IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

* * * *

Appeal No. 30163

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TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,
Petitioners and Appellants,

vs.

CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE,
Respondents and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KEVIN J. KRULL
Circuit Court Judge

* * * *

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

References to this Case

This appeal will be referred to as "Bohn II". Appellants Tammy Bohn, Justin Bohn, and Brenda Vasknetz are collectively referred to as "Citizens". Appellee City of Sturgis is referred to as "City". Appellee Daniel Ainslie is referred to as "Ainslie". Sturgis and Ainslie will be together referred to as "Appellees". The Circuit Court in Meade County, South Dakota, Judge Kevin J. Krull presiding, is referred to as "Trial Court". References to the Clerk of Court's certified record in this case are prefaced with "2CR" (for 2nd Certified Record when compared with Bohn I). References to specific pages in the Appendix to this brief are prefaced with "2App".

References to the transcript for the April 22, 2022 scheduling hearing will be prefaced with "2ST" for 'scheduling transcript'. References to the May 20, 2022 motions hearing will be prefaced with "2HT" for 'hearing transcript'.

Sister Case

The sister case to this matter is Appeal #30008, which will be referred to as "Bohn I"; Citizens requested the Trial Court take judicial notice of Bohn I, which it did. 2CR 302; 2ST 3:23-4:7; 2HT 11:2-7; 2App015. Sturgis in Bohn I on appeal stated that "City is willing to allow this Court to stay this appeal until 46CIV22-077 is decided and then combine the appeals…." Sturgis Brief in Bohn I, p. 19. In Bohn I, Citizens also requested this Court consider both appeals simultaneously. Citizens' Reply Brief in Bohn I, p. 14. As such, Citizens ask this Court to take judicial notice of Appeal #30008, which this Court can do for sister cases. *State v. Piper*, 2006 S.D. 1, ¶ 38, 709 N.W.2d 783.

References to Bohn I

The references used in Citizens' briefs in Bohn I will be likewise used here. As such, the Appellees in Bohn I are collectively referred to as "Sturgis". References to the Clerk of Court's certified record in Bohn I are prefaced with "CR". References to specific pages in the Appendix to Appellants' briefs in Bohn I are prefaced with "A". References to the transcript for the January 18, 2022 scheduling hearing in Bohn I will be prefaced with "ST" for 'scheduling transcript'. References to the February 14, 2022 motions hearing in Bohn I will be prefaced with "HT" for 'hearing transcript'.

JURISDICTIONAL STATEMENT

This is an appeal of the 1) Memorandum Decision on Defendants' Motion to Dismiss ("Memorandum") entered by the Honorable Judge Kevin J. Krull of the Fourth Judicial Circuit Court, Meade County, South Dakota, on October 6, 2022 (2CR 374-382; 2App 001-9), 2) the Order of Dismissal ("Order") entered by the Honorable Judge Kevin J. Krull of the Fourth Judicial Circuit Court, Meade County, South Dakota, on October 13, 2022 (2CR 463; 2App 010), and 3) Supplemental Memorandum of Decision on Defendants Motion to Dismiss ("Supplemental Memorandum") entered by the Honorable Judge Kevin J. Krull of the Fourth Judicial Circuit Court, Meade County, South Dakota, on October 18, 2022 (2CR 467-468; 2App 011-12). The Notice of Entry for the Order with the attached Order was served on October 28, 2022. 2CR 469-471. The Notice of Appeal was filed on November 4, 2022. 2CR 472-473.

LEGAL ISSUES

1. Whether reversal is required to prevent perversion of the judicial machinery.

2. Whether the South Dakota Supreme Court should modify the Trial Court's decision and issue a writ of quo warranto or, alternatively, grant Citizens relief on their declaratory judgment claim.

3. Whether the Trial Court erred by entering its Memorandum, Order, and Supplemental Memorandum.

4. Whether the Trial Court erred by not granting Citizens Summary Judgment.

STATEMENT OF THE CASE AND FACTS

Case History

Citizens initiated this matter on March 22, 2022, while they were awaiting the Trial Court's entry of a written order memorializing the oral ruling made at the February 14, 2022 hearing in Bohn I. 2CR 96-97. Citizens thought it was important for this Court to consider Bohn I and Bohn II simultaneously. 2HT 53:2-15; 2App 020.

On March 23, 2022, Citizens served Appellees with a Motion for Summary Judgment, Statement of Undisputed Material Facts, Brief in Support of Motion for Summary Judgment, and Notice of Hearing. 2CR 74-97. The hearing was scheduled for April 22, 2022. 2CR 76.

On April 5, 2022 Appellees filed, *but did not serve* (*see* the Amended Certificate of Service at 2CR 181-182), their Motion to Dismiss and various other documents. 2CR 98-160. Between April 7 and April 12, 2022 the parties filed and served various documents. 2CR 161-173. On April 13, 2022 Appellees filed and served their Motion for Continuance and finally served Citizens with their Motion to Dismiss. 2CR 181-185. The Trial Court converted the April 22, 2022 motions hearing into a scheduling hearing. 2CR 186-188.

Between April 14 and May 9, 2022, the parties filed various documents, including Citizens re-filing their summary judgment documents (2CR 190-210) and Appellees filing their own motion for summary judgment and correlating documents (2CR 242-

288).[1] At the May 20, 2022 motions hearing the Court took the matter under advisement. 2HT 67:3.

On July 5, 2022, Appellees, without noticing a hearing, filed their ten page Motion to Deny Leave to Bring Quo Warranto Action. 2CR 357-366. Citizens filed a responsive objection on July 7, 2022. 2CR 367-369. On July 27, 2022, two additional lawyers for Appellees filed a Notice of Appearance. 2CR 370-371. On September 15, 2022, Appellees filed and served a Notice of Hearing on their Motion to Deny Leave to Bring Quo Warranto Action for October 11, 2022. 2CR 372-373. The Court entered and filed its Memorandum on October 6, 2022, negating the need for the October 11, 2022 hearing. 2CR 374-382; 2App 001-9.

The following documents were filed on October 13, 2022:

1) Appellees' proposed Judgment of Dismissal to the Court, asking the Court to adjudicate the Complaint as "dismissed in its entirety, on its merits, and with prejudice." 2CR 383 and 460; 2App 022.[2]

2) Citizens' Motion Requesting Clarification. 2CR 394-459;

3) Citizens' objection to the proposed Judgment of Dismissal (questioning how the matter could be decided on the merits with prejudice if there in fact was no standing or jurisdiction, as alleged by Sturgis). 2CR 460.

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[1] It is unclear why Appellees assert and acknowledge that the Trial Court had jurisdiction (and therefore Citizens have standing) to determine Appellees' own motion for summary judgment while also asserting Citizens lacked standing on the Complaint.

[2] Appellees again affirmatively acknowledged and judicially admitted Citizens have standing by seeking a resolution on the merits.

4) The Trial Court's Order of Dismissal, "[c]onsistent with the Memorandum Opinion." 2CR 463; 2App 010.

On October 14, 2022, Citizens filed and served Plaintiffs' Supplement to Motion Requesting Clarification. 2CR 464-466. The Court entered the Supplemental Memorandum on October 18, 2022. 2CR 467-468; 2App 011-12. The Notice of Entry of the Order was filed and served by Appellees on October 28, 2022. 2CR 469-471.

Citizens filed and served the Notice of Appeal on November 4, 2022. 2CR 472-473.

Statement of Facts

For brevity, Citizens incorporate the Statement of Facts set forth in their initial Brief in Bohn I. The Petition calling for the election in Bohn I is remarkably similar to the Petition calling for the 2007 election in Bohn II.

Bohn I	Bohn II
The Petition at issue in Bohn I read: "…petition that the municipal government of STURGIS be changed as follows and that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL § 9-11-5: The form of government for the municipality of Sturgis should be changed *from* the current form of municipal government (aldermanic *with* a city manager form of government) *to* an aldermanic form of government *without* a city manager." CR2, 145.	The Petition calling for the 2007 election read: "…petition that the municipal government of Sturgis be changed as follows and that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL ¶ [sic] 9-11-5: CITY MANAGER FORM of GOVERNMENT…." 2CR 137.

In 2007 Sturgis received a petition and then scheduled, held, and canvassed the election on the question of whether to have a "Change in Form of Government" to

become a "City Manager form of government". CR 227-228, 255-256, 260-261. The Municipal Election Ballot Statement ("Ballot Statement") for the 2007 election states:

> [T]he primary purpose for the [2007] Petition for Election to Change Municipal Government is to provide for a change from an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a City Manager form of government….

2CR 139; 2App 099 (underline emphasis added). The Ballot Statement asserts:

> On February 9, 2007, a Petition for Election to Change Municipal Government of the City of Sturgis was submitted… pursuant to SDCL 9-11-5. The Petition requested that the form of city government be changed from an aldermanic form of government to a city manager form of government.

2CR 139 (underlined emphasis added); 2App 099. The Ballot Statement further specified:

> A vote 'FOR' would adopt the proposed Petition for Election to Change Municipal Government to a City Manager form of government.
>
> A vote 'AGAINST' would defeat the proposed Petition for Election to Change Municipal Government to a City Manager form of government and would retain the existing Aldermanic form of government.

2CR 139; 2App 099 (underlined emphasis added).

On December 16, 2021, Citizens in Bohn I presented the City with a Petition that is, essentially, the inverse question posed in 2007. CR 1-2, 145, 228-230. Faye Bueno, the City of Sturgis Finance Officer, refused to certify the signatures on the Petition, despite later acknowledging it contained valid signatures from at least 15% of the electorate. CR 215. Citizens initiated a mandamus action in Bohn I, which Sturgis aggressively resisted and successfully persuaded the Trial Court to rule that the Petition was invalid because "the office of city manager is a power that may be granted to a

municipality by its voters, and not a 'form of government.'" 2CR 360. (underlined emphasis added).[3]

Here, Appellees resist Citizens' request to simply apply the law Sturgis successfully argued in Bohn I.

On May 12, 2022 the City Attorney's Report Concerning Decision and Order in the Mandamus Action acknowledged Sturgis' position in Bohn I was that "the power to employ a manager is not a form of municipal government", and further stated that the Citizens "took a real 'shellacking' in the election" for office. 2CR 397-399; 2App 033-35.[4]

In a blatant attempt to legislate substantial compliance with the city manager election laws in the 2007 election, the City adopted the following on July 5, 2022 as part of Resolution 2022-41 (while this matter was pending):

> **NOW, THEREFORE, BE IT RESOLVED:** that based on the facts as found and recited in this Resolution, the City residents who voted "yes" in the 2007 election unambiguously intended to empower and did empower the City Council to employ a city manager and that the election and subsequent employment of a city manager substantially complied with the requirements of South Dakota law.

2CR 407.

On October 6, 2022, the Court entered the Memorandum in Bohn II. 2CR 374-382; 2App 001-9. The Court in Bohn II, after taking the matters under advisement for

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[3] Appellees assert that "The Court [in Bohn I] accepted Plaintiffs' underlying premise, that the 2007 election empowered the City to employ a city manager, but denied Plaintiffs' relief…." 2CR 360. This is patently false, as the Trial Court in Bohn I expressly refused to rule on that question, saying "that's not before me, I don't know the answer to that." HT 42:7-11.

[4] It is unclear why City would take this step despite knowing that this matter was pending.

nearly five months from May 20, 2022 to October 6, 2022, nearly verbatim copied and pasted (notwithstanding a few formatting and non-substantive descriptive word changes) portions of Appellees' following briefs to create the Memorandum: 1) Appellees' April 28, 2022 Brief in Resistance to Plaintiffs' Motion for Summary Judgment,[5] 2) Appellees' April 5, 2022 Brief in Support of Motion to Dismiss,[6] and, 3) Appellees' April 28, 2022 Supplemental Brief in Support of Motion to Dismiss.[7]

The Trial Court did not address Citizens' standing arguments, including express statutory standing under SDCL § 9-1-6, which states: "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." SDCL § 9-1-6. 2CR 304; 2App 058. It is undisputed that Citizens are citizens and taxpayers residing in Sturgis. 2CR 2, 224 (Complaint ¶ 1 and Answer ¶ 2), and 320-325; 2App 060, 68, and 087-92. It is also

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[5] Compare 1) the entirety of the 'Factual Background' section in the Memorandum from page 1 through page 3 (2CR 374-376; 2App 001-3) with 2) the second sentence of the 'Background' section on page 1 of Appellees' April 28, 2022 Brief in Resistance to Plaintiffs' Motion for Summary Judgment through midsentence of the last sentence on page 3. (2CR 233-235). Both documents misuse the word "form" in lieu of "from" in the first sentence of the second paragraph purporting to cite the ballot's explanatory statement. The explanatory statement correctly used the word "from". 2CR 139; 2App 099.

[6] Compare 1) the Memorandum beginning at subheading 1 on page 4 of the Memorandum through the fourth sentence of the last paragraph on page 6 of the Memorandum (2CR 377-379; 2App 004-6) with 2) Appellees' April 5, 2022 Brief in Support of Motion to Dismiss beginning at subheading B on page 3 through subheading C on page 7 (2CR 102-106).

[7] Compare 1) the Memorandum's subheading 2 beginning on page 7 through 9 of the Memorandum (2CR 380-382; 2App 007-9) with 2) Appellees' April 28, 2022 Supplemental Brief in Support of Motion to Dismiss beginning with subheading A on page 2 through the first paragraph on page 6 (2CR 212-216).

undisputed that Citizens brought their action to prevent a violation of SDCL Title 9. 2CR 2-8 (Complaint, ¶¶ 16, 19-22, 28-30, 37, 50-51, 56-62); 2App 062-66.[8]

STANDARD OF REVIEW

"By its judgment, the Supreme Court may reverse, affirm, or modify the judgment or order appealed from, and may either direct a new trial or the entry by the trial court of such judgment as the Supreme Court deems is required under the record." SDCL 15-26A-12. "A judgment may be disturbed or modified if 'refusal to take such action appears to the court inconsistent with substantial justice' because 'substantial rights of the parties' will otherwise be jeopardized." *Matter of Estate of Tallman,* 1997 S.D. 49, ¶ 14, 562 N.W.2d 893 (citing SDCL § 15-6-61).

Motions to dismiss under SDCL 15-6-12(b) are "viewed with disfavor and seldom prevail." *North American Truck v. M.C.I. Comm.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710. Jurisdictional issues are reviewed de novo. *Hutterville Hutterian Brethren, Inc. v. Waldner,* 2010 S.D. 86, ¶ 18, 791 N.W.2d 169.

ARGUMENT

The crux of this case is whether City violated SDCL Title 9 by adopting its City Manager ordinances without first obtaining the required special power to do so pursuant to SDCL ch. 9-10, whether City's City Manager office legally exists, whether Ainslie is legally occupying the office of City Manager, and whether City is illegally spending

[8] Citizens' Complaint alleges, and Appellees admit, that a municipality must adhere to the requirements of SDCL ch. 9-10 to create an office of City Manager (2CR 4 and 225 (Complaint, ¶ 16 and Answer, ¶ 13); 2App 062 and 069), and that after the 2007 election the City legislated multiple "City Manager" ordinances (2CR 7 and 224 (*see* Complaint, ¶ 45 and Answer, ¶ 2); 2App 065 and 068.

public monies to pay Ainslie. This Court has repeatedly held that, as a matter of law, "[f]ailure to file a valid petition rendered the election void", and that:

> equitable relief is proper in prohibiting enforcement of an election result where the election itself could not legally have been held. When a petition is invalid, no authority or jurisdiction exists to hold an election. The same holds true for electing people to positions that do not legally exist.

Bienert v. Yankton School Dist., 63-3, 507 N.W.2d 88, 90 (S.D. 1993).

The arguments made by Sturgis in Bohn I and Appellees in Bohn II have weaved a Gordian knot – either 1) both the 2007 Petition and the Petition in Bohn I are valid calls for an election, or 2) both Petitions are invalid. If the Trial Court's holding in Bohn I is correct, then the 2007 petition likewise was not valid and City has never acquired the special power to employ a City Manager and pass the City Manager ordinances because the 2007 election had no effect:

> [t]he petition for such an election, is the only authority the officials of a city, town, or township have for the holding of such an election, and where there is no petition, or where the petition filed is insufficient in law (which amounts to the same thing as no petition at all), such officials are without any jurisdiction to hold such an election; and such election, if held, together with all proceedings had thereunder or pursuant thereto, are wholly void. Such an election furnishes no authority to the board of county commissioners, a city council, or a township board of supervisors to issue licenses or permits to sell intoxicating liquors....

Klaudt v. City of Menno, 72 S.D. 1, 28 N.W.2d 876 (S.D. 1947) (considering an improperly held special election on the question of a municipality procuring a license to sell intoxicating liquors) (internal citations omitted). If there is no special power for City to employ a City Manager and the City Manager ordinances were adopted in violation of SDCL Title 9, then there is no legal City Manager office to occupy. If there is no legally established office of City Manager to occupy, SDCL Title 9 is continuing to be violated by Ainslie purporting to occupy said office and Sturgis expending public monies to pay

Ainslie to do so. City admitted that "The City has employed a City Manager since adopting SRO 7.03.01 and continues to do so". 2CR 448. Without Court intervention, Appellees have been and will continue to violate SDCL Title 9 even despite the unnerving contradictions between Appellees' arguments here and Sturgis' arguments in Bohn I.

1. Reversal is required to prevent perversion of the judicial machinery.

Estoppel is necessary in this matter because Citizens are being "whipsawed" between Bohn I and Bohn II, compromising the integrity of the judicial process.[9] Despite expressly briefing and acknowledging that:

> [a] party to an action may not make a voluntary decision to proceed in a subsequent inconsistent manner when they find themselves in an undesirable position as a result of a legal posture. 'Judicial estoppel bars such gamesmanship';

Appellees made a voluntary decision to directly contradict the position taken in Bohn I. 2CR 361.

> …judicial estoppel requires neither privity between parties in the two proceedings nor detrimental reliance by the other party. The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery.

State v. St. Cloud, 465 N.W.2d 177, 180 (S.D. 1991) (underline emphasis added). By whipsawing Citizens under these unique circumstances, Appellees pervert the judicial machinery.

A party is "whipsawed" when inconsistent positions are taken in two separate matters. *Fullmer v. State Farm Ins. Co.,* 498 N.W.2d 357, 358 (S.D. 1993); *Kaiser v.*

[9] Citizens raised the issue of res judicata before the Trial Court. 2CR 317-19.

University Physicians Clinic, 2006 S.D. 95, ¶ 37, 724 N.W.2d 186. When the assertions are "perceptibly different" in two matters, taking inconsistent positions implicates the doctrine of judicial estoppel to protect the essential integrity of the judicial process; "[g]enerally, a party may not successfully maintain a position in litigation only to later change to a contrary position, 'especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Healy Ranch Partnership v. Mines*, 2022 S.D. 44, ¶¶ 50 and 53 (emphasis added).

The following table compares many, though not all, of the inconsistent and 'perceptibly different' positions taken by Sturgis in Bohn I and Appellees in Bohn II (underlines added for emphasis):[10]

Bohn I	Bohn II
City Manager Form of Government	
"the employment of a city manager is not a 'form of government' but is instead a special power granted to a municipality." A 26.	"Resolution 2007-15 used the language 'For the Change in Form of Government' when referencing the election, and…that the City of Sturgis will change to the manager form of government." 2CR235; 2App 038.
Substantial Compliance	
"I've noticed a couple truisms about the practice of law. I have come to understand, Your Honor, that you rarely get or can expect the correct answer if you ask the wrong question. I think that's the admonition all lawyers get in law school, to be careful what you ask for because you might get something else…." (HT 21:6-12).	"While labeled under an incorrect statute and as a "form of government, the petition and election substantially complied with all requirements under SDCL § 9-10-1, and the intent of the petition and election was to determine whether to employ a city manager in the City of Sturgis." 2CR 231 (at paragraph 11).
"Your Honor, for the petition to be appropriate, it has to ask the correct question. If you don't ask the correct question, as I mentioned at the beginning	"Any erroneous references to a different statute, and using the term 'form of government' do not impact the underlying substantive intent of the petition and

[10] Sturgis in Bohn I is represented by two attorneys who, along with two additional attorneys, represent the Appellees in Bohn II.

of this argument, your likelihood of getting the right answer is reduced, sometimes dramatically." HT 44:5-9.	election. Any reliance on these erroneous references is placing form over substance." 2CR 239 and 256; 2App 042.
"The procedure for changing the form of government is different than the procedure to authorize the employment of a city manager." A 26.	"Substantively, the City complied with all of the requirements to employ a city manager under SDCL §9-10-1. Therefore, the law supports that the April 10, 2007, election employing a city manager in the City of Sturgis was a valid election which granted the City the authority to employ a city manager." 2CR 239; 2App 042.
"The question posed in the Petition conflates the power to employ a city manager with a change in form of city government." A 27.	"As a matter of law, the April 10, 2007, election substantively complied with SDCL § 9-10-1, and legally provided the City Council the authority to hire a City Manager." 2CR 253. *See also* 2CR 331-34.
"The city denied the application or petition for change of form of government because the underlying predicate question was improper." HT 22:16-18.	"There is no dispute that Resolutions 2007-09, 2007-15, and the ballot for the April 10, 2007, election reference SDCL § 9-11-5, and a change in municipal government." 2CR 238; 2App 041.
Liberally Construe	
"The defect in the petition is not a mere technicality, but instead the defect goes to [sic] core of the question posed. A petition must pose a lawful question to be valid. There is nothing to liberally construe in the petition. The question is either lawful or not. The Circuit Court cannot liberally construe a petition which proposes an unlawful result." Appellee Brief in Bohn I, pp. 24-25 (internal citations omitted).	"Plaintiffs contend the citizens who filed the Petition for an Election to Change Municipal Government cited the wrong statute in their Petition and in artfully [sic] phrased the question presented. Plaintiffs further say those errors vitiate the operation of City government for the past 15 years. Plaintiffs' argument ignores S.D.C.L. § 2-1-11, which states 'the petitions herein provided for shall be liberally construed, so that the real intention of the petitioners may not be defeated by a mere technicality." 2CR 107.
"Confusion can be created by using a term of art. Colloquially 'form of government' is just such a term of art…[Citizens] didn't have a clue what they were asking for." A 70 (at 32:5-7 and 17-19).	"It is undisputed that Resolutions 2007-09, 2007-15, and the ballot for the April 10, 2007, election refer to SDCL § 9-11-5, and a change in municipal government. However, these references are not

	dispositive to the substantive effect of the election….Both the petition signers and the voters knew they were voting whether to employ a city manager in the City." 2CR255 and 256.

The positions taken by Sturgis in Bohn I and Appellees in Bohn II are clearly inconsistent and perceptibly different. By not addressing Citizens' standing arguments at all and adopting Appellees' briefs nearly verbatim in Bohn II, the Trial Court erred by allowing Citizens to get whipsawed, compromising the integrity of the judicial process and perverting the judicial machinery. Citizens simply ask their local government treat them civilly and fairly.

Res judicata is implicated when four elements are satisfied:

> (1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding.

Farmer v. Dept. of Revenue & Regulation, 2010 S.D. 35, ¶ 9, 781 N.W.2d 655 (internal citation omitted).[11]

[11] Collateral estoppel is also applicable in this matter. "Where a subsequent action between the same parties or their privies is on a different cause of action the judgment in the former operates as an estoppel in respect to issues, claims or defenses actually litigated and determined." *Kowing v. Williams,* 75 S.D. 454, 67 N.W.2d 780 (S.D. 1954) (internal citation omitted).

Appellants in Bohn I are also the Appellants in Bohn II. On April 14, 2022, the Trial Court in Bohn I (which is the same Trial Court here) filed its Memorandum Decision and Order ("Bohn I Order"), holding that there is no City Manager form of government. A3-4. The City of Sturgis (the City itself as well as the City through its Councilmembers and Mayor) and the Citizens were parties in both actions. Although Mr. Ainslie was not a named party in Bohn I, he is a party to this action because he claims to be legally holding the office of Sturgis City Manager. Lastly, the Trial Court granted Sturgis Summary Judgment in Bohn I. A4. [12] Judicial estoppel applies here insofar as the Trial Court in Bohn I is affirmed.

Res Judicata bars Appellees from arguing in Bohn II against the express decision they successfully persuaded the Trial Court to make in Bohn I. Sturgis' arguments now before the Court are not arguments in the alternative, but instead directly contradict the

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> Collateral estoppel prevents relitigation of issues that were actually litigated in a prior proceeding. *Id.* It also precludes a party which successfully maintains a certain position in a legal proceeding . . . from later assuming a contrary position simply because that party's interests have changed, especially if the change works to the prejudice of one who acquiesced in the position formerly taken by that party. The purpose of collateral estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. This Court has held that three elements must be satisfied in order to apply collateral estoppel: (1) the later position must be clearly inconsistent with the earlier one; (2) the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and (3) the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped.

Dakota, Mn & E. R. v. Acuity, 2006 S.D. 72, ¶ 13, 720 N.W.2d 655 (internal citations omitted). All of the elements are met in this case.

[12] Even if judicial estoppel required privity, it exists here, and because Appellees also asked for the Trial Court in Bohn II to invoke judicial estoppel. 2CR 361-65; 2App 027-31.

position taken by Sturgis and adopted by the Court in Bohn I. Appellees have made it clear they want it both ways to whipsaw Citizens, and this Court should correct this perversion of the judicial machinery by granting Citizens relief.

2. This Court should modify the Trial Court's decision and issue a writ of quo warranto or, alternatively, a declaratory judgment in favor of Citizens.

This Court should modify the Trial Court's Memorandum, Order, and Supplementary Memorandum to grant Citizens relief. This Court can modify the judgment or order appealed from. SDCL § 15-26A-12; 2App 100. "A judgment may be disturbed or modified if 'refusal to take such action appears to the court inconsistent with substantial justice' because 'substantial rights of the parties' will otherwise be jeopardized." *Matter of Estate of Tallman,* 1997 S.D. 49, ¶ 14, 562 N.W.2d 893.

It is inconsistent with substantial justice for Citizens to be whipsawed with Sturgis being successful in Bohn I and Appellees in Bohn II. Without this Court's intervention, both Citizens' and the taxpayers' substantial rights are not only jeopardized, but trampled upon. Resulting in a perversion of the judicial machinery.

This Court should exercise its authority under SDCL § 15-26A-12 and either 1) issue a writ of mandamus as requested in Bohn I, or 2) grant Citizens leave and issue a writ of quo warranto or, alternatively, grant Citizens declaratory judgment.[13]

3. The Trial Court made reversible error by entering the Memorandum, Order, and Supplemental Memorandum.

[13] However, even if this Court grants Citizens relief in Bohn I, Citizens are still entitled to relief in Bohn II on the standing issue; in that event this Court should reverse the Trial Court on the issue of standing with directions to the Trial Court in Bohn II to allow Citizens an opportunity to voluntarily dismiss their Complaint in Bohn II.

The Trial Court made reversible error by entering the Memorandum, Order, and Supplemental Memorandum based on Citizens' lack of standing.

> Whether a party has standing is a legal conclusion, which we review under the de novo standard. In general, a party establishes standing by showing "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.

H & W CONTRACTING v. City of Watertown, 2001 S.D. 107, ¶ 9, 633 N.W.2d 167 (underline emphasis added) (internal citations omitted). There are multiple exceptions to the general requirement to show actual or threatened injury to have standing which include, but are not limited to, the following:

1) "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." SDCL § 9-1-6; 2App 058.

2) "Any person … whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." SDCL § 21-24-3 (in part); 2App 059.

3) "[h]owever, a taxpayer need not suffer special injury to himself to entitle him to institute an action to protect public rights." *H & W CONTRACTING v. City of Watertown*, 2001 S.D. 107, ¶ 11, 633 N.W.2d 167 (internal citation omitted).

See also, Agar School Dist. No. 58-1 Bd. of Educ., Agar, S.D. v. McGee, 527 N.W.2d 282 (S.D. 1995) (citing *Wyatt v. Kundert*, 375 N.W.2d 186, 195 (S.D.1985), in turn citing *State ex rel. Jensen v. Kelly*, 65 S.D. 345, 347, 274 N.W. 319, 321 (S.D. 1937)).

Despite Citizens pointing the Trial Court to the exceptions listed above, the Trial Court did not analyze any of them, in clear reversible error.

It is without question that the 2007 petition and election were pursuant to SDCL § 9-11-5. 2CR 14-15, 19-20, and 139; 2App 099. After the 2007 election, City passed several ordinances relating to having a city manager. 2CR 330. Ainslie was hired under

the auspices that City possessed the special power to employ him as a City Manager and City has paid him to do so. 2CR 226 (at ¶ 22-24).[14] It is undisputed in this case that "The only way for a municipality to effect the office of a 'City Manager' is to do so pursuant to the procedures required in SDCL ch. 9-10." 2CR 6 (paragraph 25 of the Complaint) and 224 (paragraph 2 of the Answer); 2App 064 and 068. It is likewise undisputed in this case that "to create the office of City Manager, the petition and election requirements provided under SDCL Chapter 9-10 must be met." 2CR 225 (paragraph 13 of Appellees' Answer), 2App 069; *See also* 2CR 4 (paragraph 16 of the Complaint), 2App 062. Citizens logically brought this proceeding based on the arguments made by Sturgis in Bohn I and the Trial Court's ruling therein. 2CR 6-7 (Complaint ¶¶ 37-47); 2App 064-65.

This Court has previously determined a municipal office did not exist when challenged by an individual who did not claim to be entitled to hold said office:

> [i]t is manifest that no person could lawfully [hold the office of City Manager], and indeed that such office could not exist, until the establishment of the [office] had been accomplished pursuant to law. The statutory method for establishing such [office] is by action of the electors. Such action of the electors is not completed and is not sufficient to constitute the establishment of the [office] or create the office of [City Manager] thereof until there have been, first, a valid and lawful submission of the question to the electors; second, a vote thereon; and, third, a legal canvass of said vote and a lawful declaration of the favorable result thereof. In the instant case the [first and second] essential element[s are] utterly lacking.

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[14] The Trial Court also simply adopted Appellees' argument (without any supporting evidence) that "Plaintiff's [sic] disagreement is solely based on Mr. Ainslie's implementation of the City Council's vision of the City." 2CR 381; 2App 008. There is zero evidence in the record supporting this finding, and further illustrates the Trial Court's erroneous ruling. It is truly unfortunate that Appellees have taken an ad hominem approach to personally attack Citizens in both Bohn I and Bohn II.

Hurley v. Coursey, 64 S.D. 131, 265 N.W. 4, 9 (S.D. 1936).[15]

Here, Appellees make "a factual challenge to the Court's subject-matter jurisdiction", claiming Citizens had no 'special interest'. 2CR 103. However, Appellees simultaneously acknowledge Citizens' special interest by asking the Trial Court to 1) invoke judicial estoppel, 2) dismiss the Complaint on the merits, and 3) grant Appellees' motion for summary judgment. 2CR 357-365, 383, and 242-243, respectively. Appellees make a judicial admission that Citizens have standing by acknowledging these special interests, asserting judicial estoppel, and asking the Trial Court to rule on the merits. The standing argument should end here.

The Trial Court in Bohn II made reversible error by dismissing Citizens' declaratory judgment and quo warranto matters based on a lack of standing. Other reasons this Court should find standing are set forth below.

a. The Trial Court made reversible error by dismissing Citizens' declaratory judgment action.

Citizens had the express authority to bring their declaratory judgment matter. The law is clear: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." SDCL § 21-24-1. 2App 073. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." SDCL § 15-6-57 (in part); 2App 074. *See also, Thom v.*

[15] In an interesting set of circumstances, Steve Hurley challenged the existence of the office of a municipal court despite never being a candidate for said office. *Hurley*, at 7. Hurley made this challenge not just after the election to purportedly create the office, but after a later election to seat a judge for the office. The bracketed changes in the cite illustrate how and why *Hurley* should and does apply to this case.

Barnett, 2021 S.D. 65 and *Agar School Dist. No. 58-1 Bd. of Educ., Agar, S.D. v. McGee*, 527 N.W.2d 282, 287 (S.D. 1995).

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

SDCL § 21-24-3; 2App 059 (underline added for emphasis). Because a municipality with the special power to employ a city manager is substantially differently structured and operated than one without, Citizens' rights, status, and legal relations with the City are affected by the city manager ordinances passed by City after the 2007 election. *Id.* A 45. Therefore, Citizens have express standing to adjudicate the validity of the ordinances by declaratory action.

The Trial Court made reversible error by ignoring SDCL §§ 21-24-1, 21-24-3, and 15-6-57 when concluding "[t]herefore, the Plaintiffs' declaratory action is a disguised quo warranto claim and must be treated as such." 2CR380; 2App 007.[16] There is no authority for the Trial Court to treat Citizens' declaratory judgment action as a quo warranto. This Court reviews a dismissal *de novo*, and should reverse the Trial Court on this issue for misapplying the law as described above, and for the additional reasons set forth below.

The Trial Court's dismissal of Citizens' declaratory judgment action constitutes reversible error in three additional ways, each of which independently justify reversal: i) SDCL § 9-1-6 expressly grants Citizens standing, ii) Citizens possess standing to protect

[16] This sentence is also reused by the Trial Court at 2CR 380; 2App 007. This sentence was also used by Appellants, likewise without citing any authority. 2CR213.

public rights, and iii) Citizens possess a special interest different than that of the general public.

i. SDCL § 9-1-6 expressly grants Citizens standing.

Citizens affirmatively pointed the Trial Court to the fact that they have express statutory standing in this matter pursuant to SDCL § 9-1-6. 2CR 304, 348; 2App 077-081. The Trial Court did not even mention, much less analyze, Citizens' standing under this clear statute. 2CR 374-382 and 467-468; 2App 001-12. SDCL § 9-1-6 expressly and unambiguously gives Citizens standing:

> Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title.

SDCL § 9-1-6. 2App 058.[17]

It is undisputed that Citizens here are citizens and taxpayers residing in the City of Sturgis. 2CR 1 and 224 (Complaint, ¶ 1 and Answer, ¶ 2), 320-325; 2App 060 and 068. It is also undisputed that Plaintiffs brought this case forward to prevent violation of the provisions to SDCL Title 9 and protect public funds. 2CR 4-9 (Complaint ¶¶ 16, 21, 26-30, 33, 37-38, 45-47, 50-51, 56-62) 2App 062-067.

Based on the Trial Court's decision in Bohn I, Citizens challenge whether the voters in the 2007 election granted Sturgis the special power to employ a City Manager and enact its City Manager Ordinances – all actions that must be made pursuant to and in compliance with SDCL Title 9.[18]

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[17] SDCL § 9-1-6 provides a special status. For example, a citizen who does not pay real property taxes would not have the same status. *Winter Brothers Underground, Inc. v. City of Beresford,* 2002 S.D. 117, 652 N.W.2d 99.

[18] Appellees deny that the 2007 election was held pursuant to SDCL § 9-11-5 (2CR 225 at ¶ 11), despite the fact that the 2007 petition, resolution 2007-09, ballot statement, and

Because Citizens are citizens, taxpayers, and residents of Sturgis, they have express statutory standing to bring this action under SDCL § 9-1-6. The Trial Court failed to even analyze this issue, and this Court should grant Citizens relief.

ii. Citizens have standing to protect public rights.

Additionally, Citizens have separate standing in this matter to protect public rights, which Citizens argued to the Trial Court. 2CR304-305; 2App 077-78. The Trial Court did not even mention the phrase "public rights" in its analysis. 2CR374-382; 2App 001-12. This Court has previously acknowledged that public rights are at issue in a special election under the "City Manager Law", holding that "in view of the nature of this action—the public rights involved therein, and the relief granted by the trial court—we deem it highly proper and in the interests of the public welfare that we proceed to determine the merits of this appeal." *Toohey v. Burnside*, 40 S.D. 579, 168 N.W. 742, 743 (S.D. 1918) (underline added for emphasis).

In assessing standing for a Declaratory Judgment action, South Dakota has long recognized that:

> A taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights. The constitutionality of legislation affecting the use of public funds is a matter of public right. Ownership, special interest, or injury is not a prerequisite to litigate a case ... involving public funds.

Wyatt v. Kundert, 375 N.W.2d 186, 196 (S.D. 1985) (original citations omitted). *See also, Kanaly v. State By and Through Janklow*, 368 N.W.2d 819, 827 (S.D. 1985); *Edgemont School Dist. 23-1 v. South Dakota Dept. of Revenue*, 1999 S.D. 48, ¶ 16, 593 N.W.2d 36;

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canvass of the vote all expressly state otherwise. CR 14, 227-228, 255-256, 260-261, and 358-59.

and *State ex rel. Adkins v. Lien,* 68 N.W. 748 (S.D. 1896). "Since 1896, we have stated that 'taxpayers' and 'electors' have standing without demonstrating a special interest in the action….If the taxpayer or elector seeks to protect a public right, no special injury or special interest need be established." *Stumes v. Bloomberg,* 1996 S.D. 93, ¶ 8, 551 N.W.2d 590 (internal citations omitted). The Trial Court erred by ignoring the law and justifying dismissal on the rationale that "[Citizens] do not point to any specific injury or threatened injury to a right or interest." 2CR381; 2App 008.[19] The Trial Court also erroneously determined that the "Court would need to speculate to find an injury suffered by the Plaintiffs, which is a direct result of the 2007 election to employ a City Manager. Therefore, the Plaintiffs do not have standing to bring a declaratory action…." 2CR 381-382; 2App 008-9.

Granting City the special power to employ a City Manager pursuant to SDCL § 9-10-1 is the right of the people, i.e., a public right. S.D. Const. art. VI § 26 and SDCL § 9-10-1; 2App 093-94. A special election relating to a City Manager undisputedly involves public rights. *Toohey*, at 743. Because Citizens have standing by virtue of being taxpayers and the fact that this matter is to protect the rights of the people and public funds, the Trial Court imposed an improper test on Citizens in this matter to determine whether they had a "special interest", requiring reversal.

iii. Citizens possess a special interest different than that of the general public.

Even if Citizens were required to have a special interest for the declaratory judgment matter, they do have special interests. The Trial Court erred by concluding "All

[19] Further, Citizens disagree that they did not point to a specific injury or interest. 2CR 305-306.

that the [Citizens] are alleging in their Complaint is an interest that they have in common with the public generally." 2CR 468; 2App 012. The Trial Court erroneously imposed, without authority, an illogical test on Citizens that "One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office…. If a person does not allege they have a right to the challenged office, then they have no "special interest" in the action." 2CR 378; 2App 005 (internal citations omitted). This conclusion by the Trial Court directly contradicts *Hurley*, a case expressly acknowledged and cited by Citizens, Appellees, and the Trial Court. 2CR 93, 104, 191, 348-351, 378, and 388; *see also, Hurley*, at ¶¶ 7 and 8. [20] The facts in this case are directly analogous to *Hurley*, where the existence of an office is the question, not who is entitled to hold the office.

Additionally, If it were true that Citizens merely had the same interest as the general public, then surely Appellees in Bohn II would not have 1) sought imposition of judicial estoppel (2CR 357), 2) petitioned the Board of Elections (A 30), 3) investigated Citizens' conduct without any authority to do so (A 25-29), 4) directly attacked Citizens' credibility (A 54), 5) made derogatory comments about Citizens on multiple occasions (2CR 399; 2HT 28:15-18; Sturgis Brief in Bohn I, at fn. 4.)[21], and 6) issued a government

[20] "Hurley had not been a candidate for the office of municipal judge in the 1935 election, and it is entirely plain that Hurley's contest is predicated upon the theory that there had never been a valid establishment of any municipal court in Rapid City, and consequently that there was no such office as that of judge of said court, and that neither Coursey nor anyone else could be elected thereto." *Hurley v. Coursey*, 64 S.D. 131, 135-136, 265 N.W. 4 (S.D. 1936). *See also, Bronson v. Rapid City,* 259 N.W. 674 (S.D. 1935) for more details leading up to the *Hurley* case.

[21] Despite Citizens' assertion at the May 20, 2022 Hearing in Bohn II that comments about a shellacking were "incredibly unprofessional and ad hominem against [Citizens]

press release on the eve of an election accusing Citizens of trying to "undo the will of the people" and that "[t]heir action threatens to damage the City's relationship with employees, creditors, and Rally Sponsors." (2CR 466) One can only hope that the general public is not subject to the same kind of treatment Citizens have been.

Additionally, Plaintiffs have other special statuses and interests different that of the general public:

(A) Plaintiffs are signors, sponsors, and circulators of the Petition in Bohn I, which was deemed invalid by Sturgis. A1.

(B) Citizens are parties in Bohn I. A1-4.

(C) Citizens have a special, express statutory interest pursuant to SDCL § 9-1-6. 2CR 304.

Citizens have a special interest in this matter, and this Court should grant them relief.

b. The Trial Court made reversible error by granting Appellees' motion to dismiss Citizens' request for a writ of quo warranto.

South Dakota law is clear: a civil action in the nature of quo warranto is an available (though not exclusive) remedy to challenge the legal existence of a municipal office which requires the electorates' grant of a special power in order to exist. *Hurley,* at 8. The Appellees and Trial Court expressly acknowledged the holding in *Hurley* that "Quo Warranto allows a person to attack the existence of an office" (2CR 104 and 378; 2App 049 and 005, respectively).

> Quo warranto allows a person…to attack the existence of an office. *See Hurley v. Coursey,* 64 S.D. 131, 265 N.W. 4, 9 (S.D. 1936) (allowing the

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should stop" (2HT30:15-18; 2App 019), such attacks continue. *See* the September 27, 2022 Sturgis Brief in Bohn I, at fn. 4.

> attack of an elected municipal judge by addressing the existence of the municipal court to which the judge serves).

This Court in *Hurley* emphasized "That [Hurley] might have sought it by quo warranto is clear, but it does not follow that a civil action in the nature of quo warranto (section 2781 *et seq.*, RC 1919) was his only available remedy." *Hurley*, at 8.[22]

Citizens initiated their Quo Warranto action pursuant to SDCL Ch. 21-28. SDCL § 21-28-2; 2App 095. The Trial Court dismissed the quo warranto matter on the erroneous rationale that Citizens:

> fail to allege they were granted leave…[and do not] allege any facts on which to find they have a 'special interest'...Additionally, allowing the [Citizens] to challenge the City Manager position more than a decade after it has been established would completely undermine all public interaction with that office; therefore, for all of the reasons stated above the Defendants Motion to Dismiss the Quo Warranto Action is GRANTED.

2CR 379; 2App 006. The Trial Court erred by finding Citizens had no special interest, refusing to grant leave, and dismissing the matter.

i. The Trial Court erred by determining Citizens have no special interest.

Citizens have a special status and interest to maintain the quo warranto action by virtue of SDCL § 9-1-6, as previously briefed. SDCL § 9-1-6; 2App 058.[23] If City passed

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[22] Though the Trial Court and Appellees acknowledge *Hurley*, they confusingly assert that Citizens had no special interest because "[i]f a person does not allege they have a right to the challenged office, then they have no 'special interest' in the action." 2CR 105, 177, and 378; 2App 050 and 005, respectively. *Hurley* proves otherwise. Appellees' argument, which the Trial Court adopted, would require one challenging the existence of an office to simultaneously assert their right to hold said office, which is a false dichotomy logical fallacy.

[23] Citizens have other additional statuses and special interests as well, argued in the preceding section, which is incorporated herein for brevity.

ordinances and is employing a City Manager without having been granted the special power to do so by the people, then this quo warranto action is a proper remedy for Appellees' violations of SDCL ch. 9-10.[24] *See Hurley*, at 8. The Trial Court erroneously misapplied the law in a way that prejudices Citizens; despite acknowledging and citing *Hurley,* the Trial Court held "Therefore, to have a 'special interest' to an action under SDCL § 21-28-3, the person must contend they have rights to the challenged office." 2CR 379; 2App 006. If the Trial Court's holding is affirmed, then no one could ever challenge the existence of an office, because they could not, with a straight face, claim entitlement to a nonexistent office when suing out the matter.

The Trial Court also misapplied the *Lippold* case, articulating that "The Court found that allowing the public to raise a collateral attack to the validity of an office, years after establishment, would undermine any public interaction with the office." 2CR 379; 2App 006. The facts in the *Lippold* case has no bearing in this proceeding, as it dealt with a challenge to the incorporation of the City of Buffalo Chip and whether or not non-state parties have standing in light of SDCL § 9-3-20, a statute that is not applicable here, which Citizens briefed to the Trial Court. 2CR 352-353; 2App 085-86. The Trial Court further erroneously dismissed the Quo Warranto action in part because "Additionally, allowing the Plaintiffs to challenge the City Manager position more than a decade after it has been established would completely undermine all public interaction with that office…." 2CR 379; 2App 006. There is no authority supporting this.

[24] Note, SDCL § 9-1-6 grants special status to a citizen and taxpayer. It does not grant standing to a mere resident of Sturgis nor anyone merely conducting business in Sturgis. The status of a citizen and taxpayer is different than that of the general public, and is therefore a special status.

The Trial Court did not apply the correct law, prejudicing Citizens. This Court should reverse, finding Citizens have a special interest under SDCL § 21-28-2.

ii. The Trial Court erred by not granting leave.

Citizens requested the Trial Court grant them leave of Court. 2CR 347. "[L]eave shall be freely given when justice so requires." SDCL § 15-6-15(a) (in part, discussing amendments to pleadings). Without citing any authority, Appellees assert that "[s]ince the Plaintiffs filed the quo warranto action before being granted leave, the Plaintiffs [sic] Complaint is materially defective." 2CR 178-179. Certainly, under the circumstances of Bohn I and Bohn II, had Plaintiffs requested *ex parte* leave of court prior to initiating the action then the Defendants would have complained about *ex parte* communications with the Court. Plaintiffs' Motion Requesting Leave of Court was filed and served on April 11, 2022, weeks before Defendants filed and served their Answer on April 28, 2022. 2CR 171 and 224-229. Appellees are in no way prejudiced by the way Citizens ask for leave- in fact, Appellees benefit from Citizens' professional courtesy by having a seat at the table while the Court considers the issue.[25] Justice requires that leave be freely given, and the Trial Court erred by not granting Citizens' request for leave of court. This Court should reverse, granting Citizens leave of court for the quo warranto matter.

c. The Trial Court made reversible error by granting dismissal without complying with SDCL § 15-6-17(a).

[25] It also begs the question as to how the Court could procedurally grant leave prior to Citizens filing anything – the Court does not take action without a court file being opened.

Even if this Court finds Plaintiffs lack standing on the declaratory judgment and/or quo warranto matters, the Trial Court still made reversible error. The law is clear that:

> ….No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

SDCL § 15-6-17(a) (in part); 2App 096. In the event this Court finds Citizens lack of standing in this matter, a reasonable amount of time must be allowed for joinder or substitution of the real party in interest. Despite Citizens raising this issue (2CR306), the Trial Court allowed no time to allow for joinder or substitution and, if the Citizens are indeed not the real parties in interest, made reversible error that this Court should correct.

4. The Trial Court made reversible error by not granting citizens' motion for summary judgment.

Appellees did not object to any of Citizens' Statement of Undisputed Material Facts ("SUMF"). 2CR 194-208, 230-232. Despite claiming to dispute the majority of Citizens' 15 SUMFs, Appellees actually briefed an admission that "[t]he facts are generally undisputed." 2CR233.

Citizens' SUMFs were deemed admitted as a matter of law due to Appellees' failure to include appropriate citations to the record and otherwise adequately controvert the statements. SDCL § 15-6-56(c)(2) and (3); 2App 097. Only one out of 15 of Appellees' SUMF responses include a citation to the record. Appellees also failed to set forth specific facts showing there is a genuine issue for trial, as is required by statute. SDCL § 15-6-56(e); 2App 098. Appellees only made general legal conclusions and mere

allegations and denials – which are not legally sufficient to oppose summary judgment. *Schwaiger v. Avera Queen of Peace Health Servs.*, 2006 S.D. 44, ¶ 7, 714 N.W.2d 874, 877-78. *See also,* 2CR 311-319.

Because the SUMFs were admitted, the Trial Court only needed to apply the law (with its ruling in Bohn I in mind): "...where the petition filed is insufficient in law... and such an election, if held ... [is] wholly void." *Gooder v. Rudd,* 160 N.W. 808, 809 (S.D. 1916). Citizens are entitled to Summary Judgment as a matter of law, and the Trial Court erred by not granting Citizens summary judgment. This Court should reverse.

Because Appellees failed to adequately respond to the Citizens' SUMF, Citizens are entitled to Summary Judgment as a matter of law, and the Trial Court erred by not granting Citizens summary judgment. This Court should reverse.

CONCLUSION

Appellees have put the Citizens through the bandsaw in the public arena and the whipsaw in the judicial arena. Citizens have standing in this matter, and respectfully request this Court grant them relief.

Dated this 2nd day of February, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Tammy Bohn, Justin Bohn, and Brenda Vasknetz

By:_____

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CERTIFICATE OF COMPLIANCE

COME NOW, the Appellants, TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, by and through their attorney of record, Kellen B. Willert, of Bennett Main Gubbrud & Willert, P.C., 618 State Street, Belle Fourche, South Dakota, and pursuant to SDCL 15-26A-66(4), hereby certifies that he has complied with the type volume limitation of SDCL 15-26A-66(4) in that Appellants' Brief is double-spaced and proportionally spaced in Times New Roman, 12-point, with a total word count of 8,779 and a total character count of 44,635. The Appellants' Brief and all copies are in compliance with this rule.

Dated this 2nd day of February, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Tammy Bohn, Justin Bohn, and Brenda Vasknetz

By:_____

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CERTIFICATE OF SERVICE AND FILING

I, KELLEN B. WILLERT, attorney for BRENDA BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, do hereby certify that on the 2nd day of February, 2023. I caused a full, true, and complete copy of APPELLANTS' BRIEF to be served *electronically* through the Odyssey electronic filing system:

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I further certify that on the same day I caused the APPELLANTS' BRIEF to be filed *electronically* through the Odyssey electronic filing system and the original APPELLANTS' BRIEF to be filed by U.S. Mail with:

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

by depositing said copy in envelope securely sealed with first class postage thereon fully prepaid in the U.S. Mail in Belle Fourche, S.D., and addressed as shown above.

Dated this 2nd day of February, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.

By: _____
Kellen B. Willert

APPENDIX

Table of Contents

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, AND BRENDA VASKNETZ Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE Defendants.	)	File No: 46CIV22-77 MEMORANDUM OF DECISION ON DEFENDANTS MOTION TO DISMISS

On April 5, 2022, Defendants, by and through their attorney of record, Mark Marshall, filed a Motion to Dismiss COUNT I of the Complaint. On April 28, 2022, Defendants filed a Motion to Dismiss COUNT II of the Complaint. On May 13, 2022, the Plaintiffs, by and through their attorney of record, Kellen B. Willert filed a Response to the Defendants Motion to Dismiss. Accordingly, this Court having heard the arguments of Counsel, and having considered the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

FACTUAL BACKGROUND

On February 20, 2007, the Sturgis City Council passed Resolution 2007-09, which set the April 10, 2007, election to address whether to incorporate a city manager into the City of Sturgis' government. Resolution 2007-09 provides in full:

> ***Whereas*** it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota to bring the following proposal to voters for their approval or rejection pursuant to SDCL § 9- 11-5:
>
> > CITY MANAGER FORM OF GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment,

compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council and presents recommendations and programs to the City Council.

WHEREAS it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;

NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.

Dated this 20th day of February 2007.

Published: March 7, 2007
Effective: March 24, 2007

The April 10, 2007 election ballot provides an "Explanatory Statement" regarding the proposal to add the city manager position to the City of Sturgis. The "Explanatory Statement" on the ballot stated:

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition for election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change form an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a city Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the city Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents

> recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

Following the April 10, 2007, election, the City Council canvassed the votes on April 10, 2007. Resolution 2007-15 states that the proposal to add a City Manager passed with 1,224 yes votes, and 768 no votes. Resolution 2007-15 used the language "For the Change in Form of Government" when referencing the election, and provided that the "'For the Change in Form of Government' received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government." After the official canvassing, the City Council employed a City Manager and continues to do so.

STANDARD OF REVIEW

In this action, the Defendants have moved to dismiss the Plaintiffs' claims under SDCL 15-6-12(b)(1). A motion to dismiss under 12(b)(1), lack of subject matter jurisdiction, vests in this Court "the authority to consider material in the court file in addition to the pleadings." *Decker by Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362 (citations omitted). "Because at issue in a factual 12(b)(1) motion is the [circuit] court's jurisdiction—its very power to hear the case—there is substantial authority that the [circuit] court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case... To resolve the question, the court may hold hearings, consider live testimony, or review affidavits and documents." *Chase Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 12, 931 N.W.2d 707, 711 (citations omitted).

At the heart of subject matter jurisdiction lies standing. For a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person." *Black Bear v. Mid-Central Educ. Coop.*, 2020 S.D. 14, ¶ 11, 941 N.W.2d 207, 212 (citations omitted). "Whether a party has standing to maintain an action is a question of law[.]" *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779 (quotations omitted). "[T]he plaintiff will have the burden of proof that jurisdiction does in fact exist." *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990); *see also Black Bear*, 2020 S.D. 14, ¶ 12, 941 N.W.2d 207, 213 ("[E]ach element [of standing] must be supported in the same way as any other manner on which the plaintiff bears

the burden of proof[.]'"). Absent abrogation and waiver "[w]hether the defendants are protected by sovereign immunity is a question of law" which is a question that is jurisdictional in nature. *Osborn*, 918 F.2d at 730; *see also C. Brunsch. Inc.*, 2019 S.D. 41, ¶ 12, 931 N.W.2d at 711 (citations omitted).

OPINION

ISSUES

1. ***Do the Plaintiffs have standing to bring this action?***

"Motions to dismiss for lack of subject matter jurisdiction call into one of two categories: (1) facial attacks on allegations of subject matter jurisdiction within the complaint; or (2) disputes regarding the facts upon which subject matter jurisdiction rests." *Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710-11(citations and quotations omitted). "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." *Id.*, (quoting *Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1140 (8th Cir. 1998). Courts can consider matters outside the pleadings when presented with a factual challenge to subject-matter jurisdiction. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 174. (citations omitted). The South Dakota Supreme Court further explained that:

> A court deciding a motion under Rule12(b)(1) must distinguish between a "facial attack" and a "factual attack." In the first instance, the court restricts itself to the face of the pleadings, and the non- moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6) In a factual attack, the court considers matters outside the pleadings, and the non- moving party does not have the benefit of 12(b)(6) safeguards.

Id. Stated another way, a court does not assume the allegations in the complaint are true when considering factual challenges to subject-matter jurisdiction. *Alone*, 2019 S.D. 41, ¶ 12, 931 N.W.2d at 711. The City poses a factual challenge to the Court's subject-matter jurisdiction.

In *Lippold.* the South Dakota Supreme Court discussed the relationship between standing and subject-matter jurisdiction:

> Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void. Subject matter jurisdiction is conferred solely by constitutional or statutory provisions. Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ. The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought.

> Relevant to the existence of subject-matter jurisdiction is the doctrine of standing. A litigant must have standing in order to bring a claim in court. Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing.

Lippold v. Meade Cnty. Bd. of Commissioners, 2018 S.D. 7, ¶¶ 18,19, 906 N.W.2d at 921-22. (internal citations and quotations omitted).

> SDCL § 21-28-2 provides who may bring a quo warranto action. The statute states that:
>
> An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:
>
> (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;
>
> (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;
>
> (3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

Quo warranto allows a person to not only attack the validity of a municipal corporation, but also to attack the existence of an office. *State through Attorney General v. Buffalo Chip*, 2020 S.D. 63, ¶ 25, 951 N.W.2d 387, 396; *See also Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4, 9 (1936) (allowing the attack of an elected municipal judge by addressing the existence of the municipal court to which the judge serves). One must meet specific requirements to have standing to challenge the existence of either a municipal corporation or the existence of a public office. The court has no subject-matter jurisdiction without standing to bring a quo warranto action. *Lippold*, 2018 S.D. 7, ¶ 18, 906 N.W.2d at 922 (citing *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313)

A challenger must either file a complaint with the state's attorney, who will then proceed at their discretion on behalf of the state, or alternatively, proceed on their own if they have (1) a special interest in the action, and (2) they receive leave from the circuit court or circuit judge. SDCL § 21-28-3. One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office, such as a defeated candidate for that office. *Bridgman v. Koch*, 2013 S.D. 83, ¶ 8, 840 N.W.2d 676, 678. If a person does not allege they have a right to the challenged office, then they have no "special interest" in the action. *Id.*

(finding that a person who ran for state's attorney in Jerauld County did not have standing to also challenge the same person as state's attorney in Buffalo County). A private citizen has no "special interest" in an office merely from being a citizen or a taxpayer. *Cummings v. Mickelson*, 495 N.W.2d 493, 498 n.6 (S.D. 1993) (citing *Knockemuss v. De Kerchove,* 66 S.D. 446, 285 N.W. 441 (1939)).

In *Cummings,* the Court determined that two challengers to appointed judgeships did not have a "special interest" because they had not applied for the position. *Id.* Additionally, a third person had no "special interest" even though he applied for the position, because he could not establish his name was on the certification list sent to the Governor for selection. Therefore, to have a "special interest" to an action under SDCL § 21-28-3, the person must contend they have rights to the challenged office. The Court in *Lippold* explained the reasons for limiting actions brought by the state and preventing collateral attacks by individuals. 2018 S.D. 7, ¶ 23, 906 N.W.2d at 923. The Court found that allowing the public to raise a collateral attack to the validity of an office, years after establishment, would undermine any public interaction with the office. *Id.* (quoting *Merchants' National Bank v. McKinney*, 2 S.D. 106, 116-17, 48 N.W. 841, 844 (1891)). Lack of confidence in the validity of an office would require anyone doing business with the office to verify its validity of the office before doing business with it. *Id.* Limiting the ability to challenge the validity of an office to only the state, or parties with a special interest, prevents these types of collateral attacks.

The Plaintiffs challenge the existence of the City of Sturgis' City Manager position. Plaintiffs fail to allege they were granted leave by the Meade County Circuit Court to bring this action, nor do they allege any facts on which to find they have a "special interest" in the action. Without meeting these requirements, the only means to challenge the existence of the Sturgis City Manager is through the state's attorney acting on behalf of the state. Like *Lippold,* if State does not bring the challenge, then the Plaintiffs do not have standing, and the Court cannot exercise subject-matter jurisdiction. Because the State through the State Attorney is not bringing the Quo Warranto Action, this Court lacks standing. Additionally, allowing the Plaintiffs to challenge the City Manager position more than a decade after it has been established would completely undermine all public interaction with that office; therefore, for all of the reasons stated above the Defendants Motion to Dismiss the Quo Warranto Action is **GRANTED**.

2. Can the Plaintiffs bring a Declaratory Action against the Defendants?

The purpose of a declaratory action is to "enable parties to authoritatively settle their rights in advance of any invasion thereof." *Abata v. Pennington Country Board of Commissioners*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141). The Plaintiffs' Complaint does not assert any right the City may invade. Instead, the Plaintiffs merely restate the same substantive arguments as they did in their quo warranto claim. The Plaintiffs request the Court declare "that the 2007 Election granted the City no special power to employ a City Manager," and that "[t]he voters have not granted the City the special power to employ a City Manager." Complaint, 8 (filed March 18, 202 2). This is substantively identical to the Plaintiffs' quo warranto claim which requests the Court for a "Judgment entering a Quo Warranto ... declaring the 2007 Election had no effect and the voters did not grant the City a special power to employ a City Manager." *Id.* at 7. Substantively, both claims aim to address the City Manager office's existence and remove the existing City Manager.

SDCL Chapter 21-28 codifies the quo warranto common law in South Dakota. As part of this codification, the Legislature expressly limited who may bring a quo warranto action. SDCL § 21-28-2. The Plaintiffs' declaratory action fits precisely within the purpose of a quo warranto claim and attempts to circumvent the limitations on who may bring a quo warranto action. Allowing the Plaintiffs' declaratory action would raise the same concerns that serve as the basis for the quo warranto limitation. Therefore, the Plaintiffs' declaratory action is a disguised quo warranto claim and must be treated as such.

"[T]o establish standing in a declaratory judgment action the plaintiff must have 'personally ... suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.'" *Abata*, 2019 S.D. 39, ¶ 12 , 931 N.W.2d at 719 (quoting Benson, 2006 S.D. 8, ¶ 22, 710 N.W.2d at 141). To have standing, "a litigant must show: (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiffs' injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision." *Id.* In the Plaintiffs' complaint, they assert no basis to support they suffered an injury from the 2007 election or the City Manager office. While SDCL § 21-24-3 allows an interested person to secure a declaration of the construction or validity of an ordinance, this S.D. declaration is only provided if the ordinance "affect[s] the person seeking the declaration." *Kneip v. Herseth*, 87 S.D. 642, 647, 214 N.W.2d 93, 96 (citing SDCL § 21-24-3; *Torigian u. Saunders*, 97 N.W.2d

586 (S.D. 1959)). Restrictions on the extent to which declaratory judgment may be sought require "that there must be a justiciable controversy between legally protected rights of parties whose interests are adverse." *Id.* at 648 (citations omitted).

While it is apparent the Plaintiffs disagree with the policies and actions of Mr. Ainslie, the Sturgis City Manager, in their Complaint the Plaintiffs do not point to any specific injury or threatened injury to a right or interest. The Plaintiffs' disagreement is solely based on Mr. Ainslie's implementation of the City Council's vision of the City. Whether Mr. Ainslie is adequately pursuing the City Council's vision is a political question which is better resolved through the Sturgis City Council rather than the courts. *See* SDCL § 9-10-11 (providing that appointed city manager "may be removed by majority vote of the members of the governing body."); *see also Mcintyre v. Wick*, 1996 S.D. 147, ¶ 64, 558 N.W.2d 347, 364 (Sabers, J., dissenting) (providing that a "political question" is one that "courts will refuse to take cognizance, or to decide, on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative powers."). Ultimately, if a city manager is not performing to standard, the people may statutorily remove the sitting City Manager through their elected representative on the City Council. A city's elected governing body is better suited to addressing the needs of the people than the courts. *See State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 10, 785 N.W.2d 272, 279 (finding that the Court "has a history of not interfering with municipal governments" because "municipalities are familiar with their local conditions and know their own needs."). Any alleged injury to the Plaintiffs from the existence of the City Manager's office, or Mr. Ainslie's decisions, is political and outside of the Court's purview.

Additionally, even if an injury in fact, occurred through a City Manager's decision, the connection between this decision and the 2007 election are far too remote to give the Plaintiffs standing for a declaratory action. Any far-reaching connection between the Plaintiffs and the 2007 election are theoretical and speculative. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not happen." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (citing *Kneip*, 214 N.W.2d 93, 96 (S.D. 1974)). This Court will decline to hear an action "if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id.* (citing *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir. 1986)). The Court would need to speculate

to find an injury suffered by the Plaintiffs, which is a direct result of the 2007 election to employ a City Manager. Therefore, the Plaintiffs do not have standing to bring a declaratory action, thus the Defendants' Motion to Dismiss the Plaintiff's Declaratory Action is **GRANTED**.

CONCLUSION

Consistent with the foregoing Memorandum Decision, Defendants' Motion to Dismiss COUNT I and COUNT II, is **GRANTED**. COUNTS I and II are hereby **DISMISSED**. All other pending motions in this action are now considered **MOOT** and will not be addressed.

Dated this 6th day of October 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk of Courts
By Jen Rude
Deputy

FILED
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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, AND BRENDA VASKNETZ Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE Defendants.	)	File No: 46CIV22-77 ORDER OF DISMISSAL

The Court has entered its Memorandum of Opinion granting the Defendants' Motion to Dismiss the Plaintiffs' Complaint in its entirety. Consistent with the Memorandum Opinion, it is hereby:

ORDERED, ADJUDGED, AND DECREED that: Plaintiffs' Complaint is dismissed in its entirety.

Dated this 13th day of October, 2022.

BY THE COURT:

Attest:
Brill, Kimberly
Clerk/Deputy

Kevin J. Krull
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, AND BRENDA VASKNETZ Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE Defendants.	)	File No: 46CIV22-77 SUPPLEMENTAL MEMORANDUM OF DECISION ON DEFENDANTS MOTION TO DISMISS

Plaintiffs, by and through their attorney of record, filed a Motion Requesting Clarification on October 14, 2022. Plaintiffs bring two questions for this Court to Clarify. First, whether Plaintiffs have standing to bring their Declaratory Judgment Action pursuant to SDCL § 21-24-3, and second, what authority prohibits Plaintiffs from bringing both a quo warranto action and a declaratory judgment action.

OPINION

1. ***Do Plaintiffs under SDCL § 21-24-3 have standing to bring a Declaratory Judgment Action?***

SDCL § 21-24-3 states that:

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations *are affected by a statute, municipal ordinance, contract, or franchise*, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(emphasis added). The South Dakota Declaratory Judgment Act provides that its purpose is to "declare rights, status, and other legal relations." SDCL § 21-24-1. "This purpose may be accomplished by securing a declaration of the 'construction or validity' of any instrument, statute, or ordinance *if these affect the person seeking the declaration.*" *Kneip v. Herseth*, 87 S.D. 642, 647 (S.D. 1974) (citing *Torigian v. Saunders*, 77 S.D. 610, 97 N.W.2d 586 (S.D. 1959) (emphasis added). In a Declaratory Action proceeding the challenging party must have an "interest special or

peculiar to him and not merely an interest that he has in common with the public generally." *Torigian v. Saunders*, 77 S.D. 610, 97 N.W.2d 586, 589 (S.D. 1959). The Plaintiffs in the current case have not demonstrated that they have any special or peculiar interest to have standing to question the validity of the 2007 Election. The Plaintiffs state in their Complaint state that they brought this Declaratory Action matter forth "as residents, taxpayers, petition sponsors and candidates." All that the Plaintiffs are alleging in their Complaint is an interest that they have in common with the public generally. Until the Plaintiffs can show that they have some sort of a special or peculiar interest for seeking this Declaratory Judgment, they do not have standing.

2. ***What authority prohibits Plaintiffs from bringing both a quo warranto action and a declaratory judgement action.***

There is no authority that prohibits the Plaintiffs from bringing both a quo warranto action and a declaratory judgment action. The Court is not sure how the Plaintiffs interpreted the Memorandum of Decision to state that. On page 8 of the Memorandum of Decision this Court states that "[w]hile it is apparent the Plaintiffs disagree with the policies and actions of Mr. Ainslie, the Sturgis City Manager, in their Complaint the Plaintiffs do not point to any specific injury or threatened injury to a right or interest." The Plaintiffs can bring both a Quo Warranto Action and a Declaratory Action. This Court found that the Plaintiffs lack standing to bring a Quo Warranto action because they were not granted leave by the Meade County Circuit Court to bring this action, nor do they allege any facts on which to find they have a "special interest" in the action. Without meeting these requirements, the only means to challenge the existence of the Sturgis City Manager is through the state's attorney acting on behalf of the state. Lastly, this Court found that because the Plaintiffs have failed to show that they some sort of a special or peculiar interest, or specific injury to a right or interest in seeking a Declaratory Judgment Action in this case, they lack standing to seek the same.

Dated this 18 day of Oct 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk of Court
Deputy

FILED
OCT 18 2022
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4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF MEADE)	FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs,	Scheduling Hearing
vs.	46CIV22-77
CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE, Defendants.	

BEFORE: **THE HONORABLE KEVIN J. KRULL**
Circuit Court Judge
Sturgis, South Dakota
April 22, 2022, at 8:30 a.m.

APPEARANCES:

For the Plaintiffs: Kellen Brice Willert
Attorney at Law
618 State Street
Belle Fourche, South Dakota 57717

For the Defendants: Eric Charles Miller
Sturgis City Attorney's Office
1040 Harley-Davidson Way
Sturgis, South Dakota 57785

MR. MILLER: I think a lot of the motions -- for instance, the motion to leave may have a dispositive effect on the motion to dismiss, and the motion to dismiss may have a dispositive effect on the summary judgment.

THE COURT: Sure.

MR. MILLER: The Defendants would prefer having the summary judgment at a later hearing, and having the three other motions, pending motions at one hearing. I think if we could potentially set the summary judgment hearing at the end of the motion to dismiss and motion to leave hearing.

THE COURT: Well, I guess there's two ways we could do it. We can do that, or we can take them up in an order that's more logical all in one hearing. Mr. Willert, your thoughts?

MR. WILLERT: I'd rather do the one hearing, Your Honor. You know, there's basically the motion for summary judgment on Count 1 and then in the alternative on Count 2 as well. As I understand things, their motion to dismiss is trying to dismiss Count 1. There's only 15 material facts that I put in my statement of undisputed material facts. You know, this is a case -- depending on the law, you know, I think this is a clear case for summary judgment, and you know, I guess I'd also ask the Court to take notice of the mandamus file which I think which was Civil File 22-5. There are a lot of the same issues that are going back and

forth.

THE COURT: Sure.

MR. WILLERT: So I'd the Court to take notice of that as well.

THE COURT: Okay. Well, at the next hearing, or hearings, I will take judicial notice of the decision in the mandamus file, or the whole file.

I would prefer to schedule just one hearing in this matter. I understand your concern, Mr. Miller, but you know, if the first motion resolves everything, then we'll be done. If it doesn't, then we'll proceed onto the next one.

Probably an hour and a half which we had set aside for today is not enough time if we actually hear all of these motions. Would counsel agree with that?

MR. WILLERT: Yes, Your Honor.

MR. MILLER: Yes, Your Honor.

THE COURT: Okay. We don't need a whole day. I'm thinking maybe a half a day or maybe a couple hours?

MR. WILLERT: Your Honor, I would think that two hours would be good and four hours would be more than good.

THE COURT: Sure, okay. A lot of this has to do with my calendar. Let's see.

MR. WILLERT: And, Your Honor, before we really look at the scheduling too, I just -- just for my record, and I spoke

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF MEADE)

I, TAMMY STOLLE, RPR, an Official Court Reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that pages 1 through 7, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE KEVIN J. KRULL, Circuit Court Judge.

Dated at Sturgis, South Dakota, this 15th day of November, 2022.

/s/Tammy Stolle
TAMMY STOLLE, RPR
Registered Professional Reporter
My Commission Expires: 2/2/28

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)		
COUNTY OF MEADE)		FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,		
Plaintiffs,		Motion Hearing
vs.		46CIV22-77
CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,		
Defendants.		

BEFORE: **THE HONORABLE KEVIN J. KRULL**
Circuit Court Judge
Sturgis, South Dakota
May 20, 2022, at 1:15 p.m.

APPEARANCES:

For the Plaintiffs: Kellen Brice Willert
Attorney at Law
618 State Street
Belle Fourche, South Dakota 57717

For the Defendants: Mark F. Marshall and Eric Charles Miller
Sturgis City Attorney's Office
1040 Harley-Davidson Way
Sturgis, South Dakota 57785

County, even existed.

At this time I'd also like to ask the Court to take judicial notice of Court File 46CIV22-5 and that was the mandamus action that we had a couple months ago with basically these parties.

THE COURT: All right. It was my intent to take judicial notice of that file.

MR. WILLERT: Thank you, Your Honor.

And I had briefed this, again I'll try and just hit the wave tops, but the Defendants relied on the Brigman or *Bridgman* case in their briefs. That really stood for that a person could not challenge the candidacy of the Buffalo County State's Attorney, and it also says that a quo warranto must be timely directed to the current term of office. There's been -- in some of these pleadings the Defendants have alleged that Ainslie's, Mr. Ainslie's predecessor is an indispensable party to this action. Granted, they haven't noticed up or made a motion to that effect, but they've pointed that out. That's clearly not the case under the *Bridgman* case. No predecessors are needed because it's directed to the current term of office.

Defendants also rely on the *Cummings* case which did not address the existence of an office, and then lastly they rely on the *Lippold* case which challenges -- that case dealt with a challenge to the incorporation of a

In terms of there being no entity or no person having the authority to question things, that would essentially abrogate the *Hurley* case. That's not the case. In Hurley, they pushed forward.

In terms of the statement that the Plaintiffs' only remedy is to run for office. That's clearly not the case either, Your Honor. In the South Dakota Constitution, Bill of Rights, Section 26, the power is inherent in the people, they have the right in lawful and constituted methods to alter or reform their forms of government.

Remember, the way that the city manager was purportedly created, that office, according to Sturgis's argument, was by a change of form of government election. Certainly the people can undo that which they have done.

In terms of my clients receiving a shellacking, Your Honor, all I want to say is that's incredibly unprofessional and ad hominem attacks against my client should stop.

THE COURT: Well, let me address that. The results of those elections as far as I'm concerned are irrelevant. The fact that they ran, you have made an issue, the fact that they ran, but the results of the election are irrelevant, and you know, stuff doesn't change unless people get involved so I commend you for at least trying, so anyway. And by the way, is it Bone or Bohn?

much, all of those things, but one, the Defendants have not raised that issue. Two, the Plaintiffs at this time are dropping that request, okay, we are not requesting that he have to pay anything back.

THE COURT: Okay.

MR. WILLERT: However, I want to protect my record in the sense that they are seeking to protect public funds in the sense of future inappropriate expenditures, and so that's where we are, Your Honor. I think that clears things up so that the Court can make a decision, and realistically where I see both cases going is to the Supreme Court. No matter who essentially wins on this case, I would assume the other side will do that, and that's just fine, the Supreme Court can weigh in. I think by dropping that request will help get the matter before the Supreme Court.

THE COURT: Well, I just have a hard time -- I would have a hard time ordering a city employee who had applied for and obtained a job in good faith and did a job, you know, people can argue whether he's doing it well or not, but --

MR. WILLERT: And if I could just clarify my position, Your Honor. There is some statutory authority for paying back things when you did not appropriately hold an office. That was pled to essentially preserve our opportunity to make that request, and yeah, so we are dropping that request.

THE COURT: Okay. All right. All right, Mr. Miller, Mr.

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF MEADE)

I, TAMMY STOLLE, RPR, an Official Court Reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that pages 1 through 67, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE KEVIN J. KRULL, Circuit Court Judge.

Dated at Sturgis, South Dakota, this 20th day of December, 2022.

/s/Tammy Stolle
TAMMY STOLLE, RPR
Registered Professional Reporter
My Commission Expires: 2/2/28

STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, v. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE, Defendants.	46CIV22-000077 **JUDGMENT OF DISMISSAL**

The Court has entered its Memorandum Opinion granting the Defendants' Motion to Dismiss the Plaintiffs' Complaint in its entirety. A copy of said Memorandum Opinion is attached hereto, labeled as Exhibit A, and incorporated herein by reference.

Consistent with the Memorandum Opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that: Plaintiffs' Complaint is dismissed in its entirety, on its merits, and with prejudice.

Dated this ____ day of October, 2022.

BY THE COURT:

DENIED-OBJECTION FILED

Kevin J. Krull
Circuit Court Judge

Attest:

STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE, Defendants.	)	46CIV22-077 **MOTION TO DENY LEAVE TO BRING QUO WARRANTO ACTION**

Defendants move the Court for an Order Denying Leave to Bring an Action in of Quo Warranto. This Motion is based on the doctrine of judicial estoppel.

FACTUAL BACKGROUND

In early 2007 Sturgis residents circulated a "Petition for Election to Change Municipal Government." The City Finance Officer typically keeps the originals of such Petitions for one year and then discards them. (Affidavit of Fay Bueno, ¶ 6 (filed April 5, 2022). However, Ms. Bueno found a file copy of a blank petition as well as a part of a circulated petition and form of ballot in the Finance Office. Ms. Bueno attached copies of those documents to her Affidavit as Exhibits A, B, and C, respectively.

The Petition was filed in the Finance Office on February 7, 2007. The Finance Officer examined the Petition and concluded that it had the requisite

number of signatures to compel an election. Thereafter the following form ballot form was prepared:

OFFICIAL MUNICIPAL ELECTION BALLOT
STURGIS, SOUTH DAKOTA APRIL 10, 2007

STATEMENT

On February 9, 2007, a Petition for Election to Change Municipal Government of the City of Sturgis was submitted to the Finance Officer of the City of Sturgis requesting that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL 9-11-5. The Petition requested that the form of city government be changed from an aldermanic form of government to a city manager form of government. The petitions that were signed by registered voters in support of the petitions were timely filed with the City Finance Officer. The matter will be before the electorate at the annual municipal election which shall be held on the 10 day of April, 2007.

EXPLANATORY STATEMENT

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition For Election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change from an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a City Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council; however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall

be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

A vote "FOR" would adopt the proposed Petition for Election to Change Municipal Government to a City Manager form of government.

A vote "AGAINST" would defeat the proposed Petition for Election to Change Municipal Government to a City Manager form of government and would retain the existing Aldermanic form of government.

SHOULD THE PROPOSED PETITION FOR ELECTION TO CHANGE MUNICIPAL GOVERNMENT TO A CITY MANAGER FORM OF GOVERNMENT BE APPROVED?

O FOR
O AGAINST

On April 10, 2007, the citizens of Sturgis voted in favor of the Petition by a margin of 61.14 percent. 1,224 voters favored the proposed change, and 768 voters opposed the proposed change. No one challenged either the validity of the Petition or the outcome of the election. The City has employed a city manager ever since.

In *Bohn et al v. Bueno et al,* (46CIV22-05) (*Bohn 1*), Plaintiffs brought an action for mandamus to compel the City to hold an election on the following the following question:

> The form of government for the municipality of Sturgis should be changed from the current form of municipal government (aldermanic with a city manager from of government) to an aldermanic form of government without a city manager.

Affidavit and Application for Writ of Mandamus, ¶ 3, 2 (filed January 4, 2022). The Application assumed the City was empowered to employ a City Manager.

The City moved for summary judgment and asserted that the question posed was invalid because the state legislature does not recognize the office of

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city manager as a separate form of municipal government. The City's principal contention was that SDCL § 9-2-3 defines the forms of municipal government and states that "[e]ach municipality shall be governed by a board of trustees, a mayor and common council, or by a board of commissioners. A city manager (as an employee) may serve with any of the forms of government." As such, the office of city manager is a power that may be granted to a municipality by its voters, and not a "form of government."

This Court held a hearing on the City's Motion for Summary Judgment and subsequently issued a Memorandum Decision. The Court accepted Plaintiffs' underlying premise, that the 2007 election empowered the City to employ a city manager, but denied Plaintiffs' requested relief, noting:

> The Petition in this matter seeks to change the form of government of the City of Sturgis from aldermanic with a city manager to aldermanic without a city manager. **Such a change, however, does not change the city's form of government. It merely seeks to do away with the position of city manager, which is not a change in the city's form of government.** Since the Petition improperly seeks to achieve an outcome that is not possible, whether by initiative, referendum, or other means, it is invalid.

Memorandum Decision, 3-4, *Bohn et al. v. Bueno et al.* (46CIV22-005) (*Bohn 1*) (filed April 14, 2022) (Emphasis added).

Defeated, but undeterred, Plaintiffs brought the current action, abandoning the factual premise of first case and now contending that the 2007 election did not grant the City the authority to employ a city manager. Thus, in *Bohn 1*, the 2007 election was presumptively valid, and now in *Bohn 2*, the 2007 election was a nullity. The Plaintiffs' positions are not simply inconsistent, the positions are diametrically opposed to one another.

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To add injury to insult, after arguing that the 2007 election was a nullity, Plaintiffs appealed *Bohn 1* to the South Dakota Supreme Court, once again asserting the 2007 election presumptively empowered the City to employ a City Manager. Plaintiffs should not be allowed to have it both ways.

THE COURT SHOULD DENY LEAVE TO PROCEDE WITH QUO WARRANTO ON THE BASIS OF JUDICIAL ESTOPPEL

A. What is the Doctrine of Judicial Estoppel?

"Under the doctrine of judicial estoppel the party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving the same issues and parties." *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 32, 650 N.W.2d 829, 837 (citing Black's Law Dictionary 848 (6th ed. 1990)). "In order for the doctrine of judicial estoppel to apply, the two positions must be absolutely irreconcilable." *Id.* ¶ 33, 650 N.W.2d at 838 (citing *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D.1995)).

Stated another way, "[a] party to an action may not make a voluntary decision to proceed in a subsequent inconsistent manner when they find themselves in an undesirable position as a result of a legal posture. 'Judicial estoppel bars such gamesmanship.'" *Estes v. Millea*, 464 N.W.2d 616, 619 n. 3 (SD 1990) (quoting *Gregory v. Solem*, 449 N.W.2d 827, 832 n. 8 (SD 1989) (other citations omitted)).

According to the South Dakota Supreme Court "[c]ourts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]' "

Wyman v. Bruckner, 2018 S.D. 17, ¶ 12, 908 N.W.2d 170, 174–75 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 1815, 149 L.Ed. 2d 968 (2001)) (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982)).

> Generally, for judicial estoppel to apply: "[t]he later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped."

Id., (quoting *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 10, 781 N.W.2d 464, 468). Additionally, the South Dakota Supreme Court has also said that the "inconsistency must be about a matter of fact, not law." *Id.* (citing *State v. Hatchett*, 2014 S.D. 13, ¶ 33, 844 N.W.2d 610, 618).

Unlike collateral estoppel or equitable estoppel, judicial estoppel does not require privity between parties in the two proceedings or detrimental reliance by the other party. "The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *State v. St. Cloud*, 465 N.W.2d 177, 179–80 (S.D. 1991) (quoting Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244, 1249 (1986)).

The judicial acceptance element requires inquiry into "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled[.]' "

Wilcox, 2010 S.D. 29, ¶ 42, 781 N.W.2d 464, 475 (Sabers, J., concurring in part and dissenting in part) (quoting *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. 1808 (citation omitted) (*New Hampshire v. Maine*, cited with approval in *Watertown Concrete Products, Inc. v. Foster, ex rel. Estate of Foster*, 2001 SD 79, ¶ 12, 630 N.W.2d 108, 112–13)).

Justice Sabers noted in his special writing in *Wilcox* that "[t]he law is unsettled as to what constitutes success in achieving judicial acceptance." *Id.* Justice Sabers further noted:

> One view hold that [judicial estoppel] is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation; only in that situation ... is there a risk of inconsistent results and a threat to the integrity of the judicial process. The opposing view holds that judicial estoppel applies even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing 'fast and loose' with the court. Clearly, judicial estoppel is more appropriate when a court has adopted a prior position or statement because only then is there a clear risk of inconsistent results which threatens the integrity of the judicial process.

Id. ¶ 43 (Citations and quotations omitted).

The Plaintiffs' positions are clearly inconsistent – either the 2007 election substantially complied with the statutory requirement to *empower* the City to employ a city manager or the 2007 election was a nullity. If the 2007 election empowered the *City* to employ a city manager, there is a risk of inconsistent legal determinations as if leave is granted, this action will be decided long before the South Dakota Supreme Court decides *Bohn1*. Finally, defending both this action and the appeal imposes a substantial detriment to the City in terms of staff time and expense.

B. When May the Doctrine of Judicial Estoppel be Raised?

The South Dakota Supreme Court has held

> "The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 14, 853 N.W.2d 878, 882. Also known as the "doctrine of preclusion of inconsistent positions" and "doctrine of the conclusiveness of the judgment," Estoppel, Black's Law Dictionary (10th ed. 2014), the issue of judicial estoppel may be raised "even at the appellate stage" and on a court's "own motion[.]" *Hayes*, 2014 S.D. 64, ¶ 13, 853 N.W.2d at 882.

Wyman v. Bruckner, 2018 S.D. 17, ¶ 11, 908 N.W.2d 170, 175. Thus, the City's motion is timely.

C. Why Should the Doctrine of Judicial Estoppel be Invoked?

During the motions hearing in this matter, the Court posed the question of whether equitable considerations, such as laches, bore on the issues before the Court. At that time, neither the Court, nor counsel had found any such authority. The City has discovered secondary authority supporting the application of equitable principles.

Equitable principles *are* appropriate when considering whether to grant leave to pursue an action in quo warranto. For example:

> To the extent that leave of court is an element in the right to pursue quo warranto in the matter of title to public office, the factor of judicial discretion is present. This has given the court scope to take into account equitable considerations felt to be involved and to apply judicial discretion according to the view of what would be fair under the circumstances shown. Such discretion has been used to withhold the quo warranto remedy sought by private parties where it appeared that there was no abuse or wrongdoing on the part of the officer under attack, and there was an element of harshness in the bringing of the suit.

Right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of public office, 51 A.L.R.2nd 1306, § 10. Judicial Discretion (Originally published in 1957).

In this matter, leave of court is not merely an element of the right to pursue quo warranto, it is a statutory prerequisite.

CONCLUSION

In *Bohn 1* Plaintiffs asserted, as a matter of fact, that the 2007 election was valid and empowered the City to employ a City Manager. In *Bohn 2* Plaintiffs asserted, again as a matter of fact, that the 2007 election was a nullity and the City had no power to employ a city manager and its efforts to do so are void. To come full circle, Plaintiffs have appealed Bohn 1, to the South Dakota Supreme Court, once again asserting that the 2007 election validly empowered the City to employ a City Manager. The Plaintiffs' positions are not simply inconsistent, the positions are diametrically opposed to one another and now entirely circular. The ever-revolving positions make this litigation much like a game of whack a mole[1].

Litigation should not be a game. One way to take gamesmanship out of the process is to deny leave to bring the pending quo warranto action. Or, in the alternative, postpone a decision on whether to grant leave until the South Dakota Supreme Court decides *Bohn 1.*

[1] The term "Whac-a-mole" (or "Whack-a-mole") is used colloquially to depict a situation characterized by a series of repetitious and futile tasks, where the successful completion of one just yields another popping up elsewhere. (https://en.wikipedia.org/wiki/Whac-A-Mole, lasted visited June 29, 2022.)

Dated this 5th day of July 2022.

/s/ Mark F. Marshall

Mark F. Marshall
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 5, 2022, he caused a true and correct copy of the above to be served upon each of the person identified as follows:

[ ]	First Class Mail	[ ]	Overnight Mail
[ ]	Hand Delivery	[ ]	Facsimile
[ ]	Electronic Mail	[X]	Odyssey/ECF System

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May 12, 2022

CITY ATTORNEY'S REPORT CONCERNING DECISION AND ORDER IN THE MANDAMUS ACTION

On January 4, 2022, Tammy Bohn, Justin Bohn and Brenda Vaskentz filed a lawsuit in which they attempted to compel the members of the City Council to hold an election on the following proposition:

> The form of government for the municipality of Sturgis should be changed from the current form of municipal government (aldermanic with a city manager form of government) to an aldermanic form of government without a manager.

The City opposed the lawsuit and asserted in Motion for Summary Judgment that the power to employ a manager is not a form of municipal government and that the question posed by the Petitioners in their Petition was not subject to initiative or referendum.

The City concluded its written legal argument by noting:

> To change the form of government Petitioners could run for City Council. If a majority of the City Council subscribes to Petitioner's beliefs, the Council may afford the city manager his

due process rights and remove from him from office. Once the manager is removed from office, Petitioner are free to seek a change in the form of government.

Judge Krull held a hearing on the City Motion for Summary Judgment on February 14, 2022 and wrote a Memorandum Decision and Order. The Court filed its decision on April 14, 2022, two days after the City of Sturgis Municipal election. I have attached a complete copy of the Judge's decision and order to this Report.

Judge Krull observed "the Petition in this matter seeks to change the form of government in the City of Sturgis from aldermanic with a city manager to aldermanic without a city manager. Such a change, however, does not change the city's form of government. It merely seeks to do away with the position of city manager, which is not a change in the city's form of government."

Judge Krull concluded:

CONCLUSION

Since the Petition for Election to Change Municipal Government in the Municipality of Sturgis improperly seeks to achieve an outcome that is not possible, it is invalid. There is no genuine issue as to any material fact, and Respondents are entitled to a judgment as a matter of law. Consistent with the above, Respondents' Motion for Summary Judgment is GRANTED, and this matter is therefore dismissed.

Dated this 14th day of April, 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest:
Adam, Laura
Clerk/Deputy

The Petitioners in the Mandamus lawsuit took the

City's suggestion and ran for office. As a political consultant might say, the Petitioners, and with them their ideas about how to organize city government, took a real "shellacking" in the election, losing by a margin of about 2 to 1. Of course, this is not to say political winds are constant. There may come a time when the will of the citizens of Sturgis, as expressed by the duly elected City Council, may decide to discharge the city manager.

The power to employ a City Manager brings with it due process rights for any person so employed. It is my opinion that whether to remove a city manager is a political question that can only the City Council can decide by a majority vote of its members.

STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE, Defendants.	)	46CIV22-077 **DEFENDANTS' BRIEF IN RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants City of Sturgis (City) and Daniel Ainslie (Ainslie) submit this *Brief in Resistance of Plaintiffs' Motion for Summary Judgment.*

BACKGROUND

The facts are generally undisputed. On February 20, 2007, the Sturgis City Council passed Resolution 2007-09 which set an April 10, 2007, election to address whether to incorporate a city manager into the City of Sturgis' government. *Plaintiffs' Exhibit 1,* 5-6 (filed March 23, 2022). Resolution 2007-09 provides in full:

> *Whereas* it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota to bring the following proposal to a voters for their approval or rejection pursuant to SDCL § 9-11-5:
>
> > CITY MANAGER FORM OF GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises

the administration of the City's personnel system and futher supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts, and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council, and presents recommendations and programs to the City Council.

WHEREAS it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;

NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.

Dated this 20th day of February 2007.

Published: March 3, 2007
Effective: March 24, 2007

Plaintiffs' Exhibit 1, at 5-6. The ballot for the April 10, 2007, election provides an "Explanatory Statement" regarding the proposal to add the city manager position to the City of Sturgis. *Exhibit C*, Affidavit of Fay Bueno (filed April 5, 2022). The "Explanatory Statement" on the ballot provided:

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition for election to Change municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change form an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a city Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager

> implements policy decisions of the city Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.
>
> The City Council however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

Id.

Following the April 10, 2007, election, the City Council canvassed the votes on April 16, 2007. Resolution 2007-15 provided that the proposal to add a City Manager passed with 1,224 yes votes, and 768 no votes. *Plaintiffs' Exhibit 2*, 3 (filed March 23, 2022). Resolution 2007-15 used the language "For the Change in Form of Government" when referencing the election, and provided that the "For the Change in Form of Government' received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government." *Id.* at 4. After the official canvassing, the City Council appointed a City Manager, and this position is presently still in effect.

ARGUMENT AND AUTHORITY

A. As a matter of law, the April 10, 2007, election complied with SDCL § 9-10-1, therefore the Plaintiffs' summary judgment must be denied.

Summary judgment is appropriate "if 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 a judgment as a matter of law." SDCL § 15-6-56(c). "Summary judgment is appropriate when there is no genuine issue of material fact and there must be no genuine issue on the inferences to be drawn from those facts." *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 20, 969 N.W.2d 208, 213 (quoting *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 17, 719 N.W.2d 780, 786). Courts "view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Id.* (quoting *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343).

The facts of this case at bar are generally undisputed. The primary dispute arises as to whether the Plaintiffs are, as a matter of law, entitled to summary judgment. For the Plaintiffs' summary judgment to be proper, the 2007 election and petition must not comply with SDCL § 9-10-1, the statute addressing employing a city manager. However, if SDCL § 9-10-1 is complied with, then as a matter of law, the Plaintiffs are not entitled to summary judgment.

As a matter of law, the April 10, 2007, election substantively complied with SDCL § 9-10-1, and legally provided the City Council the authority to hire a City Manager. SDCL § 9-10-1 which was in effect in 2007, provides:

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> If a petition signed by fifteen percent of the registered voters of any first or second class municipality as determined by the total number of registered voters at the last preceding general election is presented requesting that an election be called to vote upon the proposition of employing a city manager, the governing body shall call an election for that purpose to be held within sixty days from the date of filing such petition with the auditor.
>
> The election shall be held upon the same notice and conducted in the same manner as other city elections. The vote upon the question of employing a city manager shall be by ballot which conforms to a ballot for statewide question except that the statement required to be printed on the ballot shall be prepared by the municipal attorney.

SDCL § 9-10-1 (2007); *see also* 2006 S.D. Sess. Laws ch. 29, § 5. Based on SDCL § 9-10-1, the essential requirements are: (1) that the petition be signed by 15% of the registered voters; (2) the valid petition be presented to the City Council; (3) the question be submitted to the voters; (4) the question may be presented at the next annual municipal election; and (5) the election shall be held upon the same notice and conducted in the same manner as other municipal elections. Generally, if these requirements are met, then SDCL § 9-10-1 is complied with.

SDCL § 9-11-5 provides the authority for voters to change the form of government in a municipality. The specific process and requirements to change the form of municipal government are provided in SDCL § 9-11-6. The primary relevant requirements of SDCL § 9-11-6 are: (1) the petition be signed by 15% of the registered municipal voters; (2) the valid petition be presented to the City Council; (3) the question be presented be submitted to the voters; (4) the question may be presented at the next annual municipal election; and (5) the election be held upon the same notice and conducted in the same manner

as other municipal elections. If these requirements are met, then SDCL § 9-11-6 is complied with.

There is no dispute that Resolutions 2007-09, 2007-15, and the ballot for the April 10, 2007, election reference SDCL § 9-11-5, and a change in municipal government. However, these references are not dispositive to the substantive effect of the election. "Substantial compliance with a statute requires actual compliance with every reasonable objective of the statute." *State v. Jensen*, 2003 S.D. 55, ¶ 20, 662 N.W.2d 643, 649. "What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case." *Id.* (quoting *In the Matter of License of Cork 'n bottle, Inc.*, 2002 S.D. 139, ¶ 12, 654 N.W.2d 432, 435).

While the petition and ballot referenced a change in municipal government, substantively the petition and ballot explained the ultimate purpose was to incorporate the city manager position into the City government. The explanation on the ballot provides an in-depth analysis what the voters are determining and providing the specific duties that are statutorily delegated to the city manager. Resolution 2007-09 also provides an in-depth explanation into the purpose of the petition. Both the petition and the ballot provide a sufficient explanation for a reasonable voter to understand precisely what they were voting for in the April 10, 2007, election. Additionally, the petition serving as the basis for the election substantively explained precisely what the purpose of the petition was, to incorporate a city manager into the Sturgis government. Both the petition signers and the voters knew they were voting whether or not

to employ a city manager in the City of Sturgis. Any erroneous references to a different statute, and using the term "form of government" do not impact the underlying substantive intent of the petition and election. Any reliance on these erroneous references is placing form over substance.

Even though the petition and ballot provide an intelligible explanation of the intent of the election, SDCL § 9-10-1 requires certain requirements be met for the election to be valid. Resolution 2007-09 provides that 584 valid signatures were needed to meet the 15% threshold. The resolution also provided that the petition contained 589 valid signatures. The petition met the 15% threshold as provided in SDCL § 9-10-1. The petition was presented to the City Council and the Council set the question to be voted on at the next annual municipal election on April 10, 2007. The municipal voters resoundingly approved the question at the election. Substantively, the City complied with all of the requirements to employ a city manager under SDCL § 9-10-1. Therefore, the law supports that the April 10, 2007, election employing a city manager in the City of Sturgis was a valid election which granted the City the authority to employ a city manager.

As a matter of law, the April 10, 2007, election employing a city manager complied with SDCL § 9-10-1, therefore, the Plaintiffs' Motion for Summary Judgment must be denied.

CONCLUSION

The April 10, 2007, election granting the City of Sturgis the authority to employ a city manager complied with the requirements under SDCL § 9-10-1.

This legal compliance provides that, as a matter of law, the City had the legal authority to employ a city manager, and renders the Plaintiffs' summary judgment inappropriate. Therefore, Plaintiffs' Motion for Summary Judgment must be denied.

Dated this 28th day of April 2022.

/s/ Eric Miller

Eric Miller
Mark Marshall
Sturgis City Attorney
Counsel for Defendants
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Sturgis, SD 57785
(605) 347-4422, Ext. 205
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 28, 2022, he served true and correct copies of the above upon each of the person identified as follows:

[ ]	First Class Mail	[ ]	Overnight Mail
[ ]	Hand Delivery	[ ]	Facsimile
[ ]	Electronic Mail	[X]	Odyssey/ECF System

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/s/ Eric Miller
Eric Miller
Sturgis Staff Attorney

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STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE, Defendants.	)	46CIV22-077 **BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendants City of Sturgis (City) and Daniel Ainslie (Ainslie) submit this *Brief in Support of Motion to Dismiss.*

BACKGROUND

Plaintiffs alternatively pray for a declaratory judgment or writ of quo warranto. Plaintiffs challenge the organization of municipal government in Sturgis as a basis for those claims, contending that the 2007 election authorizing the City to employee a city manager was defective. Plaintiffs do not have standing and therefore this Court does not have subject-matter jurisdiction to hear Plaintiffs' claims.

On February 9, 2007, a Petition for Election to Change Municipal Government was submitted to the Finance Officer of the City of Sturgis. (Affidavit of Fay Bueno, Ex. C.) The City Finance Officer typically keeps the originals of such Petitions for one year and then discards them. (Id., ¶ 3.) However, Ms. Bueno found a file copy of a blank petition as well as a part of a

circulated petition and form of ballot in the Finance Office. (Id., ¶ 6.) Ms. Bueno attached copies of those documents to her Affidavit as Exhibits A, B, and C, respectively.

The Petition was filed in the Finance Office on February 9, 2007. (Id., Ex. C.) The Finance Officer examined the Petition and concluded that it had the requisite number of signatures to compel an election. (Id.).

On April 10, 2007, the citizens of Sturgis voted in favor of the Petition by a margin of 61.14 percent. 1,224 voters favored the proposed change, and 768 voters opposed the proposed change. (Plaintiff's Ex. 2, p. 327.) No one challenged either the validity of the Petition or the outcome of the election.

Since 2007, the organization of municipal government in City of Sturgis has featured a city manager. The City has employed two city managers in the past 15 years -- David Boone from 2007 to 2013 and Daniel Ainslie from 2013 to date. Over the past 15 years, no one has challenged the organization of municipal government in the City. Plaintiffs do not have standing to bring this action and the Court lacks subject-matter jurisdiction over Plaintiffs' complaint as a matter of fact.

ARGUMENT AND AUTHORITY

A. Standard of Review.

"Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Lippold v. Meade Cty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922. "Whether a party has standing to maintain an action is a question of

law." *Pickerel Lake Outlet Ass'n v. Day Cty.*, 2020 S.D. 72, ¶ 8, 953 N.W.2d 82, 87 *citing Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779.

A challenge to the subject-matter jurisdiction of a court is also a question of law. *Estate of Ducheneaux v. Ducheneaux*, 2015 S.D. 11, ¶ 7, 861 N.W.2d 519, 521 *citing State ex rel. LeCompte v. Keckler*, 2001 S.D. 68, ¶ 6, 628 N.W.2d 749, 752.

B. Plaintiffs do not have Standing and this Court does not have Subject Matter Jurisdiction.

"Motions to dismiss for lack of subject matter jurisdiction fall into one of two categories: (1) facial attacks on allegations of subject matter jurisdiction within the complaint; or (2) disputes regarding the facts upon which subject matter jurisdiction rests." *Chase Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710–11(Citations and quotations omitted). "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." *Id., quoting Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1140 (8th Cir. 1998).

Courts can consider matters outside the pleadings when presented with a factual challenge to subject-matter jurisdiction. *Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 2010 S.D.86, ¶ 20, 791 N.W.2d 169, 174-75 *citing Decker v. ex rel Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 S.D. 61, ¶ 14, 594 N.W2d 357, 362. Relying on *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir.1990), our South Dakota Supreme Court explained:

> A court deciding a motion under Rule12(b)(1) must distinguish between a "facial attack" and a "factual attack." In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6) .... In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Stated another way, a court does not assume the allegations in the complaint are true when considering factual challenges to subject-matter jurisdiction. *Chase Alone,* 2019 S.D. 41, ¶ 12, 931 N.W.2d at 711. The City poses a factual challenge to the Court's subject-matter jurisdiction.

In *Lippold* The South Dakota Supreme Court discussed the relationship between standing and subject-matter jurisdiction:

> Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void. Subject matter jurisdiction is conferred solely by constitutional or statutory provisions. Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ. The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought.
>
> Relevant to the existence of subject-matter jurisdiction is the doctrine of standing. A litigant must have standing in order to bring a claim in court. Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing.

Lippold, 2018 S.D. 7, ¶¶ 18 & 19, 906 N.W.2d at 921-22 (Citations and quotations omitted).

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C. Plaintiffs have no Individual Standing to Bring this Action.

SDCL § 21-28-2 provides who may bring a quo warranto action. The statute provides:

> An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:
>
> (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;
> (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;
> (3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

SDCL § 21-28-2. Quo warranto allows a person to not only attack the validity of a municipal corporation, *see State through Attorney General v. Buffalo Chip*, 2020 S.D. 63, ¶ 25, 951 N.W.2d 387, 396, but also to attack the existence of an office. *See Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4, 9 (1936) (allowing the attack of an elected municipal judge by addressing the existence of the municipal court to which the judge serves).

One must meet specific requirements to have standing to challenge the existence of either a municipal corporation or the existence of a public office. Without standing to bring a quo warranto action, the court has no subject-matter jurisdiction. *Lippold*, 2018 S.D. 7, ¶ 18, 906 N.W.2d at 922 (citing *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313)

A challenger must either file a complaint with the state's attorney, who will then proceed at their discretion on behalf of the state, or alternatively, proceed on their own if they have (1) a special interest in the action, and (2) they receive leave from the circuit court or circuit judge. SDCL § 21-28-3. Plaintiffs have not satisfied wither requirement.

One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office, such as a defeated candidate for that office. *Bridgman v. Koch*, 2013 S.D. 83, ¶ 8, 840 N.w.2d 676, 678. If a person does not allege they have a right to the challenged office, then they have no "special interest" in the action. *See id.* (finding that a person who ran for state's attorney in Jerauld County did not have standing to also challenge the same person as state's attorney in Buffalo County). A private citizen has no "special interest" in an office merely from being a citizen or a taxpayer. *Cummings v. Mickelson*, 495 N.W.2d 493, 498 n.6 (S.D. 1993) (citing *Knockemuss v. De Kerchove*, 66 S.D. 446, 285 N.W. 441 (1939)).

In *Cummings*, the Court determined that two challengers to appointed judgeships did not have a "special interest" because they had not applied for the position. *Id.* Additionally, a third person had no "special interest" even though he applied for the position, because he could not establish his name was on the certification list sent to the Governor for selection. Therefore, to have a "special interest" to an action under SDCL § 21-28-3, the person must contend they have rights to the challenged office.

The Court in *Lippold* explained the reasons for limiting actions those brought by the state, and for preventing collateral attacks by individuals. 2018 S.D. 7, ¶ 23, 906 N.W.2d at 923. The Court found allowing the public to raise a collateral attack to the validity of an office, years after establishment of the office would undermine any public interaction with the office. *Id.* (quoting *Merchants' National Bank v. McKinney*, 2 S.D. 106, 116-17 48 N.W. 841, 844 (1891)). Lack of confidence in the validity of an office would require anyone doing business with the office to verify its validity of the office before doing business with it. *Id.* Limiting ability to challenge the validity of an office to only the state, or parties with a special interest, prevents these types of collateral attacks.

The Plaintiffs challenge the existence of the City of Sturgis' City Manager position. Plaintiffs' fail to allege they were granted the Meade County Circuit Court to bring this action, nor do they allege any facts on which to find they have a "special interest" in the action. Without meeting these requirements, the only means to challenge the existence of the Sturgis City Manager is through the state's attorney acting on behalf of the state. Like *Lippold*, if State does not bring the challenge, then the Plaintiffs do not have standing, and the Court cannot exercise subject-matter jurisdiction.

D. Only the State has Standing to Challenge the Organization of Sturgis Municipal Government.

In 2007 the citizens of Sturgis authorized the City to employ a city manager. No one challenged the validity of the petition or election in 2007, and no one has challenged the validity of the petition or the 2007 election in the

STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE, Defendants.	)	46CIV22-077 **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendants City of Sturgis (City) and Daniel Ainslie (Ainslie) submit this *Supplemental Brief in Support of Motion to Dismiss.*

BACKGROUND

This brief is a supplement to the Defendants' Brief in Support of Motion to Dismiss, filed April 5, 2007, and all prior arguments are incorporated by reference into this brief. Plaintiffs alternatively pray for a declaratory judgment or writ of quo warranto. Plaintiffs challenge the organization of municipal government in Sturgis as a basis for those claims, contending that the 2007 election authorizing the City to employ a city manager was defective. Plaintiffs do not have standing and therefore this Court does not have subject-matter jurisdiction to hear Plaintiffs' claims. In addition to the previous arguments focused on the Plaintiffs' quo warranto claim, this brief focuses on the Plaintiffs' alternative declaratory action.

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ARGUMENT AND AUTHORITY

A. The Plaintiffs' declaratory action is a quo warranto action in disguise.

The purpose of a declaratory action is to "enable parties to authoritatively settle their rights in advance of any invasion thereof." *Abata v. Pennington County Board of Commissioners*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141). The Plaintiffs' Complaint does not assert any right which may be invaded by the City. The Plaintiffs merely restate the same substantive arguments as they did in their quo warranto claim.

The Plaintiffs request the Court declare "that the 2007 Election granted the City no special power to employ a City Manager," and that "[t]he voters have not granted the City the special power to employ a City Manager." *Complaint*, 8 (filed March 18, 2022). This is substantively identical to the Plaintiffs' quo warranto claim which requests the Court for a "Judgment entering a Quo Warranto . . . declaring the 2007 Election had no effect and the City was not granted a special power by the voters to employ a City Manager." *Id.* at 7. Substantively, the goal of both claims is to address the existence of the City Manager office, and to remove the existing City Manager.

SDCL Chapter 21-28 codifies the quo warranto common law in South Dakota. As part of this codification, the Legislature expressly limited who may bring a quo warranto action. SDCL § 21-28-2. The Court in *Lippold v. Meade Cty. Bd. of Comm'rs*, explained the reasons for limiting who may bring a quo

warranto action. 2018 S.D. 7, ¶ 23, 906 N.W.2d 917, 923. The Court found allowing the general public to raise a collateral attack to the validity of an office, years after establishment of the office, would undermine any public interaction with the office. *Id.* (quoting *Merchants' National Bank v. McKinney*, 2 S.D. 106, 116-17 48 N.W. 841, 844 (1891)). The Court reasoned that allowing these collateral attacks create a lack of confidence in the office, and would require, as a prerequisite to doing business with the office, an inquiry into the validity of the office. *Id.* Limiting the ability to challenge the validity of an office to only the state, or parties with a special interest, prevents these types of collateral attacks and ensures that others may confidently do business with the public office.

The Plaintiffs' declaratory action fits precisely within the purpose of a quo warranto claim, and attempts to circumvent the limitations on who may bring a quo warranto action. By allowing the Plaintiffs' declaratory action would raise the same concerns which serve the basis for the quo warranto limitation. Therefore, the Plaintiffs' declaratory action is a disguised quo warranto claim, and must be treated as such.

B. Plaintiffs do not have Standing to bring a declaratory action.

"[T]o establish standing in a declaratory judgment action the plaintiff must have 'personally . . . suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.'" *Abata*, 2019 S.D. 39, ¶ 12, 931 N.W.2d at 719 (quoting *Benson*, 2006 S.D. 8, ¶ 22, 710 N.W.2d at 141). To have standing, "a litigant must show: (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." *Id.*

In the Plaintiffs' complaint they assert no basis to support they suffered an injury in fact from the 2007 election, or from the City Manager office. While SDCL § 21-24-3 allows an interested person to secure a declaration of the construction or validity of an ordinance, this declaration is only provided if the ordinance "affect[s] the person seeking the declaration." *Kneip*, 214 N.W.2d at 647 (citing SDCL § 21-24-3; *Torigian v. Saunders*, 97 N.W.2d 586 (S.D. 1959)). Restrictions on the extent to which declaratory judgment may be sought require "that there must be a justiciable controversy between legally protected rights of parties whose interests are adverse." *Id.* at 648 (citations omitted).

While it is apparent the Plaintiffs disagree with the policies and actions of Mr. Ainslie, the Sturgis City Manager, in their Complaint the Plaintiffs do not point to any specific injury or threatened injury to a right or interest. The Plaintiffs' disagreement is solely based on Mr. Ainslie's implementation of the City Council's vision of the City. Whether Mr. Ainslie is adequately pursuing the City Council's vision is a political question which is better resolved through the Sturgis City Council rather than the courts. *See* SDCL § 9-10-11 (providing that appointed city manager "may be removed by majority vote of the members of the governing body."); *see also Mcintyre v. Wick*, 1996 S.D. 147, ¶ 64, 558 N.W.2d 347, 364 (Sabers, J., dissenting) (providing that a "political

question" is one that "courts will refuse to take cognizance, or to decide, on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative powers."). Ultimately, if a city manager is not performing to standard, the people, through their elected representative on the City Council, may statutorily remove the sitting City Manager. A city's elected governing body is better suited to addressing the needs of the people, than the courts. *See State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 16, 785 N.W.2d 272, 279 (finding that the Court "has a history of not interfering with municipal governments" for the reason that "municipalities are familiar with their local conditions and know their own needs."). Any alleged injury to the Plaintiffs from the existence of the City Manager's office, or Mr. Ainslie's decisions, is political in nature, and outside of the Court's purview.

Additionally, even if an injury in fact occurred through a City Manager's decision, the connection between this decision and the 2007 election are far too remote to give the Plaintiffs standing for a declaratory action. Any far-reaching connection between the Plaintiffs and the 2007 election are theoretical and speculative. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not happen." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (citing *Kneip v. Herseth*, 214 N.W.2d 93, 96 (S.D. 1974)). The court should decline to hear an action "if the issue is so premature that the court

would have to speculate as to the presence of a real injury." *Id.* (citing *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir. 1986)). The Court would need to speculate to find an injury suffered by the Plaintiffs which is a direct result of the 2007 election to employ a City Manager.

Therefore, the Plaintiffs do not have standing to bring a declaratory action.

C. The Plaintiffs provide no authority which requires Mr. Ainslie to payback earned wages, nor do the Plaintiffs have standing to require payback.

The Plaintiffs demand that if the Court declares that the 2007 election did not validly create the City Manager office, that the Court require Mr. Ainslie payback all of his earned wages. The Plaintiffs do not provide any statutory authority which would require Mr. Ainslie payback the City. Additionally, the Plaintiffs are attempting to stand in the shoes of the City of Sturgis, and assert rights and interests that only the City, and not the Plaintiffs, have.

The United States Supreme Court has addressed attempts at third-party standing, and has "declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978). The Supreme Court has "narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another." *Id.* "Even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held

9-1-6. Citizens' remedies to enforce requirements of title.

Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title.

Source: SL 1913, ch 119, § 134; RC 1919, § 6163; SDC 1939, § 45.0112.

21-24-3. Construction and determination of validity of written instruments, legislative acts, and franchises.

Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Source: SL 1925, ch 214, § 2; SDC 1939 & Supp 1960, § 37.0102.

STATE OF SOUTH DAKOTA	)	**IN THE CIRCUIT COURT**
	) ss.	
COUNTY OF MEADE	)	**FOURTH JUDICIAL CIRCUIT**

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, **Plaintiffs,** **vs.** **CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,** **Defendants.**	46CIV22-000077 **COMPLAINT**

COMES NOW, TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ ("Plaintiffs"), by and through their attorney of record, Kellen B. Willert of Bennett Main Gubbrud & Willert, P.C., and for their cause of action against **CITY OF STURGIS,** a South Dakota Municipal Corporation ("City" or "Sturgis"), and **DANIEL AINSLIE** ("Ainslie") state and allege as follows:

PARTIES AND ALLEGATIONS

1. Plaintiffs are residents and taxpayers of the City of Sturgis, Meade County, South Dakota.

2. Plaintiffs were sponsors of a Petition that was filed with the Sturgis Finance Officer on December 16, 2021 that was the subject of Court File 46CIV22-5.

3. Plaintiff Tammy Bohn is on the ballot as a candidate for Sturgis Mayor for the election scheduled for April 12, 2022.

4. Plaintiffs Justin Bohn and Brenda Vasknetz are on the ballot as a candidate for Sturgis Alderman for the election scheduled for April 12, 2022.

5. Sturgis is a first-class South Dakota Municipal Corporation incorporated and existing under the laws of the State of South Dakota and situated in Meade County, South Dakota.

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6. Ainslie purports to hold the position of "City Manager" for Sturgis.

COUNT 1 – QUO WARRANTO

7. In 2007 City passed Resolution 2007-09. A copy of Resolution 2007-09 is attached hereto as "Exhibit 1".

8. Resolution 2007-09 is titled "Resolution Setting the Election Date for Vote on Change in Form of Government." Exhibit 1.

9. The first whereas paragraph in Resolution 2007-09 states, in part, "...bring the following proposal to a voters [sic] for their approval or rejection pursuant to SDCL § 9-11-5: CITY MANAGER FORM of GOVERNMENT." Exhibit 1.

10. Resolution 2007-09 makes the following resolution (following all the whereas paragraphs):

> ***NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.***

Exhibit 1.

11. In 2007 City passed Resolution 2007-15. A copy of Resolution 2007-15 is attached hereto as "Exhibit 2".

12. After the April 10, 2007 election ("2007 Election"), City's Resolution 2007-15 (a copy of which is attached hereto as "Exhibit 2") canvassed the votes "For the Change in Form of Government" and "Against the Change in Form of Government" as follows:

"For the Change in Form of Government"	***1,224***
"Against the Change in Form of Government"	***768***
	1,992

Exhibit 2.

13. City's Resolution 2007-15 concluded, in part, that:

> ***"For the Change in Form of Government" received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government.***

Exhibit 2.

14. The 2007 Election was held pursuant to SDCL § 9-11-5, which states:

> The voters of any municipality may change its form of government or change the number of its commissioners, wards, or trustees by a majority vote of all electors voting at an election called and held as provided. Any municipality under special charter may adopt any form of government as provided in this title.

SDCL § 9-11-5.

15. SDCL § 9-11-6 provides for the petitioning and election process for a vote pursuant to SDCL § 9-11-5:

> If a petition signed by fifteen percent of the registered voters of any municipality, as determined by the total number of registered voters at the last preceding general election, is presented to the governing body requesting that an election be called for the purpose of voting upon a question of change of form of government or upon a question of the number of wards, commissioners or trustees, the governing body shall call an election to be held within fifty days from the date of the filing of the petition with the municipal finance officer. At that election the question of the change of form of government or the number of wards, commissioners or trustees, or both, shall be submitted to the voters. No signature on the petition is valid if signed more than six months prior to the filing of the petitions. If the petition is filed on or after January first prior to the annual municipal election and within sufficient time to comply with the provisions of § 9-13-14, the question may be submitted at that annual municipal election.
>
> The election shall be held upon the same notice and conducted in the same manner as other city elections.

SDCL § 9-11-6.

16. In order to create the office of "City Manager", a municipality must adhere to the requirements of SDCL ch. 9-10.

17. The version of SDCL § 9-10-1 in effect at the time of the 2007 Election was:

> ~~Whenever~~ If a petition signed by fifteen percent of the registered voters of any first or second class municipality as determined by the total number of registered voters at the last preceding general election is presented requesting that an election be called to vote upon the proposition of employing a city manager, the governing body shall call an election for that purpose to be held within ~~twenty~~ sixty days from the date of filing such petition with the auditor.
>
> ~~Such~~ The election shall be held upon the same notice and conducted in the same manner as other city elections. The vote upon the question of employing a city manager shall be by ballot ~~in the form and be cast in the manner provided by § 9-13-22~~ which conforms to a ballot for statewide question except that the statement required to be printed on the ballot shall be prepared by the municipal attorney.

SL 2006, ch. 29, § 5.

18. SDCL § 9-10-1 is substantially different than SDCL §§ 9-11-5 and -6.

19. The 2007 Election was not called by the voters pursuant to SDCL ch. 9-10.

20. The 2007 Election was not administered by the City pursuant to SDCL ch. 9-10.

21. The 2007 Election was not held pursuant to SDCL ch. 9-10.

22. The 2007 Election was held pursuant to SDCL ch. 9-11.

23. SDCL § 9-2-3 provides:

> Each municipality shall be governed by a board of trustees, a mayor and common council, or by a board of commissioners. A city manager may serve with any of the forms of government.

SDCL § 9-2-3.

24. South Dakota does not recognize a "City Manager" as a form of government, as that phrase is used in SDCL chs. 9-10 and 9-11.*[1]

[1] Paragraphs containing an asterisk denote positions taken by the Respondents (which included all the Sturgis Aldermen and the Mayor) in Court File 46CIV22-5.

25. The only way for a municipality to effect the office of a "City Manager" is to do so pursuant to the procedures required in SDCL ch. 9-10.*

26. The office of "City Manager" cannot be created using the procedures of SDCL ch. 9-11 because "City Manager" is not a form of government.*

27. The office of City Manager could not be created using the procedures of SDCL ch. 9-11, which are to change a municipality's form of government.

28. Because the City held the 2007 Election pursuant to SDCL ch. 9-11 and not SDCL ch. 9-10, the election had no effect.

29. The 2007 Election did not create an office of City Manager for Sturgis.

30. Sturgis has no office of City Manager.

31. A Quo Warranto proceeding is an appropriate remedy to challenge the legal existence of whether a government office exists.

32. A Quo Warranto proceeding is an appropriate remedy to challenge the legal existence of whether Sturgis has the authority to employ a "City Manager".

33. It is manifest that no person can lawfully be employed as City's City Manager, and indeed that office cannot exist, until the office is established and approved by the voters pursuant to SDCL ch. 9-10.

34. Ainslie has been employed by City as the purported City Manager since September 13, 2011. Attached as "Exhibit 3" is Ainslie's Employment Agreement with the City ("Employment Agreement").

35. Ainslie is currently purportedly employed by Sturgis as the City Manager.

36. Ainslie's Employment Agreement with the Sturgis states:

> **WHEREAS the City has the authority to employ an Employee and fix his compensation, pursuant to SDCL 9-10-3;**
>
> Exhibit 3, page 1.

37. There has never yet been any valid or lawful election pursuant to SDCL ch. 9-10 enabling Sturgis to employ a City Manager.

38. Ainslie's employment as the City Manager is without authority of law because the office of City Manager has not yet been lawfully established.

39. Ainslie's compensation, payments, fees, and emoluments have been fixed by Sturgis without any lawful authority to do so because the office of City Manager has not yet been lawfully established.

40. The position of "City Manager" is an appointed office.

41. Ainslie has usurped City's nonexistent office of City Manager.

42. Ainslie has intruded into City's nonexistent office of City Manager.

43. Ainslie has unlawfully held City's nonexistent office of City Manager.

44. Ainslie has unlawfully exercised City's nonexistent office of City Manager.

45. City has legislated multiple ordinances creating the "Office of City Manager" (Ordinance 7.03.07), providing for various duties of the City Manager (these ordinances are collectively referred to as "City Manager Ordinances").

46. City had no authority to create the City Manager Ordinances.

47. Because there is no authority for City to adopt the City Manager Ordinances, the City Manager Ordinances have no effect and are void ab initio.

48. The power to employ a City Manager is not a form of municipal government.*

49. A form of municipal government cannot be created by estoppel.*

50. The authority to employ a City Manager is a special power granted to a municipality by a vote of the people pursuant to SDCL ch. 9-10.*

51. City does not have an office of City Manager.

COUNT 2 – DECLARATORY ACTION

52. The Plaintiffs hereby restate and reallege all preceding paragraphs of this Complaint as though fully set forth herein.

53. City has publicly acknowledging and held itself out to be under the "City Manager form of government" since 2007.

54. As recently as January 3, 2022, City acknowledged and held itself out to be under a City Manager form of government in Resolution 2022-08. Exhibit 3, p. 15.

55. The City has a long history of acknowledging and holding itself out to be a City Manager form of government since 2007. *See* Exhibits 4-9, attached hereto.

56. City has no legally created office for a City Manager.

57. South Dakota statutory provisions relating to the powers and duties of a City Manager, and those statutes relating to the powers and duties of a Mayor when a City Manager is employed, are not applicable to City.

58. Ainslie holds no legally created office with City.

59. Ainslie holds no legal office with City.

60. Payments, fees, and emoluments received by Ainslie under the guise of being employed as City Manager were wrongful expenditures and should be paid back to City.

61. The City Manager Ordinances relating to a City Manager are invalid.

62. The City Manager Ordinances are void ab initio.

WHEREFORE, Plaintiffs request the Court enter judgment against the Defendants as follows:

1. For a Judgment entering a Quo Warranto:

a. declaring the 2007 Election had no effect and the City was not granted a special power by the voters to employ a City Manager;

b. prohibiting Defendant City from carrying itself out to be a municipality with the authority to employ a City Manager prohibiting them from continuing to act as a municipality with the special power to employ a City Manager;

c. prohibiting Ainslie from acting as the City's City Manager;

d. requiring Ainslie to immediately return all books and papers and equipment to City;
e. City's ordinances relating to a City Manager are void ab initio.

2. For a Declaratory Judgment:

a. that the 2007 Election granted the City no special power to employ a City Manager;

b. The voters have not granted City the special power to employ a City Manager; and

c. Payments, fees, and emoluments received by Ainslie pursuant to the guise of being employed as City Manager be paid back to City.

3. Award Plaintiffs judgment against Defendants, joint and several, for all costs, expenses, and attorney's fees incurred by Plaintiffs in this action; and

4. For such other and further relief as the Court may deem just and equitable.

Dated this 18th day of March, 2022.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Plaintiffs

By: */s/ Kellen B. Willert*
KELLEN B. WILLERT
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Filed: 3/18/2022 5:19 PM CST Meade County, South Dakota 46CIV22-000077

STATE OF SOUTH DAKOTA) SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE, Defendants.	)	46CIV22-077 **ANSWER**

For their Answer, Defendants City of Sturgis ("City"), and Daniel Ainslie ("Ainslie"), collectively referred to as "Defendants," by and through their Attorneys Mark Marshall and Eric Miller, state and allege:

ANSWER

1. The Defendants deny each allegation in Plaintiffs' Complaint except those allegations hereinafter admitted.
2. The Defendants admit the allegations in paragraphs 1, 2, 3, 4, 5, 17, 25, 40, 45, and 50 of Plaintiff's Complaint.
3. In response to paragraph 6, the Defendants deny Mr. Ainslie "purports" to hold the office of City Manager, however the Defendants admit Mr. Ainslie is the City Manager for the City of Sturgis.
4. In response to paragraph 7, the Defendants admit the City Council passed Resolution 2007-09 in 2007. Plaintiffs' Exhibit 1 is the

minutes from the February 20, 2007, Sturgis City Council meeting, which includes Resolution 2007-09.

5. In response to paragraph 8, the document speaks for itself.

6. In response to paragraph 9, the document speaks for itself.

7. In response to paragraph 10, the document speaks for itself.

8. In response to paragraph 11, the Defendants admit the City passed Resolution 2007-15 in 2007, however Plaintiffs Exhibit 2 is minutes from the April 16, 2007, Sturgis City Council meeting, which includes Resolution 2007-15.

9. In response to paragraph 12, the Defendants admit the votes from the April 10, 2007, election were canvassed and reported in City's Resolution 2007-15. Defendants also admit that the vote regarding employing a City Manager passed with 1,224 voting for the proposition, and 768 voting against. In all other aspects, the document speaks for itself.

10. In regard to Paragraph 13, the document speaks for itself.

11. In regard to Paragraph 14, the Defendants deny the 2007 election was held pursuant to SDCL § 9-11-5, and the paragraph calls for a legal conclusion.

12. In regard to paragraph 15, the statute speaks for itself.

13. In regard to paragraph 16, the Defendants admit that to create the office of City Manager, the petition and election requirements provided under SDCL Chapter 9-10 must be met.

14. In regard to paragraph 18, the Defendants deny to the extent the paragraph calls for legal conclusion.

15. In regard to paragraph 23, the statute speaks for itself.

16. In regard to paragraph 24, the paragraph calls for a legal conclusion.

17. In regard to paragraph 26, the paragraph calls for a legal conclusion.

18. In regard to paragraph 27, the paragraph calls for a legal conclusion.

19. In regard to paragraph 31, the paragraph calls for a legal conclusion.

20. In regard to paragraph 32, the paragraph calls for a legal conclusion.

21. In regard to paragraph 33, the paragraph calls for a legal conclusion.

22. In regard to paragraph 34, the Defendants deny Mr. Ainslie "purports" to hold the office of City Manager, however the Defendants admit Mr. Ainslie has been employed as the City Manager for the City of Sturgis since September 13, 2011.

23. In regard to paragraph 35, the Defendants deny Mr. Ainslie "purports" to hold the office of City Manager, however the Defendants admit Mr. Ainslie is the current City Manager for the City of Sturgis.

24. In regard to paragraph 36, the Defendants admit that is what the document says, the document speaks for itself.

25. In regard to paragraph 47, the Defendants deny, and the paragraph calls for legal conclusion.

26. In regard to paragraph 48, the paragraph calls for a legal conclusion.

27. In regard to paragraph 49, the paragraph calls for a legal conclusion.

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28. In regard to paragraph 52, the Defendants responds the same to any paragraph restated or realleged in the Complaint as though fully set forth herein.

29. In regard to paragraph 53, the Defendants deny to the extent it calls for a legal conclusion.

30. In regard to paragraph 54, the Defendants deny to the extent it calls for a legal conclusion.

31. In regard to paragraph 55, the Defendants deny to the extent it calls for a legal conclusion.

DEFENSES

32. Plaintiffs lack standing to bring a quo warranto action under SDCL Chapter 21-28.

33. The Plaintiffs lack standing to bring a declaratory action in this matter.

34. The Plaintiffs action and requested relief is beyond the scope as provided in SDCL Chapter 21-24, therefore the Court lacks subject-matter jurisdiction.

35. The Plaintiffs fail to join an indispensable party under SDCL § 15-6-19 and fail to join a party who has an interest which would be affected by the Plaintiffs' declaratory action to which the Plaintiffs requested declaratory relief will prejudice the rights of persons not parties to the proceeding as provided in SDCL § 21-24-7.

36. The Plaintiffs fail to state a claim upon which relief can be granted.

37. The Defendant, City of Sturgis, substantially complied with SDCL Chapter 9-10 when employing the City Manager position in the City of Sturgis.

38. Res Judicata bars Plaintiffs' claims.

WHEREFORE, the Defendants request the Court grant judgment as follows:

1. Dismiss the Plaintiffs' Complaint with prejudice;
2. For a judgment in favor of Defendants in favor of Defendant and against Plaintiff;
3. For judgment awarding Defendants their costs, disbursements, and reasonable attorney's fees; and
4. For such other and further relief as the Court may deem just and equitable in the circumstances.

Dated this 28th day of April 2022.

/s/ Eric Miller

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21-24-1. Power of courts to provide declaratory relief--Form and effect of declarations.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Source: SL 1925, ch 214, § 1; SDC 1939 & Supp 1960, § 37.0101.

15-6-57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to chapter 21-24, shall be in accordance with this chapter, and the right to trial by jury may be demanded under the circumstances and in the manner provided in §§ 15-6-38 and 15-6-39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Source: SD RCP, Rule 57, as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

STATE OF SOUTH DAKOTA	**)**	**IN THE CIRCUIT COURT**
	) ss.	
COUNTY OF MEADE	**)**	**FOURTH JUDICIAL CIRCUIT**

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, **Plaintiffs,** **vs.** **CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,** **Defendants.**	**46CIV22-000077** **RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

COMES NOW, Plaintiffs **TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,** by and through their attorney, Kellen B. Willert, and respectfully submit this response to Defendants' Motion to Dismiss.

Attached hereto as "Exhibit 1" is the Memorandum Decision and Order in Meade County Court File 46CIV22-000005, which Plaintiffs request the Court take judicial notice of.

Defendants' motion is based solely on the theory that the Court lacks subject matter jurisdiction in this matter pursuant to SDCL § 15-6-12(b)(1). Although Defendants' briefing may suggest they are asking the Court to dismiss the Complaint on grounds other than SDCL § 15-6-12(b)(1), Defendants have not made other motions nor noticed them for hearing; the Court is constrained to the limitations of Defendants' Motion pursuant to SDCL §§ 15-6-12(b)(1) and 15-6-6(d).

PRELIMINARY STATEMENT

Plaintiffs are not contesting the 2007 election nor the petition that it was based on. Plaintiffs simply ask the Court to declare whether the 2007 election had any effect because it sought to change the "form of government" to a "City Manager Form of Government" (See Exhibit 1 to the Complaint), which has been adjudicated to be an outcome that is not possible under South Dakota law. Exhibit 1, pages 3-4.

Significant admissions on behalf of the Defendants thus far in this matter include:

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1) "The authority to employ a City Manager is a special power granted to a municipality by a vote of the people pursuant to SDCL ch. 9-10." See Defendants' Answer to paragraph 50 of the Complaint.

2) "The only way for a municipality to effect the office of a "City Manager" is to do so pursuant to the procedures required in SDCL ch. 9-10." See Defendants' Answer to paragraph 25 of the Complaint.

3) The City legislated multiple ordinances relating to the office of City Manager. See Defendants' Answer to paragraph 45 of the Complaint.

4) "In order to create the office of 'City Manager', a municipality must adhere to the requirements of SDCL ch. 9-10." See Defendants' Answer to paragraph 16 of the Complaint.

5) Ainslie has been employed by the City since 2011. See Defendants' Answer to paragraph 34 of the Complaint.

6) Plaintiffs are residents and taxpayers of the City of Sturgis. See Defendants' Answer to paragraph 1 of the Complaint.

In South Dakota, "All political power is inherent in the people...." South Dakota Constitution, Article VI, § 26. The only way for a municipality to gain the special power of employing a City Manager is that a petition for an "election be called to vote upon the proposition of employing a city manager...." SDCL § 9-10-1.

1. DEFENDANTS ERRONEOUSLY CLAIM THAT PLAINTIFFS CHALLENGE THE INCORPORATION OF THE MUNICIPALITY OF STURGIS

Even though Plaintiffs do not challenge Sturgis' incorporation as a municipality, Defendants spend their briefing arguing about it. Defendants first argue that "Plaintiffs challenge the organization of municipal government in Sturgis" and that "Plaintiffs do not have standing and therefore this Court does not have subject-matter jurisdiction to hear Plaintiffs' claims." Brief in Support of Motion to Dismiss ("Support Brief"), page 1. Defendants conclude their Support Brief by stating "SDCL 9-3-20 only permits the State or a person acting on the State's behalf to inquire into the regularity of the organization of any acting municipality...." *Id.*, at page 13 (internal citation omitted).

SDCL § 9-3-20 states "The regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state." SDCL § 9-3-20. SDCL Chapter 9-3 has nothing to do with Plaintiffs' claims, as it pertains to incorporating a municipality.

Plaintiffs do not challenge the fact that Sturgis is an incorporated municipality, as evidenced by paragraph 5 of the Complaint in this matter. Plaintiffs concede that Sturgis is a municipality incorporated in the State of South Dakota. SDCL § 9-3-20 is not applicable in this matter, and Defendants' arguments relating to it are not relevant to this case.

2. PLAINTIFFS HAVE EXPRESS STATUTORY STANDING TO BRING THEIR CLAIMS

SDCL § 9-1-6 expressly provides: "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." Plaintiffs are Sturgis citizens and taxpayers seeking to prevent violations of SDCL Title 9. *See* Complaint, ¶ 1; Answer, ¶ 2; Affidavit of Tammy Bohn; Affidavit of Justin Bohn; and Affidavit of Brenda Vasknetz, all on file in this matter. The argument about standing should end here. None of the authority Defendants presented to the Court analyzes standing under this clear-cut statute, but instead relies on standing in easily distinguishable circumstances - for example, standing in the *Abata* case was determined by SDCL 7-8-27 – a statute dealing with appeals from a county commission. *Abata v. Pennington Cnty. Bd. Of Commissioners*, 2019 S.D. 39, 931 N.W.2d 714.[1]

Plaintiffs question the effect of the 2007 election and whether Sturgis was properly granted the special power to employ a City Manager and enact its City Manager Ordinances – all actions that must be made pursuant to SDCL Title 9. Plaintiffs are given special status for standing under SDCL § 9-1-6.[2] Because Plaintiffs are Sturgis citizens, taxpayers, and residents, they have express statutory standing to bring this action.

3. OTHER LAW SUPPORTS THE FACT THAT PLAINTIFFS HAVE STANDING

Standing as a Taxpayer to Protect Public Rights.

In assessing standing in regard to a Declaratory Judgment action, South Dakota has long recognized that:

> [A] taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights." *State ex rel. Jensen v. Kelly*, 65 S.D. 345, 347, 274 N.W. 319, 321 (1937). "The constitutionality of legislation affecting the use of public funds is a matter of public right." *State ex rel. Parker v. Youngquist*, 69 S.D.

[1] SDCL § 7-8-27 grants standing to "any person aggrieved", which is completely different from "any citizen and taxpayer residing" standing granted in SDCL § 9-1-6.

[2] SDCL § 9-1-6 proivides a special status. For example, a citizen who does not pay real property taxes would not have the same status. *Winter Brothers Underground, Inc. v. City of Beresford*, 2002 S.D. 117, 652 N.W.2d 99.

> 423, 426, 11 N.W.2d 84, 85 (1943). "[O]wnership, special interest, or injury is not a prerequisite to litigate a case ... involving public funds." *Kanaly v. State*, 368 N.W.2d 819, 827 (S.D.1985). It is beyond conjecture that the constitutionality of Chapter 240 affects the use of public funds.

Wyatt v. Kundert, 375 N.W.2d 186, 196 (S.D. 1985) (original citations).

> It has become the settled law of this state that a taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights.

Kanaly v. State By and Through Janklow, 368 N.W.2d 819, 827 (S.D. 1985).

> A taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights." *Agar Sch. Dist.*, 527 N.W.2d at 284 (alteration in original) (quoting *Wyatt v. Kundert*, 375 N.W.2d 186, 195 (S.D.1985) (citing *State ex rel. Jensen v. Kelly*, 65 S.D. 345, 347, 274 N.W. 319, 321 (1937))).

Edgemont School Dist. 23-1 v. South Dakota Dept. of Revenue, 1999 S.D. 48, ¶ 16, 593 N.W.2d 36 (original citations).

Granting Sturgis the special power to employ a City Manager pursuant to SDCL § 9-10-1 is statutorily the right of the people. SDCL § 9-10-1. It is beyond conjecture that employment of a City Manager involves and affects the use of public funds.

Plaintiffs have standing to bring their quo warranto and declaratory judgment action by virtue of being taxpayers and the fact that this matter is to protect the rights of the people.

Plaintiffs Have a 'Special Interest' that is Different from the General Public.

Additionally, Plaintiffs have other special statuses and interests giving them standing to bring the quo warranto action and declaratory judgment action:

(A) Plaintiffs are sponsors and circulators of a petition calling for an election in the same form as was done in 2007 – that petition was deemed invalid by Sturgis.

(B) In Meade County Court file 46CIV22-5 (hereinafter referred to as "Mandamus Action", which Plaintiffs ask the Court to take judicial notice of) the City of Sturgis argued that the petition called for an election to change the form of government, was therefore invalid, and that no election could be called. The Court in the Mandamus Action essentially found that the petition

called for changing the form of government to not have a City Manager and was therefore invalid because the petition "improperly seeks to achieve an outcome that is not possible...." Exhibit 1, page 4, attached hereto.

(C) Plaintiffs were all candidates on the ballot for the Mayor or Aldermen for the City of Sturgis at the time this matter was initiated.

4. EVEN IF THE COURT FINDS PLAINTIFFS LACK STANDING, THE COURT IS WITHOUT AUTHORITY TO DISMISS THE ACTION AT THIS TIME

If the Court finds Plaintiffs lack standing in this matter it would be so because Plaintiffs are not the real parties in interest. The law is clear that:

> ....No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

SDCL § 15-6-17(a) (in part). In the event the Court finds Plaintiffs lack standing in this matter, a reasonable amount of time must be allowed for joinder or substitution of the real party in interest.

WHEREFORE, Plaintiffs request the Court deny Defendants' Motion to Dismiss for lack of subject matter jurisdiction pursuant to SDCL § 15-6-12(b)(1).

DATED this 13th day of May, 2022.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Plaintiff

By: */s/ Kellen B. Willert*
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Filed: 5/13/2022 4:55 PM CST Meade County, South Dakota 46CIV22-000077

STATE OF SOUTH DAKOTA) ss. COUNTY OF MEADE	)	IN THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE, Defendants.		46CIV22-000077 PLAINTIFFS' REPLY IN SUPPORT OF MOTION REQUESTING LEAVE OF COURT

COME NOW, TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ ("Plaintiffs"), by and through their attorney of record, Kellen B. Willert, of Bennett Main Gubbrud & Willert, P.C., and respectfully submit **PLAINTIFFS' REPLY IN SUPPORT OF MOTION REQUESTING LEAVE OF COURT.**

Count 1 of the Complaint in this matter is a Quo Warranto action, which is governed by SDCL Ch. 21-28.

> An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:
>
> (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;
>
> (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;
>
> (3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

SDCL § 21-28-2.

"[L]eave shall be freely given when justice so requires." SDCL § 15-6-15(a) (in part, discussing amendments to pleadings). Without citing any authority, Defendants assert that "[s]ince the Plaintiffs filed the quo warranto action before being granted leave, the Plaintiffs [sic] Complaint is materially defective." *See* Defendants' Objection to Plaintiffs' Motion Requesting Leave of Court ("Objection"), pages 3-4.

Certainly, had Plaintiffs requested ex parte leave of court prior to initiating the action the Defendants would have complained about ex parte communications with the Court. Plaintiffs' Motion Requesting Leave of Court was filed and served before Defendants even filed and served their Answer in this action.

Defendants are in no way prejudiced by Plaintiffs asking for leave of court to bring their quo warranto action - in fact, Defendants benefit from Plaintiffs' professional courtesy by having a seat at the table while the Court considers the issue.[1]

The crux of Plaintiffs' quo warranto action is determining whether Sturgis has the special power to employ a City Manager pursuant to SDCL ch. 9-10. Without the special power to employ a City Manager, then (among other things) the office of Sturgis City Manager does not exist and Sturgis lacked authority to pass its ordinances relating to City Manager and to employ the current City Manager.

Plaintiffs have special status to maintain the quo warranto action (and the declaratory judgment action as well) by virtue of SDCL § 9-1-6, which expressly gives standing to Plaintiffs as citizens and taxpayers of Sturgis:

> Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title.

SDCL § 9-1-6. If Sturgis passed ordinances and is employing a City Manager without having been granted the special power to do so by the people, then this quo warranto action is the proper remedy for Defendants' violations of SDCL ch. 9-10, which provides for and regulates a municipal government with the special power to employ a City Manager.[2]

In *Hurley v. Coursey*, Hurley brought an election contest after an election. The Court held Hurley "might have sought it by quo warranto is clear, but it does not follow that a

[1] It also begs the question as to how the Court could procedurally grant leave prior to the Plaintiffs filing anything – the Court does not take civil action without a court file being opened, and to Plaintiffs' knowledge the Clerks do not open a file without a Summons and Complaint. Plaintiffs ask the Court to take judicial notice of this procedural fact.

[2] Note, SDCL § 9-1-6 grants special status to a citizen and taxpayer. It does not grant standing to a mere resident of Sturgis nor anyone merely conducting business in Sturgis. The status of a citizen and taxpayer is different than that of the general public, and is therefore a special status.

civil action in the nature of quo warranto (section 2781 *et seq.*, RC 1919) was his only available remedy." *Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4, 8 (S.D. 1936). **The Court went on to approve and affirm the fact that "the point that the office claimed by contestee has no legal existence may be raised, either by quo warranto, or by an election contest."** *Id.* (emphasis added).

Significantly, the Court in *Hurley* acknowledged:

> Hurley had not been a candidate for the office of municipal judge in the 1935 election, and it is entirely plain that Hurley's contest is predicated upon the theory that there had never been a valid establishment of any municipal court in Rapid City, and consequently that there was no such office as that of judge of said court, and that neither Coursey nor anyone else could be elected thereto.

Id., at 7.

This case involves the following facts:

1) The Plaintiffs, as residents, citizens, and taxpayers were sponsors and circulators of a petition ("2021 Petition") in the same form as the 2007 petition ("2007 Petition) to call for an election just as was done in 2007;

2) Sturgis refused to certify the 2021 Petition;

3) The Plaintiffs brought a mandamus action in Meade County Court file 46CIV22-5 ("Mandamus Action") (which Plaintiffs request the Court take judicial notice of) requesting the Court to order Sturgis to certify the Petition and schedule an election;

4) Sturgis argued against the Mandamus action that the 2021 petition was invalid because a 'City Manager form of government' does not exist;

5) The Court in the Mandamus Action ruled in its Memorandum Decision and Order that "[s]ince the Petition for Election to Change Municipal Government in the Municipality of Sturgis improperly seeks to achieve an outcome that is not possible, it is invalid".

Additionally, the fact that Plaintiffs were sponsors, circulators, and prosecutors of the Mandamus Action for the 2021 Petition calling for an election just like the 2007 Petition called for, the 2021 Petition being declared invalid, and the Defendants now defending the validity of the 2007 Petition (and subsequent actions) is a clear division between Plaintiffs and the general population. Plaintiffs have a 'special interest' in the existence of the office

of Sturgis City Manager and validity of Sturgis' correlating ordinances due to the fact that the 2007 Petition and election sought to achieve an outcome that was not possible.

SDCL § 9-1-6, the *Hurley* case, and the fact that Plaintiffs were sponsors and circulators of the 2021 Petition are three independent and dispositive facts of multiple ways Plaintiffs have a 'special interest' to bring forth the quo warranto action. Plaintiffs should be granted leave of Court.[3]

DEFENDANTS' RESISTANCE

Plaintiffs now address Defendants' arguments against Plaintiffs' Motion Requesting Leave of Court. Plaintiffs' Motion was filed and served over two weeks before Defendants filed and served their Answer in this matter. Defendants argue that Plaintiffs have no "special interest" in this matter.

None of the cases cited by Defendants deal with the issue of whether or not an office actually exists. Plaintiffs submit that the office does not exist, and challenge the right of Mr. Ainslie to exercise said non-existent office.

Defendants cite *Bridgman v. Koch* and *Cummings v. Mickelson*. *See* Defendants' Objection to Plaintiffs' Motion Requesting Leave of Court ("Objection"), page 2. Specifically, Defendants argue:

> One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office, such as a defeated candidate for that office. *Bridgman v. Koch*, 2013 S.D. 83, ¶ 8, 840 N.w.2d 676, 678. If a person does not allege they have a right to the challenged office, then they have no "special interest" in the action. *See id.* (finding that a person who ran for state's attorney in Jerauld County did not have standing to also challenge the same person as state's attorney in Buffalo County). A private citizen has no "special interest" in an office merely from being a citizen or a taxpayer. *Cummings v. Mickelson*, 495 N.W.2d 493, 498 n.6 (S.D. 1993) (citing *Knockemuss v. De Kerchove*, 66 S.D. 446, 285 N.W. 441 (1939)).

Id.

[3] Plaintiffs also had a 'special interest' in the existence of the special power to employ a City Manager as candidates for Sturgis City Council.

Bridgman v. Koch

Defendants' analysis of *Bridgman* is misguided. Defendants' statement that"[i]f a person does not allege they have a right to the challenged office, then they have no 'special interest' in the action" is without support. *See* Objection, page 2. The *Bridgman* case does not state that the only way to have standing is to allege one has a right to the challenged office – in fact the case expressly asserts a quo warranto action "deals only with a person's right to **hold or exercise** public office...." *Bridgman*, at ¶ 8 (emphasis added). Certainly, the *Hurley* case proves Defendants' assertion to be false.[4]

In *Bridgman*, Dedrich Koch filed a declaration of candidate as a Republican for Jerauld County State's Attorney in March 2012. Then, on May 29, 2012, Koch filed a declaration of candidate for Buffalo County State's Attorney as an Independent. On June 5, 2012 Koch won the Republican primary against Casey Bridgman for Jerauld County State's Attorney. Koch ran unopposed in the election for Jerauld County State's Attorney and was therefore deemed elected pursuant to SDCL § 12-16-1.1.

Then, later in November 2012, Koch won the general election for Buffalo County State's Attorney, and in December he advised Buffalo County officials he did not intend to take that office. In January 2013, Koch was sworn in as Jerauld County State's Attorney.

Bridgman refused to vacate his office as Jerauld County State's Attorney and brought a quo warranto action claiming he, and not Koch, was qualified and entitled to the office of Jerauld County State's Attorney; Bridgman also challenged Koch's "candidacy for the office of Buffalo County State's Attorney". *Bridgman*, at ¶ 8. The Court found Bridgman had no "special interest" in the quo warranto relating to the Buffalo County State's Attorney position. *Bridgman*, at ¶ 8. Bridgman also challenged the constitutionality of SDCL § 7-16-31 – and the Court found that was beyond the scope of a quo warranto action. *Bridgman*, at ¶ 7. The Court affirmed that Bridgman's quo warranto action relating to the Jerauld County State's Attorney position was properly brought. *Bridgman*, at ¶ 7.

The analysis in *Bridgman* is not applicable to the case now before the Court in terms of whether Plaintiffs have a "special interest". The *Bridgman* Court held "[s]ince this action deals only with a person's right to hold or exercise public office, the proceeding must be timely directed to the current term of office...Bridgman cannot also challenge Koch on his **candidacy** for the office of Buffalo County State's Attorney...." *Bridgman*, at ¶ 8 (emphasis added). In terms of the office of Buffalo County State's Attorney, Koch's candidacy for the office could not be challenged because he never held that office. *Id.*

[4] Again, recall the *Hurley* case, which states: "the point that the office claimed by contestee has no legal existence may be raised, either by quo warranto, or by an election contest." *Hurley*, at 8.

Again, a quo warranto action "deals only with a person's right to hold or exercise public office, [and therefore] the proceeding must be timely directed to the current term of office." *Bridgman*, at ¶ 8. [5]

Cummings v. Mickelson

The *Cummings* case involved a challenge to the authority of the Governor to appoint two attorneys to the positions of Circuit Court Judge on the basis of their residency at the time of appointment being outside of the Circuit to which they were being appointed to. *Cummings v. Mickelson*, 495 N.W.2d 493, 493 (S.D. 1993). The challengers in the case sought a writ of prohibition, and one of the issues on appeal was "Should a writ of prohibition be denied in that the Applicants purportedly have a plain, speedy and adequate remedy in quo warranto?" *Cummings v. Mickelson*, 495 N.W.2d 493, 493 (S.D. 1993). The Court refused to deny the writ of prohibition, and instead declared that it would "address the Applicants' issue on the merits." *Cummings v. Mickelson*, 495 N.W.2d 493 (S.D. 1993).

Defendants rely on the dicta found in endnote 6 of the opinion, which was by no means a unanimous opinion (one concurring opinion, one concur in part and dissent in part opinion, and one dissenting opinion) and, again did not the issues of whether or not an office existed.

Lippold v. Meade Cnty. Bd. Of Comm'rs

Defendants also cite *Lippold v. Meade Cnty. Bd. Of Comm'rs* to support their argument.

The facts of the *Lippold* case cited by Defendants have no bearing on this proceeding – *Lippold* dealt with a challenge to the incorporation of the City of Buffalo Chip and whether non-state parties had standing in light of SDCL § 9-3-20 – a statute that is not applicable here. *Lippold v. Meade Cnty. Bd. Of Comm'rs*, 2018 S.D. 7, 906 N.W.2d 917.

In citing the *Lippold* case, Defendants assert that "lack of confidence in the validity of an office would require anyone doing business with the office to verify its validity of the office before doing business with it." Objection, at page 3. Defendants' assertion is misplaced – the *Lippold* case quoted from the *Merchants' National Bank* case, which dealt with the executive's authority to organize new counties and defacto organizations. *Id.*, at ¶ 21. The question in this case is whether Sturgis has ever been granted the special municipal power to employ a City Manager. The special power to employ a City Manager is not an

[5] Defendants have mentioned in their pleadings the fact that no individuals who formerly acted as Sturgis City Managers were not named in this action. As the Court can see, a Quo Warranto challenge is properly brought against those currently exercising said office.

executive or legislative authority to great or grant – it is a special power held solely by the people.

WHEREFORE, Plaintiffs request the Court grant leave of Court as requested and pursuant to SDCL § 21-28-2.

Dated this 17th day of May, 2022.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Plaintiffs

By: */s/ Kellen B. Willert*
KELLEN B. WILLERT
618 State Street
Belle Fourche, SD 57717
(605)892-2011

STATE OF SOUTH DAKOTA)) **ss.** **COUNTY OF MEADE**)		**IN THE CIRCUIT COURT** **FOURTH JUDICIAL CIRCUIT**
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, **Plaintiffs,** **vs.** **CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,** **Defendants.**		**46CIV22-000077** **AFFIDAVIT OF JUSTIN BOHN**

STATE OF SOUTH DAKOTA)
) **ss.**
COUNTY OF Meade)

Justin Bohn, being first duly sworn upon his oath, deposes and says that:

1. I am one of the Plaintiffs in Meade County Court File No. 46CIV22-000077.

2. I own real property in the City of Sturgis, South Dakota.

3. I am a current resident of the City of Sturgis, South Dakota.

4. I pay taxes in and to the City of Sturgis, South Dakota.

5. I am a registered voter, and vote, in the City of Sturgis, South Dakota.

6. I was a sponsor and circulator of the Petition referenced in paragraph 2 of the Complaint herein.

Filed: 5/13/2022 4:55 PM CST Meade County, South Dakota 46CIV22-000077

7. I was a Plaintiff in Meade County Court File No. 46CIV21-000005, wherein I sought a Writ of Mandamus in relation to the Petition referenced in paragraph 2 of the Complaint herein.

8. I am a citizen of Sturgis, South Dakota.

DATED this 13 day of May, 2022.

Justin Bohn

JUSTIN BOHN
1616 Elk Court
Sturgis, SD 57785
Ph: (605) 490-4422

Subscribed and sworn to before me this 13 day of May, 2022.

(SEAL)

Ashley Katchmark

Notary Public
My Commission Expires: 03/21/23

STATE OF SOUTH DAKOTA) **) ss.** **COUNTY OF MEADE)**	**IN THE CIRCUIT COURT** **FOURTH JUDICIAL CIRCUIT**
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, **Plaintiffs,** **vs.** **CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,** **Defendants.**	**46CIV22-000077** **AFFIDAVIT OF BRENDA VASKNETZ**

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF Meade **)**

Brenda Vasknetz, being first duly sworn upon her oath, deposes and says that:

1. I am one of the Plaintiffs in Meade County Court File No. 46CIV22-000077.

2. I own real property in the City of Sturgis, South Dakota.

3. I am a current resident of the City of Sturgis, South Dakota.

4. I pay taxes in and to the City of Sturgis, South Dakota.

5. I am a registered voter, and vote, in the City of Sturgis, South Dakota.

6. I was a sponsor and circulator of the Petition referenced in paragraph 2 of the Complaint herein.

Filed: 5/13/2022 4:55 PM CST Meade County, South Dakota 46CIV22-000077

7. I was a Plaintiff in Meade County Court File No. 46CIV21-000005, wherein I sought a Writ of Mandamus in relation to the Petition referenced in paragraph 2 of the Complaint herein.

8. I am a citizen of Sturgis, South Dakota.

DATED this 13 day of May, 2022.

Brenda Vasknetz

BRENDA VASKNETZ
1510 Jackson Street
Sturgis, SD 57785
Ph: (605) 490-3945

Subscribed and sworn to before me this 13th day of May, 2022.

ASHLEY KATCHMARK NOTARY PUBLIC SEAL (SEAL) SOUTH DAKOTA

Ashley Katchmark

Notary Public
My Commission Expires: 03/21/23

STATE OF SOUTH DAKOTA) **) ss.** **COUNTY OF MEADE)**	**IN THE CIRCUIT COURT** **FOURTH JUDICIAL CIRCUIT**
TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, **Plaintiffs,** **vs.** **CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE,** **Defendants.**	**46CIV22-000077** **AFFIDAVIT OF TAMMY BOHN**

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF Meade **)**

Tammy Bohn, being first duly sworn upon her oath, deposes and says that:

1. I am one of the Plaintiffs in Meade County Court File No. 46CIV22-000077.

2. I own real property in the City of Sturgis, South Dakota.

3. I am a current resident of the City of Sturgis, South Dakota.

4. I pay taxes in and to the City of Sturgis, South Dakota.

5. I am a registered voter, and vote, in the City of Sturgis, South Dakota.

6. I was a sponsor and circulator of the Petition referenced in paragraph 2 of the Complaint herein.

Filed: 5/13/2022 4:55 PM CST Meade County, South Dakota 46CIV22-000077

7. I was a Plaintiff in Meade County Court File No. 46CIV21-000005, wherein I sought a Writ of Mandamus in relation to the Petition referenced in paragraph 2 of the Complaint herein.

8. I am a citizen of Sturgis, South Dakota.

DATED this 13 day of May, 2022.

TAMMY BOHN
1616 Elk Court
Sturgis, SD 57785
Ph: (605) 490-1321

Subscribed and sworn to before me this 13 day of May, 2022.

(SEAL) ASHLEY KATCHMARK NOTARY PUBLIC SEAL SOUTH DAKOTA

Notary Public
My Commission Expires: 03/21/23

§ 26. Power inherent in people--Alteration in form of government--Inseparable part of Union. All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper. And the state of South Dakota is an inseparable part of the American Union and the Constitution of the United States is the supreme law of the land.

9-10-1. Petition for employment of city manager--Election.

If a petition signed by fifteen percent of the registered voters of any first or second class municipality as determined by the total number of registered voters at the last preceding general election is presented requesting that an election be called to vote upon the proposition of employing a city manager, the governing body shall call an election for that purpose. Upon receipt of a valid petition, the question shall be presented at the next annual municipal election or the next general election, whichever is earlier. However, the governing body may expedite the date of the election by ordering, within ten days of receiving the petition, a special election to be held on a Tuesday not less than thirty days from the date of the order of the governing body.

The election shall be held upon the same notice and conducted in the same manner as other municipal elections. The vote upon the question of employing a city manager shall be by ballot which conforms to a ballot for statewide question except that the statement required to be printed on the ballot shall be prepared by the municipal attorney.

Source: SL 1918, ch 57, § 1; RC 1919, § 6231; SL 1935, ch 158, §§ 2, 11; SDC 1939, § 45.0901; SL 1988, ch 63, § 5; SL 1992, ch 60, § 2; SL 2006, ch 29, § 5; SL 2011, ch 42, § 1, eff. March 14, 2011.

21-28-2. Persons entitled to bring action--Grounds for action.

An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:

(1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;

(2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;

(3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

Source: CCivP 1877, § 534; CL 1887, § 5348; RCCivP 1903, § 573; RC 1919, § 2784; SL 1919, ch 289, § 4; SDC 1939 & Supp 1960, § 37.0509.

15-6-17(a). Real party in interest.

Every action shall be prosecuted in the name of the real party in interest. A personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Source: SDC 1939 & Supp 1960, § 33.0402; SD RCP, Rule 17 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; as amended by Sup. Ct. Order No. 2, March 31, 1969, effective July 1, 1969; SL 1993, ch 213, § 88.

15-6-56(c). Motion for summary judgment and proceedings thereon.

Unless different periods are fixed or permitted by order of the court, the motion and supporting brief, statement of undisputed material facts, and any affidavits shall be served not later than twenty-eight calendar days before the time specified for the hearing; any response or reply thereto, including any response to the movant's statement of undisputed material facts, shall be served not later than fourteen calendar days before the hearing; and a reply brief or affidavit may be served by the movant not later than seven calendar days before the hearing. The time computation rules of SDCL 15-6-6(a) requiring the exclusion of intermediate Saturdays, Sundays, and legal holidays shall not apply to the seven-calendar-day reply period.

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

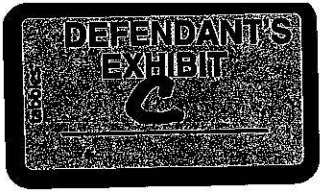
The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Source: SD RCP, Rule 56 (c), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; SL 2006, ch 329 (Supreme Court Rule 06-55), eff. July 1, 2006; SL 2007, ch 302 (Supreme Court Rule 06-70), eff. Jan. 1, 2007; SL 2008, ch 281 (Supreme Court Rule 07-02), eff. Jan. 1, 2008; SL 2021, ch 256 (Supreme Court Rule 21-04), eff. Jul. 1, 2021.

15-6-56(e). Form of affidavits for summary judgment--Further testimony--Defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Source: SD RCP, Rule 56 (e), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.



OFFICIAL MUNICIPAL ELECTION BALLOT
STURGIS, SOUTH DAKOTA
APRIL 10, 2007

STATEMENT

On February 9, 2007, a Petition for Election to Change Municipal Government of the City of Sturgis was submitted to the Finance Officer of the City of Sturgis requesting that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL 9-11-5. The Petition requested that the form of city government be changed from an aldermanic form of government to a city manager form of government. The petitions that were signed by registered voters in support of the petitions were timely filed with the City Finance Officer. The matter will be before the electorate at the annual municipal election which shall be held on the 10 day of April, 2007.

EXPLANATORY STATEMENT

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition For Election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change from an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a City Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council; however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

A vote "FOR" would adopt the proposed Petition for Election to Change Municipal Government to a City Manager form of government.

A vote "AGAINST" would defeat the proposed Petition for Election to Change Municipal Government to a City Manager form of government and would retain the existing Aldermanic form of government.

SHOULD THE PROPOSED PETITION FOR ELECTION TO CHANGE MUNICIPAL GOVERNMENT TO A CITY MANAGER FORM OF GOVERNMENT BE APPROVED?

○ FOR

○ AGAINST

15-26A-12. Actions available to Supreme Court on decision.

By its judgment, the Supreme Court may reverse, affirm, or modify the judgment or order appealed from, and may either direct a new trial or the entry by the trial court of such judgment as the Supreme Court deems is required under the record.

Source: SDC 1939 & Supp 1960, § 33.0710; SDCL, § 15-26-26.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Supreme Court Appeal No. 30163

TAMMY BOHN, **JUSTIN BOHN**, and
BRENDA VASKNETZ,

Petitioners and Appellants,

vs.

CITY OF STURGIS, a South Dakota municipal corporation, and
DANIEL AINSLIE,

Respondents and Appellees.

APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE KEVIN J. KRULL, RETIRED CIRCUIT COURT JUDGE

BRIEF OF THE REGISTERED VOTERS OF STURGIS AS *AMICUS CURIAE*

Kellen B. Willert
618 State Street
Belle Fourche, SD 57717
(605) 892-2011

Attorney for Appellants

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(605) 224-8803

Attorneys for Appellees

Filed: 2/3/2023 4:34 PM CST Supreme Court, State of South Dakota #30163

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Throughout this brief, civil action 46CIV22-5 captioned *Bohn et al. v. Bueno et al.* now pending before this Court as Appeal No. 30008 will be referred to as "*Bohn I.*" Civil action 46CIV22-77 captioned *Bohn et al. v. City of Sturgis and Ainsley* now pending before this Court as Appeal No. 30163 will be referred to as "*Bohn II.*"

The three individuals identified as Petitioners and Appellants in *Bohn I* and Plaintiffs and Appellants in *Bohn II* will be referred to collectively as "Appellants." The first-class municipal corporation and political subdivision of the State of South Dakota identified as Respondent and Appellee in *Bohn I* and Defendant and Appellee in *Bohn II* will be referred to as "the City." The municipal election held April 7, 2007 and canvased April 16, 2007 will be referred to herein as "the 2007 Election." Citations to the settled record of *Bohn I* will be designated "SRB1 ___." Citations to the settled record of *Bohn II* will be designated "SRB2 ___." Documents cited in the appendix of the brief will be designated "App. ___."

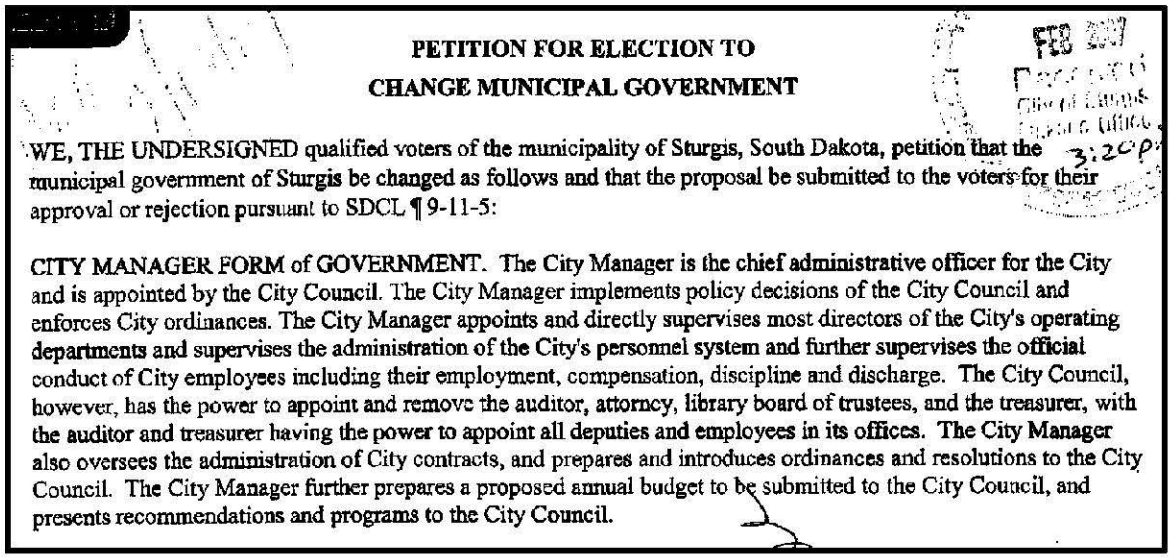
FACTS

– – 2007 – –

In January 2007, a grassroots, voter-initiated, local political movement was born in Sturgis with an idea to abandon the then-existing "strong-mayor" form of municipal government (aldermanic without a city manager) and replace it with the aldermanic form of government with a city manager. *See*

generally SRB2 114-60. Citizens organized to form a committee with a stated goal "to affect the change in Sturgis to utilize the council/manager form of government." SRB2 140. Members of that group began to circulate a petition.

On February 9, 2007, a "Petition for Election to Change Municipal Government" was presented to the City Finance Officer bearing the following language:



PETITION FOR ELECTION TO
CHANGE MUNICIPAL GOVERNMENT

FEB 2007
3:20P

WE, THE UNDERSIGNED qualified voters of the municipality of Sturgis, South Dakota, petition that the municipal government of Sturgis be changed as follows and that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL ¶ 9-11-5:

CITY MANAGER FORM of GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts, and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council, and presents recommendations and programs to the City Council.

SRB2 138; App. 001.

On February 12, 2007, the City invited Roland Van der Werff, then president of the South Dakota City Managers Association, to give a presentation to the Sturgis City Council and the public explaining the primary practical and statutory differences between the then-existing strong-mayor form of government and the proposed change to city manager form of government. SRB2 142-60; 203; 261; 270.

On February 20, 2007, the Sturgis City Council passed Resolution 2007-09, a Resolution Setting the Election Date for Vote on Change in Form of Government:

Green introduced the following written resolution and moved its adoption:

RESOLUTION 2007-09

RESOLUTION SETTING THE ELECTION DATE FOR VOTE ON CHANGE IN FORM OF GOVERNMENT

WHEREAS it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota

to bring the following proposal to a voters for their approval or rejection pursuant to SDCL § 9-11-5:

CITY MANAGER FORM of GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts, and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council, and presents recommendations and programs to the City Council.

WHEREAS it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;

NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.

Dated this 20th day of February 2007.

Published: March 3, 2007
Effective: March 24, 2007

SRB2 15-16; App. 002-03. At the end of that meeting, a member of the Sturgis City Council made the following observation, which was recorded in the official minutes:

> **OTHER MATTERS THAT MAY COME BEFORE COUNCIL**
>
> Green advised that she had requested a copy of the petitions for the management form of government that over 1000 people had signed. She wanted it clarified that the vote would be for the City Manager form of government and not for the option of manager or administrator.
>
> Green further advised that the program the other night was presented based on the request of the Citizens to Advance Sturgis. This group requested that the City invite Roland Van der werff. Green has concerns with the way the news has been reporting the petitions as a "manager/administrator" proposal.
>
> Again, the vote is on a city manager form of government. Should that fail, the council then has the right to look into an administrator position. Green is concerned that the council is taking a hit based on the mis-information that is circulating and she just wants to make sure the public knows what they are voting for.
>
> Jack Hoel advised that he felt everybody already understands that.

SRB2 16; App. 004.

Numerous newspaper articles informed conversations between friends and neighbors; and, after being fully subjected to the political process *in the time allowed by law*, the voter-proposed change in form of government was submitted to the electorate on April 10, 2007. *See* SRB2 114-142. The language on the official municipal ballot read:

OFFICIAL MUNICIPAL ELECTION BALLOT
STURGIS, SOUTH DAKOTA
APRIL 10, 2007

STATEMENT

On February 9, 2007, a Petition for Election to Change Municipal Government of the City of Sturgis was submitted to the Finance Officer of the City of Sturgis requesting that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL 9-11-5. The Petition requested that the form of city government be changed from an aldermanic form of government to a city manager form of government. The petitions that were signed by registered voters in support of the petitions were timely filed with the City Finance Officer. The matter will be before the electorate at the annual municipal election which shall be held on the 10 day of April, 2007.

SRB2 139; App. 005.

The ballot also contained the City's official explanation of the voter initiative:

EXPLANATORY STATEMENT

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition For Election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change from an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a City Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council; however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

A vote "FOR" would adopt the proposed Petition for Election to Change Municipal Government to a City Manager form of government.

A vote "AGAINST" would defeat the proposed Petition for Election to Change Municipal Government to a City Manager form of government and would retain the existing Aldermanic form of government.

Id.

The Voters approved the initiated change in form of government. In the resolution canvassing the election, the City declared it would "change to the manager form of government." SRB2 20; App. 013-14. The city council proposed, debated, and enacted ordinances which constructed an entirely new government on the foundation of the 2007 Election and established the Office of City Manager by ordinance.[1] The city council hired a qualified individual to be the City's chief administrative officer and to wield the extraordinary statutory powers granted by law to the newly-created Office of City Manager.[2] The mayor—who had previously possessed the authority to veto resolutions and ordinances passed by the city council and the authority to unilaterally hire, fire, and supervise key city employees—ceded most of that authority to the City Manager and was reduced to a mere figurehead position who otherwise occupied the same role as any council member. For the next sixteen years, the Sturgis City Council passed a Resolution declaring the City to "operate under the city manager form of government,"[3] a form of municipal

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[1]https://archive.sturgisgov.com/docs/Public/Minutes/City%20Council%20Minutes/1990%20to%202009/2007-11-19.pdf.

[2] A City Manager is not merely an employee of the City Council, it is a special municipal office with enumerated statutory powers. *See* SDCL §§ 9-1-8; 9-8-3; 9-14-13. The statutory powers wielded by the Office of City Manager are so extraordinary that the law prohibits any of the People's elected representatives from "deal[ing] with the administrative service" of the City and prescribes criminal penalties and removal from office as consequences for any elected official's efforts to circumvent the manager's sweeping authority. SDCL § 9-10-16.

[3] *See, e.g.*, SRB2 24.

government explicitly recognized by the South Dakota Legislature,[4] the South Dakota Supreme Court,[5] the South Dakota Municipal League,[6] and the municipalities of Yankton, Aberdeen, Brookings, Vermillion, Watertown, and Sturgis (until now, it seems).

– – November 2021 – –

On November 3, 2021, a group of Sturgis Registered Voters calling itself "Sturgis Citizens for Change"[7] very publicly announced the circulation of an initiative petition around the community. Thereafter, at least seven (7) individual Registered Voters of Sturgis began circulating the Petition, engaging with other registered voters, and rapidly collecting hundreds of signatures. SRB1 11-111.

The City took notice. In response to the Petition, on November 16, 2021, the Mayor, City Manager, Finance Officer, and City Attorney all executed an addendum to the City Manager's employment contract to ensure the orderly transition of government in the event the Petition sponsors

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[4] SDCL § 9-14-19.

[5] *Kolda v. City of Yankton*, 2014 S.D. 60, N. 7, 852 N.W.2d 425.

[6] The South Dakota Municipal League instructs its members, "[t]here are five forms of government in South Dakota," including the "City Manager Form." The League identifies the City of Sturgis as one of five municipalities in South Dakota operating under the "Aldermanic Form with a City Manager." https://www.sdmunicipalleague.org/index.asp?Type=B_PR&SEC={33E9C767-2065-4201-8F6B-DBDA8625A402}&DE={8ED171C6-7486-4770-B412-C99E60303C64}.

[7] The author of this brief is not affiliated with this group in any way and did not sign the Petition.

collected the number of signatures required to call an election and the voters were to adopt the initiative:

> If the City residents vote to return to an aldermanic form of government without a City Manager, the City believes the need for a competent chief executive officer will not change. The City still must have a chief executive office to implement the City's goals and objectives and to direct the day-to-day operations of City staff to achieve those goals and objectives. The title of the position may change under a different form of government and a different chapter of the South Dakota Code may apply; nevertheless, the core function of the chief executive officer remains the same.
>
> Therefore, the parties understand that, if there is a change of form of government, the job performed by the Employee under his Employment Agreement could become that of the City Administrator performing those duties and responsibilities outlined by the City in the City Administrator job description, or by resolution, or by ordinance or by any combination of job description, resolution, and ordinance.

SRB1 417; App. 006.

This addendum to the City Manager's employment contract also had the secondary effect of memorializing the City's *true* understanding of the intent of the Petition and the effects the Petition would bring about if ultimately approved by the Voters. This addendum was executed in secret, did not appear on a public agenda, was not discussed or voted on in an open meeting, and was not released as a public record until it finally surfaced during the course of discovery in *Bohn I*. Somehow, the addendum stated it had been approved by the City Council nearly a year before the Petition was filed. Of course, the City could not make this secret addendum public, or it would expose the ruse that was to play out a month later.

On December 16, 2021, the Petition was submitted bearing the signatures of approximately 900 Registered Voters of Sturgis and the following language:

> The form of government for the municipality of Sturgis should be changed from the current form of municipal government (aldermanic with a city manager form of government) to an aldermanic form of government without a city manager.

SRB1 1-111; 419; App. 010.

When they signed the secret addendum to the City Manager's employment contract a month earlier, the Mayor, the City Manager, the City Attorney, and the City Finance Officer all understood the intent of the Petition and exactly what its effect would be if the Voters ultimately adopted the initiative it proposed. But, a month later, it was all just so confusing. "Really, if you want to get technical," asked the City, "what even is 'a form of government' anyway?" ¯_(ツ)_/¯ Notwithstanding the clear language of the Petition and the contrary opinion stated in the secret addendum, the City Attorney now claimed to believe:

> **The Petition does not call for any change in the form of city government. Indeed, two individuals called me to express concerns about the way the Petition was presented to them and asked to have their signature stricken from the Petition. These individuals told me that the Petition was presented to them as an effort to remove the current City Manager from his job. The Petition calls for the removal of the city manager, a power that the South Dakota legislature as reserved to the City Council. As such, it is improper to set an election on the question posed in the Petition.**

Id. The City Attorney also made unsupported (and later determined to be baseless) allegations of "irregularities" and unspecified and anonymous reports of alleged criminal conduct related to the Petition's circulation and asked the city council to authorize him to "refer the matter to law enforcement." *Id.* at 12. The City Finance Officer began calling signers of the Petition at random and questioning them. *See Id.* at 011-12. The Finance Officer refused to certify the Petition and refused to hold the election commanded by law.

PROCEDURAL HISTORY IN CIRCUIT COURT

A. *Bohn I*

After months of bad faith stalling by the City, including the truly baffling decision to ask the State Board of Elections for a declaratory judgment, several of the petition circulators filed an Application for Writ of Mandamus in circuit court seeking to compel the Finance Officer to perform her ministerial duty to certify the Petition and schedule an election. SRB1 1-11; App. 011. In response, the City moved for summary judgment. If, under the City's new fake legal opinion, there was no such thing as the "city manager form of government," then the Petition was invalid. Totally ignoring the historical reality of the 2007 Election and its own course of conduct for two decades, the City instead invited the circuit court to pluck a single arcane and ambiguous statutory provision from its essential political and historical context and construe that statute in a manner that would vindicate the City's

refusal to hold the required election absent court order. After months of delay, the circuit court adopted the City's proffered statutory interpretation and determined the Petition "seeks to achieve an outcome that is not possible, whether by initiative, referendum, or other means[.]" SRB1 421-24.

This is, of course, an incredibly problematic interpretation in light of the 2007 Election and the incredible change in form of government that election brought about; but, that is a matter for another day—or perhaps never if the petition sponsors would grow weary of getting money-whipped by their own government in court and give up. But, for now, the City had accomplished its true objective: there will be no election.

B. *Bohn II*

The petition sponsors did not give up. Instead, they filed *Bohn II*, which predictably challenged the lawful constitution and existence of the Office of City Manager in light of the circuit's court's order in *Bohn I* declaring the Voter's creation of that Office in 2007 to have been a legal impossibility. SRB2 1-9. If, as the argument goes, the Voters possessed no authority to change their form of government to a "city manager form of government" in 2007 because the law does not create a "city manager form of government," then the results of the 2007 Election must be overturned, the Office of City Manager judicially abolished, and the *status quo ante* form of government reinstituted by judicial decree. *See Id.*

The circuit court dismissed *Bohn II* and held the voters of Sturgis have no standing to challenge the legal existence of the Office of City Manager they supposedly created illegally. SRB2 467-68. Under the City's and the circuit court's view of the law, the incredible change in form of government brought about by the Registered Voters of Sturgis as the result of the 2007 Election can never be changed by any act of the voters who created the Office or the Sturgis City Council. The Office of City Manager and its extraordinary statutory powers would exist forever in Sturgis.

ARGUMENT

A. This Court should consolidate *Bohn I* and *Bohn II*.

In response to the circuit court's declaration in *Bohn I* that the "city manager form of government" is not something that can be brought about by initiative, Appellants seek the judicial abolition of the Office of City Manager in *Bohn II*. *See* SRB2 1-9. This would, in fact, be the correct and lawful result if *Bohn I* had been correctly decided, but it was not. The Voters created the Office of City Manager in 2007, and it is they and they alone who can eliminate that Office and its extraordinary statutory powers and return to the aldermanic form of government without a city manager. Because the legal issues in *Bohn I* and *Bohn II* are materially interrelated and arise from the same set of undisputed facts, this Court should consolidate these cases and consider them holistically.

B. The circuit court's order violates the rights guaranteed to the Registered Voters of Sturgis by Article VI, Section 26 of the South Dakota Constitution.

In 2007, the Registered Voters of Sturgis brought about a material change in their form of municipal government by enacting an initiated measure explicitly invoking SDCL Chapter 9-11. At the time, the City publicly adopted the legal opinion that SDCL Chapter 9-11 allowed the Voters to change their form of municipal government to a "city manager form of government." The City then repeatedly represented that legal opinion to its citizenry (including in the official minutes of its proceedings). The City acted in conformity with that legal opinion for sixteen years—and even memorialized that opinion as recently as December 6, 2021 in its secret addendum to the City Manager's employment contract. But, the moment the Petition was filed, the City suddenly and unexpectedly changed that position and argued *against* the validity of the 2007 Election in an effort to prevent a duly-called election.

In *Bohn I*, the circuit court committed material error by granting the City's motion for summary judgment and failing to acknowledge the historical fact of the 2007 Election and the legal precedent it created. Without access to this history, the circuit court could not fulfill its statutory obligation to construe the Petition liberally, "so that the real intention of the petitioners may not be defeated by a mere technicality." SDCL §§ 9-20-10; 2-1-11. If the Registered Voters of Sturgis believe the form of government they created in

2007 is no longer serving their interests, it is their right to alter or reform it in the methods authorized by the Legislature. *S.D. Const.* Article VI, § 26. The clear intent of the Petition is to call an election on the question of whether the Voters believe their interests are better served by the city manager form of government they created in 2007 or by the aldermanic form of government without a city manager it replaced and which is shared by the overwhelming majority of South Dakota municipalities.

The City has failed to cite to any legal authority for the proposition that the voters possessed the legal ability to create the Office of City Manager pursuant to SDCL Chapter 9-11 (which they obviously did) but no authority to eliminate the Office of City Manager using the same procedure and invoking the same statutory authority. Unable to support its actions and arguments with either legal precedent or common sense, the City's brief to this Court in *Bohn I* instead lobs *ad hominem* attacks on three unsuccessful candidates for municipal office and cites to the Gospel of Jesus Christ as legal authority for why the Registered Voters of Sturgis should prefer the city manager form of government over the alternative. *See City's Brief* in *Bohn I* at 13-15. Despite the City's repeated attempts to characterize it otherwise, this lawsuit is not about which of two distinct forms of municipal government the voters ought to prefer, nor is it about the results of the recent city council and mayoral elections, nor is it an attempt by political rivals of the current city manager to overthrow city government using judicial machinations. To

the contrary, this lawsuit is about the constitutional voting rights of the approximately 900 Registered Voters of Sturgis who validly exercised their right to call an election to reconsider the identical question they resolved in 2007 and the City's unlawful and bad-faith denial of those rights.

The political history surrounding this issue is deep and complex and will be interpreted differently in the mind of every Registered Voter of Sturgis. Most of that political history is not evidenced in the settled records of *Bohn I* and *Bohn II* but will be vivid in the recollections of most Registered Voters. No doubt many will support the City's efforts to prevent encroachment on the hard-won Office of City Manager and its extraordinary powers at all costs. Others may view the City's refusal to certify the Petition as a bad-faith effort to throw cold water on an engaged electorate and chill any future efforts to circulate initiative and referendum petitions.[8] Many others will be entirely uninformed (maybe even misinformed) on the issue. They will have the opportunity to become informed and persuaded by their own experiences with city government and the numerous public forums, newspaper articles, campaigning, and dialogues between neighbors that will inevitably occur in the weeks preceding the election. The Registered Voters of

[8] Many Registered Voters of Sturgis will remember signing referendum petitions and voting in referendum elections in August 2020 and February 2021. In these referenda, the voters overwhelmingly rejected two of the City's major policy proposals. If the focus is to be drawn on the intent of such an engaged electorate, it is not unreasonable to believe these voters might focus their next petition on the government advancing those voter-rejected policies.

Sturgis are engaged and informed on this issue and many others emanating from Sturgis City Hall. This is an issue of local concern reserved to the exclusive judgment of the Registered Voters of Sturgis pursuant to SDCL Chapter 9-11, Article VI Section 26 of the South Dakota Constitution, and the outcome of the 2007 Election. This dispute should have been adjudicated long ago at the ballot box instead of in a courtroom.

On its face, the intent of the Petition is clear. The shadow of any doubt can be cast away by viewing the Petition in the light of the 2007 Election. The outcome of the proposed initiative is one specifically contemplated by South Dakota law. The circuit court's order violates Article VI, Section 26 of the South Dakota Constitution in that it prevents the Registered Voters of Sturgis from voting on an issue reserved exclusively to their judgment.

PRAYER FOR RELIEF

The City Finance Officer had a ministerial duty to certify the Petition and conduct an election. Her failure to perform that duty has infringed and continues to infringe upon the constitutionally protected voting rights of the Registered Voters of Sturgis. This Court should vacate the order of the circuit court in *Bohn I* with instructions to issue a writ of mandamus based upon the arguments and authorities contained in Appellants' Brief in *Bohn I*. Then, the Court should vacate the order of the circuit court in *Bohn II* as moot. Finally, the Court should order the payment of Appellants' reasonable costs and attorney's fees as sanctions for the City's conduct in this case and what

the evidence suggests was a premeditated, secret, hostile offensive against the constitutional rights of its own citizens.

Dated this 3rd day of February, 2023.

Respectfully submitted,

/s/ Eric T. Davis

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Sturgis, South Dakota 57785
SD Bar No. 4467
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(605) 561-6283

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), the undersigned hereby states that the foregoing brief is typed in proportionally spaced typeface in Century Schoolbook 12-point font. This brief is sixteen (16) pages in length. The word processor used to prepare this brief indicates there are 2,906 words in the body of this brief.

Dated this 3rd day of February, 2023.

/s/ Eric T. Davis
Eric T. Davis

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of February, 2023, he filed a true and correct copy of the foregoing Brief of the Registered Voters of Sturgis as Amicus Curiae in the Office of the Clerk of the South Dakota Supreme Court and served true and correct copies of the same upon

the following individuals or entities by way of Odyssey File and Serve:

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Dated this 3rd day of February, 2023.

/s/ Eric T. Davis
Eric T. Davis

APPENDIX

Page Number(s)

DEFENDANT'S EXHIBIT

FEB 2007 Received 3:20pm

PETITION FOR ELECTION TO CHANGE MUNICIPAL GOVERNMENT

WE, THE UNDERSIGNED qualified voters of the municipality of Sturgis, South Dakota, petition that the municipal government of Sturgis be changed as follows and that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL ¶ 9-11-5:

CITY MANAGER FORM of GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts, and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council, and presents recommendations and programs to the City Council.

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.

Void — No city of residence

Name	Residence Address	County	Date
Sign: Carol B. Walker Print: Carol B. Walker	1141 Deadwood St.	Meade	1-29-2007
Sign: Donna Marshall Print: D Marshall	1309 Pineview Road	Meade	1-31-2007
Sign: Mary Ann Hackert Print: MARY ANN HACKERT	202 Tulsa Cr.	Meade	1-31-2007
Sign: [illegible] Print: BRIDEEK UBERSTAGAARD	3341 Whitewood Service Rd	Meade	1-31-2007
Sign: Geraldine Riggs Print: Geraldine Riggs	1355 Meade Ave	Meade	1-31-07
Sign: Brenda Schaeffer Print: Brenda Schaeffer	1320 Pineview Dr.	Meade	2/1/07
Sign: Dana Craig Print: Dana Craig	936 Sherman Street	Meade	2-2-07
Sign: Mae K Garrett Print: Mae K Garrett	1903 Pine St	Meade	2-2-07
Sign: R E Lindstrom Print: RUTH E LINDSTROM	1207 DEADWOOD ST	Meade	2/3/07
Sign: Cristy S. Schaffer Print: Cristy S. Schaffer	1230 Shephard St	Meade	2-3-07
Sign: [illegible] Print: [illegible] Skinner	2613 Cottontail Dr	Meade	2-7-07
Sign: [illegible]	[illegible]		

App. 001

CR000188

WHEREAS the Sturgis Motorcycle Rally will be held in the City of Sturgis, August 6, 2007 through August 12, 2007; and

WHEREAS due to the great number of motorcyclists in Sturgis, South Dakota, during this time, it would be in the best interest for the City of Sturgis and its citizens that a portion of Main Street in the City of Sturgis be designated for motorcycle traffic only during this time and that parking restrictions be placed in effect adjacent to the Main Street area; and

WHEREAS it is necessary for portions of First Street and Third Streets be closed to normal automobile vehicle traffic for Rally displays and activities; and

WHEREAS a considerable number of organized motorcycle tours are held during the Rally and from the standpoint of public safety, the City Council has determined that a location should be set aside to safely facilitate allowing these tours to begin at a place convenient to the participants and consistent with public safety, and it is necessary for a portion of Fifth Street be closed to normal automobile traffic.

NOW, THEREFORE, BE IT RESOLVED: That Main Street in the City of Sturgis, from its intersection with Middle Street to its intersection with Fourth Street, shall be closed to all traffic with the exception of motorcycle traffic, including two-wheel and three-wheel motorcycles, during a time period from 2 a.m. on Saturday August 4, 2007 to 2 a.m. on Sunday August 12, 2007, and for such additional time if deemed necessary by the Chief of Police of the City of Sturgis and the City Council's Public Safety Committee. The City Council of the City of Sturgis does hereby determine that it is necessary to close Main Street during the above time, in order to provide orderly traffic control and to ensure the safety of the citizens of the City of Sturgis and their guests. Only motorcycles, including two wheel and three-wheel motorcycles shall be allowed on Main Street during the above time period with the exception of maintenance vehicles, law enforcement vehicles, and fire protection vehicles. Bicycles, skateboards, scooters, roller blades, and other similar conveyances shall not be allowed to use that portion of Main Street described during the above time period, as the presence of bicycles, skateboards, scooters, roller blades, and other similar conveyances present a safety hazard to pedestrians, motorcyclists, bicyclists and those riding skateboards, scooters, roller blades and other similar conveyances. A 14-foot fire lane for emergency vehicles shall be maintained throughout the closed area.

BE IT FURTHER RESOLVED that a portion of First Street, from the alley between Main Street and Sherman Street to Lazelle Street shall be closed to motor vehicle traffic at 2 a.m. on Friday August 3, 2007 to 2 a.m. on Sunday August 12, 2007, for parking, rally displays, and other rally activities to be determined by the Council. A 14-foot fire lane for emergency vehicles shall be maintained throughout the closed area.

BE IT FURTHER RESOLVED a portion of Third Street from the alley between Main and Sherman Streets to the alley between Main and Lazelle Streets shall be closed to all traffic with the exception of motorcycle traffic from 2 a.m. on Friday August 3, 2007 to 2 a.m. Sunday August 12, 2007 for parking, rally displays, and other rally activities to be determined by the Council. Bicycles, skateboards, scooters, roller blades and other similar conveyances shall not be allowed to use that portion of Third Street described during the above time period, as the presence of bicycles, skateboards, scooters, roller blades and other similar conveyances present a safety hazard to pedestrians, motorcyclists, bicyclists and those riding skateboards, scooters, roller blades and other similar conveyances. A 14-foot fire lane for emergency vehicles shall be maintained throughout the closed area.

BE IT FURTHER RESOLVED that that portion of Fifth Street from Sturgis Community Center to Lazelle Street be closed to normal traffic for rally display purposes for the time period from 2 a.m. on Friday, August 3, 2007 to 2 a.m. on Sunday August 12, 2007, and for such additional time if deemed necessary. That a 14-foot fire lane for emergency vehicles shall be maintained throughout the closed area.

BE IT FURTHER RESOLVED that four-wheel vehicular traffic shall be allowed through said alley between Main and Sherman Street from Middle Street through Fourth Street; and that the alley between Main Street and Lazelle Street, shall be open to four-wheel vehicular traffic from said Middle Street through Fourth Street.

BE IT FURTHER RESOLVED that while four-wheel vehicular traffic is allowed in the above said alleys, no parking is allowed in this area except for strict adherence to loading and unloading vehicles as set forth in Ordinance 2001-24 Chapter 16.05.07 (12) of the Sturgis City Ordinances.

Dated this 20th day of February, 2007.

Published: March 3, 2007
Effective: March 24, 2007

Anders duly seconded the motion for the adoption of the foregoing resolution. All those present voted in favor of and the resolution was declared passed & adopted.

Green introduced the following written resolution and moved its adoption:

RESOLUTION 2007-09
RESOLUTION SETTING THE ELECTION DATE FOR VOTE ON CHANGE IN FORM OF GOVERNMENT

WHEREAS it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota

to bring the following proposal to a voters for their approval or rejection pursuant to SDCL § 9-11-5:

CITY MANAGER FORM of GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts, and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council, and presents recommendations and programs to the City Council.

WHEREAS it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;

NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.

Dated this 20th day of February 2007.

Published: March 3, 2007
Effective: March 24, 2007

Patterson duly seconded the motion for the adoption of the foregoing resolution. All those present voted in favor of and the resolution was declared passed & adopted.

Motion by Anders, second Chaplin & carried unanimously to approve the 2006 write-offs for sanitation ($891.07) and wastewater ($1,832.15).

Motion by Call, second by Chaplin & carried unanimously to authorize the purchase of a John Deere backhoe in the amount of $69,995 from RDO. This is from the bid submitted to the City of Mission.

Motion by Chaplin, second by Anders & carried unanimously to authorize to advertise for bids on a street sweeper.

Motion by Ferguson, second by Chaplin & carried unanimously to authorize to advertise for bids on an ambulance.

Motion by Chaplin, second by Anders & carried unanimously to authorize to advertise for bids on the 2007 Street Improvement Project.

Motion by Patterson, second by Chaplin & carried to approve first reading of Ordinance 2007-02 – Ordinance Amending Title 12.02.01 Specific Acts, Conditions and/or Things Deemed to be Nuisances.

Motion by Patterson, second by Chaplin & carried to approve first reading of Ordinance 2007-03 – Ordinance Amending Title 12.08.02 Sale of Fireworks.

Motion by Green, second by Anders & carried to approve first reading of Ordinance 2007-04 – Ordinance Amending Title 12.08.03 Use of Fireworks.

Motion by Patterson, second by Chaplin & carried to approve first reading of Ordinance 2007-05 – Ordinance Adding Title 12.08.04 Restriction by Resolution.

Motion by Green, second by Chaplin & carried to approve first reading of Ordinance 2007-06 – Ordinance Amending Title 12.11.07 Fees for Sexually Oriented Performers.

Motion by Green, second by Call & carried to approve first reading of Ordinance 2007-07 – Ordinance Amending Title 13.02.08 Trespass and Unauthorized Use of Property.

Motion by Green, second by Chaplin & carried to approve first reading of Ordinance 2007-08 – Ordinance Amending Title 13.04.03 Carrying: Persons Under 18 (Firearms)

Motion by Green, second by Anders & carried to approve first reading of Ordinance 2007-10 – Ordinance Amending Title 15.04.01 Unlawful to Obstruct Streets and Sidewalks.

Motion by Chaplin, second by Anders & carried unanimously to authorize to advertise for a full-time rubble site operator.

Motion by Chaplin, second by Anders & carried unanimously to approve the following salary matters: **Wages** – a) Tanya Neuschwander – Transfer to Parks Dept, $11.29/hr (3/4 time), effective 3/12/07; b) Ashley Johnson – CC Aquatics, $7.25/hr, effective 1/1/07 (correction).

OTHER MATTERS THAT MAY COME BEFORE COUNCIL

Green advised that she had requested a copy of the petitions for the management form of government that over 1000 people had signed. She wanted it clarified that the vote would be for the City Manager form of government and not for the option of manager or administrator.

Green further advised that the program the other night was presented based on the request of the Citizens to Advance Sturgis. This group requested that the City invite Roland Van der werff. Green has concerns with the way the news has been reporting the petitions as a "manager/administrator" proposal.

Again, the vote is on a city manager form of government. Should that fail, the council then has the right to look into an administrator position. Green is concerned that the council is taking a hit based on the mis-information that is circulating and she just wants to make sure the public knows what they are voting for.

Jack Hoel advised that he felt everybody already understands that.

Scudder advised that the rally committee had discussed the issue of contracts being signed. The committee felt that, due to the limited time frame, the rally director be allowed to sign any contracts that would enable the department to continue their daily business with guidelines set forth from legal counsel.

Patterson advised she would like to visit with legal regarding the contracts and binding the city by them.

Chaplin advised that they had a nice attendance at the Freedom Memorial Fundraiser on Saturday, February 17, 2007. The final tally is not in yet but they raised enough to be able to get the granite ordered. The committee would like the Freedom Memorial dedication set for Flag Day in June. Of course, more donations would be welcomed.

Wayne Reynolds requested clarification from Green on her previous comments on the change in form of government, which she gave.

Finance Officer Pauline Sumption also clarified that there were not over 1,000 signatures that were certified. She advised that she certified 589 (584 were needed) and there were maybe half a dozen additional petitions in which she could certify names. However, many had to be disregarded for various reasons.

Motion by Anders, second by Chaplin & carried to adjourn to executive session for the purpose of discussing personnel matters.

Motion by Green, second by Anders & carried to return to regular session.

Motion by Chaplin, second by Green & carried unanimously to accept, with regrets, the resignation of Finance Officer Pauline Sumption, effective April 13, 2007.

Motion by Chaplin, second by Green & carried to adjourn the meeting at 8:50pm.

ATTEST: Pauline Sumption
Pauline Sumption, Finance Officer

APPROVED: Terry Jensen
Terry Jensen, Mayor

App. 004

OFFICIAL MUNICIPAL ELECTION BALLOT
STURGIS, SOUTH DAKOTA
APRIL 10, 2007

STATEMENT

On February 9, 2007, a Petition for Election to Change Municipal Government of the City of Sturgis was submitted to the Finance Officer of the City of Sturgis requesting that the proposal be submitted to the voters for their approval or rejection pursuant to SDCL 9-11-5. The Petition requested that the form of city government be changed from an aldermanic form of government to a city manager form of government. The petitions that were signed by registered voters in support of the petitions were timely filed with the City Finance Officer. The matter will be before the electorate at the annual municipal election which shall be held on the 10 day of April, 2007.

EXPLANATORY STATEMENT

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition For Election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change from an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a City Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council; however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

A vote "FOR" would adopt the proposed Petition for Election to Change Municipal Government to a City Manager form of government.

A vote "AGAINST" would defeat the proposed Petition for Election to Change Municipal Government to a City Manager form of government and would retain the existing Aldermanic form of government.

SHOULD THE PROPOSED PETITION FOR ELECTION TO CHANGE MUNICIPAL GOVERNMENT TO A CITY MANAGER FORM OF GOVERNMENT BE APPROVED?

○ FOR

○ AGAINST

App. 005

ADDENDUM TO CITY MANAGER
EMPLOYMENT AGREEMENT

This Agreement ("Agreement") is an Addendum to the Employment Agreement between the City of Sturgis ("City") and Daniel Ainslie ("Employee"), dated September 2011 ("the Employment Agreement"). This Agreement is effective as of December 6, 2021.

The City affirms that the City of Sturgis, as a municipal corporation, requires a chief executive officer to implement the City's goals and objectives and to direct the day-to-day operations of City staff to achieve those goals and objectives. Currently, City's chief executive officer is a City Manager as provided in SDCL Ch. 9.

During the term of the Employment Agreement to date, the Employee has done an exemplary job as City's chief executive officer. Every aspect of Employees job performance has met or exceeded the City's expectations. The City believes that it is in the City's best interest to ensure the Employee's continued employment with the City.

The City is informed and thereby believes that the technical termination of the Employee because of a change in form of City government election is not "cause" for calculating compensation to be paid to the Employee upon termination of his Employment Agreement.

If the City residents vote to return to an aldermanic form of government without a City Manager, the City believes the need for a competent chief executive officer will not change. The City still must have a chief executive office to implement the City's goals and objectives and to direct the day-to-day operations of City staff to achieve those goals and objectives. The title of the position may change under a different form of government and a different chapter of the South Dakota Code may apply; nevertheless, the core function of the chief executive officer remains the same.

Therefore, the parties understand that, if there is a change of form of government, the job performed by the Employee under his Employment Agreement could become that of the City Administrator performing those duties and responsibilities outlined by the City in the City Administrator job description, or by resolution, or by ordinance or by any combination of job description, resolution, and ordinance.

If Employee does not accept the change in job title and duties after such an election or if the City does not offer of a change of job title and description, any resulting termination must be considered involuntary by the Employee and "not for cause" for the purposes of calculating Employee's compensation due on the termination of the Employment Agreement.

If such a change in job title and duties is accepted by both parties, the total compensation packages for the Employee as the City Administrator must be no less than the base compensation of the Employee immediately prior to the change in form of city government.

The health, retirement, and insurance benefits (including any cost sharing or matches) for the City Administrator under this Agreement must be the same as for other direct reports to the City Council.

All other terms and conditions of the Employment Agreement will remain in effect without amendment or change.

Executed this 16th day of November 2021, *nunc pro tunc* December 21, 2020.

SIGNED

Daniel Ainslie

WITNESS

Name: 11/16/2021

Approved by Sturgis City Council and authorized for signature by the Mayor the 21th day of December 2020.

SIGNED:

Mayor Mark Carstensen

ATTEST

FAY BUENO, FINANCE OFFICER

CITY of STURGIS
1883
MEADE COUNTY, SD

FILED
FEB 14 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

CITY OF Sturgis

Mark F. Marshall
City Attorney
1040 Harley-Davidson Way
Sturgis, SD 57785
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December 23, 2021

CITY ATTORNEY'S REPORT ON PETITION TO CHANGE MUNICIPAL GOVERNMENT IN THE MUNICIPALITY OF STURGIS

On December 16, 2021, a Petition for Election to Change Municipal Government in the Municipality of Sturgis was delivery to the City Finance Officer. The Mayor and City Finance Officer asked me to render a legal opinion as expressly allowed by SDCL §9-14-22 on the propriety of the question presented in the Petition presented to her office.

EXECUTIVE SUMMARY

1. The City Finance Officer should not schedule an election on the question presented in the Petition because the question posed is improper.

2. The City Council should authorize an action for declaratory judgment in circuit court to determine whether the power to employ a city manager is a form of government.

3. There is reason to believe criminal conduct occurred in connection with the circulation of the Petition and City Council should refer the matter to appropriate authorities for further investigation.

THE PROPRIETY OF THE QUESTION PRESENTED

"Generally, 'municipal corporations possess only those powers given to them by the Legislature.'" *City of Rapid City v. Schaub*, 2020 S.D. 50, ¶ 13, n. 8, 948 N.W.2d 870, 874 n. 8 *citing Ericksen v. City of Sioux Falls*, 70 S.D. 40, 53, 14 N.W.2d 89, 95 (1944) ("A municipal corporation is a creature of the Constitution and statutes of the state. It possesses only such powers, great or small, as these laws give to it.")

South Dakota law recognizes two forms of municipal government. SDCL ch. 9-8 authorizes the aldermanic form of government and SDCL ch. 9-9 authorizes the commissioner form of government. SDCL ch. 9-12 identifies the general powers of municipalities and does not include the power to employ a city manager. A municipality under either form of government may employ a

city manager, if authorized by a vote approving a proposition to do so. SDCL § 9-10-1. "The vote upon the question of employing a city manager shall be by ballot which conforms to a ballot for statewide question except that the statement required to be printed on the ballot shall be prepared by the municipal attorney." *Id.* Thus, while municipalities have the power to employ a city manager if authorized by the voters, nothing in state law recognizes the concept of a city manager as a separate form of municipal government.

Once authorized by the voters, the governing body, and not the voters, has the sole power to remove a city manager. SDCL § 9-10-11 provides in relevant part "[t]he manager shall be appointed for an indefinite term but may be removed by majority vote of the members of the governing body."

Once employed a city manager has a property interest in his or her employment and has a right of due process before the city manager can be removed from office. SDCL § 9-10-11 further provides:

> At least thirty days before such removal may become effective, the manager shall be furnished with a formal statement in the form of a resolution passed by a majority vote of such governing body stating the intention of such governing body to remove him, and the reasons therefor. He may reply in writing to such resolution. If so requested by the manager, the governing body shall fix a time for a public hearing upon the question of his removal, and the final resolution removing him shall not be adopted until such public hearing has been had.
>
> Upon passage of a resolution stating the governing body's intention to remove the manager, such governing body may suspend him from duty, but his pay shall continue until his removal shall become effective as herein provided. The action of the governing body in removing the manager shall be final.

After a city manager has been removed from office, the governing body is authorized to designate a qualified administrative officer to perform the duties of his or her office. SDCL § 9-10-12. In a first- or second-class municipality the designated administrative officer is authorized to "perform the duties of the manager". *Id.*

South Dakota law authorizes to petition for a "change in form of municipal government". As noted above, the employment of a city manager is not a "form of government" but is instead a special power granted to a municipality.

The procedure for changing the form of government is different than the procedure to authorize the employment of a city manager. For example, on a petition for employment of a city manager, "the statement required to be

printed on the ballot shall be prepared by the municipal attorney." SDCL § 9-10-1. There is no such requirement petition for change of form of government. *See* SDCL § 9-11-7 ("The vote upon such questions shall be by ballot in the form and be case in the manner provided by chapter 9-13.")

A city manager is entitled to due process before he or she may be removed from office. SDCL § 9-10-11. There is no similar right of due process for a city manager when there is a change of form of government. Instead, "[a]ny ordinance, resolution, contract, obligation, right or liability of the municipality shall continue in force and effect the same as though no change of government has occurred." SDCL § 9-11-10. Thus, it is fair to suggest that a change in form of government does not contemplate the removal of a city manage.

Finally, when a city manager is removed from office by the governing body pursuant to SDCL §9-10-11 there is no provision for any election. That is not the case where the form of government is changed. SDCL § 9-11-9 provides:

> If an election changes the form of government or number of commissioners, wards or trustee is approved, at the next annual municipal election or a special election call by the governing board and held pursuant to § 9-13-14, officers shall be chosen under the changed form of government.

The question posed in the Petition conflates the power to employ a city manager with a change in form of city government. That much is apparent in the way the Petitioner framed the question posed:

> The form of government for the municipality of Sturgis should be changed from the current form of municipal government (aldermanic with a city manager form of government) to an aldermanic form of government without a city manager.

The Petition does not call for any change in the form of city government. Indeed, two individuals called me to express concerns about the way the Petition was presented to them and asked to have their signature stricken from the Petition. These individuals told me that the Petition was presented to them as an effort to remove the current City Manager from his job. The Petition calls for the removal of the city manager, a power that the South Dakota legislature as reserved to the City Council. As such, it is improper to set an election on the question posed in the Petition.

REQUEST TO FILE AN ACTION FOR DECLARATORY JUDGMENT

The question whether hiring a city manager is a special power granted to municipal government or a distinct form of government may be an appropriate subject of an action for declaratory judgment. A declaratory judgment defines the rights of the parties regarding the legal question presented. Declaratory judgments differ from other judgments because they do not order a party to take any action or award any damages for violations of the law. Instead, declaratory judgments state whether the parties may seek or are entitled to relief.

One may apply to circuit court for a declaratory judgment pursuant to SDCL §15-6-57. Or in cases such as this, one may apply to the South Dakota Board of Elections for declaratory relief pursuant to A.R.S.D. 5:02:02. You may expect an initial answer more quickly from the South Dakota Board of Elections, however a decision from the South Dakota Board of Elections may be appealed to circuit court and from circuit court to the South Dakota Supreme Court. Filing an action for declaratory judgment in circuit would probably lead to a final decision more quickly than by initiating the action before the Board of Elections.

The benefit of seeking a declaratory judgment is a final binding decision determining on whether removal of a city manager is a change in the form of government. In an action for declaratory relief, the petition circulators would be the adverse party.

I recommend that the City Council direct me to apply for declaratory relief in the forum that the Council deems more appropriate.

PETITION IRREGULARITIES

On examination by the City Finance Officer, the Petition contained several irregularities. For example, there were ten instances of where the same person signed the petition more than once. This conduct provides no basis from criminal investigation but is nonetheless irregular.

The Petition contained one forged signature. Forgery is a Class 5 felony. SDCL § 22-39-36. One convicted of a Class 5 felony faces a maximum possible punishment of up to five years in the state penitentiary, a fine of up to $10,000 or a combination of prison and fine.

The City Finance Officer received reports that the Petition had been left unattended in a local business creating the opportunity for someone to sign the Petition without the circulator observing the act of signing. As a result of those reports, the City Finance Officer asked the person submitting the Petitions to

segregate those which had been signed in the business. Four persons who signed under such circumstances were selected at random and contacted to determine if the Circulator in fact witnessed the signature. Two persons reported that someone other than the circulator observed them sign the Petition while two persons reported that the Circulator observed them sign the Petition.

The City Finance Officer and her staff observed that in many instances the column identifying the date and county of the signature appeared to be in different handwriting than the rest of the entry. These observations suggest many of the signatures may have been gathered outside of the statutory time limit but dated within the time allowed by statute contrary to state law. Additionally, two signature dates were obviously altered to show dates within the 6-month limitation, while it is apparent that the signatures were obtained outside of the time limit. The observations also suggest conduct that may constitute the crime of offering a false or forged instrument for filing, registering, or recording, a violation of SDCL § 22-11-28.1, a Class 6 felony. A Class 6 felony is punishable by up to two years in the state penitentiary, a fine of up to $4000, or a combination of prison and fine.

Eighty-nine persons who signed the Petition were not registered to vote in Meade County and an additional nine person who signed the Petition do not reside within the city limits of Sturgis. The Petition circulator "attest[ed] to the legality of the signatures and that each signing [the] petition is a resident of and a qualified voter of the municipality of Sturgis." False attestation is also a violation of SDCL § 22-11-28.1.

Allegations of forgery and false attestation in election petitions are serious matters. Most recently, Annette Bosworth was convicted of six counts of offering false or forged instruments in connection with her submission of nominating petitions for election to the United States Senate, and her conviction for that conduct was affirmed on appeal. *State v. Bosworth*, 2017 S.D. 43, 899 N.W.2d 691 (2017). Bosworth, a medical doctor, received a suspended imposition of sentence, placed on probation, and ordered to serve 500 hours of community service as a condition of her probation. Bosworth lost her license to practice medicine, but the license was ultimately restored to her.

Because of the serious nature of the irregularities in the Petition and the way the Petition was signed and attested, I suggest the City Council authorize me to refer the matter to law enforcement for such further investigation or other action as law enforcement deems appropriate.

Patterson introduced the following written resolution and moved its adoption:

RESOLUTION 2007 - 14

A RESOLUTION AMENDING THE MUNICIPAL COMPENSATION FOR ELECTION BOARD

WHEREAS it is necessary to set the municipal compensation for the election board for the City of Sturgis; and

WHEREAS on January 2, 2007 the compensation for the election board had been set at $110.00 per day with the superintendent receiving $125.00; and

WHEREAS it has been determined that the size of the election was larger than anticipated and that there were multiple issues to be voted on and counted;

NOW THEREFORE BE IT RESOLVED that the compensation for the members of the election board be amended so that they be paid $8.00 per hour with the superintendent receiving $8.25/hr.

BE IT FURTHER RESOLVED that those members of the election board that attended the election school shall be paid $10.00/hr while the school was in session.

Dated this 16th day of April 2007.

Published: April 21, 2007
Effective: May 11, 2007

Green duly seconded the motion for the adoption of the foregoing resolution. All those present voted in favor of and the resolution was declared passed and adopted.

Green introduced the following written resolution and moved its adoption:

RESOLUTION 2007-15

A RESOLUTION CANVASSING THE ELECTION

BE IT RESOLVED by the Common Council of the City of Sturgis, South Dakota, as follows:

This is the time and place for canvassing the vote of the Annual City Election held on April 10, 2007. All poll books were thoroughly examined and the votes cast were as follows:

For Second Ward Alderman – Two Year Term	*Bev Patterson*	*216*
	David Hersrud	*266*
		482
For Third Ward Alderman – Two Year Term	*Pokey Jacobson*	*115*
	Jamie McVay	*300*
	Carmen Flint	*203*
		618
For Fourth Ward Alderman – Two Year Term	*Penny Green*	*185*
	Bernadette Usera	*396*
		581
For Mayor – Two Year Term	*Maurice LaRue*	*833*
	Joseph Bryant	*424*
	Richard Deaver	*762*
		2,019
"For the Change in Form of Government"		*1,224*
"Against the Change in Form of Government"		*768*
		1,992

The results of the election of April 10, 2007 are hereby declared to be as follows:

Tom Ferguson was unopposed for First Ward Alderman, two-year term, and is hereby declared elected to that office.

David Hersrud received a majority of the votes cast for Second Ward Alderman, two-year term, and is hereby declared elected to that office.

Jamie McVay received a majority of the votes cast for Third Ward Alderman, two-year term, and is hereby declared elected to that office.

Bernadette Usera received a majority of the votes cast for Fourth Ward Alderman, two-year term, and is hereby declared elected to that office.

Maurice LaRue received a majority of the votes cast for Mayor, two-year term, and is hereby declared elected to that office.

"For the Change in Form of Government" received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government.

BE IT FURTHER RESOLVED that the Finance Officer shall issue certificates of election to all elected candidates.

Dated this 16th day of April 2007.

Published: April 21, 2007
Effective: May 11, 2007

Anders duly seconded the motion for the adoption of the foregoing resolution. All those present voted in favor of and the resolution was declared passed and adopted.

Motion by Patterson, second by Chaplin and carried unanimously to approve the second reading of Ordinance 2007-12 – Ordinance Amending Title 16.05.03 Parking or Stopping on Streets or Highways. The ordinance reads as follows:

ORDINANCE 2007-12

REVISED ORDINANCE AMENDING TITLE 16, CHAPTER 16.05, SECTION 16.05.03 PARKING OR STOPPING ON STREETS OR HIGHWAYS

BE IT ORDAINED by the Common Council of the City of Sturgis, Meade County, South Dakota, that Title 16 Chapter 16.05 Section 16.05.03 PARKING OR STOPPING ON STREETS OR HIGHWAYS shall be amended to add Subsection E to read as follows:

E. No person shall park or leave standing any vehicle upon Moose Drive from its intersection with Dolan Creek Road to Highway 14A.

Dated this 16 day of April, 2007.

First reading: April 2, 2007
Second reading: April 16, 2007
Adopted: April 16, 2007
Published: April 21, 2007
Effective: May 11, 2007

Motion by Chaplin, second Scudder and carried unanimously to authorize Deputy Finance Officer Shyne to transfer any remaining funds from the Half Mile Fund to the Rally Fund.

Motion by Green, second by Scudder and carried unanimously to appoint Ann Bertolotto and Jeanie Shyne as Interim Finance Officers.

Motion by Jacobson, second by Chaplin and carried to authorize advertisement for Finance Officer.

Motion by Anders, second by Chaplin and carried unanimously to authorize the hiring of A to Z Shredding for record destruction at the average of $.20 per pound.

Motion by Anders, second by Chaplin and carried unanimously to approve a raffle request from Guide Dogs of America, which will be sold during the 2007 Motorcycle Rally from Custom Corners, 1700 block of Lazelle Street.

Motion by Chaplin, second by Scudder and carried to authorize Mayor Jensen to sign the West Nile grant application.

Motion by Jacobson, second by Chaplin and carried unanimously to authorize Mayor Jensen to sign agreement with Black Hills Central Reservations.

Bryan Carter, The Knuckle Saloon, appeared before the city council to inform them of their plans concerning existing structures on Second Street that house Turkey Graphix and Turkey Graphix Factory Outlet. The current plan calls for tearing down these two structures and replacing them with a temporary structure or tent. Carter does plan on starting construction of a new structure in the fall of 2007 that will again hold these two businesses along with the possibility of a sports bar and gift shop.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30163

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,

Plaintiffs and Appellants.

vs.

CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE KEVIN J. KRULL
Circuit Court Judge

APPELLEES' BRIEF

APPELLEES' ATTORNEYS
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NOTICE OF APPEAL FILED November 4, 2022

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TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Appellants Tammy Bohn, Justin Bohn, and Brenda Vasknetz will be referred to as "Citizens", Appellee Daniel Ainslie will be referred to as "Ainslie", while Ainslie and the City of Sturgis will be collectively referred to as "City". Reference to the Clerk's Index will be made by "CR___" with the page number, and reference to the May 20, 2022, Motions Hearing transcript as "TR___".

JURISDICTIONAL STATEMENT

Citizens appeal from an October 13, 2022 Order of Dismissal, in which the Circuit Court granted the City's motion to dismiss and dismissed Citizens' complaint in its entirety. CR 463. The Court's order is supported by its initial and supplemental Memorandum Decisions on Defendants Motion to Dismiss, filed October 6, and October 18, 2022, respectively. CR 374-382; 467-68. *See also* App 1-11. The City served and filed a Notice of Entry of the Order on October 28, 2022. CR 469-71. Citizens filed a timely notice of appeal on November 4, 2022. CR 472-73. This Court has jurisdiction pursuant to SDCL § 15-26A-3(2).

STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR IN DISMISSING CITIZENS' COMPLAINT?

The Circuit Court dismissed Citizens' complaint in its entirety based on lack of subject matter jurisdiction.

- SDCL § 21-28-2
- *Knockenmuss v. De Kerchove,* 66 S.D. 446, 285 NW 441 (S.D. 1939)
- *Cummings v. Mickelson*, 495 NW.2d 493 (S.D. 1993)
- *Weger v. Pennington County*, 534 NW.2d 854 (S.D. 1995)

STATEMENT OF THE CASE

On March 18, 2022, Citizens filed a complaint with the Fourth Judicial Circuit Court in Meade County seeking a "Judgment entering a Quo Warranto" challenging the existence of the Sturgis City Manager office and prohibiting Ainslie from acting as City Manager. CR 2-73; CR 8-9. The Complaint also requested a judgment declaring that the "2007 Election granted the City no special power to employ a City Manager," and that "[t]he voters have not granted City the special power to employ a City Manager." CR 9. Prior to filing their Complaint, Citizens did not obtain the required leave from the court or approval from the State's Attorney to file the quo warranto action. City filed a Motion to Dismiss thereafter. CR 98-99. On April 11, 2022, Citizens filed a Motion Requesting Leave of Court to file their quo warranto action. CR 171. Citizens then filed a Motion for Summary Judgment. CR 209. On May 20, 2022, the court heard arguments related to Citizens' Motion Requesting Leave, the City's Motion to Dismiss, and Citizens' Motion for Summary Judgment (filed March 23, 2022). *See* TR, in general.

On October 6, 2022, the Court issued its memorandum opinion granting the City's motion to dismiss (CR 374-82) and filed an Order of Dismissal on October 13, 2022, dismissing Citizens' complaint in its entirety. CR 463. In response to Citizens' subsequent motion for clarification, the Court issued a supplementary memorandum decision on October 18, 2022, affirming the decision to grant the City's motion to dismiss. 467-68. On October 28, 2022, the City filed and served a Notice of Entry of Order of Dismissal. CR 469-471. Citizens filed a timely appeal to this Court on November 4, 2022. CR 472-73.

STATEMENT OF FACTS

On February 20, 2007, the Sturgis City Council passed Resolution 2007-09 which set an April 10, 2007, election to address whether to incorporate a city manager into the City of Sturgis' government. CR 14-15. Resolution 2007-09 provides in full:

> *Whereas* it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota to bring the following proposal to a voters for their approval or rejection pursuant to SDCL § 9-11-5:
>
> > CITY MANAGER FORM OF GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment, compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council and presents recommendations and programs to the City Council.
>
> *WHEREAS* it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;
>
> *NOW THEREFORE BE IT RESOLVED* that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.
>
> Dated this 20th day of February 2007.
>
> *Published: March 3, 2007*
> *Effective: March 24, 2007*

Id. The ballot for the April 10, 2007, election provides an "Explanatory Statement" regarding the proposal to add the city manager position to the City of Sturgis. CR 139. The "Explanatory Statement" on the ballot provided:

> The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition for election to Change municipal Government can be obtained from the Finance Office during normal business hours.
>
> The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change form an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a city Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the city Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.
>
> The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

Id.

Following the April 10, 2007, election, the City Council canvassed the votes on April 16, 2007. Resolution 2007-15 passed with 1,224 yes votes, and 768 no votes. CR 19-20. Resolution 2007-15 used the language "For the Change in Form of Government" when referencing the election, and provided that the "'For the Change in Form of

Government' received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government." CR 20. After the official canvassing, the City Council appointed a City Manager, and this position continues to exist today. No election contest was ever commenced.

ARGUMENT

I. THE CIRCUIT COURT ACTED APPROPRIATELY IN GRANTING THE CITY'S MOTION TO DISMISS.

A. *Standard of Review*

This Court reviews the Circuit Court's decision on a Motion to Dismiss on a de novo basis. *Sierra Club v. Clay Cty. Bd. of Adjustment*, 959 NW.2d 615, 2021 S.D. 28. No deference is given to the Circuit Court's determination. *Hallberg v. South Dakota Board of Regents*, 937 NW.2d 568, 2019 S.D. 67.

Challenges to a circuit court's ruling based on lack of standing and lack of subject matter jurisdiction are likewise reviewed de novo. *Pickerel Lake Outlet Ass'n v. Day Cty.*, 2020 S.D. 72, 953 NW.2d 82, 87 and *Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, 931 NW.2d 707, 711. Since the Circuit Court determined that the City's Motion to Dismiss constituted a factual attack on subject matter jurisdiction, the pronouncement in the *Alone* case applies: "When presented with a factual attack, the circuit court does not assume the allegations in the complaint are accurate." *Alone*, 2019 S.D. 41, ¶ 12, 931 NW.2d at 711 (citing *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 NW.2d 169, 175).

Applying this standard of review, the Circuit Court's decision must be affirmed.

B. *Citizens' brief argues matters beyond the scope of the circuit court's order.*

Both the briefs filed by Citizens and the amicus curiae devote a significant discussion to matters which are beyond the scope of this appeal and not relevant to the resolution of the clearly stated issues. Generally, the Court's appellate jurisdiction is "limited to a review of final judgments." *Nelson v. Estate of Campbell*, 2021 S.D. 47, ¶ 24, 963 NW.2d 560, 567 (quoting *MGA Ins. Co. v. Goodsell*, 2005 S.D. 118, ¶ 33, 707 NW.2d 483, 489 (Zinter, J. concurring)). Additionally, SDCL § 15-26A-4 requires the party to "designate the judgment, order, or part thereof appealed from." It has been a long-standing practice that the Court will not address any issues not properly before it. *See Schmaltz v. Nissen*, 431 NW.2d 657, 681 (S.D. 1988) (refusing to address issues on which the trial court entered no final ruling and were not raised in the notice of appeal); *City of Chamberlain v. R.E. Lien, Inc.*, 521 NW.2d 130, 131 n.1 (S.D. 1994) (refusing to address issues not raised in a notice of review); *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 32-33, 643 NW.2d 56, 67 (issues not referenced in notice of appeal not properly in front of Court).

Citizens' Notice of Appeal expressly identifies the Circuit Court's October 13, 2022, Order of Dismissal, and the supporting October 6, and October 18, 2022, memorandum decisions as the final judgment being appealed. CR 472. This Court's appellate jurisdiction is therefore limited to reviewing these orders. The Circuit Court dismissed Citizens' complaint based on lack of subject matter jurisdiction and standing, CR 377-82, and never ruled on Citizens' motion for summary judgment or on the validity

of the 2007 election[1]. Therefore these issues are not before the court. CR 463. In fact, the Circuit Court determined that "[a]ll other pending motions [beyond the City's motion to dismiss] in this action are now considered moot and will not be addressed. CR 382. The fact that the Circuit Court would grant City's Motion to Dismiss and, therefore, not rule on a summary judgment motion made by Citizens only makes sense in both a legal and practical manner. If the pleading is defective and justifies dismissal, there is no reason to rule on a summary judgment motion (which goes to the merits) filed after the motion to dismiss. Based on the Circuit Court's ruling, Citizens' arguments related to the validity of the 2007 election, including any estoppel and summary judgment arguments, are beyond the scope of this appeal and are not properly before the Court.

Citizens and the amicus brief also attempt to raise issues addressed in a separate appeal now pending before this court, *Bohn et al. v. Bueno et al.* (*Bohn I*) (Appeal No. 30008). Citizens cite to *State v. Piper*, 2006 S.D. 1, ¶ 38, 709 NW.2d 783, 801, as a basis to support their request that the Court take judicial notice of *Bohn I*. This reliance is misplaced. In *Piper*, the Court took judicial notice of summaries of other death penalty cases to comply with the Court's mandatory disproportionality analysis required by SDCL § 23A-27A-12(3).[2] *Id.* Citizens' request is beyond the scope of *Piper* and raises duplicity issues. Absent consolidation, "[t]wo independent separate appealable orders

[1] The procedures followed by Citizens in this case deviated from the process required by statute. SDCL § 21-28-2 provides that, in order for a private citizen to pursue a quo warranto action, the citizen must either get state's attorney's approval or leave from the court prior to filing their complaint. This provides a sensible threshold determination before a defendant is required to appear and defend such a claim. However, in the present case, Citizens filed a complaint and multiple pleadings, including a motion for summary judgment, prior to the court hearing any leave arguments on May 20, 2023. The unorthodox procedures used in this case add additional complexity to the procedural history but also provide yet another basis to support the Circuit Court's dismissal.

[2] The relevant portion of the statute requires the Supreme Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This statute effectively mandates the Court review other similar cases in its review.

cannot be united and made the subject of one appeal." *Grieves v. Danaher*, 60 S.D. 120, 243 N.W. 916, 917 (1932). Citizens argue many of the same issues raised in *Bohn I*, however without a specific order consolidating both appeals, this raises duplicity issues and causes the City to litigate the same issues on multiple fronts. The scope of this appeal is limited to whether the Circuit Court erred by dismissing Citizens' complaint for lack of subject matter jurisdiction/standing.

C. *Citizens do not have individual standing to bring a quo warranto action.*

Citizens' complaint requests the Circuit Court for a Judgment entering a Quo Warranto:

> (a) Declaring the 2007 Election had no effect and the City was not granted a special power by the voters to employ a City Manager;
> (b) Prohibiting Defendant City from carrying itself out to be a municipality with the authority to employ a City Manager prohibiting them from continuing to act as a municipality with the special power to employ a City Manager;
> (c) Prohibiting Ainslie from Acting as the City's City Manager;
> (d) Requiring Ainslie to immediately return all books and papers and equipment to the City;
> (e) Declaring that city ordinances relating to a City Manager are void ab initio.

CR 8-9. A Quo Warranto action not only allows a person to directly attack an officer's rights to an office but also collaterally attack the existence of the office. See *Hurley v. Coursey*, 64 S.D. 131, 265 NW 4, 9 (1936) (allowing the attack on an elected municipal judge by collaterally attacking the existence of the municipal court to which the judge serves). This is what Citizens strive to do in their complaint – attack Ainslie's rights to the Sturgis City Manager Office by collaterally attacking the validity of the 2007 election granting the City authority to employ a city manager. However, Citizens must comply

with SDCL § 21-28-2 to have standing to assert their quo warranto claim. This they have failed to do, and the Court was justified on that basis alone in dismissing their complaint.

SDCL § 21-28-2 provides who may bring a quo warranto action. The statute provides:

> An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:
>
> (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;
> (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;
> (3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

The Meade County State's Attorney never approved or ratified Citizens' quo warranto claim. Without such action by the State's Attorney, Citizens must have a special interest in the action and receive leave from the circuit court.

i. Citizens do not have a special interest allowing them to bring a quo warranto action under SDCL §21-28-2.

"Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Lippold,* 2018 S.D. 7, ¶ 18, 906 NW.2d at 922 (citing *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n,* 2016 S.D. 48, ¶ 19, 882 NW.2d 307, 313).

One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office, such as a defeated candidate for that office. *Bridgman v. Koch,* 2013 S.D. 83, ¶ 8, 840 NW.2d 676, 678. If a person does

not allege they have a right to the challenged office, then they have no "special interest" in the action. *Id.* A private citizen has no "special interest" in an office merely from being a citizen or a taxpayer. *Cummings v. Mickelson*, 495 NW.2d 493, 498 n.6 (S.D. 1993) (citing *Knockenmuss v. De Kerchove*, 66 S.D. 446, 285 NW 441 (1939)).

In *Knockenmuss*, the Court specifically addressed the issue of whether a person has a "special interest" to bring a quo warranto action merely because they are a taxpayer. 66 S.D. 446, 285 NW at 441. Knockenmuss brought a quo warranto claim to challenge a city commissioner's rights to hold office of a city commissioner of Rapid City. *Id.* The State's attorney declined to commence the quo warranto action, requiring Knockenmuss to have a special interest as the only means to have standing to bring a quo warranto claim. *Id.* The Court held that merely being a taxpayer is insufficient to have a special interest to bring a quo warranto claim. *Id.* at 442. In *Knockenmuss*, this Court stated:

> That general public interest is not sufficient to authorize a private citizen to institute such proceedings; for if it was, then every citizen and taxpayer would have the same interest and the same right to institute such proceedings, and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title. The interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be "an interest in the office itself and must be peculiar to the applicant." (emphasis ours)

Id. (citing *Newman v. U.S. ex rel. Frizzell*, 238 U.S. 537 (1915)).

In *Cummings*, the court determined that challengers to appointed judgeships did not have a "special interest" because they had not applied for the position. *Id*, and, in the case of a third, could not establish his name was on the certification list sent to the Governor for selection. To have a "special interest" to an action under SDCL § 21-28-2, the person must contend they have rights to the challenged office. Plaintiffs and Appellants in this action can raise no such challenge.

The Court in *Lippold* explained the reasons for limiting actions to those brought by the state and for preventing collateral attacks by individuals. 2018 S.D. 7, ¶ 23, 906 NW.2d at 923. The Court found allowing the general public to raise a collateral attack to the validity of an office, years after establishment of the office, would undermine any public interaction with the office. *Id.* (quoting *Merchants' National Bank v. McKinney*, 2 S.D. 106, 116-177 48 NW 841, 844 (1891)). The Court reasoned that allowing these collateral attacks create a lack of confidence in the office and would require, as a prerequisite to doing business with the office, an inquiry into the validity of the office. *Id.* Limiting the ability to challenge the validity of an office to only the state, or parties with a special interest, prevents these types of collateral attacks and ensures that others may confidently do business with he public office.

If this rule was not applied, one can only imagine the chaos if any taxpayer or citizen could make such a claim.

The reasoning in both *Knockenmuss* and *Lippold* and that of the Circuit Court in this proceeding supports the ultimate purpose for the significant limitations on whom may bring a quo warranto claim. The fact that Citizens are collaterally challenging the validity of an election held more than fifteen years ago is a prime example. Citizens assert no facts beyond being citizens and taxpayers as the basis for their "special interest". This is insufficient for Citizens to have standing to bring a quo warranto claim. The Circuit Court should be affirmed on this basis alone.

ii. SDCL § 9-1-6 does not apply to remedies in quo warranto.

Citizens rely heavily on SDCL § 9-1-6 and *Hurley v. Coursey*, 64 S.D. 131, 265 NW 4 (1936), to support their claims that they have a sufficient special interest to have

standing to bring a quo warranto claim. This reliance is erroneous. SDCL § 9-1-6 provides: "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, *by proper remedy*, a violation of any provision of this title." (emphasis ours)

Because of the strict statutory limitations placed on the quo warranto remedy by SDCL § 21-28-2, application of SDCL § 9-1-6 would contravene and even nullify § 21-28-2. See *Cummings*, 295 NW.2d at 298 n.6 (citing *Knockenmuss*, 285 NW 441). Quo warranto is not a "proper remedy" as referred to in the body of SDCL § 9-1-6 and does not provide Citizens standing to bring a quo warranto claim.

An almost identical version of SDCL § 9-1-6 existed in 1939 when the Court decided *Knockenmuss*. At the time of *Knockenmuss*, § 6163 of the Revised Code of 1919 stated: "Any citizen and taxpayer residing within any municipality may maintain an action or proceeding to prevent, by injunction, mandamus, prohibition, certiorari, or other proper remedy, any violation of any provision of this part." If SDCL § 9-1-6 provides a private citizen standing to bring a quo warranto claim merely from being a citizen and taxpayer, then the Court would have applied this in *Knockenmuss*. The *Knockenmuss* decision is persuasive authority for the proposition that quo warranto is not a "proper remedy" as required under SDCL § 9-1-6, therefore SDCL § 9-1-6 does not provide Citizens standing to bring a quo warranto claim.

In *Onnen v. Sioux Falls Indep. Sch. Dist.*, 2011 S.D. 45, ¶ 16, 801 NW.2d 752, 756-57, this Court recognized that statutes were intended to be consistent and harmonious in their several parts and provisions. This Court further stated, "For purposes of determining legislative intent, we must assume that the legislature in enacting a provision

has in mind previously enacted statutes relating to the same subject matter. As a result, the provision should be read, if possible, in accord with the legislative policy embodied in those prior statutes" (citing *State v. Chaney*, 261 NW.2d 674, 676 (S.D. 1978)).

Reading SDCL § 21-28-2 together with SDCL § 9-1-6, it is apparent that § 21-28-2 is specific as to quo warranto and § 9-1-6 is not. It would not be "consistent and harmonious" to disregard the fairly strict limitations on quo warranto proceedings established by SDCL § 21-28-2 by adopting Citizens' argument based on SDCL § 9-1-6.

iii. Hurley v. Coursey is distinguishable from the facts of this appeal.

Citizens also rely on *Hurley v. Coursey*, 64 S.D. 131, 2265 NW 4 (1936) to support their contention that they have a special interest to pursue their quo warranto claim. However in *Hurley*, the challenger received approval from the state's attorney, and the case does not address the special interest requirement. *Id.* at 8; 9 (noting a handwritten note at the bottom of the challenger's notice of contest stating "The above and foregoing contest is hereby allowed by the undersigned states aty. of Penning Co., S.D. T.B. Thorson."). *Hurley* is not persuasive on the special interest issue.

In *Hurley*, a citizen, who did not run for elected office, properly initiated an election contest within 20 days of the final canvassing to challenge the election of a municipal judge based on the theory that the city invalidly established the municipal court and that no office existed. *Id.* at 7. In deciding the case, the Court found that Hurley could pursue the action as either an election contest or through quo warranto. *Id.* at 8. The primary distinguishing factor is that Hurley had the approval of the state's attorney to pursue his action. *Id.* at 9 (providing "The parties are the same who would have been necessary in quo warranto, they have appeared and fully submitted and argued

their controversy, and the *proceeding has had the approval of the state's attorney.*") emphasis added. With the state's attorney's approval, Hurley was not required to have a special interest nor receive leave to pursue a quo warranto action. Plaintiff's standing in *Hurley*, therefore, did not rest on their mere status as taxpayers or citizens.

Based on the above, the circuit court correctly applied the law and determined that Citizens do not have a sufficient special interest to pursue their quo warranto claim. Therefore, the circuit court did not err by denying leave and dismissing Citizens' quo warranto claim.

D. *SDCL § 15-6-15(a) does not apply to leave to bring quo warranto actions.*

Citizens argue that SDCL § 15-6-15(a)[3] requires the circuit court to freely grant leave to its quo warranto action. SDCL § 15-6-15(a) does not apply to SDCL § 21-28-2. SDCL § 15-6-15(a) expressly applies to amending a pleading and makes no reference to applying to quo warranto proceedings. Additionally, the legislature adopted and amended SDCL § 15-6-15(a) much later than the leave requirement was added to SDCL § 21-28-2.[4] By not adding the "freely given" language to SDCL § 21-28-2 when they adopted SDCL § 15-6-15(a), this shows the legislature intended on leave not being freely given in quo warranto proceedings. Even if it did, amendment would not cure the standing and subject matter jurisdiction problems arising from Citizens' lack of a special interest.

---

[3] The pertinent part of SDCL § 15-6-15(a) provides "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

[4] Through SL 1919, ch 289 § 4, the legislature added the additional means for a person who has a special interest to pursue a quo warranto action after receiving leave from the circuit court. See also *Knockenmuss*, 66 S.D. 446, 285 NW at 441 (noting that "[p]rior to the amendatory act of 1919, such an action to try title to public office could be brought only by the state's attorney.").

The requirement of leave in quo warranto actions acts as a requirement forcing those bringing such actions to meet a threshold determination showing that they have a "special interest". *Knockenmuss*, 66 S.D. 446, 285 NW at 442. Unlike the amendment of pleadings, the circuit court's authority in granting leave under SDCL § 21-28-2 is very limited. *Knockenmuss*, 66 S.D. 446, 285 NW at 442 (providing "It is evident that if he did not have a "special interest" the court was without authority to grant him leave under the statute."). The statutory and caselaw limitations on granting leave in quo warranto actions preclude the circuit court from "freely giv[ing]" leave. Therefore, the circuit court did not err by denying Citizens leave to pursue their quo warranto action.

E. *Quo warranto is Citizens' exclusive remedy to challenge the existence of the City Manager Office. Declaratory judgment is not available to Citizens as a result.*

Citizens' complaint alternatively requests a declaratory judgment declaring:

> (a) That the 2007 Election granted the City no special power to employ a City Manager,
> (b) The voters have not granted City the special power to employ a City Manager; and
> (c) Payments, fees, and emoluments received by Ainslie pursuant to the guise of being employed as City Manager be paid back to City.[5]

CR 9. The demands in Citizens' declaratory judgment claim mirror those in their quo warranto claim. "The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought." *Lippold*, 2018 S.D. 7, ¶ 17, 906 NW.2d at 922 (quoting *State v. Phipps*, 406 NW.2d 156, 148 (S.D. 1987)). Based on Citizens' complaint and the relief sought, their declaratory action attacks Ainslie's right to the city manager office by collaterally attacking the validity of the 2007 election granting the City

[5] Citizens abandoned their demand that Ainslie pay back any prior wages and benefits at the May 20, 2022 Motions Hearing. TR 45:19-25.

the authority to employ a city manager. CR 9. The nature of Citizens' declaratory action fits precisely within the same parameters as their quo warranto claim. CR 8-9. If Citizens' quo warranto action is a duck, then their declaratory judgment action is a duck as well. They both quack the same.

"The court has held in a long line of cases that quo warranto is a proper method to determine the issue of title to a public office." *Weger v. Pennington County*, 534 NW.2d 854, 859 (S.D. 1994) (citations omitted). "We have departed from this rule only in instances of 'exceptional circumstances' of an emergency nature involving the public interest of the entire statee or a good portion of it." *Id.* (citing *Cummings*, 495 NW.2d at 498.

Generally, "[t]he remedies of quo warranto and election contest are cumulative, and therefore the existence of the latter does not preclude relief under quo warranto proceedings." *Burns v. Kurtenbach*, 327 NW.2d 636, 638 (S.D. 1982) (citing *Hurley v. Coursey*, 64 S.D. 131, 265 NW 4 (1936)). Based on the underlying purpose of limiting quo warranto proceedings, see *supra* I(C)(i), allowing a much wider group, including citizens and taxpayers, to pursue an election contest is logical because of the close proximity between the contest and the election. *See* SDCL § 12-22-5 (requiring an election contest be commenced within ten days after the official election canvas). Additionally, SDCL § 12-22-3 provides that the contest may be initiated "by any registered voter who was entitled to vote on ... a submitted question", however, the contest may be initiated "only with the permission of a judge of the court in which such contest is instituted". The primary reason why an election contest is cumulative with quo warranto is because the underlying quo warranto standing restrictions provided in SDCL

§ 21-28-2 are not implicated in an election contest, but a similar leave requirement exists in both actions. However, once the ten-day election contest commencement period passes, unless extraordinary circumstances applies, quo warranto is the exclusive remedy. See *Weger*, 534 NW.2d at 859; *Cummings*, 495 NW.2d at 498. Therefore, the logic of permitting a declaratory judgment action concurrently with a quo warranto action, or in lieu thereof, does not exist.

In *Weger*, the Court addressed whether a private individual may challenge the legality of an office through a declaratory judgment action. *Weger*, 534 NW.2d at 859. Weger brought his declaratory judgment action against individual members of a county board, "seeking their removal, declaring their positions vacant, and declaring void all actions taken by the [board] during the term of those four individuals." *Id.* The Court held that quo warranto was Weger's exclusive remedy because he failed to "establish any justification for relief via a declaratory judgment action rather than proceeding in quo warranto." *Id.*

In *Cummings*, the Court allowed the use of a writ of prohibition in lieu of quo warranto to challenge the Governor's appointment of two judges because extraordinary circumstances existed. 495 NW.2d at 498. The Court found that judges assuming office without clear authority to act would significantly impact the public interest and confidence in the judicial system. *Id.* The Court found that this extraordinary circumstance and public interest provided an appropriate basis to "deviate from the general rule" that quo warranto is the proper remedy to challenge the issue of title to a public office. *Id.* Such rationale does not apply here for many reasons – one such reason

being the election complained of by Citizens occurred more than 15 years ago, and the City has been utilizing the City Manager since that time.

Citizens' declaratory judgment claim presents the same circumstance as that in *Weger*. Citizens challenge Ainslie's right to the city manager office by requesting the circuit court declare: the 2007 election invalid; Ainslie holds no title to the office; and all ordinances and actions taken by Ainslie be rendered invalid. CR 9. Similar to *Weger*, there are no exceptional circumstances which exist here "of an emergency nature involving the public interest of the entire state or a good portion of it". See *Weger*, 534 NW.2d at 859.

F. *Citizens do not have standing to bring a declaratory judgment action.*

"[T]he test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought." *Lippold*, 2018 S.D. 7, ¶ 17, 906 NW.2d at 922 (quoting *State v. Phipps*, 406 NW.2d 146, 148 (S.D. 1987)). Citizens' requested declaratory judgment relief is almost identical to that of their quo warranto claim. Citizens reference no specific injury caused to them from the 2007 election. "[T]o establish standing in a declaratory judgment action, the plaintiff must have 'personally ... suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.'" *Abata v. Pennington Cty. Bd. of Comm'rs*, 2019 S.D. 39, ¶ 12, 931 NW.2d 714, 719 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 22, 710 NW.2d 131, 141). To have standing, "a litigant must show: (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 complaints, and (3) the likelihood that the injury will be redressed by a favorable decision." *Id.*

Citizens' complaint asserts no basis to support that they suffered an injury in fact from the 2007 election, or from the establishment of the City Manager office. While SDCL § 21-24-3 allows an interested person to secure a declaration of the construction or validity of an ordinance, this declaration is only provided if the ordinance "affect[s] the person seeking the declaration". *Kneip v. Herseth*, 214 NW.2d 93, at 96 (citing SDCL § 21-24-3; *Torigian v. Saunders*, 97 NW.2d 586 (S.D. 1959)). Restrictions on the extent to which declaratory judgment may be sought require "that there must be a justiciable controversy between legally protected rights of parties whose interests are adverse". *Id.* (citations omitted).

Citizens rely on their taxpayer status alone as the basis to support their standing to bring this declaratory judgment action. Citizens contend that "[a] taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights." *Agar School Dist. No. 58-1 Bd. of Educ., Agar, S.D. v. McGee*, 527 NW.2d 282, 284 (S.D. 1995) (quoting *Wyatt v. Kundert*, 375 NW.2d 186, 195 (S.D. 1985)). Citizens attempt to broadly use this concept to grant them standing to now challenge the 2007 election 15 years after the fact. However, even though this provision opens the door for taxpayers to challenge the constitutionality of statutes, laws, and ordinances related to the expenditure of public funds or those which may affect public rights, they still need to articulate a specific injury. See *Agar*, 527 NW.2d at 285-86 (providing taxpayers have standing to challenge the legality of an increase in a tax levy to fund a new school district); *Wyatt*, 375 NW.2d at 195 (finding taxpayers have standing to challenge the constitutionality of a statute allowing the state to enter into compacts with other states with respect to the disposal of nuclear waste);

Kanaly v. State by and through Janklow, 368 NW.2d 819, 827 (S.D. 1985) (challenging constitutionality of legislation which changed university to a minimum security prison).

In their complaint, Citizens do not challenge the legality or constitutionality of any specific legislation passed by the City. *See* CR 8-9. While Citizens request relief which provides the "City's ordinances relating to a City Manager are void ab initio," this relief request falls under their quo warranto action rather than their declaratory action. CR 8-9. Citizens' primary argument related to the validity of these ordinances is based solely on the validity of the 2007 election which granted the City the authority to employ a city manager. There is no specific and articulable nexus between the validity or legality of the petition and any specific legislation which affects the use of public funds or a public right.

Even if an injury in fact occurred through a City Manager's decision, the connection between such decision and the 2007 election are far too remote to give Citizens standing for a declaratory action. Any far-reaching causal connection between Citizens and the 2007 election are theoretical and speculative. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not happen." *Boever v. South Dakota Bd. of Accountancy*, 526 NW.2d 747, 750 (S.D. 1995) (citing *Kneip*, 214 NW.2d at 96). The court should decline to hear an action "if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id.* (citing *Medows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir. 1986)). The Court would need to speculate to find an injury

suffered by Citizens which is a direct result of the 2007 election to employ a City Manager.

Citizens provide no rationale as to why they have standing to bring this declaratory action. Citizens' exclusive remedy is quo warranto – the requirements of which they cannot satisfy. Therefore, the circuit court acted appropriately by dismissing Citizens' attempt to obtain a declaratory judgment.

G. *The claims against Ainslie, in his individual capacity, are moot.*

Although Citizens suggest that they have dismissed this action against Ainslie, there has been no order entered to that effect. Ainslie accepted other employment and submitted his written resignation to City, which was accepted. *See* App012. City asks this Court to take judicial notice of the resignation letter and minutes of the City of Sturgis which reflect that his resignation was accepted and is effective April 6, 2023. This Court renders opinions regarding actual controversies and will generally not rule on an issue if it "will have no practical legal effect upon an existing controversy". *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 12, 922 NW.2d 784, 787. This concept leads to the rule that this Court will not decide a moot case. *Netter v. Netter*, 2019 S.D. 60, ¶ 9, 935 NW.2d 789, 791. A decision by this Court as it relates to claims against Ainslie would have no practical or remedial effect and, therefore, should be found moot. This Court should not address such claims under the mootness doctrine. *Sullivan v. Sullivan*, 2009 S.D. 27, ¶ 11, 764 NW.2d 895, 899; and *Skjonsberg, supra.*

CONCLUSION

The circuit court's decision to dismiss Citizens' complaint in its entirety should be affirmed. The circuit court correctly found in its well-reasoned opinion that citizens lack

standing to bring their claims and that, therefore, the circuit court was without subject matter jurisdiction. This applies both to the quo warranto action and the thinly disguised effort to assert quo warranto claims in Citizens' "declaratory judgment" count. The Appellees should no longer be subjected to the arguments now raised by Citizens relating to an election held in 2007 – the results of which have been implemented since that time. City respectfully requests that the circuit court be affirmed in its entirety.

REQUEST FOR ORAL ARGUMENT

City respectfully requests oral argument on these issues.

Dated this 31st day of March, 2023.

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CERTIFICATE OF SERVICE

Robert B. Anderson, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 31st day of March, 2023, he electronically served one true and correct copy of the Appellees' Brief in the above-entitled action to the following at their last known address, to-wit:

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He further certifies that two (2) copies of the Appellees' Brief in the above-entitled action were hand-delivered to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, South Dakota 57501, and one electronic copy of the Appellees' Brief filed and served via the Odyssey File & Serve system.

ROBERT B. ANDERSON

CERTIFICATE OF COMPLIANCE

Robert B. Anderson, attorney for Appellee, hereby certifies that the foregoing Appellees' Brief complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has been used. Appellees' Brief contains 6,744 words and does not exceed 32 pages. Microsoft Word processing software has been used.

Dated this 31st day of March, 2023.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30163

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,

Plaintiffs and Appellants.

vs.

CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE KEVIN J. KRULL
Circuit Court Judge

APPENDIX TO APPELLEES' BRIEF

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NOTICE OF APPEAL FILED November 4, 2022

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, AND BRENDA VASKNETZ Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE Defendants.	)	File No: 46CIV22-77 MEMORANDUM OF DECISION ON DEFENDANTS MOTION TO DISMISS

FILED
OCT - 6 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By:

On April 5, 2022, Defendants, by and through their attorney of record, Mark Marshall, filed a Motion to Dismiss COUNT I of the Complaint. On April 28, 2022, Defendants filed a Motion to Dismiss COUNT II of the Complaint. On May 13, 2022, the Plaintiffs, by and through their attorney of record, Kellen B. Willert filed a Response to the Defendants Motion to Dismiss. Accordingly, this Court having heard the arguments of Counsel, and having considered the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

FACTUAL BACKGROUND

On February 20, 2007, the Sturgis City Council passed Resolution 2007-09, which set the April 10, 2007, election to address whether to incorporate a city manager into the City of Sturgis' government. Resolution 2007-09 provides in full:

> ***Whereas*** it appears to the Common Council of the City of Sturgis that more than 589 signatures have been received from qualified voters of the municipality of Sturgis, South Dakota to bring the following proposal to voters for their approval or rejection pursuant to SDCL § 9- 11-5:
>
> > CITY MANAGER FORM OF GOVERNMENT. The City Manager is the chief administrative officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the City Council and enforces City ordinances. The City Manager appoints and directly supervises most directors of the City's operating departments and supervises the administration of the City's personnel system and further supervises the official conduct of City employees including their employment,

compensation, discipline and discharge. The City Council, however, has the power to appoint and remove the auditor, attorney, library board of trustees, and the treasurer, with the auditor and treasurer having the power to appoint all deputies and employees in its offices. The City Manager also oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager further prepares a proposed annual budget to be submitted to the City Council and presents recommendations and programs to the City Council.

WHEREAS it appears to the Council that 584 signatures were required to bring this matter to a vote of the people;

NOW THEREFORE BE IT RESOLVED that the question of the change in form of city government be submitted for a vote of the people to be held at the regular municipal election dated April 10, 2007.

Dated this 20th day of February 2007.

Published: March 7, 2007
Effective: March 24, 2007

The April 10, 2007 election ballot provides an "Explanatory Statement" regarding the proposal to add the city manager position to the City of Sturgis. The "Explanatory Statement" on the ballot stated:

The petitions requesting a change in the form of city government are on file in the office of the City Finance Officer. A true copy of the proposed amendment as set forth in the Petition for election to Change Municipal Government can be obtained from the Finance Office during normal business hours.

The primary purpose for the Petition for Election to Change Municipal Government is to provide for a change form an Aldermanic form of government, which is comprised of a Mayor and eight City Council members to a city Manager form of government in which the City Manager is the chief administrating officer for the City and is appointed by the City Council. The City Manager implements policy decisions of the city Council and enforces City Ordinances. The City Manager appoints and directly supervises most of the City operations, departments, and supervises the administration of City personnel and the official conduct of City employees including their employment compensation, discipline, and discharge.

The City Council however, has the power to appoint and remove the auditor, attorney, library board of trustees, and treasurer, both the auditor and treasurer having the power to appoint all deputies and employees in their office. The City Manager oversees the administration of City contracts and prepares and introduces ordinances and resolutions to the City Council. The City Manager prepares a proposed annual budget to be submitted to the City Council and presents

> recommendations on programs to the City Council. The City Council would continue to consist of a Mayor and eight Council Members to be elected by the voters of the City. The City Council shall act as a part time policy making and legislative body, avoiding management and administrative issues, which are to be assigned to the City Manager. The City Manager is to be appointed by the City Council. The Mayor shall be recognized as the government official for all ceremonial purposes and shall perform other duties specified by the City Council.

Following the April 10, 2007, election, the City Council canvassed the votes on April 10, 2007. Resolution 2007-15 states that the proposal to add a City Manager passed with 1,224 yes votes, and 768 no votes. Resolution 2007-15 used the language "For the Change in Form of Government" when referencing the election, and provided that the "'For the Change in Form of Government' received a majority of the votes cast and it is hereby declared that the City of Sturgis will change to the manager form of government." After the official canvassing, the City Council employed a City Manager and continues to do so.

STANDARD OF REVIEW

In this action, the Defendants have moved to dismiss the Plaintiffs' claims under SDCL 15-6-12(b)(1). A motion to dismiss under 12(b)(1), lack of subject matter jurisdiction, vests in this Court "the authority to consider material in the court file in addition to the pleadings." *Decker by Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362 (citations omitted). "Because at issue in a factual 12(b)(1) motion is the [circuit] court's jurisdiction—its very power to hear the case—there is substantial authority that the [circuit] court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case... To resolve the question, the court may hold hearings, consider live testimony, or review affidavits and documents." *Chase Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 12, 931 N.W.2d 707, 711 (citations omitted).

At the heart of subject matter jurisdiction lies standing. For a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person." *Black Bear v. Mid-Central Educ. Coop.*, 2020 S.D. 14, ¶ 11, 941 N.W.2d 207, 212 (citations omitted). "Whether a party has standing to maintain an action is a question of law[.]" *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779 (quotations omitted). "[T]he plaintiff will have the burden of proof that jurisdiction does in fact exist." *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990); *see also Black Bear*, 2020 S.D. 14, ¶ 12, 941 N.W.2d 207, 213 ("[E]ach element [of standing] must be supported in the same way as any other manner on which the plaintiff bears

the burden of proof[.]'"). Absent abrogation and waiver "[w]hether the defendants are protected by sovereign immunity is a question of law" which is a question that is jurisdictional in nature. *Osborn*, 918 F.2d at 730; *see also C. Brunsch. Inc.*, 2019 S.D. 41, ¶ 12, 931 N.W.2d at 711 (citations omitted).

OPINION

ISSUES

1. Do the Plaintiffs have standing to bring this action?

"Motions to dismiss for lack of subject matter jurisdiction call into one of two categories: (1) facial attacks on allegations of subject matter jurisdiction within the complaint; or (2) disputes regarding the facts upon which subject matter jurisdiction rests." *Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710-11(citations and quotations omitted). "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." *Id.*, (quoting *Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1140 (8th Cir. 1998). Courts can consider matters outside the pleadings when presented with a factual challenge to subject-matter jurisdiction. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 174. (citations omitted). The South Dakota Supreme Court further explained that:

> A court deciding a motion under Rule12(b)(1) must distinguish between a "facial attack" and a "factual attack." In the first instance, the court restricts itself to the face of the pleadings, and the non- moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6) In a factual attack, the court considers matters outside the pleadings, and the non- moving party does not have the benefit of 12(b)(6) safeguards.

Id. Stated another way, a court does not assume the allegations in the complaint are true when considering factual challenges to subject-matter jurisdiction. *Alone*, 2019 S.D. 41, ¶ 12, 931 N.W.2d at 711. The City poses a factual challenge to the Court's subject-matter jurisdiction.

In *Lippold.* the South Dakota Supreme Court discussed the relationship between standing and subject-matter jurisdiction:

> Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void. Subject matter jurisdiction is conferred solely by constitutional or statutory provisions. Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ. The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought.

> Relevant to the existence of subject-matter jurisdiction is the doctrine of standing. A litigant must have standing in order to bring a claim in court. Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing.

Lippold v. Meade Cnty. Bd. of Commissioners, 2018 S.D. 7, ¶¶ 18,19, 906 N.W.2d at 921-22. (internal citations and quotations omitted).

> SDCL § 21-28-2 provides who may bring a quo warranto action. The statute states that:
>
> > An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:
> >
> > (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;
> >
> > (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;
> >
> > (3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

Quo warranto allows a person to not only attack the validity of a municipal corporation, but also to attack the existence of an office. *State through Attorney General v. Buffalo Chip*, 2020 S.D. 63, ¶ 25, 951 N.W.2d 387, 396; *See also Hurley v. Coursey*, 64 S.D. 131, 265 N.W. 4, 9 (1936) (allowing the attack of an elected municipal judge by addressing the existence of the municipal court to which the judge serves). One must meet specific requirements to have standing to challenge the existence of either a municipal corporation or the existence of a public office. The court has no subject-matter jurisdiction without standing to bring a quo warranto action. *Lippold*, 2018 S.D. 7, ¶ 18, 906 N.W.2d at 922 (citing *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313)

A challenger must either file a complaint with the state's attorney, who will then proceed at their discretion on behalf of the state, or alternatively, proceed on their own if they have (1) a special interest in the action, and (2) they receive leave from the circuit court or circuit judge. SDCL § 21-28-3. One has a "special interest" in an action if the person contends they have a right to the office over the person currently holding the office, such as a defeated candidate for that office. *Bridgman v. Koch*, 2013 S.D. 83, ¶ 8, 840 N.W.2d 676, 678. If a person does not allege they have a right to the challenged office, then they have no "special interest" in the action. *Id.*

(finding that a person who ran for state's attorney in Jerauld County did not have standing to also challenge the same person as state's attorney in Buffalo County). A private citizen has no "special interest" in an office merely from being a citizen or a taxpayer. *Cummings v. Mickelson*, 495 N.W.2d 493, 498 n.6 (S.D. 1993) (citing *Knockemuss v. De Kerchove*, 66 S.D. 446, 285 N.W. 441 (1939)).

In *Cummings*, the Court determined that two challengers to appointed judgeships did not have a "special interest" because they had not applied for the position. *Id.* Additionally, a third person had no "special interest" even though he applied for the position, because he could not establish his name was on the certification list sent to the Governor for selection. Therefore, to have a "special interest" to an action under SDCL § 21-28-3, the person must contend they have rights to the challenged office. The Court in *Lippold* explained the reasons for limiting actions brought by the state and preventing collateral attacks by individuals. 2018 S.D. 7, ¶ 23, 906 N.W.2d at 923. The Court found that allowing the public to raise a collateral attack to the validity of an office, years after establishment, would undermine any public interaction with the office. *Id.* (quoting *Merchants' National Bank v. McKinney*, 2 S.D. 106, 116-17, 48 N.W. 841, 844 (1891)). Lack of confidence in the validity of an office would require anyone doing business with the office to verify its validity of the office before doing business with it. *Id.* Limiting the ability to challenge the validity of an office to only the state, or parties with a special interest, prevents these types of collateral attacks.

The Plaintiffs challenge the existence of the City of Sturgis' City Manager position. Plaintiffs fail to allege they were granted leave by the Meade County Circuit Court to bring this action, nor do they allege any facts on which to find they have a "special interest" in the action. Without meeting these requirements, the only means to challenge the existence of the Sturgis City Manager is through the state's attorney acting on behalf of the state. Like *Lippold*, if State does not bring the challenge, then the Plaintiffs do not have standing, and the Court cannot exercise subject-matter jurisdiction. Because the State through the State Attorney is not bringing the Quo Warranto Action, this Court lacks standing. Additionally, allowing the Plaintiffs to challenge the City Manager position more than a decade after it has been established would completely undermine all public interaction with that office; therefore, for all of the reasons stated above the Defendants Motion to Dismiss the Quo Warranto Action is **GRANTED**.

2. Can the Plaintiffs bring a Declaratory Action against the Defendants?

The purpose of a declaratory action is to "enable parties to authoritatively settle their rights in advance of any invasion thereof." *Abata v. Pennington Country Board of Commissioners*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141). The Plaintiffs' Complaint does not assert any right the City may invade. Instead, the Plaintiffs merely restate the same substantive arguments as they did in their quo warranto claim. The Plaintiffs request the Court declare "that the 2007 Election granted the City no special power to employ a City Manager," and that "[t]he voters have not granted the City the special power to employ a City Manager." Complaint, 8 (filed March 18, 202 2). This is substantively identical to the Plaintiffs' quo warranto claim which requests the Court for a "Judgment entering a Quo Warranto ... declaring the 2007 Election had no effect and the voters did not grant the City a special power to employ a City Manager." *Id.* at 7. Substantively, both claims aim to address the City Manager office's existence and remove the existing City Manager.

SDCL Chapter 21-28 codifies the quo warranto common law in South Dakota. As part of this codification, the Legislature expressly limited who may bring a quo warranto action. SDCL § 21-28-2. The Plaintiffs' declaratory action fits precisely within the purpose of a quo warranto claim and attempts to circumvent the limitations on who may bring a quo warranto action. Allowing the Plaintiffs' declaratory action would raise the same concerns that serve as the basis for the quo warranto limitation. Therefore, the Plaintiffs' declaratory action is a disguised quo warranto claim and must be treated as such.

"[T]o establish standing in a declaratory judgment action the plaintiff must have 'personally ... suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.'" *Abata*, 2019 S.D. 39, ¶ 12 , 931 N.W.2d at 719 (quoting Benson, 2006 S.D. 8, ¶ 22, 710 N.W.2d at 141). To have standing, "a litigant must show: (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiffs' injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision." *Id.* In the Plaintiffs' complaint, they assert no basis to support they suffered an injury from the 2007 election or the City Manager office. While SDCL § 21-24-3 allows an interested person to secure a declaration of the construction or validity of an ordinance, this S.D. declaration is only provided if the ordinance "affect[s] the person seeking the declaration." *Kneip v. Herseth*, 87 S.D. 642, 647, 214 N.W.2d 93, 96 (citing SDCL § 21-24-3; *Torigian u. Saunders*, 97 N.W.2d

586 (S.D. 1959)). Restrictions on the extent to which declaratory judgment may be sought require "that there must be a justiciable controversy between legally protected rights of parties whose interests are adverse." *Id.* at 648 (citations omitted).

While it is apparent the Plaintiffs disagree with the policies and actions of Mr. Ainslie, the Sturgis City Manager, in their Complaint the Plaintiffs do not point to any specific injury or threatened injury to a right or interest. The Plaintiffs' disagreement is solely based on Mr. Ainslie's implementation of the City Council's vision of the City. Whether Mr. Ainslie is adequately pursuing the City Council's vision is a political question which is better resolved through the Sturgis City Council rather than the courts. *See* SDCL § 9-10-11 (providing that appointed city manager "may be removed by majority vote of the members of the governing body."); *see also Mcintyre v. Wick*, 1996 S.D. 147, ¶ 64, 558 N.W.2d 347, 364 (Sabers, J., dissenting) (providing that a "political question" is one that "courts will refuse to take cognizance, or to decide, on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative powers."). Ultimately, if a city manager is not performing to standard, the people may statutorily remove the sitting City Manager through their elected representative on the City Council. A city's elected governing body is better suited to addressing the needs of the people than the courts. *See State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 10, 785 N.W.2d 272, 279 (finding that the Court "has a history of not interfering with municipal governments" because "municipalities are familiar with their local conditions and know their own needs."). Any alleged injury to the Plaintiffs from the existence of the City Manager's office, or Mr. Ainslie's decisions, is political and outside of the Court's purview.

Additionally, even if an injury in fact, occurred through a City Manager's decision, the connection between this decision and the 2007 election are far too remote to give the Plaintiffs standing for a declaratory action. Any far-reaching connection between the Plaintiffs and the 2007 election are theoretical and speculative. "Although declaratory relief is designed to determine legal rights or relations before an actual injury occurs, courts ordinarily will not render decisions involving future rights contingent upon events that may or may not happen." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (citing *Kneip*, 214 N.W.2d 93, 96 (S.D. 1974)). This Court will decline to hear an action "if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id.* (citing *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir. 1986)). The Court would need to speculate

to find an injury suffered by the Plaintiffs, which is a direct result of the 2007 election to employ a City Manager. Therefore, the Plaintiffs do not have standing to bring a declaratory action, thus the Defendants' Motion to Dismiss the Plaintiff's Declaratory Action is **GRANTED**.

CONCLUSION

Consistent with the foregoing Memorandum Decision, Defendants' Motion to Dismiss COUNT I and COUNT II, is **GRANTED**. COUNTS I and II are hereby **DISMISSED**. All other pending motions in this action are now considered **MOOT** and will not be addressed.

Dated this 6th day of October 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk of Courts
By Lori Rude
Deputy

FILED
OCT - 6 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

TAMMY BOHN, JUSTIN BOHN, AND BRENDA VASKNETZ Plaintiffs, vs. CITY OF STURGIS, a South Dakota Municipal Corporation, and DANIEL AINSLIE Defendants.	)	File No: 46CIV22-77 SUPPLEMENTAL MEMORANDUM OF DECISION ON DEFENDANTS MOTION TO DISMISS

Plaintiffs, by and through their attorney of record, filed a Motion Requesting Clarification on October 14, 2022. Plaintiffs bring two questions for this Court to Clarify. First, whether Plaintiffs have standing to bring their Declaratory Judgment Action pursuant to SDCL § 21-24-3, and second, what authority prohibits Plaintiffs from bringing both a quo warranto action and a declaratory judgment action.

OPINION

1. ***Do Plaintiffs under SDCL § 21-24-3 have standing to bring a Declaratory Judgment Action?***

SDCL § 21-24-3 states that:

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations *are affected by a statute, municipal ordinance, contract, or franchise*, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(emphasis added). The South Dakota Declaratory Judgment Act provides that its purpose is to "declare rights, status, and other legal relations." SDCL § 21-24-1. "This purpose may be accomplished by securing a declaration of the 'construction or validity' of any instrument, statute, or ordinance *if these affect the person seeking the declaration.*" *Kneip v. Herseth*, 87 S.D. 642, 647 (S.D. 1974) (citing *Torigian v. Saunders*, 77 S.D. 610, 97 N.W.2d 586 (S.D. 1959) (emphasis added). In a Declaratory Action proceeding the challenging party must have an "interest special or

peculiar to him and not merely an interest that he has in common with the public generally." *Torigian v. Saunders*, 77 S.D. 610, 97 N.W.2d 586, 589 (S.D. 1959). The Plaintiffs in the current case have not demonstrated that they have any special or peculiar interest to have standing to question the validity of the 2007 Election. The Plaintiffs state in their Complaint state that they brought this Declaratory Action matter forth "as residents, taxpayers, petition sponsors and candidates." All that the Plaintiffs are alleging in their Complaint is an interest that they have in common with the public generally. Until the Plaintiffs can show that they have some sort of a special or peculiar interest for seeking this Declaratory Judgment, they do not have standing.

2. ***What authority prohibits Plaintiffs from bringing both a quo warranto action and a declaratory judgement action.***

There is no authority that prohibits the Plaintiffs from bringing both a quo warranto action and a declaratory judgment action. The Court is not sure how the Plaintiffs interpreted the Memorandum of Decision to state that. On page 8 of the Memorandum of Decision this Court states that "[w]hile it is apparent the Plaintiffs disagree with the policies and actions of Mr. Ainslie, the Sturgis City Manager, in their Complaint the Plaintiffs do not point to any specific injury or threatened injury to a right or interest." The Plaintiffs can bring both a Quo Warranto Action and a Declaratory Action. This Court found that the Plaintiffs lack standing to bring a Quo Warranto action because they were not granted leave by the Meade County Circuit Court to bring this action, nor do they allege any facts on which to find they have a "special interest" in the action. Without meeting these requirements, the only means to challenge the existence of the Sturgis City Manager is through the state's attorney acting on behalf of the state. Lastly, this Court found that because the Plaintiffs have failed to show that they some sort of a special or peculiar interest, or specific injury to a right or interest in seeking a Declaratory Judgment Action in this case, they lack standing to seek the same.

Dated this 18 day of Oct 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk of Court
Deputy

FILED
OCT 18 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

CITY OF Sturgis

Office of the City Manager
1040 Harley -Davidson Way
Sturgis, SD 57785
(605)-347-4422

February 6, 2023

To the Honorable Mayor Carstensen,

It has been a pleasure to work for you for the past 11 years.

I would like to express my gratitude for the ability to work with you and the staff of the City of Sturgis over the past decade. Each day I am humbled by your and the staff's dedication and passion for serving the people of Sturgis and working to improve their quality of life.

Working each day with your staff planning and setting up for events, cleaning up after disasters, working through challenging budgets, strategizing on new concepts and ideas have made most days at work a tremendous joy.

Please know that I hold you, your staff and several of the Councilmembers in the highest regard, in the numerous places I have been able to work, I have never seen such a positive, dedicated and determined group of public servants. Thank you for all you have done and all that you continue to do for all of the residents of Sturgis.

Sincerely,

Daniel Ainslie
Sturgis City Manager

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

* * * *

Appeal No. 30163

* * * *

TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ,
Petitioners and Appellants,

vs.

CITY OF STURGIS, a South Dakota municipal corporation, and DANIEL AINSLIE,
Respondents and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KEVIN J. KRULL
Circuit Court Judge

* * * *

APPELLANTS' REPLY BRIEF

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THE NOTICE OF APPEAL WAS FILED NOVEMBER 4, 2022.

TABLE OF CONTENTS

PRELIMINARY STATEMENT

References to this Case

Appellants'/Citizens' Reply Brief adopts the same naming conventions, arguments, and authorities used in their initial Brief in this matter. The Brief of the Registered Voters of Sturgis as Amicus Curiae will be referred to as "Amicus Brief".

ARGUMENT

1. Reversal is required to prevent perversion of the judicial machinery.

Appellees' Brief did not address the fact that Citizens are being whipsawed between Bohn I and Bohn II, compromising the integrity of the judicial process. Citizens therefore rely on the arguments and authorities presented in Appellants' Brief on this issue.

2. This Court should modify the Trial Court's decision and issue a writ of quo warranto or, alternatively, a declaratory judgment in favor of Citizens.

Appellees did not address this issue, and Citizens therefore rely on the arguments and authorities presented in Appellants' Brief on this issue.

3. The Trial Court made reversible error by entering the Memorandum, Order, and Supplemental Memorandum.

a. The Trial Court made reversible error by dismissing Citizens' declaratory judgment action.

Appellants argue that citizens lack standing to bring the declaratory judgment action because Citizens claim no specific injury. Appellees' Brief, p. 18. As previously briefed, Citizens do not need to show a special injury. Appellants' Brief, pp. 17 and 22-23.

Appellees also assert that "Citizens rely on their taxpayer status alone as the basis to support their standing to bring this declaratory judgment action." Appellees' Brief, p.

19. Appellees further argue that "Citizens provide no rationale as to why they have standing to bring this declaratory action." Appellees' Brief, p. 21. Contrary to Appellees' assertions, Citizens expressly point both the Trial Court and this Court to four separate and independent reasons Citizens have standing to bring the declaratory judgment action:

1) pursuant to SDCL § 21-24-3 (*see* Appellants' Brief, pp. 19-20);
2) pursuant to SDCL § 9-1-6 (*see* Appellants' Brief, pp. 21-22);
3) to protect public rights, (*see* Appellants' Brief, pp. 22-23); and
4) Citizens have special interests different than that of the general public (*see* Appellants' Brief, pp. 23-25).

b. The Trial Court made reversible error by granting Appellees' motion to dismiss Citizens' request for a writ of quo warranto.

Appellees argue "quo warranto is Citizens' exclusive remedy to challenge the existence of the City Manager Office." *See* Appellees' Brief, pp. 15-18. Appellees also assert that "Citizens' exclusive remedy is quo warranto – the requirements of which they cannot satisfy." Appellees' Brief, p. 21. Despite claiming "Quo Warranto is Citizens' exclusive remedy" with requirements Citizens cannot satisfy on pages 15 and 21, Appellees also assert on page 12, without citing supporting authority, that "Quo warranto is not a 'proper remedy' as referred to in the body of SDCL § 9-1-6 and does not provide Citizens standing to bring a quo warranto claim." It is unclear why Appellees believe quo warranto is Citizens' "exclusive remedy" but that it is also simultaneously not a 'proper remedy'. As previously briefed, Citizens have standing to bring the quo warranto claim, and the Trial Court erred by granting Appellees' motion to dismiss. Appellants' Brief, pp. 25-29.

4. The Trial Court made reversible error by not granting citizens' motion for summary judgment.

Appellees did not address this issue, and Citizens therefore rely on the arguments and authorities presented in Appellants' Brief on this issue.

5. The Amicus Brief.

Appellees did not substantively address anything contained in the Amicus Brief. Citizens agree with the Amicus Brief in that "[t]his dispute should have been adjudicated long ago at the ballot box instead of in a courtroom." Amicus Brief, p. 16. Citizens disagree, however, that this Court should vacate the Trial Court's order in this action as moot. Citizens have standing to bring their claims, and, in the event this Court grants Citizens their relief requested in Bohn I, Citizens request this Court reverse the Bohn II Trial Court on the standing issue and remand with directions to allow Citizens an opportunity to voluntarily dismiss their Complaint in Bohn II.

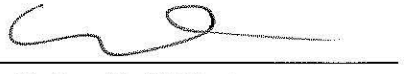
Citizens also support the comments made in the Amicus Brief that this Court should order Sturgis in Bohn I and Appellees in Bohn II to pay all of Citizens' costs and attorney's fees, which Citizens will address by separate motions.

CONCLUSION

If this Court entertains oral argument, Citizens respectfully request this matter be expedited and scheduled for the Court's April or May term.

Dated this 3rd day of April, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Tammy Bohn, Justin Bohn, and Brenda Vasknetz

By: 

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CERTIFICATE OF COMPLIANCE

COME NOW, the Appellants, TAMMY BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, by and through their attorney of record, Kellen B. Willert, of Bennett Main Gubbrud & Willert, P.C., 618 State Street, Belle Fourche, South Dakota, and pursuant to SDCL 15-26A-66(4), hereby certifies that he has complied with the type volume limitation of SDCL 15-26A-66(4) in that Appellants' Reply Brief is double-spaced and proportionally spaced in Times New Roman, 12-point, with a total word count of 718 and a total character count of 3,873. The Appellants' Reply Brief and all copies are in compliance with this rule.

Dated this 3rd day of April, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Tammy Bohn, Justin Bohn, and Brenda Vasknetz

By: _____

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CERTIFICATE OF SERVICE AND FILING

I, KELLEN B. WILLERT, attorney for BRENDA BOHN, JUSTIN BOHN, and BRENDA VASKNETZ, do hereby certify that on the 3rd day of April, 2023. I caused a full, true, and complete copy of APPELLANTS' REPLY BRIEF to be served *electronically* through the Odyssey electronic filing system:

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I further certify that on the same day I caused the APPELLANTS' REPLY BRIEF to be filed *electronically* through the Odyssey electronic filing system and the original APPELLANTS' REPLY BRIEF to be filed by U.S. Mail with:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State of South Dakota
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Pierre, SD 57501-5070
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by depositing said copy in envelope securely sealed with first class postage thereon fully prepaid in the U.S. Mail in Belle Fourche, S.D., and addressed as shown above.

Dated this 3rd day of April, 2023.

BENNETT MAIN GUBBRUD & WILLERT, P.C.

By: _____
Kellen B. Willert