	18,755	38.93%	Pass	HJR 11 (1905)
1906	Assessments for agricultural drainage	31,151	62.36%	18,799	37.64%	Pass	HJR 8 (1905)
1906	Twine plant at Penitentiary	33,285	62.59%	19,895	37.41%	Pass	SJR 12 (1905)
1908	Revise taxation articles	34,915	42.25%	47,732	57.75%	Fail	SJR 3 (1907)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.



Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1908	Attorney general's salary	43,908	45.57%	52,437	54.43%	Fail	SJR 22 (1907)
1910	School land use	48,152	52.13%	44,220	47.87%	Pass	HJR 6 (1909)
1910	Attorney general's salary	35,932	40.68%	52,397	59.32%	Fail	HJR 3 (1909)
1910	Woman suffrage	35,290	37.95%	57,709	62.05%	Fail	HJR 31 (1909)
1910	Add to debt for school construction	32,613	38.43%	52,243	61.57%	Fail	HJR 36 (1909)
1910	Change state tax structure	29,830	36.04%	52,943	63.96%	Fail	HJR 11 (1909)
1910	People must approve new institutions	36,128	43.14%	47,625	56.86%	Fail	HJR 33 (1909)
1912	Uniform taxation of corporations	70,686	69.44%	31,110	30.56%	Pass	HJR 12 (1911)
1914	Lengthen legislative term to four years	29,746	39.77%	45,051	60.23%	Fail	HJR 2 (1913)
1914	Call constitutional convention	34,832	40.31%	51,585	59.69%	Fail	SJR 5 (1913)
1914	Reduce interest on purchase of school lands	45,554	56.48%	35,102	43.52%	Pass	HJR 6 (1913)
1914	Superintendent of Schools' term	32,092	41.24%	45,733	58.76%	Fail	HJR 21 (1913)
1914	Initiative and referendum in municipalities	28,226	39.54%	43,162	60.46%	Fail	HJR 22 (1913)
1914	Changes in State Institutional Boards	29,601	40.16%	44,107	59.84%	Fail	SJR 22 (1913)
1914	Woman suffrage	39,605	43.46%	51,519	56.54%	Fail	SJR 3 (1913)
1914	Disqualification of Supreme Court judges	36,317	49.84%	36,543	50.16%	Fail	SJR 21 (1913)
1914	State control and promotion of irrigation	32,958	44.89%	40,457	55.11%	Fail	SJR 10 (1913)
1916	State construction and maintenance of irrigation	58,775	57.06%	44,238	42.94%	Pass	HJR 3 (1915)
1916	Increase certain state salaries	39,169	39.02%	61,223	60.98%	Fail	SJR 2 (1915)
1916	Prohibition	65,334	55.03%	53,380	44.97%	Pass	SJR 5 (1915)
1916	Abolish five-year lease limit on school lands	41,379	40.10%	61,798	59.90%	Fail	HJR 10 (1915)
1916	Allow rural credits system on real estate security	57,569	57.84%	41,957	42.16%	Pass	HJR 15 (1915)
1916	Woman suffrage	53,432	47.80%	58,350	52.20%	Fail	HJR 17 (1915)
1916	Change state revenue and finance structure	43,793	44.07%	55,568	55.93%	Fail	HJR 8 (1915)
1916	Change number of members in constitutional convention	35,377	38.53%	56,432	61.47%	Fail	SJR 6 (1915)
1916	Allow state to supply coal and build and maintain roads	75,922	69.37%	33,521	30.63%	Pass	SJR 2 (1916)
1918	Replacement of disqualified Supreme Court judges	41,646	62.70%	24,778	37.30%	Pass	HJR 11 (1917)
1918	Woman suffrage	49,318	63.02%	28,934	36.98%	Pass	SJR 4 (1917), SJR 7 (1918)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1918	Reduce down payment on sale of school lands	45,809	67.70%	21,855	32.30%	Pass	HJR 14 (1917)
1918	Graduated individual income tax	50,970	67.05%	25,047	32.95%	Pass	HJR 15 (1917)
1918	Allow state works of internal improvement	42,097	63.28%	24,424	36.72%	Pass	HJR 9 (1917)
1918	Allow state to go in debt for state development	34,821	55.53%	27,886	44.47%	Pass	SJR 16 (1917), SJR 6 (1918)
1918	Allow state to develop and supply water power	41,658	63.04%	24,429	36.96%	Pass	SJR 3 (1917), SJR 4 (1918)
1918	Allow state to manufacture and sell cement	38,108	59.72%	25,702	40.28%	Pass	SJR 5 (1917), SJR 3 (1918)
1918	Increase certain state salaries	26,784	38.50%	42,779	61.50%	Fail	HJR 6 (1917)
1918	Allow state to enter hail insurance business	41,162	61.38%	25,896	38.62%	Pass	HJR 13 (1917)
1918	**Allow state to build and operate grain elevators and warehouses and enter flour and meat-packing business**	**41,292**	**61.78%**	**25,545**	**38.22%**	**Pass**	**SJR 15 (1917)**
1918	Allow state to mine and sell coal	40,632	61.05%	25,922	38.95%	Pass	SJR 5 (1918)
1920	Replace State Board of Charities and Corrections	60,763	44.02%	77,285	55.98%	Fail	SJR 6 (1919)
1920	Allow Legislature to fix state salaries	70,831	47.60%	77,987	52.40%	Fail	SJR 3 (1919)
1920	Allow cities to incur added debt for street railways and lighting	66,734	48.02%	72,226	51.98%	Fail	SJR 2 (1920)
1920	Allow state credits for home-building	80,062	56.49%	61,674	43.51%	Pass	HJR 2 (1920)
1920	Provide soldiers' bonus	93,459	62.38%	56,366	37.62%	Pass	SJR 3 (1920)
1922	Increase signatures needed to invoke initiative or referendum	49,019	33.75%	96,201	66.25%	Fail	HJR 1 (1921)
1922	Allow legislature to organize counties	30,110	21.01%	113,170	78.99%	Fail	SJR 1 (1921)
1922	Allow special assessments on land subject to river drainage	33,937	24.23%	106,144	75.77%	Fail	SJR 7 (1921)
1922	Allow legislature to fix state salaries	41,343	27.28%	110,215	72.72%	Fail	SJR 11 (1921)
1924	Call constitutional convention	60,235	33.97%	117,086	66.03%	Fail	SJR 8 (1923)
1926	Increase state salaries	55,670	32.08%	117,866	67.92%	Fail	SJR 3 (1925)
1930	Permit suspension of sentence on first conviction	81,697	51.69%	76,358	48.31%	Pass	SJR 4 (1929)
1930	Give fines to county where collected	88,092	56.28%	68,434	43.72%	Pass	SJR 2 (1929)
1930	Allow legislature to classify property for school taxation	81,870	54.12%	69,414	45.88%	Pass	HJR 6 (1929)
1930	Local taxing districts may tax rural credit lands	101,527	64.82%	55,100	35.18%	Pass	SJR 5 (1929)
1930	Allow Legislature to fix state salaries	67,165	45.09%	81,797	54.91%	Fail	HJR 4 (1929)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1932	Extend terms of superintendents of schools	98,033	41.41%	138,684	58.59%	Fail	HJR 6 (1931)
1932	Allow Legislature to fix state salaries	106,585	49.63%	108,184	50.37%	Fail	HJR 11 (1931)
1934	Prohibit state from extending credit or engaging in new works of internal improvement, excepting highways	113,717	48.26%	121,918	51.74%	Fail	SJR 2 (1933)
1934	Repeal Prohibition	142,853	56.80%	108,648	43.20%	Pass	SJR 1 (1933)
1936	Reduce Legislature's membership and provide for reapportionment	125,597	57.47%	92,961	42.53%	Pass	SJR 5 (1935)
1936	Limit State Treasurer to two terms and make election of Superintendent of Public Instruction non-partisan	137,247	62.43%	82,611	37.57%	Pass	HJR 4 (1935)
1936	Make election of Superintendents of Schools non-partisan and extend terms	134,836	62.00%	82,647	38.00%	Pass	HJR 3 (1935)
1936	Allow state to engage in internal improvements, with debt limit of 0.5 percent of state properties	109,703	53.70%	94,571	46.30%	Pass	SJR 3 (1935)
1936	Make state bank shareholders and stockholders individually responsible, unless bank is FDIC member	109,154	53.01%	96,760	46.99%	Pass	HJR 5 (1935)
1938	Increase Legislature's membership	60,428	26.65%	166,326	73.35%	Fail	HJR 9 (1937)
1940	Provide that motor vehicle and gasoline taxes go to highways	142,782	56.65%	109,259	43.35%	Pass	SJR 5 (1939)
1940	Allow governor to make appointments to fill legislative vacancies	97,748	41.02%	140,564	58.98%	Fail	HJR 5 (1939)
1940	Reduce interest required on county investment of permanent school funds	93,013	38.36%	149,486	61.64%	Fail	HJR 10 (1939)
1942	Increase salary of governor and judges	55,773	39.64%	84,920	60.36%	Fail	SJR 3 (1941)
1942	Change investment restriction on permanent school funds	40,951	32.28%	85,907	67.72%	Fail	SJR 6 (1941)
1942	Channel endowment land lease money to school districts in proportion to school tax	43,009	34.81%	80,556	65.19%	Fail	HJR 8 (1941)
1942	Channel lease money or land income to school districts in proportion to school tax	44,508	36.35%	77,922	63.65%	Fail	HJR 9 (1941)
1942	Increase salary of Supreme Court judges	39,969	31.93%	85,206	68.07%	Fail	HJR 10 (1941)
1944	Restrict loans on educational funds to one-third of value	77,021	45.34%	92,842	54.66%	Fail	SJR 2 (1943)
1944	Reclassify educational and charitable institutions	86,392	54.46%	72,253	45.54%	Pass	HJR 3 (1943)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1946	Allow Legislature to fix state salaries	86,496	63.88%	48,911	36.12%	Pass	HJR 9 (1945)
1946	Include Right to Work in Bill of Rights	93,035	70.33%	39,257	29.67%	Pass	HJR 3 (1945)
1946	Require only two readings before passage of legislative act	85,975	68.57%	39,404	31.43%	Pass	SJR 2 (1945)
1948	Grant World War II veterans' bonus	120,462	61.12%	76,636	38.88%	Pass	HJR 2 (1947)
1948	Provide legislative reapportionment in 1951 and every ten years thereafter	111,674	61.67%	69,402	38.33%	Pass	HJR 8 (1947)
1948	Allow governor to make appointments to fill legislative vacancies	103,396	56.84%	78,505	43.16%	Pass	HJR 6 (1947)
1948	Allow lessees of school and public lands an option on new lease	95,949	52.91%	85,378	47.09%	Pass	HJR 4 (1947)
1948	Allow local units on tax state public shooting areas	106,458	59.67%	71,942	40.33%	Pass	SJR 1 (1947)
1950	Provide legislative reapportionment in 1951 on basis of 1950 census	92,512	46.56%	106,203	53.44%	Fail	HJR 4 (1949)
1950	Limit school district indebtedness to ten percent of assessed property value	75,191	38.52%	120,032	61.48%	Fail	SJR 1 (1949)
1950	Transfer educational fund investments to Commissioner of School and Public Lands	84,804	44.69%	104,960	55.31%	Fail	HJR 3 (1949)
1950	Allow county officials to succeed themselves indefinitely	83,505	42.53%	112,851	57.47%	Fail	HJR 1 (1949)
1952	Reduce voting age to 18 years	128,231	49.87%	128,916	50.13%	Fail	SJR 3 (1951)
1952	Restrict investment of educational funds to governmental bonds	116,463	50.91%	112,290	49.09%	Pass	SJR 1 (1951)
1952	Change composition of Board of Pardons	110,213	49.12%	114,142	50.88%	Fail	SJR 2 (1951)
1954	Pooling of oil, gas and mineral lease money of school and public lands	122,804	65.59%	64,431	34.41%	Pass	SJR 3 (1953)
1954	Increasing school district debt limit to ten percent of assessed property value	96,370	52.48%	87,265	47.52%	Pass	HJR 1 (1953)
1954	Allow county sheriffs to succeed themselves	97,059	51.05%	93,073	48.95%	Pass	HJR 2 (1953)
1954	Assessment and taxation of agricultural lands	75,830	44.00%	96,499	56.00%	Fail	HJR 3 (1953)
1956	Allow county officials to succeed themselves indefinitely	128,447	49.08%	133,273	50.92%	Fail	HJR 4 (1955)
1958	Municipal home rule	94,599	47.60%	104,138	52.40%	Fail	SJR 2 (1957)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1958	Exempt public highway property from taxation	110,565	55.31%	89,347	44.69%	Pass	SJR 8 (1957)
1958	Change in gubernatorial succession	120,511	61.13%	76,628	38.87%	Pass	SJR 4 (1957)
1958	Reduce voting age to 18 years	71,033	33.99%	137,942	66.01%	Fail	HJR 1 (1957)
1958	Maintain old voting residence in state until new one acquired	127,541	64.02%	71,675	35.98%	Pass	HJR 6 (1957)
1960	Allow county officers to succeed themselves indefinitely	133,954	53.61%	115,915	46.39%	Pass	SJR 2 (1959)
1960	Allow no county more than two senators	112,573	47.49%	124,455	52.51%	Fail	SJR 6 (1959)
1960	Constitute a Board of Pardons and Paroles	131,185	56.79%	99,832	43.21%	Pass	HJR 1 (1959)
1960	Provide for continuity of state operations in event of emergency caused by enemy attack	165,290	71.77%	65,018	28.23%	Pass	SJR 1 (1959)
1962	Taking private property for public use	99,119	50.42%	97,456	49.58%	Pass	SJR 8 (1961)
1962	Annual legislative session	101,548	53.54%	88,118	46.46%	Pass	HJR 5 (1961)
1962	Home rule for municipalities	95,737	52.14%	87,888	47.86%	Pass	SJR 2 (1961)
1964	Amendment notification	117,317	48.72%	123,504	51.28%	Fail	HJR 5 (1963)
1964	County offices	120,998	50.42%	118,973	49.58%	Pass	SJR 4 (1963)
1964	Property classification	98,454	42.68%	132,235	57.32%	Fail	HJR 6 (1964)
1966	Reclassifying farm property	92,235	51.22%	87,833	48.78%	Pass	HJR 6 (1965)
1966	Allowing counties to eliminate county superintendent	101,090	56.29%	78,499	43.71%	Pass	SJR 2 (1966)
1966	Changing county court systems	105,554	60.34%	69,391	39.66%	Pass	HJR 8 (1966)
1968	School land sales	110,327	48.28%	118,202	51.72%	Fail	HJR 9 (1968)
1968	Building authority/debt limit	80,670	36.87%	138,153	63.13%	Fail	SJR 6 (1967)
1968	Powers of retired judges	109,065	49.03%	113,398	50.97%	Fail	SJR 2 (1968)
1968	Reinvestment of school funds	116,403	53.37%	101,684	46.63%	Pass	HJR 11 (1968)
1968	Appointive Superintendent of Public Instruction	72,514	32.79%	148,618	67.21%	Fail	SJR 9 (1968)
1970	Amendment A. Residency Requirements	110,266	54.42%	92,354	45.58%	Pass	HJR 502 (1969)
1970	Amendment B. Initiative and Referendum	58,605	30.59%	132,992	69.41%	Fail	HJR 505 (1969)
1970	Amendment C. Retired Judges	111,040	57.23%	82,980	42.77%	Pass	HJR 503 (1969)
1970	Amendment D. Games of Chance	117,269	58.92%	81,746	41.08%	Pass	SJR 502 (1970)
1970	Amendment E. 4 Year Terms	94,108	48.11%	101,497	51.89%	Fail	HJR 503 (1970)
1970	Amendment F. Voting Age	78,320	40.02%	117,367	59.98%	Fail	SJR 501 (1970)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1970	Amendment G. Presidential Elections	115,292	60.74%	74,528	39.26%	Pass	HJR 513 (1970)
1970	Amendment H. School Lands	65,189	35.53%	118,306	64.47%	Fail	HJR 507 (1970)
1970	Amendment I. Constitutional Revision	69,459	38.40%	111,427	61.60%	Fail	HJR 514 (1970)
1972	Amendment A. Voting Age	206,170	73.13%	75,765	26.87%	Pass	SJR 1 (1971)
1972	Amendment B. Executive Reorganization	182,248	65.28%	96,914	34.72%	Pass	HJR 513 (1972)
1972	Amendment C. Judicial Reorganization	177,235	66.48%	89,358	33.52%	Pass	HJR 512 (1972)
1972	Amendment D. Local Government Reorganization	152,474	58.70%	107,296	41.30%	Pass	HJR 515 (1972)
1972	Amendment E. Constitutional Revision	173,541	67.14%	84,939	32.86%	Pass	HJR 514 (1972)
1974	Amendment A. Legislative Department	86,293	38.37%	138,590	61.63%	Fail	HJR 505 (1974)
1974	Amendment B. Elections & Right of Suffrage	132,120	59.88%	88,524	40.12%	Pass	HJR 507 (1974)
1976	Amendment A. Preamble Change	75,174	29.06%	183,548	70.94%	Fail	SJR 5 (1975)
1976	Amendment B. Bill of Rights	77,771	30.18%	179,936	69.82%	Fail	SJR 4 (1975)
1976	Amendment C. Legislative Article	56,538	22.17%	198,447	77.83%	Fail	HJR 502 (1975), HJR 502 (1976)
1976	Amendment D. Repeal Section 26	45,100	17.76%	208,909	82.24%	Fail	HJR 509 (1976)
1976	Amendment E. School and Public Lands	66,287	26.07%	188,012	73.93%	Fail	SJR 1 (1975)
1976	Amendment F. Arrangement of Constitution	57,710	22.92%	194,039	77.08%	Fail	HJR 507 (1976)
1978	Amendment A. 40 Day Legislative Session, etc.	104,367	46.02%	122,429	53.98%	Fail	HJR 1003 (1978)
1978	Amendment B. Flexibility in Investing School Money	106,461	48.35%	113,742	51.65%	Fail	SJR 5 (1978)
1978	Amendment C. Protects School Land Mineral Rights	115,871	52.64%	104,264	47.36%	Pass	SJR 6 (1978)
1978	Amendment D. Limits Legislature in Tax Increases	116,647	52.96%	103,621	47.04%	Pass	HJR 501 (1977)
1980	Amendment A. Relating to the appointment of Supreme Court justices and circuit court judges	158,490	53.99%	135,062	46.01%	Pass	SJR 4 (1979)
1980	Amendment B. Relating to real property taxation	113,863	37.21%	192,116	62.79%	Fail	Initiated
1980	Amendment C. Prohibiting Legislature from substantially changing or re-enacting any law enacted or defeated by vote of people	126,181	47.29%	140,632	52.71%	Fail	Initiated
1980	Amendment D. Relating to legislative prerogative to amend initiated or referred laws	77,225	35.48%	140,406	64.52%	Fail	HJR 1006 (1980)
1980	Amendment E. Relating to length of legislative session	156,630	56.48%	120,703	43.52%	Pass	HJR 1002 (1980)
1982	Amendment A. amended Sec. 5, Art. III to provide for single member Senate districts in the legislature	122,703	52.24%	112,184	47.76%	Pass	Initiated

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1982	Amendment B. Relating to remittance of fines and establishment of interest rates in Article VIII	130,637	55.57%	104,435	44.43%	Pass	HJR 1001 (1982)
1982	Amendment C. amended Sec. 7, Art. III relating to the opening day of legislature	137,262	58.10%	99,001	41.90%	Pass	SJR 2 (1982)
1982	Amendment D. amended Article III relating to the authorization of certain games of chance	107,552	42.23%	147,146	57.77%	Fail	HJR 1003 (1982)
1984	Amendment A. Amended Art. IV, VIII, XI, and XVIII to combine duties of the treasurer and the commissioner of school and public lands	142,985	49.95%	143,276	50.05%	Fail	HJR 1002 (1984)
1986	Amendment A. Amendment to Article IV, section 5 of the Constitution relating to the duties of the lieutenant governor	122,221	45.74%	144,976	54.26%	Fail	SJR 2 (1985)
1986	Amendment B. Amendment to Article III relating to the authorization of a state lottery	163,005	59.67%	110,153	40.33%	Pass	HJR 1001 (1986)
1986	Amendment C. Amendment to Article VIII relating to the loan of nonsectarian textbooks	148,813	53.85%	127,530	46.15%	Pass	SJR 3 (1986)
1988	Amendment A. Amend Article III, Section 1, relating to initiatives. Removes the legislature from the initiative process.	153,168	52.21%	140,188	47.79%	Pass	HJR 1001 (1987)
1988	Amendment B. Initiated amendment to Article III, section 25 to permit gambling in the city of Deadwood.	191,745	64.30%	106,444	35.70%	Pass	Initiated
1988	Amendment C. Initiated amendment to Article XI to add a section 14 relating to limitation on property taxes.	116,240	38.66%	184,452	61.34%	Fail	Initiated
1988	Amendment D. Amend Article XIV relating to charitable and penal institutions. Removes the Board of Charities and Corrections from the constitution and clears the way for reorganization of those departments.	171,282	58.52%	121,410	41.48%	Pass	HJR 1001 (1988)
1990	Amendment A. Amend Article VI, Section 13, relating to disposition of private property taken for public use.	104,973	43.99%	133,643	56.01%	Fail	SJR 1 (1989)
1990	Amendment B. Amend Article III, Section 12 relating to eligibility for Legislative office.	82,358	35.12%	152,175	64.88%	Fail	SJR 3 (1989)
1990	Amendment C. Adding a new section to Article XI relating to the imposition of an income tax.	114,215	48.97%	119,037	51.03%	Fail	HJR 1002 (1990)
1990	Amendment D. Adding a new section to Article III relating to sessions of Legislature.	117,969	51.64%	110,468	48.36%	Pass	SJR 1 (1990)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1990	Amendment E. Adding a new section to Article XI relating to a limit on the growth of taxes on real property.	104,947	45.26%	126,940	54.74%	Fail	HJR 1001 (1990)
1992	Amendment A. Relating to Term Limitations	205,074	63.53%	117,702	36.47%	Pass	Initiated
1994	Amendment A. An amendment to section 9 of Article VIII of the Constitution of the state of South Dakota, relating to the taxation of leased school and public lands.	176,751	58.10%	127,464	41.90%	Pass	SJR 1 (1993)
1994	Amendment B. An amendment to section 2 of Article VII of the Constitution of the state of South Dakota, relating to the minimum age to vote.	76,921	25.19%	228,444	74.81%	Fail	HJR 1001 (1993)
1994	Amendment C. An amendment to section 11 of Article VIII of the Constitution of the state of South Dakota, relating to the investment of permanent educational funds.	130,785	43.74%	168,232	56.26%	Fail	SJR 2 (1993)
1994	Amendment D. An amendment to section 3 of Article III of the Constitution of the state of South Dakota, relating to the qualifications for legislative office.	51,458	16.78%	255,166	83.22%	Fail	HJR 1002 (1994)
1994	Amendment E. An amendment to section 25 of Article III of the Constitution of the state of South Dakota, relating to the state lottery and video games of chance.	165,185	52.80%	147,680	47.20%	Pass	SJR 1 (1994 Special)
1996	Amendment A. An amendment to Article VIII, section 11 of the Constitution of the State of South Dakota, relating to the investment of permanent education funds.	191,771	62.99%	112,659	37.01%	Pass	SJR 1 (1996)
1996	Amendment B. An amendment to Article XI of the Constitution of the State of South Dakota, relating to the vote required to impose or increase taxes.	229,580	74.28%	79,493	25.72%	Pass	HJR 1003 (1996)
1998	Amendment A. Initiated amendment to Article VIII, Section 15 of the South Dakota Constitution concerning the taxation of real property for school purposes.	56,957	22.32%	198,256	77.68%	Fail	Initiated
1998	Amendment B. An Amendment to Article III of the South Dakota Constitution concerning the authority of a special interim legislative committee to approve the transfer of appropriated funds.	81,976	33.01%	166,373	66.99%	Fail	HJR 1001 (1997)
1998	Amendment C. An Amendment to Article III, Section 12 of the South Dakota Constitution concerning legislative conflicts of interest.	53,020	21.40%	194,689	78.60%	Fail	HJR 1004 (1997)

Bold items are new articles that were approved by voters

Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
1998	Amendment D. An Amendment to Article IX of the South Dakota Constitution authorizing local initiatives to provide for the cooperation and organization of local government.	121,880	49.94%	122,184	50.06%	Fail	HJR 1009 (1997)
1998	Amendment E. Initiated amendment to Article XVII of the South Dakota Constitution concerning ownership and interest in farming.	149,470	58.67%	105,282	41.33%	Pass	Initiated
1998	Amendment F. An amendment to Article VIII of the South Dakota Constitution, concerning the classification of property for purposes of taxation.	92,447	37.63%	153,230	62.37%	Fail	HJR 1006 (1998)
1998	Amendment G. An Amendment to Article VIII of the South Dakota Constitution, permitting the investment of permanent school funds in certain stocks, bonds, mutual funds, and other financial instruments.	96,975	39.12%	150,907	60.88%	Fail	SJR 2 (1998)
1998	Amendment H. Amendments to Article III, Section 3 of the South Dakota Constitution, relating to age qualifications for legislative office, and to Article IV, Section 2 of the South Dakota Constitution, relating to the age qualifications for Governor and lieutenant governor.	150,680	60.15%	99,834	39.85%	Pass	HJR 1002 (1998)
2000	Amendment A. An amendment to Article VIII of the South Dakota Constitution relating to classification of property for purposes of taxation.	167,117	54.94%	137,081	45.06%	Pass	HJR 1005 (1999)
2000	Amendment B. An amendment to Article IX of the South Dakota Constitution authorizing local initiatives to provide for the cooperation and organization of local government.	165,346	55.28%	133,780	44.72%	Pass	HJR 1007 (1999)
2000	Amendment C. An initiated amendment to Article XI of the South Dakota Constitution, concerning the taxation of inheritances.	251,316	80.13%	62,334	19.87%	Pass	Initiated
2000	Amendment D. An initiated amendment to Article III, Section 25 of the South Dakota Constitution repealing the video lottery.	146,428	46.33%	169,642	53.67%	Fail	Initiated
2000	Amendment E. An amendment to Article VIII of the South Dakota Constitution, permitting the investment of permanent school funds in certain stocks, bonds, mutual funds, and other financial instruments and to use a certain portion of the interest and income to increase the principal in the fund.	168,896	56.10%	132,181	43.90%	Pass	SJR 1 (2000)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2001	Amendment A. An amendment to Article XIII of the South Dakota Constitution authorizing the creation and administration of a trust fund for proceeds of the sale of the State Cement Plant.	69,309	78.79%	18,657	21.21%	Pass	SJR 1 (2000 Special)
2001	Amendment B. An amendment to Article XII of the South Dakota Constitution authorizing the creation and administration of trust funds for health care and education.	63,484	72.50%	24,086	27.50%	Pass	SJR 4 (2001)
2002	Amendment A. An amendment to Article XVII of the South Dakota Constitution relating to restrictions on corporate farming.	83,320	46.01%	97,755	53.99%	Fail	HJR 1009 (2002)
2002	Amendment A. An initiated amendment to Article VI, Section 7 of the Constitution, relating to the rights of a criminal defendant.	68,659	21.81%	246,097	78.19%	Fail	Initiated
2002	Amendment B. An amendment to Article III, Section 5 of the Constitution to clarify the responsibility of the Legislature to provide for its own apportionment.	116,495	38.35%	187,242	61.65%	Fail	HJR 1007 (2002)
2002	Amendment C. An amendment to Article IV, Section 4 of the Constitution, extending the time allowed for the Governor's review of legislation passed by the Legislature.	166,969	54.16%	141,326	45.84%	Pass	HJR 1010 (2002)
2004	Amendment A. An amendment to Article V, section 7 of the South Dakota Constitution, providing for the merit selection of circuit court judges.	138,368	37.81%	227,577	62.19%	Fail	HJR 1003 (2003)
2004	Amendment B. An amendment to Article VIII, section 20 of the South Dakota Constitution to authorize the provision of certain services to all children of school age.	173,650	46.99%	195,936	53.01%	Fail	HJR 1003 (2004)
2006	Amendment C. An Amendment to Article XXI of the South Dakota Constitution, relating to marriage.	172,305	51.83%	160,152	48.17%	Pass	HJR 1001 (2005)
2006	Amendment D. An Amendment to Article XI, Section 2 of the South Dakota Constitution, relating to real property assessment for taxation.	65,903	20.20%	260,375	79.80%	Fail	Initiated
2006	Amendment E. An Amendment to Article VI of the South Dakota Constitution, relating to judicial decisions.	35,641	10.79%	294,734	89.21%	Fail	Initiated

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2006	Amendment F. An Amendment to Article III of the South Dakota Constitution, relating to the Legislature.	103,026	32.35%	215,458	67.65%	Fail	HJR 1003 (2006)
2008	Amendment G. An Amendment to the South Dakota Constitution, to repeal certain reimbursement restrictions for travel by legislators to and from a legislative session.	147,763	41.14%	211,413	58.86%	Fail	HJR 1003 (2008)
2008	Amendment H. An Amendment to the South Dakota Constitution, to repeal certain provisions relating to corporations.	103,172	30.97%	229,985	69.03%	Fail	HJR 1001 (2008)
2008	Amendment I. An Amendment to the South Dakota Constitution, to provide for a maximum of forty legislative days each year.	184,722	52.41%	167,751	47.59%	Pass	HJR 1004 (2008)
2008	Amendment J. An Amendment to the South Dakota Constitution, to eliminate term limits for legislators.	87,380	24.27%	272,635	75.73%	Fail	SJR 1 (2008)
2010	Amendment K. An Amendment to Article VI of the South Dakota Constitution relating to the right of individuals to vote by secret ballot.	241,896	79.13%	63,783	20.87%	Pass	SJR 3 (2010)
2010	Amendment L. An Amendment to Article XIII of the South Dakota Constitution relating to the trust fund created from the proceeds of the state cement enterprise sales.	114,321	40.55%	167,594	59.45%	Fail	HJR 1004 (2010)
2012	Amendment M. An Amendment to the South Dakota Constitution regarding certain provisions relating to corporations.	96,187	29.60%	228,720	70.40%	Fail	HJR 1001 (2012)
2012	Amendment N. An Amendment to the South Dakota Constitution repealing certain reimbursement restrictions for travel by legislators to and from a legislative session.	125,715	36.82%	215,675	63.18%	Fail	HJR 1002 (2012)
2012	Amendment O. An Amendment to the South Dakota Constitution changing the method for distribution from the cement plant trust fund.	186,956	56.76%	142,410	43.24%	Pass	HJR 1006 (2012)
2012	Amendment P. An Amendment to the South Dakota Constitution adding balanced budget requirements.	215,659	64.60%	118,165	35.40%	Pass	HJR 1007 (2012)
2014	Amendment Q. An Amendment to the South Dakota Constitution authorizing the Legislature to allow roulette, keno and craps in Deadwood.	152,265	56.69%	116,326	43.31%	Pass	HJR 1001 (2014)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

South Dakota Proposed Constitutional Changes

Year	Title	Yes #	Yes %	No #	No %	Pass/Fail	Source
2016	Amendment R. An Amendment to the South Dakota Constitution regarding postsecondary technical education institutes.	178,209	50.61%	173,945	49.39%	Pass	HJR 1003 (2015)
2016	Amendment S. An initiated Amendment to the South Dakota Constitution to expand rights for crime victims.	215,565	59.61%	146,084	40.39%	Pass	Initiated
2016	Amendment T. An initiated Amendment to the South Dakota Constitution to provide for state legislative redistricting by a commission.	149,942	42.97%	198,982	57.03%	Fail	Initiated
2016	Amendment U. An initiated Amendment to the South Dakota Constitution limiting the ability to set statutory interest rates for loans.	130,627	36.74%	224,876	63.26%	Fail	Initiated
2016	Amendment V. An initiated Amendment to the South Dakota Constitution establishing nonpartisan elections.	157,870	44.51%	196,781	55.49%	Fail	Initiated
2018	Amendment W. An initiated Amendment to the South Dakota Constitution changing campaign finance and lobbying laws, creating a government accountability board, and changing certain initiative and referendum provisions.	142,769	45.06%	174,081	54.94%	Fail	Initiated
2018	Amendment X. An Amendment to the South Dakota Constitution increasing the number of votes needed to approve a constitutional amendment.	140,730	45.68%	167,362	54.32%	Fail	SJR 1 (2018)
2018	Amendment Y. An amendment to the South Dakota Constitution revising certain provisions relating to the rights of crime victims.	106,498	79.51%	27,448	20.49%	Pass	HJR 1004 (2018)
2018	Amendment Z. An Amendment to the South Dakota Constitution establishing that a proposed constitutional amendment may embrace only one subject, and requiring the proposed amendments to be presented and voted on separately.	195,790	62.41%	117,947	37.59%	Pass	HJR 1006 (2018)
2020	**Amendment A. An Amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use**	**225,260**	**54.18%**	**190,477**	**45.82%**	**Pass**	**Initiated**
2020	Amendment B. An Amendment to the South Dakota Constitution authorizing the Legislature to allow sports wagering in Deadwood.	239,620	58.47%	170,191	41.53%	Pass	SJR 501 (2020)

Bold items are new articles that were approved by voters
Source: South Dakota Secretary of State and South Dakota State Archives. Titles are noted as they appear in state records.

Filed: 12/23/2020 5:43 PM CST Hughes County, South Dakota 32CIV20-000186

INITIATED CONSTITUTIONAL AMENDMENT PETITION

WE, THE UNDERSIGNED qualified voters of the state of South Dakota, petition that the following section or sections and article or articles of the South Dakota Constitution be amended and that this proposal be submitted to the voters of the state of South Dakota at the general election on November 3, 2020 for their approval or rejection.

Title: **An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.**

Attorney General Explanation:

This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.

The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.

The Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp.

The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.

Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana remains illegal under Federal law.

That the Constitution of the State of South Dakota be amended to add a new Article to read as follows:

§ 1. Terms used in this article mean:

(1) "Department," the Department of Revenue or its successor agency;

(2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;

(3) "Local government," means a county, municipality, town, or township;

(4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;

(5) "Marijuana accessory," any equipment, product, material, which is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

§2. Notwithstanding the provisions of this article, this article does not limit or affect laws that prohibit or otherwise regulate:

(1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;

(2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;

(3) Consumption of marijuana by a person younger than twenty-one years of age;

(4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;

(5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;

(7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;

(8) Smoking marijuana in a location where smoking tobacco is prohibited;

(9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;

(10) Consumption of marijuana as part of a criminal penalty or a diversion program;

(11) Conduct that endangers others;

(12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

(13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

§3. Notwithstanding the provisions of this article, this article does not:

(1) Require that an employer permit or accommodate conduct allowed by this article;

(2) Affect an employer's ability to restrict the use of marijuana by employees;

(3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this article on or in that property; or

(4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this article within a building owned, leased, or occupied by the state or the local government.

§4. Subject to the limitations in this article, the following acts are not unlawful and shall not be an offense under state law or the laws of any local government within the state or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age:

(1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;

(2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided:

(a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;

(b) Not more than six plants are kept in or on the grounds of a private residence at one time; and

(c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this article.

(3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and

(4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

§5.

(1) A person who, pursuant to §4 of this article, cultivates marijuana plants that are visible by normal, unaided vision from a public place is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(2) A person who, pursuant to §4 of this article, cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two-hundred and fifty dollars.

(3) A person who, pursuant to §4 of this article, cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store is subject to a civil penalty not exceeding two-hundred and fifty dollars, unless the cultivation of marijuana plants is allowed through local ordinance or regulation pursuant to §10.

(4) A person who smokes marijuana in a public place, other than in an area licensed for such activity by the department, is subject to a civil penalty not exceeding one-hundred dollars.

(5) A person who is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories is subject to a civil penalty not to exceed one-hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine.

§ 6. The department shall have the exclusive power, except as otherwise provided in § 10, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this article. The department shall accept applications for and issue, in addition to any other types of licenses the department deems necessary:

(1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;

(2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;

(3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and

(4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

§ 7. Not later than April 1, 2022, the department shall promulgate rules and issue regulations necessary for the implementation and enforcement of this article. The rules shall be reasonable and shall include:

(1) Procedures for the issuance, renewal, suspension, and revocation of licenses;

(2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this article;

(3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;

(4) Qualifications for licensees;

(5) Security requirements, including lighting and alarm requirements, to prevent diversion;

(6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

and accurate information;

(7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;

(8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;

(9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;

(10) Restrictions on advertising and marketing;

(11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;

(12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and

(13) Civil penalties for the failure to comply with rules adopted pursuant to this article.

§ 8. In determining the appropriate number of licenses to issue, as required under this article, the department shall:

(1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and

(2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

§ 9. Actions and conduct by a licensee, a licensee's employee , and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and shall not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law. A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

§10. A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this article. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this article.

§11. An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana sold by a person licensed by the department pursuant to this article to a consumer. The Legislature may adjust this rate after November 3, 2024. The department shall by rule establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section shall be appropriated to the department to cover costs incurred by the department in carrying out its duties under this article. Fifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund.

§ 12. Any rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws. Any person aggrieved by a decision of the department is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws. If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

§13. The department shall publish an annual report that includes the number and type of licenses issued, demographic information on licensees, a description of any enforcement or disciplinary action taken against licensees, a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this article, and a statement of taxes collected in accordance with this article, and an accounting for how those revenues were disbursed.

§14. Not later than April 1, 2022, the Legislature shall pass laws to:

(1) Ensure access to marijuana beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana; and

(2) Regulate the cultivation, processing, and sale of hemp.

§15. This article shall be broadly construed to accomplish its purposes and intents. Nothing in this article purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this article or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of the article that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this article are severable.

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.

2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.

3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.

4. Abbreviations of common usage may be used. Ditto marks may not be used.

5. Failure to provide all information requested may invalidate the signature.

NAME	RESIDENCE	DATE/COUNTY
SIGN 1 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 2 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 3 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 4 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 5 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 6 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 7 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 8 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 9 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION
SIGN 10 ____ PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER ____ CITY OR TOWN	DATE OF SIGNING ____ COUNTY OF REGISTRATION

RECEIVED
SEP 11 2019
S.D. SEC. OF STATE

Filed this 17th day of September 2019
Steve Barnett
SECRETARY OF STATE

VERIFICATION BY PERSON CIRCULATING PETITION

INSTRUCTIONS TO CIRCULATOR: This section **must** be completed following circulation and before filing.

Print name of the circulator ____ Residence Address ____ City ____ State ____

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, that I am not attesting to any signature obtained by any other person, that I am a resident of South Dakota, that I made reasonable inquiry and to the best of my knowledge each person signing the petition is a qualified voter in the county indicated on the signature line, that no state statute regarding petition circulation was knowingly violated, and that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration.

Signature of Circulator

Sworn to before me this _____ day of _____, _____.
(Seal)

Signature of Officer Administering Oath

My Commission Expires _____

Title of Officer Administering Oath

Form Revised 2018 - 5:02:08:07

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

STATE OF SOUTH DAKOTA)
)
COUNTY OF HUGHES)

CERTIFICATE

We, Steve Barnett, Shirley Jameson-Fergel, Katie Hruska and Jeff Tronvold, the Board of Canvassers in the State of South Dakota for the General Election held in said state on November 3, 2020, hereby certify that the attached is a true and correct record of the votes for the candidates as shown by returns certified to the Secretary of State of South Dakota.

Steve Barnett
Secretary of State

Shirley Jameson-Fergel
for the Supreme Court

Katie Hruska
for the Governor

Jeff Tronvold
for the Attorney General

Sworn to before me this 10th day of November, 2020.

Christine Lehrkamp
Notary Public

My commission expires 1.21.21,

CHRISTINE LEHRKAMP NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Litho in U.S.A.
© GOES 340

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	Presidential Electors		
County	Donald J. Trump and Michael R. Pence - REP	Jo Jorgensen and Jeremy "Spike" Cohen - LIB	Joseph R. Biden and Kamala Harris - DEM
Aurora	1,052	36	317
Beadle	4,808	166	2,107
Bennett	694	23	466
Bon Homme	2,235	45	721
Brookings	8,000	457	6,110
Brown	10,580	429	6,538
Brule	1,750	67	673
Buffalo	183	14	352
Butte	3,731	132	939
Campbell	747	9	117
Charles Mix	2,552	54	1,177
Clark	1,373	40	437
Clay	2,456	159	3,083
Codington	8,958	366	3,837
Corson	647	14	622
Custer	3,852	120	1,522
Davison	5,613	193	2,648
Day	1,869	43	1,052
Deuel	1,699	42	609
Dewey	790	45	1,131
Douglas	1,468	23	216
Edmunds	1,538	30	417
Fall River	2,878	111	1,053
Faulk	964	20	198
Grant	2,618	71	1,056
Gregory	1,771	32	455
Haakon	1,026	6	105
Hamlin	2,372	64	647
Hand	1,433	30	373
Hanson	1,793	38	557
Harding	748	16	49
Hughes	5,522	248	2,953
Hutchinson	2,944	61	762
Hyde	564	10	136
Jackson	738	18	359
Jerauld	721	15	270
Jones	498	11	90
Kingsbury	1,904	56	819
Lake	3,681	124	2,068
Lawrence	8,753	538	4,537
Lincoln	19,617	798	11,981
Lyman	1,042	30	525
Marshall	1,287	33	858
McCook	2,068	63	769
McPherson	1,075	27	222
Meade	9,875	510	3,285
Mellette	449	22	298
Miner	787	31	320
Minnehaha	49,249	2,595	40,482
Moody	1,951	76	1,179
Oglala Lakota	297	74	2,829
Pennington	35,063	1,849	20,606
Perkins	1,401	29	239
Potter	1,139	14	227
Roberts	2,404	75	1,828
Sanborn	905	23	257
Spink	2,104	61	998
Stanley	1,203	28	421
Sully	726	19	185
Todd	532	44	1,963
Tripp	2,161	40	495
Turner	3,290	119	1,139
Union	5,944	186	2,725
Walworth	1,966	49	565
Yankton	6,581	303	4,016
Ziebach	404	21	481
Total	**261,043**	**11,095**	**150,471**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	United States Senator	
County	Mike Rounds - REP	Dan Ahlers - DEM
Aurora	1,002	403
Beadle	5,104	1,986
Bennett	729	437
Bon Homme	2,156	834
Brookings	8,792	5,746
Brown	11,168	6,283
Brule	1,735	756
Buffalo	223	322
Butte	3,809	961
Campbell	745	122
Charles Mix	2,542	1,259
Clark	1,397	450
Clay	2,857	2,807
Codington	9,479	3,626
Corson	681	583
Custer	3,973	1,483
Davison	5,893	2,540
Day	1,895	1,069
Deuel	1,714	628
Dewey	884	1,062
Douglas	1,469	235
Edmunds	1,539	448
Fall River	3,009	993
Faulk	975	213
Grant	2,723	1,026
Gregory	1,766	488
Haakon	1,032	106
Hamlin	2,413	657
Hand	1,480	378
Hanson	1,796	564
Harding	727	73
Hughes	6,217	2,546
Hutchinson	2,982	772
Hyde	568	143
Jackson	756	357
Jerauld	720	277
Jones	497	99
Kingsbury	1,970	809
Lake	3,816	2,069
Lawrence	9,385	4,358
Lincoln	21,221	11,013
Lyman	1,066	533
Marshall	1,334	853
McCook	2,072	835
McPherson	1,086	235
Meade	10,355	3,176
Mellette	468	303
Miner	807	339
Minnehaha	52,773	38,799
Moody	1,877	1,343
Oglala Lakota	510	2,691
Pennington	37,694	19,184
Perkins	1,395	249
Potter	1,160	224
Roberts	2,529	1,767
Sanborn	898	281
Spink	2,178	986
Stanley	1,274	378
Sully	759	168
Todd	706	1,796
Tripp	2,188	502
Turner	3,416	1,126
Union	6,364	2,407
Walworth	2,040	525
Yankton	6,994	3,848
Ziebach	450	458
Total	**276,232**	**143,987**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	United States Representative	
County	Dusty Johnson - REP	Randy "Uriah" Luallin - LIB
Aurora	1,224	144
Beadle	5,857	936
Bennett	807	288
Bon Homme	2,519	389
Brookings	10,741	2,791
Brown	13,706	2,841
Brule	2,073	338
Buffalo	306	196
Butte	3,977	672
Campbell	790	64
Charles Mix	2,921	703
Clark	1,571	222
Clay	3,750	1,378
Codington	10,685	1,881
Corson	755	365
Custer	4,336	902
Davison	7,101	1,069
Day	2,336	485
Deuel	2,005	294
Dewey	1,065	693
Douglas	1,568	106
Edmunds	1,741	184
Fall River	3,142	735
Faulk	1,065	90
Grant	3,164	462
Gregory	2,009	179
Haakon	1,061	59
Hamlin	2,644	359
Hand	1,647	159
Hanson	1,938	275
Harding	747	48
Hughes	7,148	1,276
Hutchinson	3,301	351
Hyde	628	68
Jackson	809	253
Jerauld	847	115
Jones	528	65
Kingsbury	2,314	361
Lake	4,717	834
Lawrence	10,481	2,521
Lincoln	25,298	5,290
Lyman	1,228	312
Marshall	1,670	364
McCook	2,479	369
McPherson	1,181	114
Meade	10,983	2,178
Mellette	548	198
Miner	964	133
Minnehaha	65,473	19,600
Moody	2,425	631
Oglala Lakota	855	1,865
Pennington	41,982	11,679
Perkins	1,427	176
Potter	1,255	102
Roberts	3,100	934
Sanborn	1,016	129
Spink	2,645	400
Stanley	1,399	180
Sully	807	92
Todd	961	1,247
Tripp	2,360	267
Turner	3,885	541
Union	6,862	1,345
Walworth	2,222	267
Yankton	8,404	1,887
Ziebach	531	297
Total	**321,984**	**75,748**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	Public Utilities Commissioner		
County	Gary Hanson - REP	Devin Saxon - LIB	Remi W. Bald Eagle - DEM
Aurora	1,073	55	207
Beadle	5,131	301	1,372
Bennett	631	51	429
Bon Homme	2,193	137	491
Brookings	8,523	735	4,389
Brown	11,118	814	4,531
Brule	1,774	124	486
Buffalo	174	15	340
Butte	3,577	294	737
Campbell	734	26	75
Charles Mix	2,532	97	1,036
Clark	1,382	95	275
Clay	2,778	252	2,299
Codington	9,285	646	2,352
Corson	605	33	605
Custer	3,692	301	1,243
Davison	6,010	406	1,631
Day	1,999	127	666
Deuel	1,704	115	416
Dewey	694	63	1,149
Douglas	1,475	36	121
Edmunds	1,533	71	280
Fall River	2,789	254	836
Faulk	942	39	133
Grant	2,721	163	671
Gregory	1,732	60	358
Haakon	1,015	18	62
Hamlin	2,384	113	421
Hand	1,485	58	245
Hanson	1,758	76	404
Harding	690	32	50
Hughes	6,155	337	2,002
Hutchinson	3,002	107	449
Hyde	559	19	105
Jackson	708	34	334
Jerauld	752	24	186
Jones	481	26	68
Kingsbury	2,034	91	541
Lake	4,014	234	1,342
Lawrence	8,818	946	3,433
Lincoln	21,904	1,460	7,421
Lyman	1,043	52	445
Marshall	1,422	85	555
McCook	2,140	117	486
McPherson	1,074	43	133
Meade	9,489	967	2,468
Mellette	437	32	275
Miner	836	52	200
Minnehaha	55,106	4,569	27,568
Moody	2,041	116	915
Oglala Lakota	257	78	2,824
Pennington	34,684	3,697	15,847
Perkins	1,302	85	191
Potter	1,155	37	133
Roberts	2,593	144	1,410
Sanborn	874	42	197
Spink	2,229	132	634
Stanley	1,234	48	308
Sully	735	29	133
Todd	479	68	1,915
Tripp	2,125	79	377
Turner	3,474	184	707
Union	6,013	375	1,941
Walworth	1,978	81	420
Yankton	6,737	573	2,748
Ziebach	361	52	473
Total	**272,378**	**20,622**	**107,494**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Senator District 01	
County	Michael H. Rohl - REP	Susan Wismer - DEM
Brown	1,130	622
Day	1,663	1,218
Marshall	1,117	1,043
Roberts	2,141	2,030
Total	**6,051**	**4,913**

	State Senator District 02
County	Brock L. Greenfield - REP
Brown	2,602
Clark	1,305
Hamlin	2,286
Spink	1,961
Total	**8,154**

	State Senator District 03
County	Al Novstrup - REP
Brown	7,496
Total	**7,496**

	State Senator District 04	
County	John Wiik - REP	Daryl Root - LIB
Brookings	3,365	774
Codington	1,405	250
Deuel	1,851	371
Grant	2,917	612
Total	**9,538**	**2,007**

	State Senator District 05	
County	Lee Schoenbeck - REP	Adam Jewell - LIB
Codington	8,272	2,193
Total	**8,272**	**2,193**

	State Senator District 06	
County	Herman Otten - REP	Nancy Kirstein - DEM
Lincoln	10,194	5,081
Total	**10,194**	**5,081**

	State Senator District 07
County	V. J. Smith - REP
Brookings	6,650
Total	**6,650**

	State Senator District 08
County	Casey Crabtree - REP
Lake	4,218
Miner	788
Moody	2,000
Sanborn	823
Total	**7,829**

	State Senator District 09	
County	Wayne H. Steinhauer - REP	Suzanne "Suzie" Jones Pranger - DEM
Minnehaha	7,654	5,552
Total	**7,654**	**5,552**

	State Senator District 10	
County	Maggie Sutton - REP	Nichole Cauwels - DEM
Minnehaha	7,205	4,261
Total	**7,205**	**4,261**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Senator District 11	
County	Jim Stalzer - REP	Tom Cool - DEM
Minnehaha	8,244	5,389
Total	**8,244**	**5,389**

	State Senator District 12	
County	R Blake Curd - REP	Jessica Meyers - DEM
Lincoln	3,219	2,178
Minnehaha	3,380	3,428
Total	**6,599**	**5,606**

	State Senator District 13	
County	Jack Kolbeck - REP	Elizabeth "Liz" Larson - DEM
Lincoln	3,969	2,017
Minnehaha	3,521	3,802
Total	**7,490**	**5,819**

	State Senator District 14	
County	Larry P. Zikmund - REP	Timothy Reed - DEM
Minnehaha	7,391	5,808
Total	**7,391**	**5,808**

	State Senator District 15	
County	Thor Bardon - REP	Reynold F. Nesiba - DEM
Minnehaha	3,411	4,127
Total	**3,411**	**4,127**

	State Senator District 16
County	Jim Bolin - REP
Lincoln	3,383
Union	6,582
Total	**9,965**

	State Senator District 17		
County	Arthur Rusch - REP	Gregory Baldwin - LIB	Ailee Johns - DEM
Clay	3,065	218	2,250
Turner	3,220	216	872
Total	**6,285**	**434**	**3,122**

	State Senator District 18	
County	Jean Hunhoff - REP	Jordan Foos - DEM
Yankton	6,342	4,255
Total	**6,342**	**4,255**

	State Senator District 19
County	Kyle Schoenfish - REP
Bon Homme	1,395
Douglas	1,403
Hanson	1,750
Hutchinson	3,111
McCook	2,107
Total	**9,766**

	State Senator District 20	
County	Joshua Klumb - REP	Alexander Martin - LIB
Aurora	1,165	156
Davison	6,567	1,215
Jerauld	784	121
Total	**8,516**	**1,492**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Senator District 21	
County	Erin Tobin - REP	Dan Kerner Andersson - DEM
Bon Homme	892	208
Charles Mix	2,593	1,093
Gregory	1,874	335
Tripp	2,270	366
Total	**7,629**	**2,002**

	State Senator District 22
County	David Wheeler - REP
Beadle	5,417
Kingsbury	1,980
Total	**7,397**

	State Senator District 23	
County	Bryan J. Breitling - REP	CJ Abernathey - LIB
Campbell	756	57
Edmunds	1,679	170
Faulk	938	106
Hand	1,557	198
McPherson	1,117	117
Potter	1,166	110
Spink	266	45
Walworth	2,040	307
Total	**9,519**	**1,110**

	State Senator District 24
County	Mary Duvall - REP
Hughes	6,656
Hyde	565
Stanley	1,242
Sully	791
Total	**9,254**

	State Senator District 25		
County	Marsha Symens - REP	Seth William Van't Hof - IND	Rick W Knobe - IND
Minnehaha	7,580	1,093	4,205
Total	**7,580**	**1,093**	**4,205**

	State Senator District 26	
County	Joel Koskan - REP	Troy Heinert - DEM
Brule	1,505	898
Buffalo	158	381
Jones	452	133
Lyman	918	635
Mellette	404	357
Todd	504	2,012
Total	**3,941**	**4,416**

	State Senator District 27	
County	Judd W Schomp - REP	Red Dawn Foster - DEM
Bennett	618	511
Haakon	1,013	81
Jackson	713	361
Oglala Lakota	324	2,842
Pennington	310	34
Total	**2,978**	**3,829**

	State Senator District 28
County	Ryan M. Maher - REP
Butte	2,915
Corson	788
Dewey	1,074
Harding	743
Perkins	1,439
Ziebach	547
Total	**7,506**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Senator District 29	
County	Gary L. Cammack - REP	Kent Wilsey - LIB
Butte	811	171
Meade	7,919	2,177
Pennington	620	308
Total	**9,350**	**2,656**

	State Senator District 30	
County	Julie Frye-Mueller - REP	A. Gideon Oakes - LIB
Custer	3,506	1,542
Fall River	2,728	1,058
Pennington	3,809	1,446
Total	**10,043**	**4,046**

	State Senator District 31
County	Timothy R. Johns - REP
Lawrence	9,911
Total	**9,911**

	State Senator District 32	
County	Helene Duhamel - REP	Michael Calabrese - DEM
Pennington	7,397	4,143
Total	**7,397**	**4,143**

	State Senator District 33	
County	David Johnson - REP	Ryan A. Ryder - DEM
Meade	1,960	692
Pennington	9,409	4,625
Total	**11,369**	**5,317**

	State Senator District 34	
County	Michael G Diedrich - REP	George Nelson - DEM
Pennington	8,079	4,470
Total	**8,079**	**4,470**

	State Senator District 35	
County	Jessica Castleberry - REP	Brian Gentry - IND
Pennington	6,012	3,747
Total	**6,012**	**3,747**

	State Representative District 01		
County	Tamara St. John - REP	Jennifer Healy Keintz - DEM	Steven D. McCleerey - DEM
Brown	1,126	595	599
Day	1,607	1,304	1,031
Marshall	1,107	1,110	807
Roberts	2,310	1,493	1,812
Total	**6,150**	**4,502**	**4,249**

	State Representative District 02	
County	Kaleb W. Weis - REP	Lana Greenfield - REP
Brown	2,200	2,025
Clark	945	1,071
Hamlin	1,769	1,739
Spink	1,467	1,593
Total	**6,381**	**6,428**

	State Representative District 03			
County	Drew Dennert - REP	Carl E Perry - REP	Leslie McLaughlin - DEM	Justin Roemmick - DEM
Brown	7,108	6,087	3,843	3,720
Total	**7,108**	**6,087**	**3,843**	**3,720**

	State Representative District 04		
County	Fred Deutsch - REP	John Mills - REP	Becky Holtquist - DEM
Brookings	2,842	2,800	1,369
Codington	1,201	865	460
Deuel	1,497	1,380	663
Grant	2,472	1,956	1,150
Total	**8,012**	**7,001**	**3,642**

	State Representative District 05	
County	Hugh M. Bartels - REP	Nancy York - REP
Codington	7,311	6,182
Total	**7,311**	**6,182**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Representative District 06		
County	Ernie Otten - REP	Aaron Aylward - REP	Cody Ingle - DEM
Lincoln	9,504	6,504	5,084
Total	**9,504**	**6,504**	**5,084**

	State Representative District 07			
County	Timothy Reed - REP	Larry Tidemann - REP	Louise Snodgrass - DEM	Bill Adamson - DEM
Brookings	5,821	5,235	3,635	2,786
Total	**5,821**	**5,235**	**3,635**	**2,786**

	State Representative District 08			
County	Marli Wiese - REP	Randy Gross - REP	John P. Kessinger - DEM	Val Parsley - DEM
Lake	3,921	3,163	1,095	2,264
Miner	700	641	188	404
Moody	1,682	1,795	685	1,291
Sanborn	726	728	194	301
Total	**7,029**	**6,327**	**2,162**	**4,260**

	State Representative District 09			
County	Rhonda Milstead - REP	Bethany Soye - REP	Michael Saba - DEM	Toni Miller - DEM
Minnehaha	7,656	6,720	4,679	4,368
Total	**7,656**	**6,720**	**4,679**	**4,368**

	State Representative District 10		
County	Steven Haugaard - REP	Doug Barthel - REP	Michelle L. Hentschel - DEM
Minnehaha	6,527	6,188	4,736
Total	**6,527**	**6,188**	**4,736**

	State Representative District 11			
County	Mark Willadsen - REP	Chris Karr - REP	Sheryl Johnson - DEM	Margaret M Kuipers - DEM
Minnehaha	7,172	7,253	5,900	4,429
Total	**7,172**	**7,253**	**5,900**	**4,429**

	State Representative District 12		
County	Greg Jamison - REP	Arch Beal - REP	Erin Royer - DEM
Lincoln	3,212	2,750	2,152
Minnehaha	3,587	2,871	3,403
Total	**6,799**	**5,621**	**5,555**

	State Representative District 13			
County	Richard L Thomason - REP	Sue Peterson - REP	Norman B. Bliss - DEM	Kelly A. Sullivan - DEM
Lincoln	3,346	3,605	1,766	2,078
Minnehaha	2,869	3,141	3,328	3,768
Total	**6,215**	**6,746**	**5,094**	**5,846**

	State Representative District 14			
County	Taylor Rae Rehfeldt - REP	Tom Holmes - REP	Mike Huber - DEM	Erin Healy - DEM
Minnehaha	6,933	5,782	5,228	6,388
Total	**6,933**	**5,782**	**5,228**	**6,388**

	State Representative District 15			
County	Matt Rosburg - REP	Cole Heisey - REP	Jamie Smith - DEM	Linda Duba - DEM
Minnehaha	2,943	2,987	3,727	3,918
Total	**2,943**	**2,987**	**3,727**	**3,918**

	State Representative District 16	
County	David L. Anderson - REP	Kevin D. Jensen - REP
Lincoln	2,784	2,253
Union	5,599	4,257
Total	**8,383**	**6,510**

	State Representative District 17			
County	Richard Vasgaard - REP	Sydney Davis - REP	Caitlin F. Collier - DEM	Al Leber - DEM
Clay	1,989	2,521	2,374	2,708
Turner	2,797	2,757	807	937
Total	**4,786**	**5,278**	**3,181**	**3,645**

	State Representative District 18	
County	Mike Stevens - REP	Ryan Cwach - DEM
Yankton	6,778	5,109
Total	**6,778**	**5,109**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Representative District 19	
County	Kent Peterson - REP	Marty Overweg - REP
Bon Homme	1,188	842
Douglas	991	1,249
Hanson	1,559	1,183
Hutchinson	2,695	1,953
McCook	2,070	1,337
Total	**8,503**	**6,564**

	State Representative District 20	
County	Paul R Miskimins - REP	Lance Koth - REP
Aurora	974	693
Davison	5,860	4,804
Jerauld	569	567
Total	**7,403**	**6,064**

	State Representative District 21		
County	Rocky Blare - REP	Caleb Finck - REP	Jessica Hegge - DEM
Bon Homme	615	794	268
Charles Mix	1,898	1,845	1,620
Gregory	1,595	1,226	537
Tripp	2,222	1,173	486
Total	**6,330**	**5,038**	**2,911**

	State Representative District 22			
County	Roger Chase - REP	Lynn Schneider - REP	Mark S Smith - DEM	C. John McEnelly - DEM
Beadle	4,409	4,310	1,910	1,734
Kingsbury	1,756	1,545	730	614
Total	**6,165**	**5,855**	**2,640**	**2,348**

	State Representative District 23	
County	Spencer Gosch - REP	Charlie Hoffman - REP
Campbell	729	566
Edmunds	1,337	1,211
Faulk	806	715
Hand	1,214	1,045
McPherson	907	989
Potter	1,032	837
Spink	212	186
Walworth	2,088	1,242
Total	**8,325**	**6,791**

	State Representative District 24		
County	Will D Mortenson - REP	Mike Welsgram - REP	Amanda Bachmann - DEM
Hughes	6,012	5,736	2,421
Hyde	526	401	155
Stanley	1,186	1,067	331
Sully	686	582	172
Total	**8,410**	**7,786**	**3,079**

	State Representative District 25			
County	Tom Pischke - REP	Jon Hansen - REP	Jeff Barth - DEM	Jared Nieuwenhuis - DEM
Minnehaha	7,784	7,826	4,460	3,720
Total	**7,784**	**7,826**	**4,460**	**3,720**

	State Representative District 26A
County	Shawn Bordeaux - DEM
Mellette	387
Todd	1,867
Total	**2,254**

	State Representative District 26B	
County	Rebecca L Reimer - REP	Tim Feliciano - DEM
Brule	1,826	597
Buffalo	200	338
Jones	491	75
Lyman	1,061	492
Total	**3,578**	**1,502**

	State Representative District 27		
County	Liz May - REP	Ernest Weston Jr - DEM	Peri Pourier - DEM
Bennett	778	320	397
Haakon	1,013	104	92
Jackson	765	212	331
Oglala Lakota	448	1,814	2,380
Pennington	316	30	34
Total	**3,320**	**2,480**	**3,234**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	State Representative District 28A
County	Oren Lee Lesmeister - DEM
Corson	732
Dewey	1,215
Ziebach	638
Total	**2,585**

	State Representative District 28B
County	Sam Marty - REP
Butte	2,745
Harding	731
Perkins	1,371
Total	**4,847**

	State Representative District 29		
County	Dean Wink - REP	Kirk J. Chaffee - REP	Jade Addison - IND
Butte	679	571	194
Meade	6,911	5,356	2,634
Pennington	577	454	346
Total	**8,167**	**6,381**	**3,174**

	State Representative District 30	
County	Trish Ladner - REP	Tim R. Goodwin - REP
Custer	3,039	3,075
Fall River	2,372	2,156
Pennington	3,257	3,204
Total	**8,668**	**8,435**

	State Representative District 31		
County	Scott Odenbach - REP	Mary Fitzgerald - REP	Brooke Abdallah - DEM
Lawrence	8,104	6,920	4,590
Total	**8,104**	**6,920**	**4,590**

	State Representative District 32			
County	Chris Johnson - REP	Becky Drury - REP	Toni Diamond - DEM	James Preston - DEM
Pennington	6,391	5,587	3,826	3,932
Total	**6,391**	**5,587**	**3,826**	**3,932**

	State Representative District 33	
County	Phil Jensen - REP	Taffy Howard - REP
Meade	1,711	1,337
Pennington	8,540	6,565
Total	**10,251**	**7,902**

	State Representative District 34			
County	Mike Derby - REP	Jess Olson - REP	Nick Anderson - DEM	Rick Stracqualursi - DEM
Pennington	7,225	6,756	3,776	3,806
Total	**7,225**	**6,756**	**3,776**	**3,806**

	State Representative District 35			
County	Tina L. Mulally - REP	Tony Randolph - REP	David A. Hubbard - DEM	Pat Cromwell - DEM
Pennington	5,777	5,375	2,916	2,740
Total	**5,777**	**5,375**	**2,916**	**2,740**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	SUPREME COURT RETENTION: SHALL JUSTICE STEVEN JENSEN REPRESENTING THE FIRST SUPREME COURT DISTRICT, WHOSE TERM EXPIRES JANUARY 1, 2021, BE RETAINED IN OFFICE?	
County	Yes	No
Aurora	1,074	181
Beadle	5,239	940
Bennett	726	294
Bon Homme	2,272	391
Brookings	10,069	1,957
Brown	12,450	2,517
Brule	1,860	381
Buffalo	308	179
Butte	3,611	675
Campbell	665	86
Charles Mix	2,670	744
Clark	1,368	226
Clay	3,935	1,053
Codington	9,161	1,716
Corson	759	383
Custer	3,882	852
Davison	6,466	1,138
Day	2,135	448
Deuel	1,718	307
Dewey	1,145	590
Douglas	1,330	158
Edmunds	1,474	274
Fall River	2,777	730
Faulk	897	128
Grant	2,743	500
Gregory	1,745	303
Haakon	872	126
Hamlin	2,261	335
Hand	1,450	184
Hanson	1,758	274
Harding	608	83
Hughes	7,019	1,019
Hutchinson	2,872	390
Hyde	564	71
Jackson	769	231
Jerauld	757	133
Jones	477	71
Kingsbury	2,098	293
Lake	4,363	746
Lawrence	9,685	2,308
Lincoln	23,388	4,650
Lyman	1,107	311
Marshall	1,576	317
McCook	2,163	393
McPherson	1,009	174
Meade	9,682	2,271
Mellette	536	145
Miner	846	126
Minnehaha	61,774	16,025
Moody	2,302	554
Oglala Lakota	1,397	1,537
Pennington	38,701	10,395
Perkins	1,232	185
Potter	1,088	143
Roberts	2,977	834
Sanborn	922	114
Spink	2,391	386
Stanley	1,337	173
Sully	729	116
Todd	1,259	1,012
Tripp	2,053	386
Turner	3,443	596
Union	6,681	1,169
Walworth	1,927	357
Yankton	7,746	1,668
Ziebach	526	265
Total	**296,824**	**67,717**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	James River Water Development District Director James River WDD 4	
County	Leroy Braun - NON	Robert J. Roeber - NON
Beadle	731	509
Spink	1,510	856
Total	**2,241**	**1,365**

	West Dakota Water Development District Director West Dakota WDD 6	
County	James A. Kammert Sr. - NON	Cheryl Rowe - NON
Pennington	1,266	2,370
Total	**1,266**	**2,370**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	Constitutional Amendment A: An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use.	
County	Yes	No
Aurora	531	850
Beadle	3,432	3,536
Bennett	637	518
Bon Homme	1,269	1,647
Brookings	8,056	6,280
Brown	9,666	7,632
Brule	1,141	1,301
Buffalo	366	162
Butte	2,221	2,524
Campbell	344	507
Charles Mix	1,678	2,036
Clark	751	1,058
Clay	3,742	1,891
Codington	6,603	6,355
Corson	665	573
Custer	2,617	2,794
Davison	4,135	4,228
Day	1,419	1,479
Deuel	920	1,373
Dewey	1,222	685
Douglas	460	1,195
Edmunds	796	1,158
Fall River	2,065	1,881
Faulk	413	751
Grant	1,649	2,027
Gregory	876	1,337
Haakon	305	809
Hamlin	1,114	1,933
Hand	619	1,195
Hanson	1,037	1,245
Harding	251	541
Hughes	4,348	4,346
Hutchinson	1,267	2,408
Hyde	264	430
Jackson	515	578
Jerauld	392	594
Jones	220	376
Kingsbury	1,234	1,490
Lake	3,001	2,818
Lawrence	7,934	5,813
Lincoln	17,741	14,432
Lyman	808	777
Marshall	1,121	1,023
McCook	1,327	1,531
McPherson	475	810
Meade	6,999	6,525
Mellette	376	387
Miner	514	614
Minnehaha	54,663	36,018
Moody	1,667	1,529
Oglala Lakota	2,523	582
Pennington	32,991	23,367
Perkins	616	1,020
Potter	530	825
Roberts	2,297	1,916
Sanborn	535	620
Spink	1,349	1,724
Stanley	788	849
Sully	402	526
Todd	1,906	562
Tripp	999	1,651
Turner	1,975	2,512
Union	5,090	3,609
Walworth	1,032	1,478
Yankton	5,839	4,870
Ziebach	522	366
Total	**225,260**	**190,477**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	Constitutional Amendment B: An amendment to the South Dakota Constitution authorizing the Legislature to allow sports wagering in Deadwood.	
County	Yes	No
Aurora	637	735
Beadle	3,627	3,251
Bennett	644	504
Bon Homme	1,456	1,426
Brookings	8,062	6,044
Brown	9,914	7,138
Brule	1,291	1,137
Buffalo	297	221
Butte	2,589	2,141
Campbell	411	419
Charles Mix	1,867	1,832
Clark	889	890
Clay	3,422	2,077
Codington	7,068	5,595
Corson	623	612
Custer	2,893	2,477
Davison	4,669	3,625
Day	1,491	1,374
Deuel	1,127	1,154
Dewey	1,124	765
Douglas	653	988
Edmunds	1,037	889
Fall River	2,224	1,696
Faulk	562	583
Grant	1,857	1,758
Gregory	1,031	1,158
Haakon	491	620
Hamlin	1,254	1,759
Hand	838	950
Hanson	1,194	1,062
Harding	423	367
Hughes	5,010	3,630
Hutchinson	1,714	1,947
Hyde	352	333
Jackson	581	505
Jerauld	477	499
Jones	265	320
Kingsbury	1,345	1,350
Lake	3,243	2,518
Lawrence	8,484	5,139
Lincoln	19,848	11,668
Lyman	938	633
Marshall	1,136	977
McCook	1,566	1,273
McPherson	538	730
Meade	8,082	5,280
Mellette	419	340
Miner	553	561
Minnehaha	55,388	33,472
Moody	1,845	1,310
Oglala Lakota	2,106	974
Pennington	33,966	21,609
Perkins	754	875
Potter	709	643
Roberts	2,217	1,955
Sanborn	629	516
Spink	1,648	1,414
Stanley	1,016	623
Sully	520	402
Todd	1,610	822
Tripp	1,332	1,315
Turner	2,409	2,035
Union	5,653	2,944
Walworth	1,269	1,228
Yankton	5,827	4,730
Ziebach	506	374
Total	**239,620**	**170,191**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

	Initiated Measure 26: An initiated measure to legalize marijuana for medical use.	
County	Yes	No
Aurora	793	598
Beadle	4,577	2,409
Bennett	786	374
Bon Homme	1,749	1,180
Brookings	10,454	3,942
Brown	12,442	4,952
Brule	1,624	835
Buffalo	403	123
Butte	2,888	1,875
Campbell	466	381
Charles Mix	2,317	1,426
Clark	1,157	662
Clay	4,466	1,180
Codington	9,000	4,029
Corson	800	445
Custer	3,464	1,970
Davison	5,563	2,818
Day	1,916	998
Deuel	1,402	913
Dewey	1,431	489
Douglas	734	926
Edmunds	1,213	746
Fall River	2,472	1,385
Faulk	648	515
Grant	2,416	1,277
Gregory	1,260	961
Haakon	494	628
Hamlin	1,665	1,388
Hand	991	829
Hanson	1,480	824
Harding	361	433
Hughes	5,802	2,922
Hutchinson	1,977	1,720
Hyde	400	298
Jackson	635	464
Jerauld	589	404
Jones	324	269
Kingsbury	1,748	990
Lake	4,058	1,792
Lawrence	9,712	4,077
Lincoln	23,476	8,718
Lyman	1,070	519
Marshall	1,591	570
McCook	1,862	1,009
McPherson	672	619
Meade	8,952	4,571
Mellette	496	269
Miner	741	387
Minnehaha	69,052	22,036
Moody	2,234	973
Oglala Lakota	2,668	443
Pennington	40,732	15,813
Perkins	840	803
Potter	773	602
Roberts	3,035	1,202
Sanborn	751	417
Spink	1,956	1,147
Stanley	1,097	550
Sully	536	388
Todd	2,063	410
Tripp	1,472	1,194
Turner	2,939	1,571
Union	6,483	2,244
Walworth	1,432	1,095
Yankton	7,539	3,216
Ziebach	615	275
Total	**291,754**	**125,488**

Filed: 11/20/2020 3:30 PM CST Hughes County, South Dakota 32CIV20-000186

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs and Appellees, vs. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant and Appellee, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants and Appellants.	)	Appeal No. 29546

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	)	Appeal No. 29547

APPELLANT SHERIFF KEVIN THOM'S JOINDER
IN BRIEF OF APPELLANT COLONEL RICK MILLER

Contestant/Appellant Sheriff Kevin Thom, by and through his undersigned counsel and pursuant to SDCL 15-26A-67, hereby joins in the Brief of Appellant Colonel Rick Miller filed in Appeal No. 29547 as to all issues.

Dated this 10th day of March, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorney for Appellant Sheriff Kevin Thom

By: _____

Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **APPELLANT SHERIFF KEVIN THOM'S JOINDER IN BRIEF OF APPELLANT COLONEL RICK MILLER,** upon the persons herein next designated, on the date below shown, as follows:

Grant Flynn Matthew W. Templar Office of the Attorney General 1302 E. Hwy 14, Suite 1 Pierre, SD 57501-8501 grant.flynn@state.sd.us matthew.templar@state.sd.us	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Brendan V. Johnson Timothy W. Billion Robins Kaplan LLP 140 N. Phillips Ave., Suite 307 Sioux Falls, SD 57104 bjohnson@robinskaplan.com tbillion@robinskaplan.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Matthew S. McCaulley Lisa M. Prostrollo Christopher Sommers Redstone Law Firm, LLP P.O. Box 1535 101 N. Phillips Ave, Suite 402 Sioux Falls, SD 5101-1535 matt@redstonelawfirm.com lisa@redstonelawfirm.com chris@redstonelawfirm.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail

Dated this 10th day of March, 2021.

Robert L. Morris

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use	Appeal No. 29547

BRIEF OF APPELLEES RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

The Honorable Christina Klinger
Circuit Court Judge

Notice of Appeal filed on February 17, 2021

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104
Attorneys for Intervenor Defendants/Appellees Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Jason Ravnsborg, in his official capacity as South Dakota Attorney General

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
1300 W 57th Street, Suite 101
Sioux Falls, SD 57108
Attorneys for Contestant/Appellant Colonel Rick Miller

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Contestant/Appellant Sheriff Kevin Thom

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF LEGAL ISSUES 1

I. Whether an election contest is an appropriate cause of action where a contestant does not allege any irregularities in the election process? 1

II. Whether Miller and Thom could commence an election contest in their official capacities? 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 4

ARGUMENT 5

I. The circuit court correctly determined that Miller and Thom failed to allege any irregularities in the voting process. 6

A. An election contest is limited to irregularities in the manner or process of voting. 7

B. Miller and Thom have not justified an expansion of the election contest to include their alleged pre-election constitutional violations. 15

II. Miller and Thom did not have standing to bring an election contest in their official capacities. 29

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Hunhoff,
491 N.W.2d 450 (S.D. 1992) 10, 26

Ageton v. Jackley,
2016 S.D. 29, 878 N.W.2d 90 8

Becker v. Pfeifer,
1999 S.D. 17, 588 N.W.2d 913 ..... 10, 31

Bienert v. Yankton Sch. Dist., 63-3,
507 N.W.2d 88 (S.D. 1993) ..... *passim*

Braun v. Borough,
193 P.3d 719 (Alaska 2008) 13, 14, 15

Brown v. Dakota Public Serv. Co.,
299 N.W.569 (S.D. 1941) 18

State ex rel. Cormick v. Ramsey,
130 N.W. 768 (S.D. 1911) 10

Danforth v. Egan,
119 N.W. 1021 (S.D. 1909) 19, 21

Discover Bank v. Stanley,
2008 S.D. 111, 757 N.W.2d 756 4

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue,
1999 S.D. 48, 593 N.W.2d 36 ..... 2, 30

In re Election Contest as to Watertown Special Referendum Election of October 26, 1999,
2000 S.D. 43, 607 N.W.2d 920 31

In re Election Contest as to Watertown Special Referendum Election of October 26, 1999,
2001 S.D. 62, 628 N.W.2d 336 ..... *passim*

Glaser v. LeBus,
274 P.3d 114 (N.M. Ct. App. 2011) 23, 24

Glaser v. LeBus,
276 P.3d 959 (N.M. 2012) 24

Green v. Indep. Consol. Sch. Dist. No. 1,
89 N.W.2d 12 (Minn. 1958) 16, 17

In re Petition for Writ of Certiorari as to the Determination of Election on the Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund, 2002 S.D. 85, 649 N.W.2d 581 ..... 11, 27

Larson v. Locken,
262 N.W.2d 752 (S.D. 1978) ..... *passim*

Loesch v. City of Huron,
2006 S.D. 93, 723 N.W.2d 694 4

McPherson v. Flynn,
397 So. 2d 665 (Fla. 1981) 29

In re Petition to Contest the Primary Election of May 19, 1998,
721 A.2d 1156 (Pa. Commw. Ct. 1998) 13

State ex rel. Pryor v. Axness,
139 N.W. 791 (S.D. 1913) 19, 21

Sherburn v. Patterson Farms, Inc.,
1999 S.D. 47, 593 N.W.2d 414 4

Warren v. Brown,
234 N.W. 38 (S.D. 1930) 29

Watland v. Lingle,
85 P.3d 1079 (Haw. 2004) 22, 23, 24

Statutes

S.D.C.L. § 6-3-4 20

S.D.C.L. § 12-13-9.2 8

S.D.C.L. § 12-22-1 ..... 2, 7, 12

S.D.C.L. § 12-22-3 ..... 2, 29

S.D.C.L. § 12-22-17 25

See S.D.C.L. § 2-1-14 8

See S.D.C.L. § 2-1-15 8

See S.D.C.L. § 2-1-16 8

See S.D.C.L. § 2-1-17 8

See S.D.C.L. § 2-1-18 8

Other Authorities

Determination, *Black's Law Dictionary* (11th ed. 2019) 12

Determination, Merriam-Webster, https://www.merriam-webster.com/dictionary/determination 12

PRELIMINARY STATEMENT

Contestants and appellants Sheriff Kevin Thom and Colonel Rick Miller brought this election contest in their individual capacities as voters and in their official capacities as Pennington County Sheriff and South Dakota State Highway Patrol Superintendent, respectively. Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele (collectively, the "Proponents") intervened as defendants before the circuit court. Thom and Miller also brought a declaratory judgment action raising identical substantive arguments, which is the subject of Appeal No. 29546.

JURISDICTIONAL STATEMENT

The Proponents agree with Miller's jurisdictional statement.[1]

STATEMENT OF LEGAL ISSUES

I. Whether an election contest is an appropriate cause of action where a contestant does not allege any irregularities in the election process?

The circuit court ruled that Miller and Thom did not allege any irregularities in the election process. Therefore, the circuit court concluded

[1] Thom and Miller filed a joint notice of appeal. Subsequently, Miller filed an appeal brief on his behalf only. Thom separately joined Miller's brief. For simplicity, this brief will refer where appropriate to Miller's appellate brief using only his name, but those references incorporate Thom's joinder in Miller's arguments on appeal.

that an election contest was not an appropriate cause of action for Miller and Thom's allegations relating to Amendment A's constitutionality.

Most relevant authority:

In re Election Contest as to Watertown Special Referendum Election of October 26, 1999, 2001 S.D. 62, 628 N.W.2d 336.

Bienert v. Yankton Sch. Dist., 63-3, 507 N.W.2d 88 (S.D. 1993).

Larson v. Locken, 262 N.W.2d 752 (S.D. 1978).

S.D.C.L. § 12-22-1.

II. Whether Miller and Thom could commence an election contest in their official capacities?

Given its holding on the election contest issue, the circuit court determined this issue was moot.

Most relevant authority:

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, 593 N.W.2d 36.

S.D.C.L. § 12-22-3.

STATEMENT OF THE CASE

The Proponents agree with Miller's statement of the case. The Proponents further note that the Attorney General, though an appellee, has elected not to participate in this appeal.

STATEMENT OF FACTS

All parties and the circuit court agreed that the facts in this matter were uncontested and that this lawsuit only presented questions of law. (*See* App.2.)[2]

This appeal arises from the dismissal of an election contest filed by Miller and Thom. (App.1, 18.) In broad terms, Amendment A legalized and regulated marijuana in South Dakota. (App.61-64.) The amendment was approved by a significant majority of South Dakota voters. (App.18.) Miller and Thom subsequently filed an election contest, raising two constitutional challenges not at issue in this appeal. (App.4.) Miller and Thom also filed a declaratory judgment action raising the same constitutional arguments, which is the subject of Appeal No. 29546 currently before this Court.

On August 16, 2019, the Attorney General's office filed the final form of Amendment A with the Secretary of State, along with a title and explanation, which authorized the sponsors of Amendment A to begin collecting signatures to place Amendment A on the ballot. (App.35-43.) On November 4, 2019, the sponsors timely submitted signed petitions

[2] Citations to Miller's appendix are denoted as "App." followed by the referenced page number(s). Citations to the record are denoted as "R." followed by the referenced page number(s).

initiating Amendment A to the South Dakota Secretary of State for validation. (App.47.) On January 6, 2020, the Secretary of State announced that Amendment A received sufficient signatures and would be placed on the ballot at the November 3, 2020, general election. (App.46-47.) The deadline to challenge this decision was Wednesday, February 5, 2020, at 5:00 p.m. central time. (*Id.*)

At the general election held on November 3, 2020, South Dakota voters approved Amendment A, with 54.2% of voters voting in favor of adopting Amendment A. (App.18.)

Thom and Miller filed this election contest on November 20, 2020. (App.2, 18.) They brought this contest in their individual capacities as voters and in their official capacities as Pennington County Sheriff and South Dakota State Highway Patrol Superintendent, respectively. (App.2.)

STANDARD OF REVIEW

This Court reviews de novo a ruling granting a motion for judgment on the pleadings. *See Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3, 723 N.W.2d 694, 695. Conclusions of law are reviewed de novo. *Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 47, ¶ 4, 593 N.W.2d 414, 416. Questions of statutory interpretation are also reviewed de novo. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15, 757 N.W.2d 756, 761.

ARGUMENT

This appeal presents a purely procedural question: can a contestant maintain an election contest without alleging or proving serious irregularities in the voting process itself? Miller and Thom try to frame this case as a challenge to the voting process by arguing that Amendment A should never have been on the ballot because it supposedly violated a single-subject requirement and was not a proper amendment. Those are *not* claims about the voting process; that is merely an effort to recast (and repeat) their constitutional arguments, which are presented in the appeal of Miller and Thom's companion lawsuit—Appeal No. 29546. The merits of Miller and Thom's constitutional challenges are dealt with in that appeal.

The circuit court correctly determined that Miller and Thom did not establish a basis for an election contest. An election contest allows voters to challenge the irregularities in the election process. A contestant must, as a prerequisite, show that voting irregularities occurred, and must then prove that the irregularities were so egregious that the will of the voters was suppressed.

Here, Miller and Thom did not plead, argue, or prove a single instance of irregularity in the voting process. Far from challenging any

irregularities in the manner in which voting occurred, Miller and Thom argued that the vote approving Amendment A was void from the outset based on alleged deficiencies in Amendment A's form. Simply put, Miller and Thom's arguments are not an election contest because they do not relate at all to the election process—the manner in which the November 2020 election was conducted.

Election contests remedy fraud or illegality in the process of conducting an election. An election contest is not an appropriate forum to pursue the constitutional arguments Miller and Thom presented to the circuit court. Instead, Miller and Thom's remedy—if any—lies in their declaratory judgment action.

I. The circuit court correctly determined that Miller and Thom failed to allege any irregularities in the voting process.

The circuit court relied on well-established South Dakota law in concluding that an election contest requires the contestant to show " 'not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed.' " (App.4 (quoting *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999,* 2001 S.D. 62, ¶ 7, 628 N.W.2d 336, 338 [hereinafter, *Watertown II*]).) The circuit court properly determined that the mere placement of Amendment A on the ballot—the only purported violation of the law

Miller and Thom alleged—did not establish the type of irregularities in the election process that an election contest is designed to remedy. (*Id.*)

A. An election contest is limited to irregularities in the manner or process of voting.

1. The circuit court properly rejected Miller and Thom's overly expansive interpretation of an election contest.

In the circuit court, Miller and Thom skimmed over the question of whether their allegations amounted to an election contest.[3] In the few pages of briefing they submitted on that topic, they took the position that an election contest can encompass everything "from start to finish—from the filing of a petition to the determination of a recount." (R.288 (Jan. 8, 2021 Br. p. 5).) This sweeping interpretation of an election contest is unfounded.

The election contest statute itself clearly states that it does not include recounts. S.D.C.L. § 12-22-1 (defining an election contest as "a legal proceeding, other than a recount, instituted to challenge the determination of any election") (emphasis added). Other statutes govern the submission of petition signatures and the secretary of state's review and approval thereof—including a specific time limit to bring such challenges well

[3] At oral argument, counsel for Thom admitted that they only brought the election contest because "we really don't know which vehicle is the proper vehicle in order to challenge this." (R.465 (Tr. 73:16-18).)

before the time to commence an election contest. *See* S.D.C.L. §§ 2-1-14 through 2-1-18 (establishing process, method, and timing for secretary of state's review of petitions and challenges thereto). Still other statutes apply to a challenge to the attorney general's title and explanation for the proposed amendment. *See* S.D.C.L. § 12-13-9.2 (imposing a seven-day time period to challenge the title and explanation); *Ageton v. Jackley*, 2016 S.D. 29, ¶ 6, 878 N.W.2d 90, 92 (describing the process for challenging the attorney general's title and explanation). Thus, an election contest cannot encompass—as Miller and Thom argued—everything from petition signatures to a recount.

2. The circuit court, following established law, limited an election contest to a serious irregularity in the voting process.

South Dakota cases are clear that an election contest involves a challenge to the mechanics of casting and counting votes. *See Larson v. Locken*, 262 N.W.2d 752, 753 n.1 (S.D. 1978) (stating that election contests are limited to "the election process itself"). The central inquiry in an election contest is whether the *manner* in which an election was conducted resulted in a free and fair expression of the will of the voters. *Watertown II*, 2001 S.D. 62 at ¶¶ 4, 7, 628 N.W.2d at 338.

As contestants, Miller and Thom bore the burden to show that (1) voting irregularities occurred, and (2) those irregularities were so

serious that the outcome of the election is doubtful. *See id.* at ¶ 7, 628 N.W.2d at 338 ("Contestants must show not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed."). This standard requires, as a prerequisite, that voters initiating an election contest allege a violation of some statute or ordinance regulating the conduct of voting during an election. *See id.* at ¶¶ 8-9, 628 N.W.2d at 338-39 (stating that voting irregularities are a prerequisite for an election contest and holding that the contestants' failure to show any irregularities was fatal to the election contest).

Many South Dakota decisions confirm that election contests are reserved for challenges to the manner in which voting occurs in an election. In *Larson v. Locken*, for example, voters re-elected the incumbent director of an irrigation district by a vote of 54 to 51. 262 N.W.2d at 753. The evidence revealed numerous instances in which both election officials and voters violated statutes relating to absentee ballots. *See id.* at 753-54. Many of these violations were serious, including the secretary of the district disbursing four absentee ballots, without an application, to the incumbent candidate himself. *See id.* at 755. In light of the "blatant" violations of laws regarding absentee voting that "cast substantial doubt

upon the validity of the outcome of the election," this Court affirmed the trial-court decision to order a new election. *Id.*

In *Abbott v. Hunhoff*, an unsuccessful primary candidate brought an election contest, alleging that eighteen registered Republicans and one registered Independent had illegally voted in a Democratic primary. 491 N.W.2d 450, 452 (S.D. 1992). Although the election contest was the proper vehicle for this challenge, this Court held that the contestant failed to show that but for the illegal votes, he would have won the election. *Id.* at 453; *see also State ex rel. Cormick v. Ramsey*, 130 N.W. 768, 768 (S.D. 1911) (observing, without elaboration, that an election contest provided a remedy where contestant argued that election judges improperly rejected certain ballots as defective).

In *Becker v. Pfeifer*, 1999 S.D. 17, ¶ 21, 588 N.W.2d 913, 918-19, the contestant alleged that the manner in which election officials counted certain overmarked ballots constituted an irregularity. He also argued that the election officials should not have counted twenty-eight absentee ballots missing proper stamps. *Id.* This Court rejected these arguments as elevations of form over substance and insufficient to put the results of the election in doubt. *Id.* at ¶¶ 22-23, 588 N.W.2d at 919.

In *Watertown II*, the contestants argued that the lines to a registration table were too long and that adequate parking was not available at the polling place. *See* 2001 S.D. 62 at ¶ 6, 628 N.W.2d at 338. The Supreme Court observed that the contestants had not pointed to a single law relating to the conduct of the election that had been violated, and declared that "[w]ithout proof of a violation of state or local election law, there is no showing that the trial court's findings [dismissing the election contest] are clearly erroneous." *Id.* at ¶ 8, 628 N.W.2d at 339; *see also In re Petition for Writ of Certiorari as to the Determination of Election on the Brookings Sch. Dist.'s Decision to Raise Additional Gen. Fund*, 2002 S.D. 85, ¶ 14, 649 N.W.2d 581, 586 [hereinafter *Brookings*] (holding that an election contest was not the proper remedy when there "was no question of the validity of the election process itself").

A common theme animates these decisions: an election contest must challenge the manner or mechanism of voting in an election. It exists to determine whether the voting occurred in accordance with applicable laws. An election contest is *not* a proper vehicle to raise challenges unrelated to the manner in which votes were cast. As *Watertown II* and *Brookings* establish, where no violation of law is shown or claimed

regarding the mechanics of the voting process, a voter may not bring an election contest.

This limitation aligns with the plain-language meaning of "determination." *See* S.D.C.L. § 12-22-1 (an election contest challenges "the determination of any election"). For example, among the definitions of determination available in the Merriam-Webster dictionary are "the resolving of a question by argument or reasoning" and "the act of deciding definitely and firmly."[4] *Black's Law Dictionary* defines the word in a similar way: "The act of deciding something official; esp., a final decision by a court or administrative agency . . . ." *Determination*, *Black's Law Dictionary* (11th ed. 2019). Thus, the "determination" of an election is not, as Miller and Thom argue, anything at all that occurs involving the election; rather, the determination of an election is the act and process of casting votes to reach the final outcome of the election.

This limitation also comports with the law in other states. For example, Pennsylvania voters brought a number of constitutional challenges, including a challenge alleging that a violation of a constitutional single-subject requirement, to a home rule charter adopted

[4] *Determination, Merriam-Webster*, https://www.merriam-webster.com/dictionary/determination (last visited Mar. 22, 2021).

by voters. *In re Petition to Contest the Primary Election of May 19, 1998*, 721 A.2d 1156, 1157 n.2 (Pa. Commw. Ct. 1998). The Pennsylvania appellate court described its election contest system as limited to challenges involving the integrity of casting and counting votes:

> [Courts] have consistently held that election contests can only be brought . . . regarding matters pertaining to the election process itself, such as the conduct of balloting according to law, the tabulation of the results, and the return thereof . . . the bare mechanics of accurately and honestly ascertaining and recording the will of the electorate. As such, election contests are limited to questions of whether or not the will of the qualified electors was correctly shown by the returns made. Echoing that interpretation, the Court has also held that to be maintainable, election contests must allege fraud or wrongdoing on the part of election officials or others in the casting, computation and return of votes concerning the election being challenged.

Id. at 1159 (internal quotations and citations omitted) (emphases added). Thus, in ascertaining whether the election results represent the "will of the qualified electors"—a standard similar to South Dakota's—the Pennsylvania court looked to the "bare mechanics" of the "casting, computation and return of votes"—not legal challenges to the constitutionality of measures. *See id.*

Similarly, the Alaska Supreme Court upheld the dismissal of an election contest where a challenger did not allege procedural irregularities but instead alleged constitutional violations. *Braun v. Borough*, 193 P.3d

719, 722-23 (Alaska 2008). The *Braun* case addressed a complex procedural history involving four different lawsuit and two elections relating to an apportionment plan following the 2000 census. *Id.* at 723-25. After voters adopted a competing plan, Braun filed a fourth lawsuit, arguing that the plan voters adopted violated the Equal Protection Clause of the United States Constitution. *Id.* at 724, 727-28. Although Braun did not file the fourth lawsuit as an election contest, Alaska law requires that if a proposed remedy would defeat the public interest in the stability and finality of election results the lawsuit should be deemed an election contest—and it should succeed or fail depending on whether the challenger complied with the procedures for an election contest. *See id.* at 731-32.

Relevant to this case, the Alaska Supreme Court articulated the limits on and requirements of an election contest, and distinguished election contests from constitutional challenges:

> Here, Braun made clear both in oral argument before Judge Pengilly and in his briefing to this court that he challenges the constitutionality of the 2004 election's subject matter, not the fairness of its procedures. Braun does not claim, and nothing in the record indicates, that the November 2004 election was marred by "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election" or by "any corrupt practice as defined by law sufficient to change the results of the election."

Id. at 732–33 (internal citations omitted). Because Braun's constitutional challenge did not relate to the fairness of the election procedures, his election contest failed as a matter of law. *Id.* at 733.

Election contests are not a means to raise complaints unrelated to the mechanics of the election process. Miller and Thom unquestionably never alleged any violation of the law regarding the manner in which the November 2020 election process occurred. The Complaint did not point to a single statute or ordinance relating to the conduct of an election that Miller and Thom believe was violated. Instead, Miller and Thom presented legal arguments as to the constitutional validity of the petition initiating Amendment A itself. These allegations are not properly part of an election contest.

B. Miller and Thom have not justified an expansion of the election contest to include their alleged pre-election constitutional violations.

Miller and Thom argue that this Court should judicially expand an election contest to encompass alleged violations of the law regardless of whether those violations occurred during the process of voting. This Court should not adopt Miller and Thom's expansive interpretation of an election contest.

1. Alleged constitutional violations based on the form of the petition initiating Amendment A do not come within the ambit of an election contest.

Miller invites this Court to expand the definition of an election contest to involve any violation of the law. (*See* Miller Br. pp. 10-11 (citing *Green v. Indep. Consol. Sch. Dist. No. 1*, 89 N.W.2d 12, 16-17 (Minn. 1958) and *Brown v. Dakota Public Serv. Co.*, 299 N.W.569, 572 (S.D. 1941).) These cases do not support Miller's overly broad interpretation of an election contest.

Miller's brief emphasizes language from *Green* purporting to show that constitutional violations could support an election contest. (Miller Br. pp. 10-11.) *Green*'s passing reference does not distinguish between constitutional violations in the voting process and alleged constitutional violations occurring well before the election process, such as those Miller and Thom alleged in this case.

In addition, when read in context, the quote from *Green* actually demonstrates a narrow and demanding construction of an election contest: pre-election challenges may require mandatory compliance with election procedures, but post-election challenges require serious violations of essential or jurisdictional requirements before election results may be overturned. *Green*, 89 N.W.2d at 16-17.

Moreover, the alleged violations in *Green* all related to the conduct of the election itself:

- the appointment of election officials and their taking of an oath;
- counting of blank ballots;
- tardiness of an election judge;
- counting ballots by one person twice as opposed to counting the same ballots by two different people;
- counting spoiled ballots;
- whether the printed ballots contained the facsimile signature of the clerk;
- a discrepancy involving a single voter;
- the opening of locked ballot boxes;
- the validity of 13 absentee ballots; and
- whether ballots were actually kept secret.

Id. at 17-19 (describing all the alleged irregularities and discussing why each was inapplicable or non-prejudicial). This case simply offers no support for Miller's position that the form of Amendment A's petition or the Secretary of State's inclusion of Amendment A on the general election ballot should be adjudicated in an election contest.

Miller's citation to *Brown* is equally unavailing. (Miller Br. p. 11.) To the contrary, *Brown* undercuts Miller's assertion that any violation of the law can justify an election contest. *Brown* involved three primary challenges: first, that the power company paying for the election amounted to fraud or bribery; second, that the conduct of election workers amounted to fraud or bribery; and third, that non-compliance with absentee-ballot requirements was sufficient to overturn the election. 299 N.W. at 571.

The Court dismissed the first two challenges for a lack of evidence. *Id.* Regarding the third challenge, the Court unsurprisingly held that voter compliance with absentee-ballot requirements was mandatory, and sustained the election challenge based on serious irregularities with enough absentee ballots to change the result of the election.[5] *Id.* at 573. The *Brown* decision simply followed the basic principle that voters must substantially comply with their statutory obligations, such as registration and acquisition of absentee ballots, but that it is unjust to disenfranchise voters based on errors made by election officials. *Id.* at 572-73. Thus, while *Brown* has nothing to do with the types of pre-election constitutional violations Miller and Thom alleged in this case, it shows why voters

[5] Similar concerns animated the *Locken* decision. *See Locken*, 262 N.W.2d at 753-55.

should not be disenfranchised after the election based on the Secretary of State's pre-election determination that the form of Amendment A was proper.

2. Election contests are not the proper mechanism to raise procedural challenges alleging that the election was void from the outset.

Citing a handful of decisions, Miller argues that "*Danforth*, *Hurley*, *Axness*, and *Gooder* all stand for the proposition that an election contest may be used to challenge the validity of an election without regard to whether there were procedural irregularities relative to the outcome of the election." (Miller Br. p. 13.) This is not the law.

Curiously, Miller's argument on this point does not direct the Court to *Bienert v. Yankton School District, 63-3*, 507 N.W.2d 88, 89-90 (S.D. 1993). *Bienert* analyzed both *Hurley* and *Gooder*, and ultimately demonstrates why this case is not an election contest.

In *Bienert*, the school district sought voter approval to issue a bond. 507 N.W.2d at 89. The school district published a required notice of election two weeks before the election. *Id.* The voters ultimately approved the bond. *Id.* After the election, a taxpayer sought an injunction barring the issuance of the bond, arguing that the pre-election notice did not meet statutory requirements for bond elections. *See id.* at 91 ("[Bienert] claims

that the notice and ballot were to be designed under the auspices of SDCL 6-3-4 instead. Because the notice and ballot did not include the requirements of SDCL 6-3-4, he deems this election void."). This Court disagreed on the merits, finding that the school district's notice complied with the applicable statutory requirements. *Id.*

Relevant to this case, though, the Court also held that Bienert was not entitled to injunctive relief because he had a plain, speedy, and adequate statutory remedy: an election contest. *Id.* at 90. The majority cited three cases— including *Hurley* and *Gooder*—in which courts awarded equitable relief to prohibit the enforcement of a local election result where no legal basis existed to hold the election at all. *See id.* The Court distinguished those situations from Bienert's challenge because a legal basis to hold the bond election existed. *Id.* An election contest provided the exclusive remedy because the "alleged faulty notice and ballot does not rise to the same level as an invalid petition." *Id.*

The rule from *Bienert* is clear: Where no basis exists for an election in the first place (such as where an insufficient number of qualified voters sign a petition, or where the office for an election does not exist), it is void from the outset and a challenger must pursue injunctive relief, not an election contest. Here, Miller and Thom alleged that Amendment A was

void from the outset. Thus, *Bienert* excludes their arguments from an election contest.

Danforth and *Axness* do not alter this rule. In *Danforth*, voters elected the defendant, Egan, as the state's attorney for Minnehaha County on November 3, 1908. *Danforth v. Egan*, 119 N.W. 1021, 1022 (S.D. 1909). But on October 10, 1908, the Supreme Court disbarred Egan. *Id.* In recognition of the obvious, the Supreme Court held that a disbarred attorney cannot hold the office of state's attorney. *Id.* at 1022-26. The Court did not address the proper scope of an election contest action—the only mention of an election contest occurs in passing in the very first sentence of the opinion. *See id.* at 1022. Given the absence of any discussion about the proper scope of an election contest, this decision is simply not illuminating.

Axness sheds no light on the question here either. In that case, a relator alleged that certain procedural defects by the city council rendered a special municipal election void. *State ex rel. Pryor v. Axness*, 139 N.W. 791, 792 (S.D. 1913). The trial court issued a writ of prohibition, but later modified its writ to allow the election to occur. *Id.* The Supreme Court held that the writ of prohibition was not a proper remedy because the relator had other adequate remedies, such as an action quo warranto, a post-election writ of prohibition, or an election contest. *Id.* at 793. This holding

was very generalized; the Court never explained what grounds might constitute a valid election contest. Read in context, this holding does not alter the well-developed rule relating to South Dakota's current election contest statutes that a contestant must allege serious irregularities in the process of voting. *See, e.g.*, *Watertown II*, 2001 S.D. 62 at ¶ 7, 628 N.W.2d at 338.

Without support in South Dakota case law, Miller points this Court to two out-of-state cases that he contends support the idea that his alleged constitutional violations can be brought as an election contest. (Miller Br. pp. 13-14.) Neither case supports Miller's argument on appeal.

In *Watland v. Lingle*, 85 P.3d 1079 (Haw. 2004), voters alleged that the adoption of a constitutional amendment was invalid because state officials failed to comply with publication and disclosure requirements, and that state officials engaged in knowing misconduct and provided voters with misinformation. *Id.* at 1081. The Hawaii Supreme Court held that the voters could use an election contest to challenge whether election officials complied with state-law publication and notice requirements in the weeks leading up to an election. *Id.* at 1089-90. Although Hawaii law required publication of the text of amendments for four successive weeks before an election, state officials did not publish the text until a mere six days before

the election. *Id.* at 1090. Similarly, the election officials never provided the text of the amendment to public libraries as required by law. *Id.* Unsurprisingly, the *Watland* court found that the election officials failed to comply with state law. *Id.*

Publication of required pre-election notices is fundamentally different from the types of constitutional violations Miller and Thom alleged here. *See Bienert*, 507 N.W.2d at 90 (holding that faulty notices and ballots are fundamentally different from allegations that no legal basis for an election existed). Here, unlike in *Watland*, the alleged violations occurred well before the election and do not relate to the manner or method of carrying out the election itself. Moreover, unlike in *Watland*, Miller and Thom did not seek pre-election judicial relief, even though they knew the full text of Amendment A on August 16, 2019, (App.35-43) and they knew on January 6, 2020, that Amendment A would be on the November 2020 general election ballot (App.46-47).

Glaser v. LeBus, 274 P.3d 114 (N.M. Ct. App. 2011),[6] simply does not apply here. The contestants in *Glaser* raised issues with the form of the

[6] The Court of Appeals determined it did not have jurisdiction to hear the election contest. The New Mexico Supreme Court adopted the reasoning of the Court of Appeals, with one distinction: the Supreme Court cautioned against expanding the scope of an election contest and

petition for a public improvement district and with the ballot material provided for the election. *See id.* at 120-21. Needless to say, those requirements do not apply to constitutional amendments under South Dakota law. Similarly, the mechanism for challenging the results of a public improvement district election under Arizona law do not shed any light on the application of South Dakota's election contest statutes. In particular, the timing of the events—with the special election approximately one and a half months after the council voted to approve the formation of the district contingent on the result of the election—underscores that the process at issue in *Glaser* has no bearing on the conduct of statewide constitutional amendment votes in South Dakota.

In South Dakota, election contests are limited to considering irregularities in the voting process itself. *Watertown II*, 2001 S.D. 62 at ¶ 7, 628 N.W.2d at 338. *Bienert* conclusively establishes that Miller and Thom's claims that the election was void from the outset do not constitute an election contest. In addition, neither *Watland* nor *Glaser* provides any persuasive reason to expand judicially South Dakota's election contest statutes.

---

held that it did not permit relief for events occurring after the formation election. *Glaser v. LeBus*, 276 P.3d 959, 962-63 (N.M. 2012).

3. Election contests are not suited for adjudication of constitutional claims such as those brought by Miller and Thom.

The procedures for an election contest also demonstrate that chapter 12-22 is not the proper mechanism to resolve Miller and Thom's constitutional arguments. An election contest provides for accelerated adjudication and a hearing to determine disputed fact issues. *See* S.D.C.L. § 12-22-17. That process makes sense for cases where alleged voting irregularities are at issue, and there is urgency in determining the true will of the voters. It does not make sense for addressing questions about the procedural sufficiency of a petition approved for submission to the voters a year before the election took place.

On appeal, Miller argues that the speedy remedy of an election contest makes it an appropriate vehicle for resolving claims such as those presented by Miller and Thom. (Miller Br. pp. 16-17.) That argument overlooks the fact that if Miller and Thom had brought their lawsuit before the election, no such time pressure would have existed.[7]

[7] The circuit court did not address the Proponents' timeliness argument in this election contest. For the reasons set forth in the Proponents' appeal brief in Appeal No. 29546, Miller and Thom should have brought their challenges well before the November 3, 2020 general election. (Appeal No. 29546, Proponents' Br. pp. 22-37.)

Miller's argument that logrolling demonstrates that no votes could have been cast in favor of Amendment A underscores a fundamental reason why this lawsuit is not an election contest. Election contests require proof that irregularities occurred in the election process, and that such irregularities were so serious that they call the results of the election into question. For example, this Court has dismissed election contests where a contestant failed to establish that the irregularities alleged would have changed the outcome of the election. *Abbott v. Hunhoff*, 491 N.W.2d 450, 452-53 (S.D. 1992).

Miller, in effect, argues on appeal that he need not prove either of those elements. Instead, he contends that no votes at all should have been counted in favor of Amendment A. (Miller Br. p. 17 ("Contestants were not required to allege particular factual irregularities with the voting process when Amendment A was unconstitutionally placed on the ballot as a matter of law.").)

This deficiency poses a catch-22 of Miller's own creation. The fact that Miller and Thom's allegations related to pre-election constitutional claims, and not factual claims concerning the election process itself, implicitly concedes that those allegations do not fit within the framework of an election contest. If, on the other hand, Miller and Thom are correct

that their remedy is an election contest, they have failed to introduce any proof of voting irregularities that would have changed the outcome of the election. That failure of proof requires the dismissal of their claim. In other words, Miller cannot excuse himself from proving his claim by arguing that the entire election was void from the outset—that claim is not an election contest.

In addition, the remedy available in an election contest is for the court to set aside the result and order a new election. *See Brookings*, 2002 S.D. 85 at ¶ 13, 649 N.W.2d at 585 ("However, the purpose of an election contest . . . is not to have certain ballots declared void and to maintain others, but rather to determine whether the election, despite irregularities, resulted in a free and fair expression of the will of the voters on the merits, and to obtain a new election if it did not."). Here, Miller and Thom were not seeking a new election on Amendment A—they were attempting to have the entire election voided. Thus, the relief Miller and Thom sought further confirms that their lawsuit was not an election contest.

4. Adopting Miller and Thom's expansive definition of an election contest will unnecessarily create myriad public policy problems.

As a matter of public policy, this Court should not permit parties to raise arguments via an election contest when those challenges could have been heard before the election itself. Any other rule would turn election

contests into a free-for-all for opponents disappointed in the results of an election to throw countless arguments against the wall and see if any will stick.

If this Court adopts Miller and Thom's expansive definition of an election contest, there is virtually no end to the creative reasons challengers could offer to undo the results of an election they do not like. What if a petition had formatting issues? What if an opponent alleged violations of the law relating to signature collection by volunteers or by paid circulators? What if a ballot committee allegedly committed a campaign finance violation? Could an election contest be used to circumvent the statutory limitations on challenges to decisions by the secretary of state or the attorney general? The election contest would subsume every variety of election argument imaginable.

Expanding election contests as Miller and Thom urge not only throws the definition of an election contest into question, but it invites opponents of a measure (or a candidate) to wait until after the results of an election are known to raise a challenge if they lose. Along with being fundamentally unfair, this wastes public resources, puts judges in an exceedingly difficult position when deciding election cases after the election occurs, and fundamentally undermines the integrity and finality

of the election process itself. Most damagingly, by waiting until after the people have voted to bring challenges like those here, the rule Miller and Thom advocate for here would disenfranchise every South Dakotan who voted on Amendment A.

II. Miller and Thom did not have standing to bring an election contest in their official capacities.

Miller and Thom alleged this election contest in both their individual and official capacities. Based on its holding that Miller and Thom failed to establish grounds for an election contest, the circuit court did not address whether they had standing in their official capacities. (App.5 (finding "all other issues identified by the parties are moot").) They do not have standing to bring an election contest in their official capacities.

As Miller recognizes, election contests are creatures of statute. (Miller Br. p. 7). Therefore, election contests must strictly conform to the statutory requirements. *See Warren v. Brown*, 234 N.W. 38, 41 (S.D. 1930) ("The proceeding which we commonly call an election contest is in form a creature of the statute."); *accord McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981) ("Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out."). Miller and Thom initiated this election contest under S.D.C.L. § 12-22-3. That statute authorizes a registered voter who

was entitled to vote on a referred or submitted question to institute an election contest. Under the express terms of the statute, Miller and Thom lack the statutory standing to bring this election contest in their official capacities.

In addition, neither Miller nor Thom has standing to sue the state in his official capacity. Subdivisions of the state lack standing to sue the state, and they lack standing to challenge the constitutionality of a state law. *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40 ("District and County are creations of the legislature and lack standing to challenge the constitutionality of [a statute]."). Miller and Thom may not use the power or position of their offices to sue the state.

Miller and Thom have never provided any explanation for why they have standing to bring an election contest in their official capacities. This is not simply an academic point. Public officials should not be permitted to use public resources to bring election contests (nor should a governor be permitted to instruct a subordinate to pursue an election contest).

If this Court determines that an election contest was the proper procedural vehicle to adjudicate Miller and Thom's alleged constitutional violations, the Court should dismiss the election contest insofar as Miller and Thom brought it in their official capacities. Allowing Miller and Thom

to bring an election contest in their official capacities would improperly authorize a new type of official election contest.

CONCLUSION

As in *Watertown II*, Miller and Thom did not allege a single irregularity that occurred on or about November 3, 2020. They make no claim that any of the 225,260 votes cast in favor of Amendment A was illegal, improper, or disputed. There is no factual basis alleged for a finding that the results of the election were somehow tainted, corrupted, or otherwise called into doubt. *See Becker v. Pfeifer*, 1999 S.D. 17 ¶ 11, n.3, 588 N.W.2d 913, 917 n.3 (noting that an election contest exists to remedy a "corrupt election").

"A setting aside of the people's decision is a serious one not to be taken lightly." *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999,* 2000 S.D. 43, ¶ 19, 607 N.W.2d 920, 925 (Gilbertson, J., dissenting). The decision of the voters on November 3, 2020, was a free and fair expression of the will of the voters. This Court should affirm the circuit court's dismissal of this improper election contest.

Appellees respectfully request oral argument.

Respectfully,

DATED: March 24, 2021

ROBINS KAPLAN LLP

By: */s/ Timothy W. Billion* .

Brendan V. Johnson (3263)
Timothy W. Billion (4641)
140 North Phillips Avenue, Suite 307
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
Email: TBillion@RobinsKaplan.com

Attorneys for Proponents

Certificate of Compliance

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court's February 26, 2021 order. This brief was prepared and printed in a proportionally spaced typeface using Microsoft Word 2016 in Book Antiqua font, size 13. This brief contains 6,279 words, including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, and certificates of counsel.

Dated this 24th day of March, 2021

/s/ Timothy W. Billion
Timothy W. Billion

Certificate of Service

The undersigned hereby certifies that on March 24, 2021, the foregoing brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

and a true and correct copy of the foregoing brief was provided by electronic mail and U.S. Mail to:

Grant M. Flynn
Matthew W. Templar
Attorney General's Office
E. Highway 34
Hillsview Plaza
Pierre, SD 57501
Attorneys for Jason Ravnsborg, in his official capacity as South Dakota Attorney General

Matthew S. McCaulley
Lisa Prostrollo
Christopher Sommers
Redstone Law Firm, LLP
1300 W. 57th St., Suite 101
Sioux Falls, SD 57108
Attorneys for Contestant/Appellant Colonel Rick Miller

Bob Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
Attorney for Contestant/Appellant Sheriff Kevin Thom

/s/ Timothy W. Billion
Timothy W. Billion

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29547

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE

APPEAL FROM THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT, HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE CHRISTINA KLINGER,
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANT COLONEL RICK MILLER

ATTORNEYS FOR APPELLANT COLONEL RICK MILLER

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Tel. (605) 331-2975

ATTORNEY FOR APPELLANT SHERIFF KEVIN THOM

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717-0370
Tel. (605) 723-7777

ATTORNEYS FOR APPELLEES RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
Tel. (605) 335-1300

ATTORNEYS FOR THE STATE OF SOUTH DAKOTA

Jason R. Ravnsborg
Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Tel. (605) 773-3215

NOTICE OF APPEAL FILED FEBRUARY 17, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. Election contests are not limited to the "bare mechanics" of elections. 1

II. Post-election challenges to proposed amendments under Article XXIII are challenges to the determination of an election. 7

III. Colonel Miller has standing to bring this election contest. 10

CONCLUSION 14

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Cases

Abbott v. Hunhoff
491 N.W.2d 450 (S.D. 1992) 3

Andrews v. Governor of Maryland
449 A.2d 1144 (Md. 1982) 7

Barnhart v. Herseth
222 N.W.2d 131 (S.D. 1974) 10

Bienert v. Yankton Sch. Dist.
507 N.W.2d 88 (S.D. 1993) 3, 4, 5

Blair v. Cayetano
836 P.2d 1066 (Haw. 1992) 8

Braun v. Borough
193 P.3d 719 (Alaska 2008) 6

Bronson v. Rapid City
259 N.W. 674 (S.D. 1935) 3

Danforth v. Egan
119 N.W. 1021 (S.D. 1909) 2, 5, 7

Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue
1999 S.D. 48, 593 N.W.2d 36 ..... 12, 13

Glaser v. LeBus
274 P.3d 114 (N.M. Ct. App. 2011) 8

Gooder v. Rudd
160 N.W. 808 (S.D. 1916) 2, 4, 5

H & W Contracting, LLC v. City of Watertown
2001 S.D. 107, 633 N.W.2d 167 14

Hurley v. Coursey
265 N.W. 4 (S.D. 1936) ..... passim

In re Bensalem Twp. Supervisor Election Contest
26 Pa. D. & C.2d 433 (Bucks Cty., 1962) 5

In re Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999 ("*Watertown I*")
2001 S.D. 62, 628 N.W.2d 336 2

In re Midwest Motor Express, Inc.
431 N.W.2d 160 (S.D.1988) 11

In re Petition to Contest the Primary Election of May 19, 1998
721 A.2d 1156 (Pa. Commw. Ct. 1998) 5

Larson v. Locken
262 N.W.2d 752 (S.D. 1978) 3, 9

Lovett v. Ferguson
71 N.W. 765 (S.D. 1897) 10

Olson v. Guindon
2009 S.D. 63, 771 N.W.2d 318 13

Sioux Falls Mun. Emp. Ass'n, Inc. v. City of Sioux Falls
233 N.W.2d 306 (S.D. 1975) 14

State ex rel. Adams v. Herried
72 N.W. 93 (S.D. 1897) 10

State ex rel. Hall v. Cline
224 N.W. 6 (Neb. 1929) 8

State ex rel. Pryor v. Axness
139 N.W. 791 (S.D. 1913) 4, 5

Warren v. Brown
234 N.W. 38 (S.D. 1930) 5

Watland v. Lingle
85 P.3d 1079 (Haw. 2004) 8

Whitesell v. Rapid Soft Water & Spas, Inc.
2014 S.D. 41, 850 N.W.2d 840 11

Statutes

Alaska Stat. Ann. § 15.20.540 6

SDCL 12-13-9.2 10

SDCL 12-22-1.....passim
SDCL 12-22-14.....2
SDCL 12-22-19.....1
SDCL 12-22-3.....10, 11
SDCL 15-26A-22.....11
SDCL 15-6-17(a).....12
SDCL 2-1-17.1.....9
SDCL 2-1-18.....10
SDCL 21-28-2.....5
SDCL 34-48A-1.....12
SDCL 6-1-12.....12

Constitutional Provisions

S.D. Const. art. IV, § 9.....12
S.D. Const. art. XXI, § 3.....13
S.D. Const. art. XXIII.....7, 9
S.D. Const. art. XXIII, § 1.....9, 10
S.D. Const. art. XXIII, § 2.....9

PRELIMINARY STATEMENT

Throughout this brief, Contestant and Appellant Colonel Rick Miller is referred to as "Colonel Miller." Contestant and Appellant Sheriff Kevin Thom is referred to as "Sheriff Thom." Colonel Miller and Sheriff Thom are collectively referred to as "Contestants." Appellees Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are collectively referred to as "Proponents." The State of South Dakota is referred to as "State." Attorney General Jason R. Ravnsborg is referred to as "Attorney General." Constitutional Amendment A will be referred to as "Amendment A."

Citations to the settled record appear as "SR." Citations to the Appendix to Colonel Miller's opening brief appear as "Appx." Citations to Proponents' Brief appear as "Pr. Brief." Citations to the transcript of the motions hearing held on January 27, 2021, appear as "MH" followed by the page and line numbers.

ARGUMENT

I. Election contests are not limited to the "bare mechanics" of elections.

The purpose of an election contest is to determine *all* questions, other than the accuracy of the official returns or a recount, "*relevant or material* to the ultimate question of whether the official determination of the result of the election is correct." SDCL 12-22-19 (emphasis added). Because Amendment A was placed on the ballot in violation of the South Dakota Constitution, the official determination of the result must necessarily be incorrect because no votes could have been cast in favor of Amendment A without violating the South Dakota

Constitution. *Cf. Danforth v. Egan*, 119 N.W. 1021 (S.D. 1909).[1] An election-contest proceeding is, therefore, a proper procedural mechanism for Colonel Miller to challenge Amendment A.

Proponents seek to have this Court judicially rewrite South Dakota's election-contest statutes so that they encompass only "a challenge to the mechanics of casting and counting votes." (Pr. Brief, 8). This interpretation is inconsistent with SDCL 12-22-1 and with this Court's precedent. *See Hurley v. Coursey*, 265 N.W. 4 (S.D. 1936); *Gooder v. Rudd*, 160 N.W. 808, 808-09 (S.D. 1916); *Danforth*, 119 N.W. 1021.

Predictably, Proponents rely on more recent election-contest cases to argue that those cases, rather than SDCL 12-22-1, define the scope of an election contest. (*See* Pr. Brief, 8-11). But as Colonel Miller pointed out in his opening brief, the facts in those cases concerned only irregularities in the conduct of an election. Therefore, it is not surprising that this Court's decisions in those cases were limited to irregularities in the conduct of the election. *See, e.g.*, *In re Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999* ("*Watertown I*"), 2001 S.D. 62, 628 N.W.2d 336 (long lines and inadequate

[1] Proponents attempt to undermine Colonel Miller's position by suggesting that Colonel Miller and Sheriff Thom only brought this election contest because they did not know which action was appropriate. (Pr. Brief, 7 n.3). As an initial matter, the election contest was pleaded separately because contests are subject to unique requirements and procedures that are incompatible with civil actions generally, *e.g.*, SDCL 12-22-14 (requiring particular title), precluding a single action pleaded with alternative claims. *See* SDCL 15-6-8(e)(2). Moreover, at oral argument before the circuit court, counsel for both Colonel Miller and Sheriff Thom made it clear that the reason for bringing both actions was to ensure that the merits were properly before the circuit court so that the court could grant full and effective relief. (MH 64:1-3, 73:12-21).

parking); *Abbott v. Hunhoff*, 491 N.W.2d 450 (S.D. 1992) (illegal votes in primary election); *Becker v. Pfeifer*, 1999 S.D. 17, ¶ 21, 588 N.W.2d 913, 918-19 (counting overmarked ballots and certain absentee ballots); *Larson v. Locken*, 262 N.W.2d 752, 756 (S.D. 1978) (counting absentee ballots missing official stamp). None of the cases that Proponents cite define the parameters of an election contest under SDCL chapter 12-22.

Proponents notably fail to include any discussion of *Hurley v. Coursey*, 265 N.W. 4 (S.D. 1936). Instead, they opt to rely on a single sentence of an opinion that mistakenly characterizes *Hurley* as having granted equitable relief. (Pr. Brief, 20 citing *Bienert v. Yankton Sch. Dist.*, 507 N.W.2d 88, 90 (S.D. 1993)).[2] Yet the precise issue before this Court in *Hurley* was whether an election contest was an appropriate action for declaring an election void because the elective office did not exist, without regard to whether there were any irregularities in the conduct of the election.[3] *Hurley*, 265 N.W. at 8 ("Appellants

---

[2] *Bienert's* mistaken characterization of *Hurley* is likely due to the peculiar history of the *Hurley* case, which is discussed at the beginning of the *Hurley* opinion. The case began when R. L. Bronson attempted to contest the election purportedly establishing the Rapid City municipal court, which was dismissed for lack of jurisdiction. *Hurley*, 265 N.W. at 5-7; *see generally Bronson v. Rapid City*, 259 N.W. 674 (S.D. 1935). On a petition for rehearing, counsel for Bronson argued that the *Bronson* case was commenced "as an equitable action . . . to endeavor to have a canvass made and a result declared." *Hurley*, 265 N.W. at 6. This Court noted that if a canvass had not been conducted (which is required before filing a contest), "then the proper remedy was mandamus addressed to the election officers and the canvassing board." *Id.* The Court in *Hurley*, however, unequivocally concluded that an election contest was the appropriate procedure to void an election without regard to irregularities in the conduct of the election. *Id.* at 8-9.

[3] A preliminary issue in *Hurley* was whether the contestant-elector complied with the unique procedures necessary to commence an election contest, further

urge that the institution of this election contest is not a proper method of raising the contention that the office to which Coursey was declared to have been elected was, in fact and in law, nonexistent."). The Court engaged in an in-depth discussion of election contests and their similarities to actions in the nature of quo warranto, *id*., and concluded that claims challenging the existence of an office may be brought in an election contest—even going so far as to confirm that dicta in a previous case for the same proposition was now black-letter law. *Id*. at 8-9 (citing *State ex rel. Pryor v. Axness*, 139 N.W. 791 (S.D. 1913)).

Proponents contend that "[w]here no basis exists for an election in the first place . . . it is void from the outset and a challenger must pursue injunctive relief, not an election contest." (*See* Pr. Brief, 19-20). This argument confuses the remedy with the result. An injunction is simply one remedy that may be available to enjoin the enforcement of an invalid election. *Gooder*, 160 N.W. at 810; *Bienert*, 507 N.W.2d at 90. An election contest may also be used to declare an election void. *Hurley*, 265 N.W. at 8-9. This Court acknowledged the distinction in *Gooder*:

> The township officials being without jurisdiction to call or hold the said election, the legal situation is the same as if no election at all had been held. It was therefore proper for the plaintiff to proceed as though no election had in fact been held, and apply for an injunction, *not for the direct purpose of declaring such election void*, but for the purpose of *restraining the township treasurer* from accepting the statutory saloon license fee from defendants Kelly and Bigler on the ground that there had been no election authorizing such sale.

---

underscoring that the case was, in fact, a statutory election contest. *Hurley*, 265 N.W. at 8.

Gooder, 160 N.W. at 810 (emphasis added). *Gooder* does not state that injunctive relief was the exclusive remedy. To the contrary, the holding in *Gooder* is that, in certain circumstances, an election contest is not the exclusive remedy. *Id.* at 809. The only difference between *Gooder* and *Bienert* is that the defect in *Gooder* was egregious enough to warrant injunctive relief when no contest was brought, whereas the defect in *Bienert* was not.

Together, the broad definition of an election contest in SDCL 12-22-1, the dicta in *Axness* and *Gooder*, and the decisions in *Danforth* and *Hurley* support the conclusion that an election contest is not limited to election-day irregularities. Proponents are effectively asking this Court to overrule *Hurley* and *Danforth* and depart from this Court's early jurisprudence on election contests to avoid the merits of Colonel Miller's claims. Such a decision would mean that post-election challenges to a candidate's eligibility for office would be limited to actions in the nature of quo warranto. *See* SDCL 21-28-2; *Hurley*, 265 N.W. at 8-9; *Warren v. Brown*, 234 N.W. 38, 41-42 (S.D. 1930). And post-election challenges based on jurisdictional defects would always necessitate injunctive relief. *See Gooder*, 160 N.W. at 808.

The out-of-state authorities that Proponents cite are not persuasive. For example, the narrow purview of election contests discussed in *In re Petition to Contest the Primary Election of May 19, 1998*, 721 A.2d 1156 (Pa. Commw. Ct. 1998), was based on Pennsylvania's unique statutory scheme and longstanding precedent dating back to 1870. *See generally In re Bensalem Twp. Supervisor Election Contest*, 26 Pa. D. & C.2d 433, 436 (Bucks Cty., 1962) (discussing legislative intent and historical precedent to conclude contests are limited to the

"bare mechanics"). And unlike this Court, which has held that election contests "partake to a very considerable degree of the nature of quo warranto and furnish summary methods of deciding controversies of a type and kind that might have been decided at the common law in quo warranto," *Hurley*, 265 N.W. at 8, Pennsylvania requires such challenges to be brought "by quo warranto or other post-election procedures." *Bensalem Twp. Supervisor Election Contest*, 26 Pa. D. & C.2d at 439. Because the Commonwealth Court of Pennsylvania was interpreting law that does not exist in South Dakota, its reasoning has no relevance for this case.

Proponents' reliance on *Braun v. Borough*, 193 P.3d 719 (Alaska 2008), is even more misplaced. Proponents conveniently neglect to mention that grounds for the contest in *Braun*—which was a substantive challenge to an apportionment plan under the federal constitution—did not fall within the three specific statutory grounds for an election contest that are set forth under Alaska law. *Id.* at 732-33 (quoting Alaska Stat. Ann. § 15.20.540). These limited statutory grounds for an election contest do not exist in South Dakota. Moreover, one of Alaska's specific grounds for an election contest is a challenge to the candidate's qualifications, Alaska Stat. Ann. § 15.20.540(2), which is necessarily not limited to the conduct of an election. Thus, *Braun* offers no support for Proponents' contentions.

If the South Dakota Legislature intended to limit election contests under SDCL chapter 12-22 to the mechanics of casting and counting ballots, it could have done so. But because no such limitations exist, an election contest under SDCL 12-22-1 encompasses challenges to the propriety of placing a proposed amendment

on the ballot in the first instance. Accordingly, election contests are not limited to the "bare mechanics" of an election under South Dakota law, and the circuit court's decision granting the Proponents' motion for judgment on the pleadings ought to be reversed.

II. Post-election challenges to proposed amendments under Article XXIII are challenges to the determination of an election.

Contrary to Proponents' hyperbolic assertions, Colonel Miller is not requesting this Court to "expand the definition of an election contest to involve any violation of the law." (Pr. Brief, 16). Rather, he has employed the procedure necessary to enforce the mandates and limitations in Article XXIII of the South Dakota Constitution—mandates that Proponents apparently do not believe are "essential." (*See* Pr. Brief, 16) ([P]ost-election challenges require serious violations of essential or jurisdictional requirements before election results may be overturned.")).

When the Constitution, as approved by the people, sets forth a specific procedure for its own amendment, the people are bound by that procedure, and "strict observance of every substantial requirement is essential to the validity of the proposed amendment." *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1148 (Md. 1982). The requirements that proposed amendments embrace only one subject and that revisions be proposed through a constitutional convention are not optional, and voter approval cannot cure a proposed amendment's constitutional invalidity. An unconstitutional amendment cannot be ratified by the people, just as a disbarred attorney cannot be elected the state's attorney. *Danforth*, 119 N.W. at 1022-23.

Proponents attempt to distinguish *Watland v. Lingle* and *Glaser v. LeBus* while completely ignoring the legal principles underlying those cases' holdings. (Pr. Brief, 22-24). Those legal principles align with South Dakota's broad statutory definition of an election contest. *See* SDCL 12-22-1; *Watland v. Lingle*, 85 P.3d 1079, 1087, 1090 (Haw. 2004); *Glaser v. LeBus*, 274 P.3d 114, 119 (N.M. Ct. App. 2011), *op. adopted* 276 P.3d 959 (N.M. 2012).

For example, the *Watland* Court highlighted the importance of giving meaning to constitutional mandates and the consequences of the failure to follow those mandates. *See Watland*, 85 P.3d at 1090. The Court emphasized that the "provisions of a constitution which regulate its own amendment are not merely directory, but mandatory," and that an election contest was the appropriate vehicle to swiftly resolve post-election litigation. *Id.* (quoting *Blair v. Cayetano*, 836 P.2d 1066, 1069 (Haw. 1992)). As the *Watland* Court explained:

> The people have a right to have the proper submission of any amendment they desire. They have both the right and the duty to see that it is lawfully done, and it is the duty of the court to look respectively to the preservation of the right and performance of the duty.

Id. at 1092 (quoting *State ex rel. Hall v. Cline*, 224 N.W. 6, 9 (Neb. 1929)).

Similarly, the *Glaser* Court squarely rejected arguments almost identical to those that the Proponents raise. 274 P.3d 114. There, the appellants argued that election contests did not include "allegations that conditions precedent to an election did not occur, such as a valid petition for the election, complete and truthful notice to the electorate, [or] the preparation and dissemination of proper ballots." *Id.* at 119. In rejecting a narrow interpretation of New Mexico's election-contest statutes, the Court concluded that grounds for an election

contest were not limited to violations of the state's election code and, therefore, conditions precedent to an election could be raised. *Id*. at 120. The decision in *Glaser* was not, as Proponents suggest, limited to "the mechanism for challenging the results of a public improvement district under [New Mexico] law." (*See* Pr. Brief, 24).

In addition, Proponents' claim that a new election is the exclusive remedy in an election contest proceeding is patently false. (Pr. Brief, 27). To be sure, this Court approved such a remedy in *Larson v. Locken* based on the circumstances of the election and the nature of the illegal ballots. 262 N.W.2d at 756. But nothing in *Larson* suggests that a new election is the exclusive remedy available. In fact, SDCL 12-22-21 explicitly contemplates a final judgment that "declare[s] the result of the election." And the Court in *Hurley* approved invalidating an election without holding a new one. *Hurley*, 265 N.W. at 9.

Finally, this Court should reject Proponents' hypothetical claims that an adverse decision will lead to an influx of election-contest litigation. (Pr. Brief, 27). These "public policy" concerns are nothing more than a recast of their timeliness arguments in both this election contest and the declaratory judgment action. Until March 18, 2021, there was no defined procedure to challenge whether a proposed amendment violated the one-subject rule under Article XXIII, § 1 or constituted a revision under Article XXIII, § 2.[4] *Cf*. SDCL 2-1-17.1 (providing for pre-election administrative action regarding counting and number

[4] On March 18, 2021, Governor Noem signed SB 86 into law, which immediately went into effect. The new laws now require the Secretary of State to certify whether proposed amendments comply with Article XXIII, SDCL 12-13-26.1, and allow for an appeal directly to this Court, SDCL 12-13-26.2.

of petition signatures); SDCL 2-1-18 (providing for pre-election court action regarding counting and validity of petition signatures); SDCL 12-13-9.2 (providing for pre-election court action to challenge Attorney General's statement). Previous cases addressing the prior version of the separate-vote rule in Article XXIII, § 1 (1889) did not elaborate on the procedure. *Lovett v. Ferguson* was a breach-of-contract action that included a collateral challenge to an amendment repealing prohibition. *Lovett v. Ferguson*, 71 N.W. 765 (S.D. 1897). *State ex rel. Adams v. Herried* was an original action in this Court that appeared to be in the nature of quo warranto, as it challenged the defendant's right and title to office following an approved amendment. 72 N.W. 93 (S.D. 1897). And *Barnhart v. Herseth* was brought as a writ of mandamus to have a candidate's name placed on the ballot for a position that had been eliminated via a constitutional amendment two years prior. *Barnhart v. Herseth*, 222 N.W.2d 131 (S.D. 1974). Despite the Court entertaining the merits of these cases, a litany of litigation did not abound. Nor will the parade of horribles against which Proponents warn materialize if this Court allows a consideration of this contest on its merits to proceed. (Pr. Brief, 27).

III. Colonel Miller has standing to bring this election contest.

Proponents argue that Colonel Miller lacks standing to bring this election contest in his official capacity. (Pr. Brief, 29-30). SDCL 12-22-3 states that an election contest

> may be instituted by any registered voter who was entitled to vote on a referred or submitted question, but in such case such contest may be instituted only with the permission of a judge of the court in which such contest is instituted, endorsed upon the complaint before the same is filed.

In this case, the circuit court authorized this election-contest proceeding and endorsed the complaint before it was filed. (SR 17). In doing so, the circuit court exercised its statutory role as an election-contest gatekeeper for a "referred or submitted question" and determined that, under SDCL 12-22-3, Colonel Miller was authorized to bring this action. *Id*. Neither the State nor Proponents challenged the circuit court's authorization of this election-contest proceeding or otherwise file a notice of review on this question. Therefore, Proponents' standing argument has been waived. *See* SDCL 15-26A-22 ("An appellee may obtain review of a judgment or order entered in the same action which may adversely affect him by filing a notice of review."); *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶ 10, 850 N.W.2d 840, 842 (noting that "a challenge to standing can be waived" and holding that a parties' failure to file a notice of review precluded appellate review of the issue); *In re Midwest Motor Express, Inc.,* 431 N.W.2d 160, 162 (S.D.1988) (holding that while a party argued the issue of standing to the circuit court and in its appellate brief, the issue of standing was waived because the party failed to file a notice of review pursuant to SDCL 15-26A-22).

Moreover, SDCL 12-22-3 does not preclude an election-contest proceeding from being initiated by a state official, or any other individual who can otherwise establish standing under South Dakota law. Instead, the statute broadens the traditional scope of standing by extending it to "any registered voter who was entitled to vote on a referred or submitted question," so long as in "such cases,"

the complaint is endorsed by the judge.[5] SDCL 12-22-3. Note that the statute does not state that an endorsement is required in "all cases." Nor does it state that a contest "must" be instituted by a registered voter who was entitled to vote. By its plain terms, SDCL 12-22-3 is permissive and does not deprive standing from a state official who can otherwise establish a basis for it under South Dakota law.

Proponents mistakenly rely on *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, 593 N.W.2d 36, in support of their argument that Colonel Miller lacks standing to sue in his official capacity. There, this Court held that a school district and county lacked standing to challenge the constitutionality of a statute because, as a school district and political subdivision created by the Legislature, they were not a "real party in interest" under SDCL 15-6-17(a). *Id.*

The rule in *Edgemont* does not apply to Colonel Miller in his official capacity as Superintendent of the Division of Highway Patrol ("Highway Patrol"). The Highway Patrol is not a school district or political subdivision of the State. *See* SDCL 34-48A-1 (defining "political subdivision"); SDCL 6-1-12 (defining "local government"). Rather, it is part of an executive agency that is under the supervision and direction of the Governor, who has authorized and ratified this election contest proceeding. S.D. Const. art. IV, § 9; Exec. Order 2021-02. As an executive officer, Colonel Miller took "an oath or affirmation to support the Constitution of the United States and of this state," which is expressly required

[5] The reference to "such cases" implies that cases asserted by registered voters are one of several types of election contest cases that may be asserted, and that the statute is not intended to be exclusive.

under Article XXI, § 3 of the Constitution. This oath justifies bringing an action to ensure that an unconstitutional amendment is not implemented in violation of the Constitution.

Moreover, if Amendment A is upheld, Colonel Miller and the Highway Patrol will suffer a direct adverse effect because powers that the Legislature delegated to the Highway Patrol would be transferred to the Department of Revenue—the entity to which Amendment A grants the "exclusive power" to regulate, administer, and enforce "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state."[6] (Appx., 62). Colonel Miller's interest in this lawsuit is not based on his status as a representative of constituent taxpayers; it is based upon the infringement of the constitutional duties and authority that would result from Amendment A divesting authority from the Highway Patrol to the Department of Revenue. Therefore, the general rule of *Edgemont* does not apply, and Colonel Miller has standing.

Finally, this Court may dispense with the technical requirements of standing if the case presents a question of great public importance. *See Olson v. Guindon*, 2009 S.D. 63, ¶ 15, 771 N.W.2d 318, 323 (holding that school districts

[6] The Legislature and Governor have granted the Highway Patrol the authority to enforce "all laws, police regulations, and rules governing the operation of motor vehicles and motor carriers over and upon the highways of this state." SDCL 32-2-7. The Highway Patrol's power to enforce "all laws" upon State highways includes the power to enforce laws regulating "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state." Yet if Amendment A is upheld, this power would be diverted to the Department of Revenue. This change would have a direct and injurious effect on Colonel Miller and the Highway Patrol because they would be forced to forsake their previously established duties and authority to comply with the contradictory provisions of Amendment A.

had standing to challenge funding of public education based, in part, upon fact that "education is a matter of great public importance"); *H & W Contracting, LLC v. City of Watertown*, 2001 S.D. 107, ¶ 14, 633 N.W.2d 167, 172-73 (recognizing that bidder on public contract may have standing "based on the protection of public interests"); *Sioux Falls Mun. Emp. Ass'n, Inc. v. City of Sioux Falls*, 233 N.W.2d 306, 309 (S.D. 1975) (holding that municipal employees association had standing to challenge amendment to ordinance despite its failure to show that it suffered actual adverse consequences because "the case presents questions of significant public interest"). Given the impact Amendment A could have on our State's citizens and system of government, this case certainly presents a question of great public importance. A final decision from this Court will uphold the integrity of our Constitution and serve as guidance for citizen initiatives moving forward. For these reasons, Colonel Miller has standing to bring this election contest proceeding in both his individual and official capacities.

CONCLUSION

An election contest is defined as "a legal proceeding, other than a recount, instituted to challenge the determination of any election" in South Dakota. SDCL 12-22-1. This action has been initiated to "challenge the determination" of an election because Amendment A was submitted to the voters in violation of the procedure imposed by the Constitution itself, resulting in a void election. Such a proceeding is properly classified as an election contest within the meaning of SDCL 12-22-1. Furthermore, Colonel Miller has standing to bring this election-contest action in both his individual and official capacities. Thus, the circuit court erred in granting the State's and Proponents' motions for judgment on the

pleadings, and Colonel Miller respectfully requests that this Court reverse the circuit court's order and remand with directions to enter judgment in favor of Colonel Miller consistent with the decision of this Court in Appeal No. 29546.

Respectfully submitted this 5th day of April, 2021.

/s/ Christopher D. Sommers
Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
REDSTONE LAW FIRM LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
Telephone: 605.331.2975
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Contestant/Appellant Rick Miller

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant Colonel Rick Miller, hereby certifies that a true and correct copy of the foregoing Brief of Appellant Colonel Rick Miller was served electronically upon:

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
grant.flynn@state.sd.us
matthew.templar@state.sd.us
Attorneys for the State of South Dakota

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
bjohnson@robinskaplan.com
tbillion@robinskaplan.com
Attorneys for Proponents/Appellees Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717
bobmorris@westriverlaw.com
Attorney for Contestant/Appellant Kevin Thom

/s/ Christopher D. Sommers
Christopher D. Sommers

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 3996 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Christopher D. Sommers
Christopher D. Sommers

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHERIFF KEVIN THOM, in his official capacity as Pennington County Sheriff and COLONEL RICK MILLER, in his official capacity as Superintendent of the South Dakota Highway Patrol, Plaintiffs and Appellees, vs. STEVE BARNETT, in his official capacity as South Dakota Secretary of State, Defendant and Appellee, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants and Appellants.	)	Appeal No. 29546

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, AN AMENDMENT TO THE SOUTH DAKOTA CONSTITUTION TO LEGALIZE, REGULATE, AND TAX MARIJUANA; AND TO REQUIRE THE LEGISLATURE TO PASS LAWS REGARDING HEMP AS WELL AS LAWS ENSURING ACCESS TO MARIJUANA FOR MEDICAL USE.	)	Appeal No. 29547

APPELLANT SHERIFF KEVIN THOM'S JOINDER
IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER

Contestant/Appellant Sheriff Kevin Thom, by and through his undersigned counsel and pursuant to SDCL 15-26A-67, hereby joins in the Reply Brief of Appellant Colonel Rick Miller filed in Appeal No. 29547 as to all issues. In addition, particular to the issue of Sheriff Thom's standing raised by Appellants in their Reply Brief in Appeal No. 29547, Sheriff Thom hereby adopts by reference the arguments and authorities he set forth in the Response Brief that he filed in Appeal No. 29546 on March 24, 2021.

Dated this 5th day of April, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorney for Appellant Sheriff Kevin Thom

By: */s/ Robert L. Morris*
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **APPELLANT SHERIFF KEVIN THOM'S JOINDER IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER,** upon the persons herein next designated, on the date below shown, as follows:

Grant Flynn Matthew W. Templar Office of the Attorney General 1302 E. Hwy 14, Suite 1 Pierre, SD 57501-8501 grant.flynn@state.sd.us matthew.templar@state.sd.us	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Brendan V. Johnson Timothy W. Billion Robins Kaplan LLP 140 N. Phillips Ave., Suite 307 Sioux Falls, SD 57104 bjohnson@robinskaplan.com tbillion@robinskaplan.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail
Matthew S. McCaulley Lisa M. Prostrollo Christopher Sommers Redstone Law Firm, LLP P.O. Box 1535 101 N. Phillips Ave, Suite 402 Sioux Falls, SD 5101-1535 matt@redstonelawfirm.com lisa@redstonelawfirm.com chris@redstonelawfirm.com	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery ☐ Odyssey File and Serve ☐ Federal Court - ECF ☒ E-mail

Dated this 5th day of April, 2021.

/s/ Robert L. Morris
Robert L. Morris