IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 27485

ERIN AGETON,

Applicant and Appellant,

vs.

MARTY J. JACKLEY, in his capacity as SOUTH DAKOTA ATTORNEY GENERAL,

Respondent and Appellee.

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

The Honorable Kathleen Trandahl, Circuit Court Judge

Notice of Appeal filed June 24, 2015

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JURISDICTIONAL STATEMENT

This is an appeal from an Order Denying Application for Writ of Certiorari dated June 19, 2015. R. 209. Appellant timely filed a Notice of Appeal on June 24, 2015. R. 215. This Court has jurisdiction pursuant to SDCL § 15-26A-3(2).

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED BY LIMITING THE RECORD AND DETERMINING THAT THE CIRCUIT COURT MAY NOT CONSIDER FACTS OUTSIDE THE RECORD?

The circuit court determined its review was limited to the record of the proceedings before the Attorney General and that it could not consider matters outside that record.

- *Cole v. Board of Adj. of City of Huron* (*Cole I*), 1999 SD 54, 592 N.W.2d 175
- *Sioux Falls Argus Leader v. Miller*, 2000 SD 63, ¶25, 610 N.W.2d 76, 87
- *Austin v. Eddy*, 41 S.D. 640, 172 N.W.517, 519 (1919)

- SDCL § 12-13-9.2
- SDCL § 12-13-25.1
- SDCL § 19-19-201
- SDCL § 21-31-8

II. WHETHER THE ATTORNEY GENERAL ABUSED HIS DISCRETION IN FAILING TO CONSIDER INFORMATION HE HAD NOTICE OF REGARDING THE PROPOSED INITIATED MEASURE?

The circuit court determined the Attorney General need not review any information, apart from the text of the proposed initiated measure, in preparation to draft a ballot measure explanation.

- *South Dakota State Fed'n of Labor AFL-CIO v. Jackley, et al.*, 2010 SD 62, 786 N.W.2d 372

- SDCL § 12-13-25.1
- SDCL § 54-4-66
- SDCL § 1-11-1

III. WHETHER THE ATTORNEY GENERAL'S BALLOT EXPLANATION EDUCATES VOTERS ABOUT THE INITIATED MEASURE'S PURPOSE", "EFFECT", AND "LEGAL CONSEQUENCES" PURSUANT TO SDCL § 12-13-25.1?

The circuit court upheld the Attorney General's ballot explanation.

- *South Dakota State Fed'n of Labor AFL-CIO v. Jackley, et al.*, 2010 SD 62, 786 N.W.2d 372
- *Schulte v. Long*, 2004 SD 102, 687 N.W.2d 501
- *Hoogestraat v. Barnett*, 1998 SD 104, 583 N.W.2d 421

- SDCL § 12-13-25.1
- SDCL § 12-13-9.2

STATEMENT OF THE CASE

This appeal arises from a Sixth Judicial Circuit, Hughes County decision. Pursuant to SDCL § 12-13-9.2, Appellant filed an application and affidavit for writ of certiorari challenging the Attorney General's statement for a proposed initiated measure imposing regulations on certain money lenders. R. at 1, 17. The Attorney General filed a Verified Return and a Brief in Opposition to Application and Affidavit for Writ of Certiorari. On June 19, 2015, the Honorable Kathleen Trandahl, Circuit Court Judge, issued a Memorandum Opinion and Order denying Appellant's Application for Writ of Certiorari. This appeal followed.

STATEMENT OF FACTS

On April 1, 2015, the Attorney General's Office received the final form of an initiated measure from its sponsor, former Rep. Steve Hickey, regarding a proposed statewide ballot question that would purport to cap the finance charges certain money lenders may charge at an annual rate of thirty-six percent. R. at 202. South Dakota law requires the Attorney General to prepare a title and explanation that must be included on an initiated measure prior to its circulation for signatures. SDCL § 12-13-25.1; *see also* SDCL § 2-1-1.2. SDCL § 12-13-25.1 states, in pertinent part:

> The attorney general shall prepare an attorney general's statement which consists of a title and explanation. The title shall be a concise statement of the subject of the proposed initiative or initiated amendment to the Constitution. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure or initiated amendment to the Constitution. The attorney general shall include a description of the legal consequences of the proposed amendment or initiated measure, including the likely exposure of the state to liability if the proposed amendment or initiated measure is adopted. The explanation may not exceed two hundred words in length. The attorney general shall file the title and explanation with the secretary of state and shall provide a copy to the sponsors within sixty days of receipt of the initiative or initiated amendment to the Constitution.

On May 27, 2015, the Attorney General timely filed the Attorney General's statement, consisting of a title and explanation, with the Secretary of State. R. at 204.

The statement provides:

> Title: An initiated measure to set a maximum finance charge for certain licensed money lenders
>
> Explanation:
>
> The initiated measure prohibits certain State-licensed money lenders from making a loan that imposes total interest, fees and charges at an annual percentage rate greater than 36%. The measure also prohibits these money lenders from evading this rate limitation by indirect means. A violation of this measure is a misdemeanor crime. In addition, a loan made in violation of this measure is void, and any principal, fee, interest, or charge is uncollectable.
>
> The measure's prohibitions apply to all money lenders licensed under South Dakota Codified Laws chapter 54-4. These licensed lenders make commercial and personal loans, including installment, automobile, short-term consumer, payday, and title loans. The measure does not apply to state and national banks, bank holding companies, other federally insured financial institutions, and state chartered trust companies. The measure also does not apply to businesses that provide financing for goods and services they sell.

R. at 203.

Appellant Erin Ageton, an opponent of the measure, contends that the Attorney General's statement does not satisfy the requirements of SDCL § 12-13-25.1. R. at 18. Specifically, Appellant contends that the Attorney General exceeded his statutory authorization under SDCL § 12-13-25.1 because his explanation "fails to educate the voters of the purpose, effect, and legal consequences of the initiated measure." R. at 18. On June 5, 2015, Appellant filed an application and affidavit for writ of certiorari challenging the Attorney General's statement for a proposed initiated measure that caps the finance charges certain money lenders may charge at an annual rate of

36%. R. at 1, 17. Appellant asks that the Attorney General revise his statement to include language disclosing that "[t]he initiated measure, if adopted, will eliminate short-term loans in South Dakota." R. at 15. The Attorney General filed a Verified Return and a Brief in Opposition to Application and Affidavit for Writ of Certiorari. R. at 164. The Attorney General argues he did not exceed his statutory authorization when drafting the statement.

The Attorney General issued a document styled as a "certification" of the records he believed were applicable to the proceedings before the circuit court. R. at 164–74. The Attorney General's record consisted of two documents: (a) the text of the initiated measure; and (b) the Attorney General's statement. The circuit court expanded the Record to include two additional letters: (a) a letter dated May 27, 2015, from the Attorney General to the Secretary of State, containing the Attorney General's title and explanation for the proposed initiated measure at issue; and (b) over the Attorney General's objection, a letter dated September 18, 2013, from Attorney Sara Frankenstein to the Attorney General. R. at 197–98.

Originally sent in response to a similar proposed initiated measure setting a 36% cap on loan finance charges, Attorney Frankenstein's letter notified the Attorney General of Appellant's position that the 36% cap was in fact, in purpose and effect, a ban on short-term consumer loans, payday loans, title loans, and some automobile loans. R. at 198. Attorney

Frankenstein's letter also proposed language for the Attorney General statement to educate voters that the initiated measure would ban short-term lending in South Dakota. R. at 198. The circuit court found Attorney Frankenstein's letter was relevant and should be included in the record "because it evidences the fact that [the Attorney General] was aware of [Appellant and Frankenstein's] position that the 'purpose and effect' of a cap of 36% is the elimination of short-term credit in South Dakota." R. at 202; 198 ("Attorney General Jackley had this letter and was aware of its contents prior to writing the Attorney General's Statement in 2015").

Appellant also provided four exhibits describing the market for short-term loans. R. at 17–20. Appellant asked the circuit court to take judicial notice of basic economic facts in the articles which described how short-term lending works; for example, the articles explained how annual percentage rates work, and calculated the amount a lender may charge under a 36% rate cap on a two-week loan. R. at 9–14, 186–90, 199. At oral argument, the circuit court made clear that it did not review any of the articles for purposes of taking judicial notice. R. at 246. In its Memorandum Decision denying Appellant's Application for Writ of Certiorari, the circuit court held Appellant's materials, which Appellant submitted as exhibits to her Affidavit, were inadmissible in a certiorari proceeding because they were not part of the record of the proceedings before the Attorney General. R. at 199–200.

The circuit court also stated the exhibits to Appellant's Affidavit were improper for judicial notice because they are "articles" containing "opinions." R. at 199. It is unclear, however, whether the circuit court actually reviewed any of the exhibits. At oral argument, the court said it did not review the articles, but the circuit court's memorandum opinion categorized the exhibits as articles containing opinions and declared they were not suitable for judicial notice in their entirety. R. at 246, 199.

The circuit court concluded that the Attorney General did not exceed his statutory authorization under SDCL § 12-13-25.1 and upheld the Attorney General's ballot explanation for the proposed initiated measure. R. at 208. Accordingly, the circuit court denied the Application for Writ of Certiorari. R. at 208. On June 24, 2015, Appellant filed this appeal, asking this Court to reverse the circuit court's decision because the circuit court incorrectly limited the record, failed to apply the correct legal standard, and incorrectly found that the Attorney General's explanation educated voters of the initiated measure's purpose and effect. R. at 215.

STANDARD OF REVIEW

Appellant's challenge to the circuit court's legal conclusions is reviewed de novo. *Hamerly v. City of Lennox Bd. of Adjustment*, 1998 SD 43, ¶10, 578 N.W.2d 566, 568; *Tri County Landfill Ass'n v. Brule County*, 535 N.W.2d 760, 763 (S.D. 1995). This Court's review of whether the Attorney General's explanation complies with the law is a limited one. *Schulte v. Long*, 2004 SD

102, ¶ 11, 687 N.W.2d 495. "[It] merely determine[s] if the Attorney General has complied with his statutory obligations and [does] not sit as some type of literary editorial board." *Id.*

ARGUMENT

This case presents the first true test of South Dakota's new standard for judging ballot measure "explanations" drafted by the attorney general pursuant to SDCL § 12-13-25.1. These explanations are a critical component of the process for qualifying citizen-initiated measures for the ballot; they distill complex statutory language into a clear policy proposal. Unlike many other states, South Dakota has chosen its chief attorney—an official elected by and from the voting public—to "educate" those voters regarding the true consequences of the proposal.

Now, for what is arguably only the second time[1] since the law was amended in 2010, an attorney general has been confronted with the sort of artfully-drafted ballot measure that South Dakota's new standard was created to address. The proponent's petition reads one way—seeming to lower finance charges on certain consumer loans to 36%—but has an entirely different purpose and effect—actually eliminating from the marketplace any loans that would ever include those finance charges. A 36% cap on finance charges will not make short-term money loans more affordable. The effect of a five-cent price ceiling on ice cream is not cheap ice cream for all. The same

[1] Proponents of the proposed initiated measure at issue filed a similar measure that sought placement on the 2014 ballot.

is true of the initiated measure. A 36% cap on finance charges does not yield cheap 36% loans. The laws of supply and demand matter. When a price ceiling is set well below suppliers' marginal costs, we know the price ceiling is a de facto ban. This, then, presents the rare case in which simply paraphrasing the legal meaning of the proposed statutory text does not convey the actual purpose or effect of the law.

There are many possible solutions to the puzzle that this statutory text presents, and for that reason, the Attorney General can exercise discretion in the words he uses to educate voters about the initiated measure's purpose and effect. But he must still "educate" voters about the purpose and effect of a measure. The circuit court's decision errs on precisely this point. It would provide the Attorney General virtually unlimited and unchallengeable discretion; so long as the explanation paraphrases the four corners of the proposed text, it passes muster. That cannot be right. If SDCL § 12-13-25.1 means what it says, the Attorney General is now to educate potential petition signers on the "purpose," "effect," and "legal consequences" of the measure. Simply paraphrasing the measure's text is not enough.

This case also presents an opportunity for this Court to clarify the scope of the record in ballot measure proceedings. Courts cannot decide whether the Attorney General properly educated voters by confining the record to the few documents "self-certified" by the Attorney General, and judicial notice should be available to prove the background facts that should

have informed the Attorney General's ballot explanation. The plain language of two statutes—the judicial notice statute and the legislature's ballot challenge law—should displace whatever common law background rule might otherwise apply. First, SDCL § 19-19-201(d) provides that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." "Judicial notice may be taken at any stage of the proceeding," SDCL § 19-19-201(g), and Appellant raised the issue at the first opportunity. Instead of following this legislative directive, the circuit court relied on common law regarding the historical nature of certiorari to limit the record. Second, SDCL § 12-13-9.2 expressly creates an action to challenge the adequacy of the Attorney General's statement. Courts have labeled this action "certiorari," even though it is an express statutory creation with its own substantive standards (which, significantly, have recently been augmented). Appellant followed the legislature's direction. The ancient forms of certiorari review cannot prevail over an express statutory directive and thereby frustrate meaningful review of individual officers' actions.

This Court should also clarify the standard for the Attorney General to ignore competing factual averments. Even on the limited record recognized by the circuit court, the court found the Attorney General had knowledge of Appellant's position that the initiated measure's true purpose and effect was to ban short-term lending.[2] The Attorney General conceded he failed to

[2] Short-term lending is a term commonly used to describe the different types of consumer-oriented lending covered by the initiated measure in this case.

consider Appellant's factual averments or arguments. Whatever the degree of discretion the law affords the Attorney General, the state's attorney cannot disregard facts a reasonable officer would have considered. That must constitute an abuse of discretion, and this Court should reverse because the Attorney General's resulting explanation fails to comply with the law.

I. THE CIRCUIT COURT ERRED IN LIMITING THE RECORD AND REFUSING TO TAKE JUDICIAL NOTICE.

Even though a ballot explanation challenge is an action the legislature expressly provided under a statute that makes no mention of certiorari, a succession of decisions by this Court continue to denominate the relief available to a challenger as a writ of certiorari. *See Jackley*, 2010 SD 62 at ¶9, 786 N.W.2d 372 (citing *Schulte*, 2004 SD 102 at ¶11, 687 N.W.2d at 498). "A writ of certiorari may be granted by the Supreme and circuit courts, when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal nor, in the judgment of the court, any other plain, speedy, and adequate remedy." SDCL § 21-31-1. "The review upon writ of certiorari cannot be extended further than to determine whether the . . . officer, has regularly pursued the authority of such . . . officer." SDCL § 21-31-8. When an officer has jurisdiction to act, the writ must issue if the officer did "some act forbidden by law or neglected to do some act required by law." *Cole v. Board of Adj. of City of Huron* (*Cole I*), 1999 SD 54, ¶4, 592 N.W.2d 175, 176 (quoting *Peters v. Spearfish ETU Planning Comm'n*, 1997 SD 105, ¶6, 567 N.W.2d 880, 883).

After the Attorney General received Appellant's Application for Writ of Certiorari, the Attorney General attempted to certify a record of the proceedings and sought to prevent Appellant from introducing additional information. This self-certified record included information if and only if the Attorney General actually considered the information in formulating the ballot explanation. The circuit court subsequently expanded the record to include two documents the circuit court found the Attorney General had knowledge of: (a) a letter dated May 27, 2015, from the Attorney General to the Secretary of State, containing the Attorney General's title and explanation for the proposed initiated measure at issue; and (b) a letter dated September 18, 2013, from Attorney Sara Frankenstein to the Attorney General. The circuit court denied Appellant's request for the circuit court to expand the record to include the exhibits attached to Appellant's Affidavit in support of certiorari. The circuit court held it could not consider Appellant's four exhibits containing information about how short-term loans work. The circuit court also held it could not take judicial notice in a certiorari proceeding.

A. The Circuit Court Should Have Considered Facts Necessary to Determine Whether the Attorney General's Explanation Educates Voters.

The circuit court's understanding of the record applicable in a certiorari proceeding relies on the false premise that an officer cannot ever be required to consider outside information or general knowledge in the

performance of his statutory duties. If the law means what it says, the Attorney General's explanation must educate voters about the purpose and effect of a proposed initiated measure. Can the Attorney General's statutory duty to educate voters require the Attorney General to consider outside information, or even general economic facts about how annual percentage rates work over a short term? Yes, and the circuit court erred when it declared all outside information and all general knowledge were always and forever out of bounds. True, in almost all cases, the Attorney General need not consider outside information or consult general knowledge. However, when an initiated measure proposes to regulate a complex market, accurate voter education may require a basic understanding of that complex market.

The circuit court relied on two statutes to determine the scope of the record applicable before it.[3] Neither statute defines what constitutes the "record" or the "proceedings" when what is being challenged is a statement drafted by a single officer like the Attorney General. SDCL § 21-31-3 states that the writ of certiorari should be directed to the person having custody of the "records or proceedings to be certified." SDCL § 21-31-4 provides as follows:

> The writ of certiorari shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them, with

[3] There is an argument that neither statute applies in this case. The circuit court expressly denied Appellant's Application for Writ of Certiorari. Arguable, if a "record" ever was certified, it was not certified under the provisions applicable to writs of certiorari.

> convenient certainty, that the same may be reviewed by the court, and requiring the party in the meantime, to desist from further proceedings in the matter to be reviewed.

The circuit court never issued a writ of certiorari in this case. The application before the circuit court did not and could not call for a return or certified record. See SDCL § 21-31-4; SDCL § 21-31-7. No statute limits what an applicant can present to the circuit court. The circuit court should have allowed Appellant to make her argument, utilizing information and exhibits for the circuit court's consideration.

The circuit court erred in applying common law concerning the review of lower court orders. The circuit court held that "certiorari review is limited to considering the record of the proceedings before the officer that is pertinent to his decision, and the court may not consider matters outside that record." R. at 198 (citing *Austin v. Eddy*, 41 SD 640, 172 N.W.517, 519 (1919); *Kirby v. Circuit Court of McCook County*, 10 SD 38, 71 N.W. 140, 141 (1897); *Save Centennial Valley Ass'n Inc. v. Schultz*, 284 N.W.2d 452, 454 (S.D 1979)). None of the cases cited discussed certiorari review of a single officer's determination in a nonadversarial "proceeding."

The circuit court also stated, "In a certiorari proceeding, the Court is not to take evidence and conduct a de novo trial on the merits." R. at 198 (citing *Cole I*, 1999 SD 54, ¶¶ 8–11, 592 N.W.2d at 177; *Cole v. Board of Adj. of City of Huron* (*Cole II*), 2000 SD 119, ¶¶12–13, 616 N.W.2d 483,487; *see Sioux Falls Argus Leader v. Miller*, 2000 SD 63, ¶25, 610 N.W.2d 76, 87).

Appellant did not and does not ask for "a de novo trial on the merits." No act of the Attorney General could be construed as a trial on the merits in the first instance. Appellant merely asked the circuit court to consider information and general knowledge the Attorney General should have taken into account.

The means for taking this background information and general knowledge into account is judicial notice, and there is nothing about certiorari proceedings that makes judicial notice inherently improper. Indeed, this Court implicitly recognized that judicial notice is appropriate in certiorari proceedings in *Cole I*. 1999 SD 54, ¶¶ 8–11, 592 N.W.2d at 177 (Gilbertson, J.). The *Cole I* court considered whether to take judicial notice of a municipal ordinance in review of a circuit court's grant of certiorari. *Id.* ¶¶4–6. The *Cole I* court stated judicial notice of municipal notices is improper, but left the door open to judicial notice of other facts in certiorari proceedings. *See id.* The circuit court also mistakenly relied on *Sioux Falls Argus Leader v. Miller*. 2000 SD 63. In that case, this Court's per curiam decision found that SDCL § 19-10-2, the predecessor to SDCL § 19-19-201, granted courts the ability to take judicial notice. *Id.* ¶23. The fact that the underlying writ in that case was prohibition, rather than certiorari, was not essential to this Court's decision. *See id.* ¶¶23–25.

Nor is there any reason to suppose that certiorari itself is hostile to taking judicial notice in cases like this. The considerations underlying traditional limits on certiorari review are inapplicable to review of single

officer actions where there was no potential below for adverse parties to present arguments or evidence. It is difficult to constrain the record to a particular proceeding when nothing that could be construed as a "proceeding" ever took place.[4]

Appellant acknowledges that ballot explanation challenges might become unwieldy if litigants could confront the Attorney General with information and general knowledge he neither considered nor reasonably should have considered. But that is not this case: the circuit court found Appellant provided the Attorney General such notice, but the Attorney General disregarded it.

No legal authority supports circuit court's position that South Dakota law prohibits courts from considering information, general knowledge, and facts that officers should have considered. In determining whether to sustain a ballot explanation challenge (even if courts continue to denominate the relief they grant as a "writ of certiorari"), the reviewing court must consider the information and general knowledge that the Attorney General should have taken into account. If the action under SDCL § 12-13-9.2 has any meaning, then at least in this case, the universe of relevant materials and knowledge must be permitted to include materials and basic economic facts the Attorney General failed to consider.

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[4] For example, if a "proceeding" took place, when did it start and when did it stop? The circuit court found the Record should contain relevant evidence submitted to the Attorney General in 2013.

The circuit court implicitly found that the general, historical rules concerning the scope of review on a writ of certiorari prevent a court from meaningfully reviewing whether the Attorney General complied with the law. Such historical rules are not good law in a ballot explanation case because historical rules governing general procedures yield to newer, specific legislative enactments. "A rule of statutory construction is that the more specific statute governs the more general statute." *Peterson v. Burns*, 2001 SD 126 ¶28, 635 N.W.2d 556 (citing *Faircloth v. Raven Indus., Inc.*, 2000 SD 158, ¶¶11, 18, 620 N.W.2d 198, 202–03). "Another rule of statutory construction is that the more recent statute supercedes the older statute." *Id.* ¶29 (citing *State v. Harris*, 494 N.W.2d 619, 622 (S.D. 1993)).

The legislature's enactment of SDCL § 12-13-25.1 and this Court's decision in *Jackley* make clear that the Attorney General has a responsibility to draft ballot explanations. No court can determine whether the Attorney General's ballot explanation educates voters without considering related provisions of law or the underlying activity regulated—particularly where the measure is a price floor or ceiling in a complex industry. The circuit court erred when it applied common law concerning certiorari to eviscerate any opportunity for meaningful review of this ballot explanation.

B. The Circuit Court Erred in Ruling that Judicial Notice is Inapplicable in Certiorari Proceedings.

The plain language of SDCL § 19-19-201 provides that judicial notice of adjudicative facts is mandatory if requested by a party and the court is

supplied with the necessary information. SDCL §§ 19-19-201(a), (d). The fact that the circuit court reviewed the Attorney General's statement in a certiorari proceeding pursuant to SDCL § 12-13-9.2 does not matter. *See Jackley*, 2010 SD 62 (meaningfully reviewing the Attorney General's ballot explanation). "Judicial notice may be taken at any stage of the proceeding." SDCL § 19-19-201(f). Appellant raised the issue at the first opportunity and provided the necessary information for the circuit court to take judicial notice.

The circuit court ignored the principle that no tribunal or official (the Attorney General included) can examine the "record" without recourse to general knowledge. Two other sources are often required: generally known facts, and facts derived from authoritative sources. Here, this includes facts about how interest is calculated and how loans work, and the statutes that define the loans subject to the ban.

The circuit court's error was prejudicial in this case. The circuit court declined to review the exhibits Appellant submitted along with her Affidavit before argument;[5] instead, the court determined the exhibits were "articles" containing "opinions" based on research. Even if one or more of the exhibits contained analysis that would qualify as an expert opinion, the articles were not submitted for that purpose. Instead, they were simply submitted as

[5] There is no indication the circuit court's order that the circuit court actually reviewed any of the exhibits, except to refer to them by description. The circuit court consistently held the exhibits were outside the record and could not be reviewed.

examples of general economic knowledge, and they contained sufficient facts capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned to permit judicial notice that a 36% cap on finance charges is a de facto ban on short-term lending.

Appellant presented the circuit court authoritative materials showing that the proposed 36% cap has resulted in a short-term lending ban in other states. "State caps on payday loan interest rates at or near 36% appear to lead to a significant reduction in payday lenders. In Oregon, for instance, there were 346 payday lenders licenses prior to enacting the 36% interest rate cap in 2007 and only 82 payday lenders in operation one year later." R. at 11 (citing Colin Morgan-Cross and Marieka Klawitter, *Effects of State Payday Loan Price Caps & Regulation, Evans School of Public Affairs*, University of Washington, p. 4 (December 2, 2011).

The effect is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," namely, mathematics and general statistics about the costs of doing business as a lender. SDCL § 19-19-201(b). "The maximum principal amount of any payday loan . . . may not exceed five hundred dollars." SDCL § 54-4-66. Under a 36% finance charge cap, the maximum revenue this type of short-term lender could generate from a single two week loan of $500 is just $6.90. In contrast, "[a] recent analysis of the payday lending market in Missouri, which operates within a regulatory framework very similar to that of South Dakota,

projected the average revenue for a $100 payday loan to be $15.26, and an average operating cost for a $100 loan to be $14.23, resulting in a profit per $100 loan of $1.03." R. at 11 (citing Affidavit Exhibit 2, p. 29). "If a thirty six percent interest cap were instituted, the same analysis projected that the revenue for a $100 loan would decrease from $14.23 to $1.38." R. at 11. A basic knowledge of the industry reveals that payday lending will not occur under a 36% finance charge cap. Under a thirty six percent cap "revenues [are] insufficient to cover variable costs, [and] the payday loan store will shut down." *See also* Pew Charitable Trusts, *How State Rate Limits Affect Payday Loan Prices*, pages 1–2 (April 2014) (referring to states with rate caps of 36% as states than ban payday lending and explaining storefront payday loans are not available in such states).[6]

The circuit court also failed to consider statements from the proponents which established the initiated measure's purpose and effect. Steve Hickey, one of the initiated measure's primary proponents recently stated that short-term lenders "had their chance . . . to stay in business in South Dakota." Todd Epp, *Hickey, Hildebrand Form Group to Put Payday Loan Interest Cap on Ballot*, Northern Plains News, Nov. 26, 2014. *See also* David Montgomery, *Payday loans could cease in South Dakota*, Argus Leader, Dec. 14, 2014 ("Both sides agree [the 36% rate cap] would shut down payday lending in South Dakota."); R. at 9.

[6] http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs/content-level_pages/fact_sheets/StateRateLimitsFactSheetpdf.pdf

II. THE ATTORNEY GENERAL CAN NOT KNOWINGLY DISREGARD RELEVANT EVIDENCE WITHOUT CONDUCTING SOME REASONABLE INQUIRY.

The Attorney General is a constitutional officer whose duties require that he or she act as the State's lawyer. *Jackley*, 2010 SD 62, ¶22 (citing SDCL § 1-11-1). As the State's lawyer, the Attorney General must make an informed, reasonable attempt to educate the voters in drafting his explanation. *See* SDCL § 12-13-25.1. This Court's standard of review "allows the Attorney General 'significant discretion' in carrying out his statutory duty of drafting ballot explanations." *Schulte*, 2004 SD 102 at ¶ 26, 687 N.W.2d at 501 (quoting *Hoogestraat*, 1998 SD 104 at ¶ 21, 583 N.W.2d at 425 (Gilbertson, J., concurring)). But significant discretion does not allow an officer to fail to consider information received regarding the proposed initiated measure or to ignore generally known facts. Though the Attorney General enjoys significant discretion, he may not simply paraphrase the statute's text, omit the purpose and effect of the measure, and leave it for the voters to decipher. SDCL § 12-13-25.1.

The Attorney General's explanation was not informed because it failed to consider the interaction between the initiated measure and other laws regulating short-term money lenders. *See*, *e.g.*, SDCL § 54-4-66 (setting a $500 maximum principal amount for payday lending). The Attorney General's explanation also failed to consider generally known facts about the market for short-term lending. These failures are unreasonable when an

officer seeks to educate voters about the effect of a price ceiling in a complex, heavily regulated industry like money lending.

The Attorney General also failed to consider the letter dated September 18, 2013, from Attorney Sara Frankenstein which expressly notified the Attorney General that a 36% cap would in effect ban short-term consumer loans, payday loans, title loans, and some automobile loans. The circuit court found the letter was relevant. But the Attorney General did not consider the letter in drafting the ballot explanation, nor did the Attorney General take steps to ascertain the truth of the allegations in the letter.

The circuit court erred when it determined the Attorney General could, without any reason, knowingly disregard the letter. As a constitutional officer and as an attorney, the Attorney General cannot knowingly disregard relevant evidence without some justification or explanation. This Court should rule that the Attorney General failed to properly exercise his discretion when he failed to consider relevant evidence.

III. THE CIRCUIT COURT ERRED IN RULING THAT THE ATTORNEY GENERAL'S STATEMENT EDUCATES VOTERS OF THE PROPOSED INITIATED MEASURE'S PURPOSE AND EFFECT.

A. The Standard for Attorney General Ballot Explanations

South Dakota provides that an election ballot shall contain a statement, title, explanation, and recitation of a proposed measure in lieu of the full text of the measure submitted to voters. SDCL § 12-13-11. The purpose of the explanation is to educate the voters. SDCL § 12-13-25.1. The

Attorney General is the officer obligated by statute to "prepare each statement, title, explanation, and recitation." SDCL § 12-13-1.

SDCL § 12-13-25.1 requires that the Attorney General's statement be an "objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure[.]" "In *Schulte*, 2004 SD 102 at ¶16, n.3, 687 N.W.2d at 499-500, (citations omitted), [this Court] defined purpose as that "which one sets before him to obtain or accomplish" and effect as "that which is produced by an agent or cause; result; outcome; consequence." *Jackley*, 2010 SD 62, ¶16. SDCL § 12-13-25.1 also requires the Attorney General's statement to apprise voters of "legal consequences" of a proposed initiated measure, but any discussion of legal consequences is within the Attorney General's discretion. *Jackley*, 2010 SD 62, ¶25. SDCL § 12-13-25.1 "sets forth the elements the Attorney General is required to address in a ballot statement. Within this legal framework, however, the Attorney General 'is granted discretion as to how to author the ballot statement.' " *Jackley*, 2010 SD 62 at ¶9 (quoting *Schulte*, 2004 SD 102 at ¶11, 687 N.W.2d at 498). The Attorney General need not and cannot opine as to whether an initiated measure's purpose, effect, and legal consequences are desirable.

It remains true that when reviewing an application for writ of certiorari in a ballot explanation case, "[t]his Court's function is limited. [This Court] merely determine[s] if the Attorney General has complied with his

statutory obligations and [does] not sit as some type of literary editorial board." *Jackley*, 2010 SD 62 at ¶9 (citing *Schulte*, 2004 SD 102 at ¶11, 687 N.W.2d at 498) (citation omitted). However, this common-sense principle applies to the Attorney General's exercise of discretion in choosing language to explain the purpose and effect of the statute; it does not apply to the question of whether the Attorney General has, in fact, complied with the law by "educating" voters regarding the purpose and effect of a proposed measure. And while a writ of certiorari is an extraordinary remedy at common law, if courts continue to refer to the action for a statutory ballot explanation challenge as certiorari, the writ is markedly less extraordinary.

Understanding the history of the Attorney General's responsibility in drafting ballot explanations is helpful because the duties of the office have recently become more demanding. "The purpose of a ballot explanation prior to July 1, 2006, was to identify an amendment [or measure] to an informed electorate rather than to educate the electorate." *Id.* ¶ 7 (citing *Hoogestraat v. Barnett*, 1998 SD 104, ¶11, 583 N.W.2d 421, 424). Between 2006 and 2010, the legislature modified the legal framework governing ballot explanations several times.

Now, the Attorney General must draft a statement that educates voters about an initiated measure, rather than merely identify the measure. *Id.* ¶9 (citing *Schulte*, 2004 SD 102 at ¶12, 687 N.W.2d at 498). Moreover, the legislature directed the Attorney General to educate voters about the effect-

in-fact of a proposed ballot measure. The removal of the modifier "legal" in "legal effect" suggests that the Attorney General may not merely describe the law, but must describe the result-, outcome-, or consequence-in-fact. *See Dahn v. Trownsell*, 1998 SD 36, ¶14, 576 N.W.2d 535, 539 (describing South Dakota's rules of statutory construction) (citing *Moss v. Guttormson*, 1996 SD 76, ¶10, 551 N.W.2d 14, 17 (citations omitted)). This Court does not review the Attorney General's choice of language, but it does consider whether he has, in fact, educated the voters regarding the effect and purpose of a proposed measure.

Educating the voters achieves two goals at one time. First, this statutory framework informs the public, protects the public from being misled, and advances the political discourse in the state. Second, this framework protects initiated measure proponents and opponents, who otherwise may have to devote substantial resources to educate voters about the purpose and effect of an initiated measure. After the Attorney General explains the initiated measure's effects, proponents and opponents may focus their political discourse on whether such effects are good or bad for the state.

B. *AFL-CIO v. Jackley* Confirms that the Attorney General's Explanation Must Educate Voters.

This Court most recently considered whether the Attorney General's ballot explanation complied with the requirements provided in SDCL § 12-13-9 and SDCL § 12-13-25.1 in *AFL-CIO v. Jackley*. 2010 SD 62, 786 N.W.2d 372. In *Jackley*, the AFL-CIO opposed a proposed constitutional amendment

protecting the right to vote by secret ballot. *Id.* ¶4. The AFL-CIO filed a suit in circuit court to challenge the Attorney General's ballot explanation, arguing the Attorney General exceeded his statutory authorization. *Id.* The circuit court concluded the Attorney General did not exceed his statutory authorization under SDCL § 12-13-9 and upheld the ballot explanation. Accordingly, the circuit court denied the AFL-CIO's request for a writ of certiorari. *Id.* The AFL-CIO appealed the circuit court's denial and petitioned this Court for a writ of certiorari. *Id.* ¶1.

The AFL-CIO argued to this Court that the Attorney General's ballot explanation failed to provide "an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed amendment," as required by SDCL § 12-13-9. *Id.* ¶14. In *Jackley*, the proposed constitutional amendment guaranteed an individual the fundamental right to vote by secret ballot '[i]f any state or federal law permits an election for public office, for any initiative or referendum, or for any designation or authorization of employee representation[.]' " *Id.* ¶15 (alterations in original). "The Attorney General's statement explain[ed] that th[e] proposed amendment 'would guarantee a right to vote by secret ballot to prevent others from knowing how a person voted" and "would apply to elections of public officers, adoption of initiated or referred measures, and elections to designate or authorize employee representation, such as elections concerning unions.' " *Id.* ¶15. The AFL-CIO argued, first and foremost, that the proposed amendment violated federal law

and the U.S. Constitution. *Id.* ¶10. This Court rejected the AFL-CIO's constitutional challenge as untimely. *Id.* ¶¶12–13. The AFL-CIO also argued that the Attorney General's statement should have mentioned that even though a right may be protected, individuals can still waive their rights. *Id.* ¶18.

This Court held the "Attorney General's explanation offer[ed] an objective summary of the language of [the] proposed [amendment] that educate[d] the voters of its purpose and effect." *Id.* ¶17. In *Jackley*, the Attorney General's statement explained the effect of a secret ballot: a secret ballot "prevent[s] others from knowing how a person voted[.]" *Id.* ¶15. The Attorney General's statement also explained the instances in which it would apply. *Id.* "While the explanation [did] not mirror the language of [the] proposed [amendment], it objectively educate[d] the voters of its purpose and effect." *Id.* ¶17. This Court rejected the AFL-CIO's argument that the Attorney General should have said more by "explain[ing] the principle of waiver of the right to vote by secret ballot." *Id.* ¶18. Citing *Schulte*, this Court stated:

> [We] cannot be concerned with what the Attorney General should have said or could have said or might have said or what is implied or suggested by what he did say. Rather we must focus on the language chosen[.]

Id. (citing *Schulte*, 2004 SD 102 at ¶18, 687 N.W.2d at 500).

Appellant's case is distinguishable. In *Jackley*, the Attorney General's statement explained the effect of a secret ballot. In this case, the Attorney

General's statement does not explain the effect of a 36% cap on short-term lenders' finance charges. The statement is a mere tautology. The Attorney General argues "the effect or consequence of the Measure is that these money lenders will be subject to this maximum rate cap[,]" *i.e.*, the effect of the law is that the law is in effect. But simply repeating that a 36% cap is a 36% cap fails to inform the voters about the purpose, effect, or legal consequences of the initiated measure because the measure's drafters (at least initially) concealed its purpose and effect.

The Attorney General's reliance on *Jackley* is further misplaced because *Jackley* addressed the AFL-CIO's request to include ballot language concerning theoretical consequences like waiver. The information AFL-CIO sought to include said nothing about the purpose of the proposed amendment or its direct effect. Essentially, the AFL-CIO wanted the Attorney General to explain a hypothetical instance where the amendment would not apply. Appellant does not argue the Attorney General should opine about additional circumstances where the initiated measure may or may not apply. The law is clear that such requests for the Attorney General's explanation to "go further" are without merit. The Appellant merely ask the Attorney General to explain what the measure actually does, ban short term lending by imposing a price ceiling below lenders' marginal cost.

C. The Attorney General's Ballot Explanation is Manifestly Misleading.

The Attorney General's explanation must apprise voters of the certain, proximate, purposeful effect of the measure: the end of short-term lending in South Dakota. The Attorney General's statement is "manifestly misleading" because it clearly fails to educate votes about the direct, purposeful effect of the initiated measure. *See Schulte*, 2004 SD 102 at ¶ 27, 687 N.W.2d at 502 (quoting *Gormley v. Lan*, 88 N.J. 26, 438 A.2d 519, 525–26 (1981)). The initiated measure sets a "maximum" finance charge so low that this form of consumer credit will simply disappear. Absent education in the Attorney General's explanation, only economically and financially astute voters or petition signers will realize the initiated measure bans short-term lending. Appellant does not argue that this Court should finely parse the language in the Attorney General's explanation. But the explanation must comply with the law.

The initiated measure substantially decreases the marginal revenue a lender might receive from each short-term loan, thereby making it irrational and impossible to ever offer such a loan. Given default rates and costs of doing business, both of which are statistics capable of judicial notice,[7] the rate cap ensures that the marginal cost of short-term lending exceeds the

[7] The Court need not determine that the precise statistics are appropriate for judicial notice. Even if parties might reasonably dispute the exact percentages, there is no reasonable dispute that after a 36% rate cap, the marginal cost of short-term lending does not come close to meeting the marginal revenue from such lending.

marginal revenue of such lending. Saunders, National Consumer Law Center, *Why 36%? The History, Use, and Purpose of the 36% Interest Rate Cap*, page 6 (April 2013) ("One of the benefits of a 36% rate cap is that it forces lenders to offer longer term, installment loans that have a more affordable structure."). A 36% rate cap, like the one proposed in the initiated measure, bans payday lending. Pew Charitable Trusts, *How State Rate Limits Affect Payday Loan Prices*, pages 1–2 (referring to states like Montana with rate caps of 36% as states than ban payday lending and explaining storefront payday loans are not available in such states). In fact, in Montana, a comparable 36% rate cap effectively eliminated title lending to the point that the Montana Legislature repealed its Title Loan Act in its entirety. MCA § 31-1-801 *et seq*. These effects are not collateral, theoretical, potential, or subjective. *See Schulte*, 2004 SD 102 at ¶11. Accordingly, the Attorney General's statement is manifestly misleading.

The Attorney General's statement also fails to objectively convey the effect of the initiated measure, in violation of the plain language of SDCL § 12-13-25.1. Paraphrasing a misleading proposed initiated measure naturally results in a misleading ballot explanation. There is no good faith exception in SDCL § 12-13-25.1 for an explanation that fails to comply with the law.

The 36% finance charge cap on short-term money lending is a disguised ban on such lending. The Court need not act intervene in any case except the one presented here: when no reasonable official could believe the

Attorney General's statement provides "an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure[.]" SDCL § 12-13-25.1.

CONCLUSION

The Attorney General's ballot explanation fails to educate the voters of the initiated measure's purpose and effect. SDCL § 12-13-25.1. This Court should reverse and remand with instructions to issue the writ of certiorari. However, the Court may also clarify the scope of the record in ballot explanation actions pursuant to SDCL § 12-13-9.2 and reverse the circuit court's denial of certiorari based on the factual averments in Appellant's exhibits before the circuit court.

REQUEST FOR ORAL ARGUMENT

Appellant, Erin Ageton, respectfully requests an oral argument in this case.

Dated this 24th day of August, 2015.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellant's Brief, including footnotes, contains 7,593 words. I have relied upon the word count of our word processing system as used to prepare this Appellant's Brief. The original Appellant's Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify on August 24, 2015, I emailed a true and correct copy of the foregoing **APPELLANT'S BRIEF and APPELLANT'S CERTIFICATE OF COSTS** to the following:

Marty J. Jackley, Attorney General
Patricia Archer, Assistant Attorney General
Steven R. Blair, Assistant Attorney General
Office of the Attorney General
1302 E Highway 14, Suite 1
Pierre, SD 57501
atgservice@state.sd.us
Attorneys for Appellee

I further certify that on August 24, 2015, I emailed the foregoing **APPELLANT'S BRIEF and APPELLANT'S CERTIFICATE OF COSTS** and sent the original and two copies of both by U.S. Mail, first-class postage prepaid, to:

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

By: */s/ Rebecca L. Mann*

APPENDIX

Order Denying Application for Writ of Certiorari .....App. 001

Memorandum Decision .....App. 003

Relevant Statutes.....App. 015

STATE OF SOUTH DAKOTA) SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
ERIN AGETON, Applicant, v. MARTY J. JACKLEY, in his capacity as South Dakota Attorney General, Respondent.	)	32 CIV. 15-124 ORDER DENYING APPLICATION FOR WRIT OF CERTIORARI

On June 5, 2015, Applicant Erin Ageton [Ageton] filed an *Application for Writ of Certiorari*, along with an *Affidavit* with attachments, challenging the explanation written for an initiated measure by Respondent Attorney General Marty Jackley [Jackley] pursuant to SDCL 12-13-25.1. Jackley was served that same date. On June 12, 2015, Jackley filed a *Verified Return to Application and Affidavit for Writ of Certiorari*, to which he attached the Certified Record pursuant to SDCL 21-31-4. He also presented a Brief in opposition, which was submitted to this Court and served on Ageton's counsel via email on June 12, 2015. Ageton responded with a *Reply in Support of Application* (with attached Exhibit 1), which was served upon this Court and Jackley's counsel via email on June 13, 2015, and filed with the Clerk on June 15, 2015.

On June 15, 2015, the parties appeared before the Court through counsel and presented argument. At the conclusion of the hearing, this Court took the matter under advisement.

On June 18, 2015, this Court issued its written *Memorandum Decision*. The Court ruled that the Certified Record would be expanded to include two

letters submitted by Ageton: (1) a letter from Jackley to the Secretary of State dated May 27, 2015, which accompanied the initiated measure and his explanation (Exhibit 5 attached to Ageton's *Affidavit*); and (2) a letter from Ageton's counsel, Sara Frankenstein, to Jackley dated September 18, 2013 (Exhibit 1 of Ageton's *Reply*). This Court further ruled it would not consider Exhibits 1-4 attached to Ageton's *Affidavit*.

NOW, therefore, based on the record considered by this Court, the briefing and arguments presented, and based on this Court's *Memorandum Decision* dated June 18, 2015, which is incorporated herein by this reference and adopted in its entirety, it is hereby

ORDERED AND ADJUDGED, and this Court concludes, that Jackley did not abuse his discretion when drafting the explanation of the initiated measure. It is further

ORDERED AND ADJUDGED, and this Court concludes, that Jackley did not exceed his statutory authorization under SDCL 12-13-25.1. It is further

ORDERED AND ADJUDGED that Jackley's explanation, as drafted, is upheld and Ageton's *Application for Writ of Certiorari* is denied.

Dated this 19th day of June, 2015.

BY THE COURT:

Kathleen Trandahl
Circuit Court Judge

ATTEST:

Clerk of Courts
By: (seal)

STATE OF SOUTH DAKOTA
Sixth Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:
JUN 19 2015
Kelli Sitzman
Hughes County Clerk Of Courts
By: Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
JUN 19 2015
Kelli Sitzman Clerk
By Deputy

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

ERIN AGETON,
Applicant,

vs.

MARTY J. JACKLEY, in his capacity as South Dakota Attorney General,
Respondent.

32CIV15-124

MEMORANDUM DECISION

The above entitled matter came before this court on June 15, 2015 at the Stanley County Courthouse, Fort Pierre, South Dakota, on Erin Ageton's *Application for Writ of Certiorari*. Erin Ageton [Ageton] appeared by and through her attorneys, Rebecca L. Mann of Rapid City, South Dakota and Edward Greim of Kansas City, Missouri.[1] Marty Jackley [Jackley] appeared by and through Assistant Attorneys General Patricia Archer and Steven Blair of Pierre, South Dakota. The court has considered this file in its entirety, the briefs and arguments of counsel and enters this written Memorandum Decision.

STATEMENT OF THE CASE AND FACTS

A. Certified Record

Attorney General Jackley certified the Record for review by this court pursuant to SDCL 21-31-3 and §21-31-4 and included it as Attachment A to the *Respondent's Verified Return to Application and Affidavit for Writ of Certiorari.*

Ageton requested that the Certified Record be expanded to include two letters and four other exhibits. At the hearing, the court granted the request to expand the Certified Record to include the two letters, and the court took under advisement whether to expand the certified record to include Exhibits 1, 2, 3 and 4 attached to the Affidavit of Erin Ashton. The Certified Record now includes the following two letters:

[1] Attorneys Edward Greim and Ryan Parks were admitted to practice *pro hac vice* as co-counsel to Sara Frankenstein and Rebecca L. Mann, counsel of record, pursuant to SDCL 16-18-2 by order of this court dated June 13, 2015.

1. Letter from Attorney General Jackley to Secretary of State Shantel Krebs dated May 27, 2015.[2]

2. Letter from Attorney Sara Frankenstein to Attorney General Jackley dated September 18, 2013.[3]

Counsel for the Attorney General did not object to including his May 27, 2015 letter to the Secretary of State in the Certified Record. This letter to the Secretary of State shows the Attorney General complied with SDCL 12-13-25.1.

Counsel for the Attorney General did object to including the September 18, 2013 letter from Attorney Frankenstein to Attorney General Jackley in the Certified Record. A review of SDCL Ch. 12-13 provides no guidance to the agency or to the court as to which documents must or should be included in the Certified Record. When the court considers whether this letter should be included, the court is aware that certiorari review is limited to considering the record of the proceedings before the officer that is pertinent to his decision, and the court may not consider matters outside the record.[4] The court finds that this 2013 letter was addressed to the same officer, Attorney General Jackley. The court finds that this letter is pertinent to the same issue of a 36% cap on short term consumer loans. Because Attorney General Jackley had this letter and was aware of its contents prior to writing the Attorney General's Statement in 2015, it should be a part of the Certified Record. While the letter the Attorney General received from Attorney Frankenstein was from a prior election cycle, this letter does set forth the opponent's position that a 36% cap would "eliminate short term consumer, payday, title loans and some automobile loans," making it relevant to Jackley's drafting of the explanation of this same measure issue in 2015. In expanding the Certified Record, this court also takes into consideration the fact that a similar letter was included in the Record in a recent analogous case involving certiorari review of an explanation drafted for a ballot measure.[5]

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[2] See, Exhibit 5 attached to the *Affidavit of Erin Ageton.*
[3] See, Exhibit 1 attached to the *Reply in Support of Application for Writ of Certiorari.*
[4] *Austin v. Eddy*, 172 NW2d 517, 519 (SD 1919); *Kirby v. Circuit Court of McCook County*, 71 NW 140, 141 (SD 1897); *Save Centennial Valley Ass'n v. Schultz*, 284 NW2d 452, 454 (SD 1979).
[5] See, *Brief in Opposition*, n.1 (citing *South Dakota State Federation of Labor AFL-CIO v. Jackley ,et al.* Hughes County Civ. 10-192.)

At the hearing the court took under advisement the issues of whether the certified record should be expanded to include Exhibit 1, 2, 3 and 4 attached to the *Affidavit of Erin Ageton.*

Exhibit 1 is a true, accurate and complete copy of scholarship by Colin Morgan-Cross and Marieka Klawitter regarding the effects of state payday loan price caps and regulation. Exhibit 2 is a true, accurate and complete copy of the July 18, 2011 report of Joseph H. Haslag, PhD. Exhibit 3 is a true, accurate and complete copy of an FDIC survey of banks' efforts to serve the unbanked and underbanked. Exhibit 4 is a true, accurate and complete copy of Gregory Elliehausen's monograph regarding consumers' use of payday loans.

Ageton asks this court to take judicial notice of Exhibits 1-4, arguing that these articles contain facts that are "generally known" or "capable of accurate and ready determination by sources whose accuracy cannot reasonably questions" making them facts the court can take judicial notice of in this case.[6] Ageton cites numerous cases wherein South Dakota and other states have allowed judicial notice of facts about economics, credits, and trade.[7] However, Exhibits 1, 2 3 and 4 do not state facts that are "generally known" or "capable of accurate and ready determination by sources whose accuracy cannot be reasonably questioned" as is required before a court can take judicial notice. Rather, these exhibits are articles that contain the opinions of the authors based upon the research they or others have done. Because these exhibits are not the proper subject of judicial notice, this request is denied.

Additionally, a court's certiorari review is limited to considering the record of the proceedings before the officer that is pertinent to his decision and the court may not consider matters outside that record.[8] In certiorari proceedings, the court is not to take evidence and conduct a de novo trial on the merits.[9] The court concludes that Exhibits 1,

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[6] SDCL 19-10-2

[7] See, *Reply in Support of Application for Writ of Certiorari*, p. 4, fn 4.

[8] *Austin v. Eddy*, 172 NW2d 517, 519 (SD 1919); *Kirby v. Circuit Court of McCook County*, 71 NW 140, 141 (SD 1897); *Save Centennial Valley Ass'n v. Schultz*, 284 NW2d 452, 454 (SD 1979).

[9] *Cole v. Board of Adj. of City of Huron (Cole I)*, 1999 SD 54, ¶¶ 8-11; *Cole v. Board of Adj. of City of Huron (Cole II)*, 2000 SD 119, ¶¶12-13; and *Sioux Falls Argus Leader v. Miller*, 2000 SD 63, ¶25 (noting distinction between writ of certiorari and writ of prohibition; under the former,

2, 3 and 4 that were submitted by Ageton in her affidavit are outside the Record and cannot be considered by this court.

B. Statement of the Case and Facts

1. On June 5, 2015, Ageton filed an *Application for Writ of Certiorari* and *Affidavit* challenging the Attorney General's explanation for a proposed initiated measure that would cap the finance charges certain lenders may charge at an annual rate of 36%. Ageton contends that the explanation submitted by Jackley fails to "educate the voters of the purpose and effect of the proposed initiated measure" and describe "the legal consequences of the proposed... initiated measure."[10] Ageton contends that while Jackley's explanation accurately repeated certain parts of the Measure, the Explanation fails entirely to mention the purpose, effect and legal consequences of the Measure: to eliminate the short-term lending marketplace, and to eliminate a key source of short term credit in South Dakota.[11]
2. Jackley is the duly-elected and qualified Attorney General for the State of South Dakota. He is required by SDCL 12-13-25.1 to prepare a title and explanation for each initiated measure prior to circulation of the petition for that measure.[12]
3. Jackley is the officer having custody of the record to be certified to this court pursuant to SDCL 21-31-3 and§21-31-4. This Record is comprised of the records on file relevant to the statutory duties performed by Jackley in this matter.
4. Jackley has certified the Record for review by this court pursuant to SDCL 21-31-4, and attached it to Respondent's Verified Return to Application and Affidavit for Writ of Certiorari as "Attachment A." The Record is consecutively paginated.
5. This court has expanded the Certified Record to include two letters: (a) Letter from Attorney General Jackley to Secretary of State Shantel Krebs dated May 27,

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the question must be determined only on the record before the officer, while under the latter, the reviewing court may consider a broader range of evidence).

[10] SDCL 12-13-25.1

[11] See, *Application for Writ of Certiorari*, page 2.

[12] See also, SDCL 2-1-1.2

2015[13]; and (b) Letter from Attorney Sara Frankenstein to Attorney General Jackley dated September 18, 2013.[14]

6. Under SDCL 2-1-1, all ballot measures proposed by initiative shall be presented by petition.

7. Before the petition is circulated, the sponsor of an initiated measure shall submit the measure to the South Dakota Legislature Research Council, and then submit the final version of the measure to the Attorney General.[15]

8. Under SDCL 12-13-25.1, once the final measure is received,

> [t]he attorney general shall prepare an attorney general's statement which consists of a title and explanation. The title shall be a concise statement of the subject of the proposed initiative or initiated amendment to the Constitution. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure or initiated amendment to the Constitution. The attorney general shall include a description of the legal consequences of the proposed amendment or initiated measure, including the likely exposure of the state to liability if the proposed amendment or initiated measure is adopted. The explanation may not exceed two hundred words in length. The attorney general shall file the title and explanation with the secretary of state and shall provide a copy to the sponsors within sixty days of receipt of the initiative or initiated amendment to the Constitution.

9. The sponsor must prepare an initiative petition that includes, *inter alia*, the text of the initiated measure, as well as the title and explanation as prepared by the Attorney General.[16] After the initiated petition is circulated, the sponsor must file it with the Secretary of State at least one year prior to the general election.[17] If the sponsor files a sufficient number of petition signatures, as determined by the Secretary of State, the measure will then be certified by the Secretary of State to appear on the ballot for the next general election.[18] Unless and until such certification occurs, the Attorney General has no further statutory duties regarding

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[13] See, Exhibit 5 attached to the *Affidavit of Erin Ageton.*
[14] See, Exhibit 1 attached to the *Reply in Support of Application for Writ of Certiorari.*
[15] SDCL 12-13-26 and §12-13-25.1
[16] SDCL 2-1-1.2
[17] Id.
[18] SDCL 2-1-17

the measure.[19] If it is determined that a measure will appear on the general election ballot, the Attorney General will deliver to the Secretary of State before the third Tuesday in May a simple recitation of a "yes" or "no" vote, which will appear on the ballot along with the Attorney General's title and explanation.[20]

10. For all measures that will appear on the general election ballot, SDCL 12-13-23 requires the Secretary of State to prepare and distribute "public information." This document is commonly known as the "pro/con pamphlet." Opponents and proponents of the measure are afforded an opportunity to present statements in support of their positions which will be published in the pro/con pamphlet.
11. When the ballot is printed, the Attorney General's title, explanation and "yes or no" recitation for the measure is included instead of the text of the measure.[21]
12. On April 1, 2015, the Attorney General's Office received an initiated measure ("Measure"), in final form, from Representative Steve Hickey.[22] Its subject matter involved the establishment of a maximum finance charge rate for certain money lenders.
13. On September 18, 2013, Attorney Sara Frankenstein emailed a letter to Attorney General Jackley regarding the Attorney General's Statement prepared for the "Maximum Finance Charge Initiated Measure".[23] Attorney Frankenstein, as the attorney for the opponents of the initiated measure, outlines their position that a cap of 36% would effectively eliminate short-term consumer loans, payday, title loans and some automobile loans in South Dakota and proposed language for his consideration in the drafting of the Attorney General's Statement for the then proposed initiated measure. This letter is relevant to the 2015 proposed initiated measure because it evidences the fact that Jackley was aware of their position that the "purpose and effect" of a cap of 36% is the elimination of short-term credit in South Dakota.

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[19] SDCL 12-13-25.1
[20] Id.
[21] SDCL 12-13-11
[22] See Record, pp. 1-2 (Attachment A to *Respondent's Verified Return to Application and Affidavit for Writ of Certiorari.*)
[23] See Exhibit 1 attached to the *Reply in Support of Application for Writ of Certiorari.*

14. On May 27, 2015, Jackley timely filed the following title and explanation for the Measure with the Secretary of State, pursuant to SDCL 12-13-25.1:[24]

INITIATED MEASURE

ATTORNEY GENERAL'S STATEMENT

Title: An initiated measure to set a maximum finance charge for certain licensed money lenders.

Explanation:

The initiated measure prohibits certain State-licensed money lenders from making a loan that imposes interest, fees, and charges at an annual percentage rate greater than 36%. The measure also prohibits these money lenders from evading this rate limitation by indirect means. A violation of this measure is a misdemeanor crime. In addition, a loan made in violation of this measure is void, and any principal, fee, interest or charge is uncollectable.

The measure's prohibitions apply to all money lenders licensed under South Dakota Codified Laws chapter 54-4. These licensed lenders make commercial and personal loans, including installment, automobile, short-term consumer, payday, and title loans. The measure does not apply to state and national banks, other federally insured financial institutions, and state chartered trust companies. The measure also does not apply to businesses that provide financing for goods and services they sell.

15. SDCL 12-13-9.2 provides that if the proponents to opponents of an initiated measure believe that the Attorney General's Statement does not satisfy the requirements of § ... 12-13-25.1, they shall, within seven days of delivery of the statement to the secretary of state, file an action in circuit court challenging the adequacy of the statement. The action takes precedence over other cases in circuit court and a final order shall be filed within fifteen days of the commencement of the action. Any party appealing the circuit court order to the Supreme Court shall file a notice of appeal within five days of the date of the circuit court order.

[24] See Record, p. 3 (Attachment A) and Exhibit 5 attached to the *Affidavit of Erin Ageton*.

LEGAL STANDARD

A writ of certiorari issuing in equity is an extraordinary remedy.[25] A writ of certiorari may be granted by the Supreme and circuit courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.[26] Under SDCL Ch. 21-31, this court's certiorari review is limited to determining whether an officer – in this case the Attorney General – had jurisdiction to take the action under review, and whether he property utilized his authority.[27] When an officer has jurisdiction to act, that action will be sustained unless he did "some act forbidden by law or neglected to do some act required by law."[28] The broad deference and the limitation on the scope of certiorari review – i.e., not allowing a court to substitute its judgment for that of the officer being challenged – is deemed necessary in order to prevent a court "from usurping policy decisions from other branches of government."[29]

The Attorney General is a constitutional officer expressly charged with the duty to prepare explanations under SDCL 12-13-25.1. Thus, his jurisdiction is clearly established. In Schulte v. Long, 2004 SD 102, ¶9, n.2, the Supreme Court determined that "the writ is appropriate to determine whether or not the Attorney General properly complied with his legal duties under SDCL 12-13-9," which addresses constitutional amendments and measures referred by the legislature rather than initiated measures, but is otherwise substantially identical to SDCL 12-13-25.1.[30]

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[25] *In re Petition for Writ of Certiorari as to the Determination of Election on the Brookings School District's Decision to Raise Additional General Fund*, 2002 SD 85, ¶13.
[26] SDCL 21-31-1
[27] SDCL 21-31-1, 21-31-8; *see Lamer Outdoor Advertising of South Dakota, Inc. v. City of Rapid City*, 2007 SD 35, ¶12.
[28] *Cole I*, 1999 SD 54, ¶4 (quoting *Peters v. Spearfish ETJ Planning Com'n*, 1997 SD 105, ¶6).
[29] *Cole II*, 2000 SD 119, ¶17.
[30] Both SDCL 12-13-9 and §12-13-25.1 require the Attorney General to draft a statement containing a title and explanatory statement. Under each statute, "[t]he title shall be a concise statement of the subject of the proposed" amendment, referred measure, initiative or initiated amendment. Each statute states that "[t]he explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the" amendment, referred measure, initiative or initiated amendment. Each statute requires the Attorney General to provide "a description of the legal consequences... including the likely exposure of the state to liability" if the amendment, referred measure, initiative or initiated amendment is adopted. Each statute places a 200 work limit on the Attorney General's explanation.

Before 2006, the Attorney General's Statement required the explanation to "state succinctly the purpose and legal effect of the proposed... initiated measure" and "shall be a clear and simple summary of the issue".[31] This language was held to mean that "the explanation must be factually accurate, legally accurate, concise, must not address collateral, theoretical or potential consequences of approval or disapproval by the voters, must not be a statement of personal opinion and must not attempt to advocate for or against the ballot question."[32] The purpose of this explanation was to *inform* the electorate rather than *educate* it. In *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62 at ¶¶8-9, the court acknowledged the framework has been changed by legislative amendments in 2006 and 2007, which added a requirement that the Attorney General "educate" the public and include a "description of the legal consequences of the proposed amendment."[33] *South Dakota State Federation of Labor AFL-CIO v. Jackley*, supra, also supersedes two pre-Jackley decisions of the South Dakota Supreme Court, which had held that a "summary could not include 'collateral, theoretical, or potential consequences which may or may not occur.'"[34] This court is also mindful that "the Attorney General is granted discretion as to how to author the ballot statement," and once it is determined the Attorney General was within the proper scope of his discretion, courts "do not sit as some type of literary editorial board."[35] In recognizing the Attorney General's explanation is limited to 200 words, the Supreme Court stated: "We have repeatedly held that how the Attorney General says it is up to his professional discretion as attorney for the State."[36] Yet this grant of discretion must still be exercised "[w]ithin [the] legal framework" fixed by the legislature in its recent amendments to SDCL 12-13-25.1.

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[31] SDCL 12-13-9 (2004)
[32] *Schulte v. Long*, 2004 SD 102, ¶11 (superseded by statute)(citing *Hoogestraat v. Barnett*, 1998 SD 104 (superseded by statute).
[33] *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62, ¶9.
[34] Id.
[35] Id.
[36] *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62, ¶25

MEMORANDUM DECISION

The Attorney General did not abuse his discretion in drafting the explanation for the initiated Measure that caps short-term loans at 36%.

Ageton contends that a writ of certiorari is the appropriate remedy because she claims the Attorney General, a public officer, has failed to comply with his legal duties under SDCL 12-13-25.1, and because she is without "any other plain, speedy, and adequate remedy." Specifically, Ageton contends that the Attorney General's explanation regarding the initiated Measure fails to provide "an objective, clear and simple summary *to educate the voters* of the *purpose and effect* of the proposed Measure as required by SDCL 12-13-25.1.

SDCL 12-13-25.1 requires the Attorney General to write an objective, clear and simply summary to educate the voters of the purpose and effect of the initiated measure. The Supreme Court held that "purpose" means that "which one sets before him to obtain or accomplish" and "effect" means "that which is produced by an agent or cause; result; outcome; consequence."[37] With regard to "legal consequences," the court held it was a general term not readily capable of specific definition. Instead, the Court left it in the discretion of the Attorney General, as legal counsel for the state, to determine who to describe the legal consequences of a measure.[38]

The Attorney General's explanation states that the purpose of the initiated measure is to establish a limit or "cap" on the amount that certain money lenders may charge on loans. This maximum total amount for all charges, including interest and fees, is 36% (annual percentage rate). Another purpose of the measure is also to specifically prohibit the money lenders from taking steps in a manner to "get around" the maximum rate cap. The explanation educates the voters that while some money lenders are subject to this rate cap, not all money lenders will be subject to this change in law. The explanation informs voters that the rate cap of 36% will apply to money lenders licensed under SDCL Ch. 54-4, and include commercial and personal loans, including installment, automobile, short-term consumer, payday and title loans. The explanation informs voters that this initiated measure does not apply to state and national banks, other federally

[37] *South Dakota Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62, ¶16 (citing *Schulte v. Long*, 2004 SD 102, ¶16, n.3).
[38] *South Dakota Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62, ¶25

insured financial institutions, and state chartered trust companies. Finally, this initiated measure does not apply to businesses that provide financing for goods and services they sell.

The effect or consequence of the initiated measure is that these money lenders licensed under SDCL Ch. 54-4 will be subject to this maximum rate cap, which would be a departure from current state law.[39]

The Attorney General explanation also summarizes the legal consequences if a loan is made in violation of the initiated measure. First, the initiated measure creates a new misdemeanor crime that would subject a lender to criminal penalties for violation of the initiated measure. Second, the initiated measure creates civil legal consequences if the loan is made in violation of the initiated measure which results in the loan being void and the lender being foreclosed from collecting any principal, fee, interest or charge.

Ageton claims the drafters of the initiated Measure have artfully drafted the measure to conceal the measure's true purpose of eliminating short term lending in South Dakota, and that the Attorney General should have said more in the explanation. In her Application for Writ of Certiorari, Ageton went so far as to suggest that the following language be added to the Attorney General's explanation:

> The initiated measure, if adopted, will eliminate short-term loans in South Dakota.

During oral arguments, counsel for Ageton acknowledged that it is not appropriate in a certiorari request to suggest any language that the Attorney General should have used in this explanation. Rather, the claim is that the Attorney General did not go far enough to educate the voters as to the purpose, effect and legal consequences of the initiated measure. Our Supreme Court was clear when it answered the same argument in *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 SD 62, ¶18:

> In *Schulte*, however, we noted that this Court:
>
> cannot be concerned with what the Attorney General should have said or could have said or what is implied or suggested by what he did say. Rather, we must focus on the language chosen[.] *Schulte*, 2004 SD 102, ¶18

[39] *See*, SDCL Ch. 54-3

As counsel for the Attorney General noted in oral arguments, the Attorney General walks a fine line to ensure objectivity and neutrality. Language that might be desired by one side of the issue could subject the Attorney General to challenge by the other side as it would be considered advocacy rather than neutral explanation. This court concludes that the Jackley did not abuse his discretion in his drafting of the explanation of the initiated measure to set a maximum finance charge for certain licensed money lenders.

CONCLUSION

The court concludes that the Attorney General did not exceed his statutory authorization under SDCL 12-13-25.1 and the court upholds the Attorney General's ballot explanation for the initiated measure. The *Application for Writ of Certiorari* is denied.

Ms. Archer or Mr. Blair is directed to prepare the order in accordance with this decision.

Dated this 18th day of June, 2015

BY THE COURT:

Kathleen F. Trandahl
Circuit Court Judge

ATTEST:

Kelli Sitzman
Clerk of Courts
(SEAL)

cc via email only:
Patricia Archer
Rebecca L. Mann
Edward Greim

1-11-1. General duties of attorney general. The duties of the attorney general shall be:

(1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party;

(2) When requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested;

(3) To attend to all civil cases remanded by the Supreme Court to the circuit court, in which the state shall be a party or interested;

(4) To prosecute, at the request of the Governor, state auditor, or state treasurer, any official bond or contract in which the state is interested, upon a breach thereof, and to prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with either of their departments;

(5) To consult with, advise, and exercise supervision over the several state's attorneys of the state in matters pertaining to the duties of their office, and he shall be authorized and it is made his duty, whenever in his judgment any opinion written by him will be of general interest and value, to mail either written or printed copies of such opinion to the auditor-general and to every state's attorney and county auditor in the state;

(6) When requested, to give his opinion in writing, without fee, upon all questions of law submitted to him by the Legislature or either branch thereof, or by the Governor, auditor, or treasurer;

(7) When requested by the state auditor, treasurer, or commissioner of school and public lands, to prepare proper drafts for contracts, forms, and other writings, which may be wanted for use of the state;

(8) To report to the Legislature, or either branch thereof, whenever requested, upon any business relating to the duties of his office;

(9) To prosecute state officers who neglect or refuse to comply with the provisions of statutes of this state prohibiting officers of the state from accepting any money, fee, or perquisite other than salary for performance of duties connected with his office or paid because of holding such office and the statute requiring issue and delivery and filing of prenumbered duplicate receipts and accounting for money received for the state;

(10) To pay into the state treasury all moneys received by him, belonging to the state, immediately upon the receipt thereof;

(11) To attend to and perform any other duties which may from time to time be required by law.

Source: SDC 1939, § 55.1501.

2-1-1.2. Petition to be circulated for initiated measure--Time for signatures and filing. The petition as it is to be circulated for an initiated measure shall be filed with the secretary of state prior to circulation for signatures and shall:

(1) Contain the full text of the initiated measure;

(2) Contain the date of the general election at which the initiated measure is to be submitted;

(3) Contain the title and explanation as prepared by the attorney general;

(4) Be accompanied by a notarized form that includes the names and addresses of the petition sponsors; and

(5) Be accompanied by a statement of organization as provided in § 12-27-6.

The petition circulator shall provide to each person who signs the petition a form containing the title and explanation of the initiated measure as prepared by the attorney general. The form shall be approved by the secretary of state prior to circulation.

For any initiated measure petition, no signatures may be obtained more than twenty-four months preceding the general election that was designated at the time of filing of the full text. The initiated measure petition shall be filed with the secretary of state at least one year before the next general election. A sworn affidavit, signed by at least two-thirds of the petition sponsors, stating that the documents filed constitute the entire petition and to the best of the knowledge of the sponsors contains a sufficient number of signatures shall also be filed with the secretary of state. The form of the petition and affidavit shall be prescribed by the State Board of Elections.

Source: SL 2012, ch 18, § 3.

12-13-1. Delivery of proposed questions to county auditors--Attorney general's explanation. The secretary of state, at least twelve weeks prior to the general election, shall deliver to each county auditor a certified copy of each initiated measure, referred law, or proposed amendment to the Constitution to be voted on at the election, together with a statement, title, explanation, and recitation of the effect of a "Yes" or "No" vote to be published preceding the text of the initiative, referendum, or proposed amendment. The attorney general shall prepare each statement, title, explanation, and recitation.

Source: SL 1913, ch 107, § 11; RC 1919, § 7225; SDC 1939, § 16.1305 as added by SL 1963, ch 114; SL 1974, ch 118, § 51; SL 1979, ch 101; SL 1994, ch 108, § 1.

12-13-9. Attorney general's statement regarding constitutional amendment proposed by legislature and referred measure--Fiscal impact statement. Before the third Tuesday in May, the attorney general shall deliver to the secretary of state an attorney general's statement for each amendment to the Constitution proposed by the Legislature, and any referred measure from an odd year. The attorney general's statement for each referred measure from an even year shall be delivered to the secretary of state before the second Tuesday in July. The attorney general's statement shall be written by the attorney general and shall consist of a title, an explanation, and a clear and simple recitation of the effect of a "Yes" or "No" vote. The title shall be a concise statement of the subject of the proposed amendment or referred measure authored by the attorney general. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed amendment to the Constitution or the referred law. The attorney general shall include a description of the legal consequences of the proposed amendment or the referred law, including the likely exposure of the state to liability if the proposed amendment or the referred law is adopted. The explanation may not exceed two hundred words in length. On the printed ballots, the title shall be followed by the explanation and the explanation shall be followed, if applicable, by the fiscal impact statement prepared pursuant to § 2-1-20 and then followed by the recitation.

Source: SL 1915, ch 181, § 1; RC 1919, § 7216; SL 1921, ch 219; SDC 1939, § 16.1302; SL 1959, ch 99, § 15; SDC Supp 1960, § 16.2215; SDCL §§ 12-13-10, 12-13-12; SL 1971, ch 90, §§ 1, 2; SL 1974, ch 118, § 58; SL 1976, ch 105, § 30; SL 1979, ch 97, § 4; SL 1994, ch 108, § 8; SL 2006, ch 67, § 3; SL 2007, ch 14, § 2; SL 2007, ch 77, § 1; SL 2009, ch 64, § 10, eff. July 1, 2010; SL 2013, ch 101, § 74.

12-13-9.2. Action to challenge adequacy of attorney general's statement--Appeal--Time limits. If the proponents or opponents of a proposed amendment to the Constitution, initiated measure, or referred measure believe that the attorney general's statement does not satisfy the requirements of § 12-13-9 or § 12-13-25.1, they shall, within seven days of delivery of the statement to the secretary of state, file an action in circuit court challenging the adequacy of the statement. The action takes precedence over other cases in circuit court and a final order shall be filed within fifteen days of the commencement of the action. Any party appealing the circuit court order to the Supreme Court shall file a notice of appeal within five days of the date of the circuit court order.

Source: SL 2007, ch 77, § 3; SL 2009, ch 64, § 4, eff. July 1, 2010.

12-13-11. Materials printed on ballot in lieu of full text--Separate ballot. The title, explanation, recitation, place for voting, and statement as required by this chapter shall be printed on the ballot in lieu of the law, measure, constitutional amendment, or other question to be submitted to a vote of the people. All proposed constitutional amendments to be submitted at an election shall be placed on one ballot and all initiated measures or referred laws upon a separate ballot.

Source: SL 1897, ch 60, § 27; SL 1899, ch 80, § 1; SL 1899, ch 93, § 4; RPolC 1903, §§ 24, 1911; SL 1911, ch 87, § 2; SL 1913, ch 107, § 2; SL 1915, ch 181, §§ 1, 2; RC 1919, §§ 7216, 7217; SL 1921, ch 219; SDC 1939, §§ 16.1302, 16.1303; SDCL, § 12-13-17; SL 1974, ch 118, § 59; SL 1994, ch 108, § 9.

12-13-25.1. Submission of initiative to attorney general--Statement of attorney general--Title--Filing with secretary of state--Fiscal impact statement. Following receipt of the written comments of the director of the Legislative Research Council, the sponsors shall submit a copy of the initiative or initiated amendment to the Constitution in final form, to the attorney general. The attorney general shall prepare an attorney general's statement which consists of a title and explanation. The title shall be a concise statement of the subject of the proposed initiative or initiated amendment to the Constitution. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure or initiated amendment to the Constitution. The attorney general shall include a description of the legal consequences of the proposed amendment or initiated measure, including the likely exposure of the state to liability if the proposed amendment or initiated measure is adopted. The explanation may not exceed two hundred words in length. The attorney general shall file the title and explanation with the secretary of state and shall provide a copy to the sponsors within sixty days of receipt of the initiative or initiated amendment to the Constitution.

If the petition is filed as set forth in § 2-1-2, the attorney general shall deliver to the secretary of state before the third Tuesday in May a simple recitation of a "Yes" or "No" vote. On the printed ballots, the title shall be followed by the explanation and the explanation shall be followed, if applicable, by the fiscal impact statement prepared pursuant to § 2-1-20 and then followed by the recitation.

Source: SL 2009, ch 64, § 2, eff. July 1, 2010; SL 2013, ch 101, § 75.

19-19-201. Judicial notice of adjudicative facts. **(a) Scope of rule.** This section governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 201); SDCL §§ 19-10-1 to 19-10-7.

21-31-1. Power to grant writ--Purposes for which used. A writ of certiorari may be granted by the Supreme and circuit courts, when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

Source: CCivP 1877, § 685; CL 1887, § 5507; RCCivP 1903, § 754; RC 1919, § 2996; SDC 1939& Supp 1960, § 37.0401.

21-31-3. Agency or person to whom writ directed. The writ of certiorari may be directed to the inferior court, tribunal, board, or officer, or to any other person having the custody of the records or proceedings to be certified.

Source: CCivP 1877, § 687; CL 1887, § 5509; RCCivP 1903, § 756; RC 1919, § 2998; Supreme Court Rule 557, 1939; SDC 1939 & Supp 1960, § 37.0403.

21-31-4. Direction to certify record--Stay of proceedings. The writ of certiorari shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them, with convenient certainty, that the same may be reviewed by the court, and requiring the party in the meantime, to desist from further proceedings in the matter to be reviewed.

Source: CCivP 1877, § 688; CL 1887, § 5510; RCCivP 1903, § 757; RC 1919, § 2999; Supreme Court Rule 588, 1939; SDC 1939 & Supp 1960, § 37.0404.

21-31-8. Scope of review on writ. The review upon writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer, has regularly pursued the authority of such court, tribunal, board, or officer.

Source: CCivP 1877, § 691; CL 1887, § 5513; RCCivP 1903, § 760; RC 1919, § 3002; SDC 1939& Supp 1960, § 37.0407.

54-4-66. Maximum amount of payday loan--Violation as misdemeanor. The maximum principal amount of any payday loan, or the total outstanding principal balances of all payday loans made by a licensee to a single borrower, may not exceed five hundred dollars at any time. A violation of this section is a Class 1 misdemeanor.

Source: SL 2002, ch 223, § 2; SL 2004, ch 291, § 3; SL 2007, ch 278, § 1.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27485

ERIN AGETON,

Applicant and Appellant,

v.

MARTY J. JACKLEY, in his capacity as South Dakota Attorney General,

Respondent and Appellee.

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

THE HONORABLE KATHLEEN TRANDAHL
Circuit Court Judge

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Notice of Appeal filed June 24, 2015

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27485

ERIN AGETON,

Applicant and Appellant,

v.

MARTY J. JACKLEY, in his capacity as South Dakota Attorney General,

Respondent and Appellee.

PRELIMINARY STATEMENT

This is an appeal from the denial of an application for writ of certiorari challenging an Attorney General ballot measure explanation. Throughout this brief, Applicant and Appellant, Erin Ageton, is referred to as "Ageton." Respondent and Appellee, South Dakota Attorney General Marty J. Jackley, is referred to as "Attorney General" or "Attorney General Jackley." The settled record below, Hughes County Civ. No. 15-124, is identified as "SR," followed by the e-record pagination in the file. The transcript of the hearing held June 15, 2015, is denoted "T," followed by the e-record pagination, as well as the page of the transcript itself. The Appendix to this brief is denoted "APP."

JURISDICTIONAL STATEMENT

A final Order Denying Application for Writ of Certiorari was filed by the Hon. Kathleen Trandahl, Circuit Court Judge, Sixth Judicial Circuit, on June 19, 2015. Ageton timely filed a Notice of Appeal on June 24, 2015. This Court has jurisdiction pursuant to SDCL 15-26A-3(2) and SDCL 12-13-9.2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT PROPERLY DENIED CERTIORARI RELIEF BECAUSE ATTORNEY GENERAL JACKLEY ACTED WITHIN HIS STATUTORY AUTHORITY WHEN DRAFTING THE EXPLANATION?

The trial court denied the application for writ of certiorari.

Cole v. Board of Adj. of City of Huron (Cole II), 2000 S.D. 119, 616 N.W.2d 483

Grant County Concerned Citizens v. Grant County Board of Adj., 2015 S.D. 54, 866 N.W.2d 149

Schulte v. Long, 2004 S.D. 102, 687 N.W.2d 495

South Dakota State Federation of Labor AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372

SDCL 12-13-9

SDCL 12-13-25.1

SDCL 21-31-1

SDCL 21-31-8

II

WHETHER THE TRIAL COURT PROPERLY REFUSED TO CONSIDER AGETON'S EXPERT REPORTS AND SCHOLARLY ARTICLES PROFFERED AS EVIDENCE FOR THE CERTIORARI HEARING?

The trial court refused to consider the evidence as being outside the proper scope of certiorari.

Cole v. Board of Adj. of City of Huron (Cole II), 2000 S.D. 119, 616 N.W.2d 483

Grant County Concerned Citizens v. Grant County Board of Adj., 2015 S.D. 54, 866 N.W.2d 149

Save Centennial Valley Ass'n Inc. v. Schultz, 284 N.W.2d 452 (S.D. 1979)

South Dakota State Federation of Labor AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372

SDCL 12-13-9.2

SDCL 19-19-201

SDCL 21-31-3

SDCL 21-31-4

STATEMENT OF THE CASE

Attorney General Jackley concurs with the Statement of the Case presented in Ageton's brief, with the exception that the Attorney General's trial brief in opposition to the application was not filed, pursuant to SDCL 15-6-5(d).

STATEMENT OF FACTS

The underlying facts are largely procedural in nature. On April 1, 2015, the Attorney General's Office received the final form of an

initiated measure ("Measure") from its sponsor, then-State Representative Steve Hickey. SR 171-72 (APP 2-3). This was submitted pursuant to SDCL 12-13-25.1, which requires the Attorney General to prepare a title and explanation that must be included on the initiative petition prior to its circulation for signatures. *See also* SDCL 2-1-1.2. Ultimately, if the Measure is certified for the November 2016 general election by the Secretary of State, the Attorney General's title and explanation, as well as a recitation of the effect of a "yes" or "no" vote, will appear on the ballot in lieu of the text of the Measure. SDCL §§ 2-1-17, 12-13-25.1.

SDCL 12-13-25.1 reads, in pertinent part:

> Following receipt of the written comments of the director of the Legislative Research Council, the sponsors shall submit a copy of the initiative or initiated amendment to the Constitution in final form, to the attorney general. The attorney general shall prepare an attorney general's statement which consists of a title and explanation. The title shall be a concise statement of the subject of the proposed initiative or initiated amendment to the Constitution. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure or initiated amendment to the Constitution. The attorney general shall include a description of the legal consequences of the proposed amendment or initiated measure, including the likely exposure of the state to liability if the proposed amendment or initiated measure is adopted. The explanation may not exceed two hundred words in length. The attorney general shall file the title and explanation with the secretary of state and shall provide a copy to the sponsors within sixty days of receipt of the initiative or initiated amendment to the Constitution.

Consistent with that statute, on May 27, 2015, Attorney General Jackley filed with the Secretary of State a title and explanation (collectively, "Explanation") for the Measure. SR 173 (APP 4). The Explanation reads:

> Title: An initiated measure to set a maximum finance charge for certain licensed money lenders
>
> Explanation:
>
> The initiated measure prohibits certain State-licensed money lenders from making a loan that imposes total interest, fees and charges at an annual percentage rate greater than 36%. The measure also prohibits these money lenders from evading this rate limitation by indirect means. A violation of this measure is a misdemeanor crime. In addition, a loan made in violation of this measure is void, and any principal, fee, interest, or charge is uncollectable.
>
> The measure's prohibitions apply to all money lenders licensed under South Dakota Codified Laws chapter 54-4. These licensed lenders make commercial and personal loans, including installment, automobile, short-term consumer, payday, and title loans. The measure does not apply to state and national banks, other federally insured financial institutions, and state chartered trust companies. The measure also does not apply to businesses that provide financing for goods and services they sell.

Pursuant to SDCL 12-13-9.2, on Friday, June 5, 2015, Ageton challenged the Explanation by filing an application for writ of certiorari that claimed the Attorney General failed to comply with his legal duties under SDCL 12-13-25.1. SR 1. Asserting she is an officer for a title-lending company who operates in South Dakota, Ageton opposed the measure. SR 17-18. She claimed that the Explanation, as drafted, failed to educate voters about the Measure's purpose and effect, and to

describe its legal consequences. Relying on documentary evidence attached to her affidavit in support of the Application, she presented several arguments about what she believes are the "true" purpose, effect and legal consequences of the Measure. She asked that the court require the Attorney General to re-draft the Explanation consistent with her position.

On Friday, June 12, Attorney General Jackley filed his Verified Return, with attached certified record, pursuant to SDCL 21-31-4. SR 164-73. He also served upon counsel and the court a brief in opposition to the application. SR 175. The certified record contained the Measure and the Explanation. SR 170-73 (APP 1-4). Due to the time constraints unique to ballot explanation challenges governed by SDCL 12-13-9.2—which requires that a final order be filed by the circuit court within fifteen days of commencement of the action (*see* APP 5)—Attorney General Jackley did not wait to be served with a preliminary writ of certiorari (indeed, none was ever issued below), but complied with his duties under SDCL ch. 21-31; the parties and the court proceeded accordingly.

Also on June 12, Ageton's in-state counsel filed motions to admit her Missouri counsel *pro hac vice.* SR 176-83. The court signed orders granting the motions the next day. SR 184-85.

On June 13, Ageton served her reply brief upon counsel and the court via e-mail. SR 186, 191. This reply brief was filed by the clerk

June 15. Attached to the brief was a copy of a letter that one of Ageton's current attorneys, Sara Frankenstein, sent to Attorney General Jackley on September 18, 2013. It was sent in response to a title and explanation he had filed earlier that month regarding a proposed initiated measure (also involving a 36% rate cap for certain lenders) that was similar, but not identical, to the one in the instant case. SR 192. While the position taken by Ms. Frankenstein was similar to that raised here, the letter doesn't identify who her client was at that time. Ageton did not provide the context or foundation for the letter, nor any response that Attorney General Jackley may have made to Ms. Frankenstein. Ageton also asked the court to take judicial notice of the information in her Exhibits 1-4.

Monday, June 15, the parties appeared through counsel and presented oral arguments to the court. Counsel for Attorney General Jackley objected to the Frankenstein letter, as well as the documents attached to Ageton's Affidavit as Exhibits 1-4. SR 243-46, 266-67 (T 4-7, 27-28). These exhibits consist of: (1) a 2011 University of Washington scholarly article on the effects of payday loan price caps and regulations; (2) a fiscal analysis of the possible impact in Missouri of a proposed initiative measure setting a 36% cap on loans (the 2011 report was prepared by an expert with a Ph.D. in economics, identified as an opponent of the measure); (3) a 2009 FDIC nationwide survey of banks' efforts to serve unbanked and underbanked individuals; and (4)

a 2009 George Washington University School of Business scholarly article analyzing consumers' use of payday loans. SR 21-149. Ageton presented the documents to the court as evidence, describing them as expert reports (SR 250-51 (T 11-12)), and also as information tending to show "general knowledge" about the short-term loan industry. *See* Reply in Support of Application for Writ of Certiorari (SR 188 n.1). The documents in Exhibits 1-4 had not been presented to the Attorney General before he filed the Explanation. SR 266 (T 27).

The court expanded the record to include the Frankenstein letter, and reserved ruling on whether it would consider the other documents. SR 246 (T 7).

The court took the matter under advisement. On June 18, the court issued its Memorandum Decision denying Ageton's request for relief. SR 197. First, the court ruled that its scope of review on certiorari was limited to matters included in the record before the Attorney General, and that the court was not to take evidence and conduct a de novo trial on the merits. SR 199. Therefore, the court did not consider the evidence submitted by Ageton in Exhibits 1-4 of her Affidavit. SR 199-200.

The court then addressed Ageton's arguments and concluded that the Attorney General did not abuse his discretion in drafting the Explanation and did not exceed his statutory authority under SDCL 12-13-25.1. SR 206-08. The court upheld the Explanation as drafted

and denied the application for writ of certiorari. *Id.* The next day the court entered an order consistent with the ruling. SR 209. This appeal followed.

ARGUMENTS

Appellee combines Issues I and II from Appellant's Brief and treats them as one re-stated issue. Appellee has also re-ordered the issues, starting first with an analysis that includes the proper scope of the Attorney General's authority under SDCL 12-13-25.1. This provides the proper context for the subsequent discussion in Issue II regarding what evidence a reviewing court may consider when assessing the Attorney General's acts under that statute.

I

THE CIRCUIT COURT PROPERLY DENIED CERTIORARI RELIEF BECAUSE ATTORNEY GENERAL JACKLEY ACTED WITHIN HIS STATUTORY AUTHORITY WHEN DRAFTING THE EXPLANATION.

A. Introduction.

The Explanation was written for the Measure which seeks to amend existing state law—SDCL ch. 54-4, the chapter governing money lending licensees, as well as the definition section in SDCL ch. 54-3. The Measure establishes a maximum rate limit of 36% that may be charged on loans made by certain State-licensed money lenders, but does not apply to all lenders or all loans in this state. *See* SDCL §§ 54-4-37, 54-4-52, 54-4-64.

As she did below, on appeal Ageton asks that Attorney General Jackley be required to revise the Explanation to include the following statement:

> The initiated measure, if adopted, will eliminate short-term loans in South Dakota.

Appellant's Brief 5.

This case is not about whether short-term lenders will or will not cease to operate in this state if the initiated measure is ultimately enacted, as suggested by Ageton's arguments. Nor is it about whether all short-term loans will be eliminated in this state, as Ageton's proffered statement proclaims.

Rather, the sole and narrow issue is whether the Attorney General acted within his jurisdictional authority under SDCL 12-13-25.1 when he drafted the Explanation in the manner he did. In other words, did the Attorney General's Explanation comply with the statute?

B. Standards governing certiorari review.

A writ of certiorari issuing in equity is an extraordinary remedy. *In re Petition for Writ of Certiorari as to the Determination of Election on the Brookings School District's Decision to Raise Additional General Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, 585. As applicable here, certiorari review is limited to determining whether an officer—in this case the Attorney General—had jurisdiction to take the action under review, and whether he properly utilized his authority. SDCL 21-31-1,

21-31-8; *Grant County Concerned Citizens v. Grant County Board of Adj.*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149, 154.

With a writ of certiorari, this Court does not review whether the officer's action is right or wrong. *Id.* Rather, the officer's acts will be sustained unless he did "some act forbidden by law or neglected to do some act required by law." *Id.; Cole v. Board of Adj. of City of Huron (Cole I),* 1999 S.D. 54, ¶ 4, 592 N.W.2d 175, 176. The remedies under certiorari generally do not include the power to require the officer to do affirmative acts. *Hamerly v. City of Lennox Board of Adj.*, 1998 S.D. 43, ¶ 14, 578 N.W.2d 566, 569.

C. Courts give broad deference to the Attorney General's exercise of discretion when drafting ballot measure explanations.

The broad deference and the limitation on the scope of certiorari review—*i.e.*, not allowing a court to substitute its judgment for that of the officer being challenged—is deemed necessary in order to prevent a court "from usurping policy decisions from other branches of government." *Cole v. Board of Adj. of City of Huron (Cole II)*, 2000 S.D. 119, ¶ 17, 616 N.W.2d 483, 488. This principle applies in the context of certiorari review of Attorney General explanations prepared for initiated ballot measures.

The Attorney General is a constitutional officer expressly charged with the duty to prepare explanations under SDCL 12-13-25.1. Thus, his jurisdiction is clearly established. The next question, therefore, is

whether he properly exercised his authority under the statute when determining what to include—or not include—in an explanation. His choice of language appearing in a ballot measure explanation is entitled to broad deference, as recognized by Justice Zinter in his concurring opinion in another ballot explanation challenge, *Schulte v. Long:*

> In evaluating the statement drafted by the Attorney General . . . we should accord great deference to [the Attorney General's] determination not only on the basis of settled principles of law, but also because of the glaring inappropriateness of judicial management and supervision of such matters. When within the scope of legislatively-delegated authority, administrative agents' actions are presumptively valid, and where that authority confers discretion upon those agents, their actions will ordinarily not be overturned by the courts unless they are manifestly corrupt, arbitrary or misleading. *We can conceive of few cases where administrative officials' discretion is of necessity broader than here, given the enormous variety of statements that could properly be drafted within the authority vested in those officials. This being the case, the deference accorded the . . . Attorney General must obviously be even greater than is generally the case.* Finally, we have traditionally shown special deference to administrative agents charged with implementing the election laws. The other basis for yielding to the judgment of the administrative officers here is the inappropriateness of judicial involvement. Public questions often have substantial political overtones. As here, the drafting of an interpretive statement, as well as the question itself, can pit party against party, the Executive against the Legislature, and region against region. The appearance of impartiality is as important to judicial effectiveness and legitimacy as impartiality itself, and in these matters it will often be impossible to appear impartial. *Rare is the case where the inadequacy of the interpretive statement will justify the risk of judicial intervention.* That risk inheres not simply in the proposal of an alternative[,] but as well in the mere enjoining of the use of the proposed statement. Either can readily be perceived by one side or the other as both prejudicial to their cause and partial to that of their adversary.

2004 S.D. 102, ¶ 26, 687 N.W.2d 495, 501-2 (emphasis added; internal citation omissions in original) (quoting *Gormley v. Lan,* 438 A.2d 519, 525-26 (N.J. 1981)).

Citing *Schulte* and *Gormley,* this Court re-affirmed the Attorney General's discretion with regard to authoring ballot explanations in *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 S.D. 62, ¶ 7, 786 N.W.2d 372, 375 ("*Jackley").* The applicant in that certiorari case raised arguments similar to what Ageton raises here, and this Court's decision is dispositive authority in this case.

In *Jackley,* the Attorney General prepared an explanation for a Legislature-proposed constitutional amendment that was to be placed on the statewide general election ballot. The measure guaranteed individuals the constitutional right to vote by secret ballot in certain elections, including elections authorizing employee representation in the workplace. AFL-CIO—a union organization and opponent of the measure—challenged the explanation by seeking a writ of certiorari, which the trial court denied.

On appeal, AFL-CIO asserted the Attorney General's explanation did not comply with the ballot explanation statute and therefore the Attorney General acted in excess of his authority. Like Ageton does here, AFL-CIO argued the explanation failed to adequately educate the voters as to what it believed were the purpose, effect and legal

consequences of the proposed amendment. *See South Dakota State Federation of Labor AFL-CIO v. Jackley*, S.Ct. No. 25642, Brief of Appellant AFL-CIO at 11. Similar to Ageton's arguments, AFL-CIO claimed the explanation should have included additional information to not only educate the voters but to give them a sense of the significance of the proposed change in the law. According to AFL-CIO, the explanation did not disclose "an essential fact which would give the voter serious ground for reflection—namely, that if the Constitutional amendment were indeed interpreted as designed to encroach on the federal scheme regulating labor relations, it is preempted by federal law." *Id.* at 14.

Like Ageton asserts here, AFL-CIO believed there was an underlying "true" purpose for the amendment that was not reflected in the measure itself or the explanation, *i.e.*, that the amendment was intended by anti-union groups as a way to interfere with the union representation selection process. AFL-CIO argued the explanation was therefore insufficient because there is "no reference to the fact that the proposed measure would eliminate the [then-existing] majority sign-up process which does not require an election to achieve union representation." *Id.* at 15 and n.9. In addition, AFL-CIO argued the explanation did not describe the legal consequences of the measure, and should have explained that the amendment was preempted by federal law and the State would have legal liability. *Id.* at 28. AFL-CIO

sought an order compelling the re-drafting of the explanation and striking it from the ballot altogether. *Jackley*, 2010 S.D. 62, ¶ 26, 786 N.W.2d at 379.

While Ageton contends the instant case presents "the first true test" for assessing a "new standard" governing the Attorney General's duties when preparing an explanation for an initiated measure (Appellant's Brief 8), as *Jackley* makes clear, that is not the case at all. In *Jackley,* this Court examined the statutory requirements governing ballot measure explanations, noting the post-*Schulte* legislative amendments that modified and clarified what was required by the Attorney General.[1] Since 2006, an explanation must be an "objective, clear, and simple summary *to educate* the voters of the purpose and effect of the proposed [measure]" and it "shall include a description of the legal consequences of the proposed [measure]. . . including the *likely* exposure of the state to liability *if* the proposed [measure] . . . is adopted." *Jackley*, 2010 S.D. 62, ¶ 9, 786 N.W.2d at 376 (emphasis in original); *see* 2006 S.D. Sess. Laws, ch. 67, § 3. This Court then held:

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[1] *Jackley* involved SDCL 12-13-9, which at the time governed explanations for constitutional amendments, initiated measures and referred measures. The 2009 Legislature amended the statute, effective July 1, 2010, to exclude initiated measures and also enacted SDCL 12-13-25.1 to govern initiated constitutional amendments and measures. 2009 S.D. Sess. Laws, ch. 64. This statute requires the title and explanation to be prepared earlier in the process for placement on the initiated measure petition prior to circulation. Substantively, however, both SDCL 12-13-9 and SDCL 12-13-25.1 contain identical requirements for what an explanation must include.

> Within this legal framework, however, the Attorney General "is granted discretion as to how to author the ballot statement." *Schulte*, 2004 SD 102, ¶ 11, 687 N.W.2d at 498. This Court's function is limited. *Id.* "We merely determine if the Attorney General has complied with his statutory obligations and we do not sit as some type of literary editorial board." *Id.*

Jackley, 2010 S.D. 62, ¶ 9, 786 N.W.2d at 376. Recognizing the Attorney General's explanation is limited to 200 words, the Court stated: "We have repeatedly held that how the Attorney General says it is up to his professional discretion as attorney for the State." *Id.* ¶ 25, 786 N.W.2d at 379.

The Court held that, contrary to AFL-CIO's claims, the explanation did indeed educate voters about the measure's purpose and effect. *Id.* ¶ 17, 786 N.W.2d at 378. The Court specifically rejected AFL-CIO's arguments that the explanation should have said *more* and should have included the additional language AFL-CIO wanted:

> [A reviewing court] cannot be concerned with what the Attorney General should have said or could have said or might have said or what is implied or suggested by what he did say. Rather [it] must focus on the language chosen[.]

Id. ¶ 18, 786 N.W.2d at 378 (quoting *Schulte*, 2004 S.D. 102, ¶ 18, 687 N.W.2d at 500). Finally, the Court made it clear that the Attorney General's decision whether to include a statement about the State's legal liability is dependent on the discretionary exercise of his professional legal judgment. *Id.* ¶ 25, 786 N.W.2d at 379.

The Court rejected all of the applicant's claims and affirmed the circuit court's conclusion that the Attorney General did not abuse his discretion in drafting the explanation. *Id.* ¶ 26, 786 N.W.2d at 379-80. An analysis of the Explanation in this case leads to a similar conclusion.

D. The explanation describes the purpose and effect of the measure in compliance with SDCL 12-13-25.1.

Ageton contends the Explanation fails to educate the voters about the purpose and effect of the Measure.[2] Her claims are groundless. As illustrated in *Jackley,* just because the Explanation does not educate the voters in the manner Ageton desires, does not mean the Attorney General's description failed to meet his statutory requirements.

When defining the elements in the explanation statutes, this Court held that purpose means that "which one sets before him to obtain or accomplish" and effect means "that which is produced by an agent or cause; result; outcome; consequence." *Jackley*, 2010 S.D. 62, ¶ 16, 786 N.W.2d at 377 (citing *Schulte,* 2004 S.D. 102, ¶ 16 n.3, 687 N.W.2d at 499-500 n.3).

Given these definitions, one would expect that purpose and effect frequently go hand-in-hand, as one may naturally lead to the other. That is certainly the case here, where the purpose and effect (and, frankly, the legal consequences) of the Measure are intertwined and

[2] Based on Ageton's statement of the issue in her Argument section (Appellant's Brief 22), subsequent discussion, and Conclusion, she does not challenge the Explanation's description of "legal consequences."

lend themselves to the objective description provided in the Explanation.

First, the *purpose* of the amendment is to establish a limit or "cap" on the amount that certain money lenders may charge on loans. This maximum total amount for all charges, including interest and fees, is 36% (annual percentage rate). Another purpose of the Measure is to specifically prohibit the money lenders from taking steps to get around the maximum rate cap. The purpose is also to incentivize compliance by creating penalties if money lenders fail to abide by the restrictions.

Second, the *effect* or consequence of the Measure is that these money lenders will be subject to this maximum rate cap and other restrictions. This is a departure from current state law. *See* SDCL ch. 54-3. Another effect, which is also a legal consequence, is that a loan made in violation of the Measure subjects the lender to criminal penalties. This is because the Measure creates a new crime (Class 1 misdemeanor). In addition, another effect and legal consequence—not currently existing in the law—is that violation of the Measure results in the loan being void and the lender being foreclosed from collecting any principal, fee, interest, or charge. This specifically affects the legal relationship that may otherwise exist between the lender and the consumer regarding the loan.

Third, to clarify the scope of the Measure's effect, the Explanation also describes what type of money lender is and is not subject to the Measure, as not all of them are. *See* SDCL 54-4-37, 54-4-52, 54-4-64.

Contrary to Ageton's arguments, Attorney General Jackley did in fact describe the purpose and effect of the Measure (as well as its legal consequences). There was no failure to comply with the statutory requirements of SDCL 12-13-25.1.

Ageton chides the Attorney General for what she considers mere paraphrasing of the Measure's text and for not explaining what she claims is the Measure's "true" purpose as a ban on short-term money lending. She regards her proffered language—that short-term loans will be eliminated in this State—as a certain and absolute truth. Appellant's Brief 29. The fact is, the Measure contains *no language* imposing a ban on short-term loans in this state. Ageton's proposed language presents a position that may be subject to debate.

In any event, the question is not whether the Attorney General could have or should have included Ageton's language as another effect of the measure. Indeed, there may be other possible purposes and effects of the measure.

The bottom line is that, consistent with this Court's precedent, the Attorney General has wide latitude to determine what language to use, within the legal framework of the statute. In doing so, he walks a fine line to ensure that the explanation is objective and neutral.

On certiorari review, the test is not whether Ageton, some other author, or a reviewing court would have worded the explanation differently. *Jackley,* 2010 S.D. 62, ¶ 18, 786 N.W.2d at 378; *Grant County Concerned Citizens*, 2015 S.D. 54, ¶ 17, 866 N.W.2d at 156 (on certiorari, Court does not decide whether it would have reached the same conclusion as the board did below). Rather, this Court must focus on the language chosen and determine whether it complies with SDCL 12-13-25.1. *Jackley*, 2010 S.D. 62, ¶ 18, 786 N.W.2d at 378. Because the Explanation does educate the voters as to the Measure's purpose and effect (and legal consequences), it should be upheld.

II

THE TRIAL COURT PROPERLY REFUSED TO CONSIDER AGETON'S EXPERT REPORTS AND SCHOLARLY ARTICLES PROFFERED AS EVIDENCE FOR THE CERTIORARI HEARING.

A. Introduction and standards governing certiorari proceedings.

Ageton argues the circuit court erred in not considering the documentary evidence attached to her Affidavit. She also contends the Attorney General cannot "knowingly disregard" this evidence or the letter Attorney Frankenstein sent him two years prior involving a similar measure.

The circuit court relied on well-established precedent when it determined that, when conducting certiorari review of an officer's acts, it may not consider matters outside of the record before the officer. SR 199 (citing *Austin v. Eddy*, 41 S.D. 640, 172 N.W. 517, 519 (1919);

Kirby v. Circuit Court of McCook County, 10 S.D. 38, 71 N.W. 140, 141 (1897); *Save Centennial Valley Ass'n Inc. v. Schultz*, 284 N.W.2d 452, 454 (S.D. 1979)). Further, the court ruled that in a certiorari proceeding, it is not to take evidence and conduct a de novo trial on the merits. SR 199 (citing *Cole I*, 1999 S.D. 54, ¶¶ 8-11, 592 N.W.2d at 177; *Cole II*, 2000 S.D. 119, ¶¶ 12-13, 616 N.W.2d at 487). *See also Grant County Concerned Citizens,* 2015 S.D. 54, ¶¶ 17, 41, 866 N.W.2d at 156, 163 (circuit court struck an affidavit containing factual averments, ruling that opening up the matter for purpose of deciding the merits would convert the case from certiorari to de novo review).

B. It was unnecessary and would have been improper for the court to consider Ageton's proffered evidence to assess whether the Attorney General acted within his authority when drafting the explanation.

Here, the Attorney General certified the record and attached it to his Verified Return, as required by the statutes governing writs of certiorari. *See* SDCL §§ 21-31-3, 21-31-4. This record is limited and straightforward: it contains the final Measure submitted to the Attorney General and the Explanation that was prepared for it. These are the pertinent documents relating to the Attorney General's statutory duty under SDCL 12-13-25.1; on their face, they provided sufficient basis for certiorari review of the Attorney General's action.

In his trial brief, Attorney General Jackley objected to the Affidavit exhibits because they were something that had never been

presented to him prior to his issuing the Explanation. SR 266 (T 27). The brief also relied on this Court's decisions recognizing the impropriety of taking evidence in a certiorari proceeding. Such evidence is improper and unnecessary in this type of case, where the court rules solely as a matter of law whether or not the Explanation complied with SDCL 12-13-25.1. Consideration of Ageton's evidence could very well have led to opening up the proceeding to the possibility of competing affidavits and evidence, and essentially turning the case into a de novo trial. That is improper. As this Court has held, "[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding[.]" *Grant County Concerned Citizens*, 2015 S.D. 54, ¶ 17, 866 N.W.2d at 156.

Ageton contends the circuit court should have considered the information by taking judicial notice of adjudicative facts contained in the documents. She claims such notice was mandatory. Appellant's Brief 17. The circuit court ruled that Exhibits 1-4 were "articles that contain the opinions of the authors based upon the research they or others have done." SR 199. Further, the court determined, the information did not meet the requirements for taking judicial notice in that the facts were not "generally known" within the territorial jurisdiction of the trial court nor "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* SDCL 19-19-201 (formerly SDCL 19-10-2).

The documents reflect expert and other opinion analysis, based on research and studies involving situations in other states. Some of the opinions contained therein are equivocal. And one must ask: If, as Ageton contends, the information is so widely and generally known, why was an expert opinion or scholarly research needed?

Ageton contends that she relies on the information not for its expert or opinion analysis, but for the underlying facts and general economic knowledge. But when presenting the documents in her Affidavit, she specifically cited them for their "analysis and conclusions." SR 18-19. Moreover, she uses this information to make the leap to her proposed language: that the measure will eliminate short-term loans in South Dakota. Nothing in the materials establishes that as a generally known fact whose accuracy cannot reasonably be questioned.

Finally, it bears noting that the information Ageton seeks to have judicially noticed is the exact same information she put into evidence and was rejected by the trial court because it is not properly considered in certiorari review. Ageton should not be able to circumvent the principles governing certiorari in this manner. The trial court did not abuse its discretion in refusing to take judicial notice of Ageton's documents. *In re Dorsey and Whitney Trust Co., LLC,* 2001 S.D. 35, ¶ 19, 623 N.W.2d 468, 474.

C. Ageton cannot recast the nature of the certiorari proceeding in an attempt to justify inclusion of her proffered evidence.

Apparently recognizing the well-recognized limitations of certiorari review, Ageton takes issue with the certiorari process in general, even though she is the one who availed herself of that process. And having done so, she now claims—incredibly—that the circuit court should not have relied on this Court's long-standing common law governing certiorari because such traditional rules are "not good law in ballot explanation cases." Appellant's Brief 17.

In making this argument, Ageton suggests the ballot explanation challenge statute, SDCL 12-13-9.2 (*see* APP 5), somehow supplants the certiorari process and therefore traditional standards governing certiorari should not apply here. But this ignores the fact that this Court has used certiorari to review ballot measure explanations several times, both before and after the enactment of SDCL 12-13-9.2 in 2007. *See Hoogestraat v. Barnett,* 1998 S.D. 104, ¶ 5, 583 N.W.2d 421, 423 (trial judge converted case from mandamus to certiorari before considering Attorney General's explanation); *Schulte,* 2004 S.D. 102, ¶ 9 n.2, 687 N.W.2d at 497 n.2 (Court re-affirmed that certiorari is appropriate to determine whether the Attorney General complied with the ballot measure explanation statute); *Jackley,* 2010 S.D. 62, 786 N.W.2d 372.

By downplaying the certiorari process, Ageton attempts to elevate SDCL 12-13-9.2 into something more than it is. Notably, the statute

creates no substantive cause of action. Enacted in 2007, it does not provide individuals a right to challenge explanations that did not previously exist before its enactment (as the long line of this Court's cases can attest). The statute refers to the filing of "an action" in circuit court, but it does not purport to define the parameters of that action or establish a new process for litigating ballot explanation challenges. Indeed, the extremely expedited timeframe in circuit court (fifteen days from filing to final order) lends itself to a process such as certiorari rather than one that is evidentiary in nature.

What the statute does is establish clearly defined and expedited time limits in which a challenge must be brought and decided in circuit court, and appealed to this Court. This ensures that such ballot explanation challenges are addressed quickly, which is especially important in general election years. Timely resolution of final ballot explanation language is imperative in order for ballots to be printed and prepared for the election, including preparation for absentee and overseas military voting. *See* SDCL 12-13-1; 12-16-1; ch. 12-19.

D. Ageton's concept of what should be included by the Attorney General in the "certified record" for certiorari review is based on incorrect assumptions, is unworkable, and invades the Attorney General's position as the legal counsel for the State.

Ageton challenges the adequacy of the record certified by the Attorney General. She contends the Attorney General, when drafting the Explanation, should have considered the documentary evidence she later attached to the Affidavit, even though she never presented it to

him. Ageton then claims, without any basis, that "the Attorney General conceded he failed to consider [Ageton's] factual averments or arguments." Appellant's Brief 10-11. She further claims that he "knowingly disregarded" this information, as well as the Frankenstein letter. *Id*. at 16, 21-22. The fallacy of Ageton's arguments is that they make assumptions about what information was considered when the Explanation was researched, developed and drafted; and the arguments are further premised on assumptions that the Attorney General ignored or disregarded Ageton's information simply based on the fact her desired language did not ultimately appear in the final Explanation. Finally, the arguments offer inconsistent positions about how the Attorney General might certify the record differently.

It is true that the process of drafting a ballot measure explanation does not lend itself to the development of the same kind of record that a typical adversarial proceeding does in other contexts. But the Legislature did not call for such a procedure when it enacted SDCL 12-13-25.1. Instead, the Legislature charged the Attorney General with the task to write, in essence, a legal opinion that will ultimately appear on the face of the initiative petition and ballot. The process contemplated by the statute is that the sponsor submits a proposed measure to the Attorney General, and the Attorney General issues an explanation within certain parameters. Those documents therefore

provide the relevant basis for a reviewing court to assess whether the Attorney General regularly pursued his authority.

Ageton's arguments suggest that she believes the Attorney General must certify the record to include more than just the Measure and the Explanation. But it is not clear what she thinks the exact scope and extent of that additional information should be. On one hand, she states that "in almost all cases, the Attorney General need not consider outside information or consult general knowledge." Appellant's Brief 13. But then she contends that in this particular case, the Attorney General should have considered such information and she apparently believes the record should have included that. This position, taken to its logical extension, leads to unworkable and inconsistent results and invades the Attorney General's obligations as lawyer for the State.

It would be entirely unworkable—if not impossible—for the Attorney General to attempt to certify as part of the record *all* the information "considered" by him and other lawyers in his office who research, develop and draft the Explanation. How does one quantify and certify "general knowledge?" What level of "consideration" would result in information being made part of the record? Moreover, even if the Attorney General were presented with concrete documentary information from interested parties (which did not occur here with respect to Exhibits 1-4), it would result in an incomplete and misleading

record to certify only those matters, to the exclusion of everything else considered.

It would also foster a situation where individuals on both sides of the issue would feel compelled to submit information to the Attorney General to establish some sort of record, to the point it becomes akin to a mini-trial, but without any basis for such a process established by the Legislature. Even Ageton does not take the position that process is warranted. SR 251 (T 12).

Furthermore, even if quantifying such a record could be done from a practical standpoint, requiring the Attorney General to certify all of the information that he and his lawyers "consider" when drafting the explanation would invade their duties as lawyers for the State. This Court has already recognized that the drafting of a ballot measure explanation is a discretionary exercise calling for the Attorney General's professional legal judgment as attorney for the State. *See Jackley*, 2010 S.D. 62, ¶ 25, 786 N.W.2d at 379. The matters considered by lawyers in the drafting of a legal opinion—which a ballot explanation represents—implicate attorney work product and deliberative process principles. It is unreasonable to expect that information to be disclosed.

The process used here, and the record presented, is workable and provides an adequate basis for a reviewing court to assess the Attorney General's compliance with SDCL 12-13-25.1. It should be upheld.

CONCLUSION

Based upon the foregoing arguments and authorities, the circuit court correctly determined that Attorney General Jackley acted within his statutory authority when drafting the Explanation. The language of the Explanation should be upheld. Attorney General Jackley respectfully requests that the order denying the application for writ of certiorari be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,344 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 13th day of October, 2015.

/s/ Patricia Archer
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of October, 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Erin Ageton* was served via electronic mail upon:

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RESPONDENT'S VERIFIED RETURN
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ATTACHMENT A

FOR AN ACT ENTITLED, An Act to provide for a limit on finance charges on payday, car title, and installment loans and to provide a penalty therefor.

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

Section 1. That 54-3-14 be amended to read as follows:

The term "regulated lenders" as used in § 54-3-13 means:

(1) A bank organized pursuant to chapter 51A-1, et seq.;

(2) A bank organized pursuant to 12 U.S.C. § 21;

(3) A trust company organized pursuant to chapter 51A-6;

(4) A savings and loan association organized pursuant to chapter 52-1, et seq.;

(5) A savings and loan association organized pursuant to 12 U.S.C. § 1464;

(6) Any wholly owned subsidiary of a state or federal bank or savings and loan association which subsidiary is subject to examination by the comptroller of the currency, or the federal reserve system, or the South Dakota Division of Banking, or the federal home loan bank board and which subsidiary has been approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the National Housing Act;

(7) A federal land bank organized pursuant to 12 U.S.C. § 2011;

(8) A federal land bank association organized pursuant to 12 U.S.C. § 2031;

(9) A production credit association organized pursuant to 12 U.S.C. § 2091;

(10) A federal intermediate credit bank organized pursuant to 12 U.S.C. § 2071;

(11) An agricultural credit corporation or livestock loan company or its affiliate, the principal business of which corporation is the extension of short and intermediate term credit to farmers and ranchers;

(12) A federal credit union organized pursuant to 12 U.S.C. § 1753;

(13) A federal financing bank organized pursuant to 12 U.S.C. § 2283;

(14) A federal home loan bank organized pursuant to 12 U.S.C. § 1423, et seq.;

(15) A national consumer cooperative bank organized pursuant to 12 U.S.C. § 3011;

(16) A bank for cooperatives organized pursuant to 12 U.S.C. § 2121;

(17) Bank holding companies organized pursuant to 12 U.S.C. § 1841, et seq.;

(18) National Homeownership Foundation organized pursuant to 12 U.S.C. § 1701y;

(19) Farmers Home Administration as provided by 7 U.S.C. § 1981;

(20) Small Business Administration as provided by 15 U.S.C. § 633;

(21) Government National Mortgage Association and Federal National Mortgage Association as provided by 12 U.S.C. § 1717;

(22) South Dakota Housing Development Authority as provided by chapter 11-11;

(23) Insurance companies, whether domestic or foreign, authorized to do business in this state, and which as a part of their business engage in mortgage lending in this state. However, § 54-3-13 does not exempt insurance companies from the provisions of § 58-15-15.8; or

(24) Any wholly owned service corporation subsidiary of a domestic or foreign insurance company, authorized to do business in this state, and which subsidiary is subject to examination by the same insurance examiners as the parent company; ~~or~~.

~~(25) An installment loan licensee under the provisions of chapter 54-4 and 54-6~~

Section 2. That 54-4-44 be amended to read as follows:

After procuring such license from the Division of Banking, the licensee may engage in the business of making loans and may contract for and receive interest charges and other fees at rates, amounts, and terms as agreed to by the parties which may be included in the principal balance of the loan and specified in the contract. However, no licensee may contract for or receive finance charges in excess of an annual rate of thirty-six percent, including all charges for any ancillary product or service and any other charge or fee incident to the extension of credit. A violation of this section is a Class 1 misdemeanor. Any loan made in violation of this section is void and uncollectable as to any principal, fee, interest, or charge.

Section 3. That chapter 54-4 be amended by adding a NEW SECTION to read as follows:

No person may engage in any device, subterfuge, or pretense to evade the requirements of § 54-4-44, including, but not limited to, making loans disguised as a personal property sale and leaseback transaction; disguising loan proceeds as a cash rebate for the pretextual installment sale of goods or services; or making, offering, assisting, or arranging a debtor to obtain a loan with a greater rate of interest, consideration, or charge than is permitted by this chapter through any method including mail, telephone, internet, or any electronic means regardless of whether the person has a physical location in the state. Notwithstanding any other provision of this chapter, a violation of this section is subject to the penalties in § 54-4-44.

INITIATED MEASURE

ATTORNEY GENERAL'S STATEMENT

Title: An initiated measure to set a maximum finance charge for certain licensed money lenders

Explanation:

The initiated measure prohibits certain State-licensed money lenders from making a loan that imposes total interest, fees and charges at an annual percentage rate greater than 36%. The measure also prohibits these money lenders from evading this rate limitation by indirect means. A violation of this measure is a misdemeanor crime. In addition, a loan made in violation of this measure is void, and any principal, fee, interest, or charge is uncollectable.

The measure's prohibitions apply to all money lenders licensed under South Dakota Codified Laws chapter 54-4. These licensed lenders make commercial and personal loans, including installment, automobile, short-term consumer, payday, and title loans. The measure does not apply to state and national banks, other federally insured financial institutions, and state chartered trust companies. The measure also does not apply to businesses that provide financing for goods and services they sell.

12-13-9.2. Action to challenge adequacy of attorney general's statement--Appeal--Time limits. If the proponents or opponents of a proposed amendment to the Constitution, initiated measure, or referred measure believe that the attorney general's statement does not satisfy the requirements of § 12 -13-9 or § 12-13-25.1, they shall, within seven days of delivery of the statement to the secretary of state, file an action in circuit court challenging the adequacy of the statement. The action takes precedence over other cases in circuit court and a final order shall be filed within fifteen days of the commencement of the action. Any party appealing the circuit court order to the Supreme Court shall file a notice of appeal within five days of the date of the circuit court order.

Source: SL 2007, ch 77, § 3; SL 2009, ch 64, § 4, eff. July 1, 2010.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 27485

ERIN AGETON,

Applicant and Appellant,

vs.

MARTY J. JACKLEY, in his capacity as SOUTH DAKOTA ATTORNEY GENERAL,

Respondent and Appellee.

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

The Honorable Kathleen Trandahl, Circuit Court Judge

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ARGUMENT

South Dakota law requires the Attorney General to draft a ballot explanation that "educates" voters about the purpose and effect of an initiated measure. SDCL § 12-13-25.1. Perhaps understandably, the Attorney General's Brief faithfully defends an eyes-closed approach to this voter education responsibility. According to the Attorney General, no matter how complex the industry the measure affects or how misleadingly written the measure is, educating voters about the true "purpose" and "effect" of a measure can never require the Attorney General to consider facts—even common knowledge, or other laws that are routine subjects of judicial notice—if they lie beyond the four corners of the text drafted by initiative proponents. This rule is certainly easy to implement. However, it fails to grapple with the requirements the legislature imposed in 2006 when it enacted SDCL § 12-13-9.2, and provided "an action" challenging the adequacy of a ballot explanation. Historically, South Dakota courts reviewed the Attorney General's ballot explanation under the standards for certiorari in equity. South Dakota courts still refer to the "action" in SDCL § 12-13-9.2 as "certiorari," but the standards have changed; a ballot explanation must, in fact, adequately educate voters of a measure's purpose and effect. SDCL § 12-13-9.2; SDCL § 12-13-25.1.

In determining whether the measure's ballot explanation adequately educates voters, the circuit court incorrectly limited the scope of review in at

least three ways. First, the circuit court ignored that the plain language of the words "action in circuit court challenging the adequacy of the statement," SDCL § 12-13-9.2, when it held that equitable certiorari limits applied. *See*, *e.g.*, SDCL §§ 21-31-8; 21-31-1 (defining a restrictive scope of review in certain circumstances where there is no other remedy). Second, even if procedures applicable to equitable certiorari still generally apply in ballot explanation actions, the circuit court jumped the gun when it limited the scope of review on Plaintiff's application for writ of certiorari to what it styled as a "certified record." But on certiorari, there is only a "certified record" *after* a court grants the writ, and here, the "certified record" was actually certified by the Attorney General himself, before any court had granted any relief at all. SDCL § 21-31-4. Third, the circuit court incorrectly found that courts cannot consider judicial notice in determining whether to grant an application for writ of certiorari. South Dakota provides for judicial notice at all stages of certiorari proceedings. *See* SDCL §§ 19-19-201 (providing that judicial notice is mandatory); 21-31-1; *Cole v. Board of Adj. of City of Huron (Cole I)*, 1999 SD 54, ¶¶8–11, 592 N.W.2d 175, 177 (Gilbertson, J.) (implicitly recognizing that judicial notice is appropriate in certiorari proceedings). Judicial notice is essential given that the Attorney General now asserts a claim of privilege on virtually all evidence related to drafting the ballot explanation. Appellee Br. 27–28 (contending information considered is subject to deliberative process and attorney work product privileges).

Perhaps recognizing the circuit court's error concerning the standard for the Attorney General to knowingly disregard relevant evidence, the Attorney General's Brief makes veiled attacks on the circuit court's factual findings. The circuit court made specific factual findings regarding a letter that informed the Attorney General that a 36% rate limitation on short-term money lending was, in purpose and effect, a ban on all such lending.

> The circuit court found Attorney Frankenstein's letter was relevant and should be included in the record "because it evidences the fact that [the Attorney General] was aware of [Appellant and Frankenstein's] position that the 'purpose and effect' of a cap of 36% is the elimination of short-term credit in South Dakota." R. at 202; 198 ("Attorney General Jackley had this letter and was aware of its contents prior to writing the Attorney General's Statement in 2015").

Appellant's Br. 6. Armed with knowledge of the disguised purpose and effect of the 36% rate limit, the Attorney General authored a ballot explanation that failed to address the concerns identified in the letter.[1] These factual findings are undisputed. R. at 281 (noting "the findings in this case are

[1] The Attorney General's Brief states that Appellant "claims, without any basis that 'the Attorney General conceded he failed to consider [Appellant's] factual averments of arguments.' " Appellee Br. 26. But the Attorney General's own admissions, coupled with his failure to state whether he did or did not consider the facts in Attorney Frankenstein's letter, all but concede this point. First, the Attorney General represented that he had provided the circuit court with all "records on file relevant to the statutory duties performed by [the Attorney General] in this matter." R. at 165. Second, the Attorney General did not provide Attorney Frankenstein's letter as one of those records. Third, despite repeated challenges, the Attorney General's Brief and other documents avoid any representation as to whether his office considered Attorney Frankenstein's letter. This admission, coupled with the Attorney General's repeated failure to state that he did actually consider the letter, yields an inference that the Attorney General did not in fact consider the facts raised in the letter.

undisputed"). As a result, the circuit court's decision below stands for the proposition that the Attorney General may knowingly disregard relevant evidence, as well as the interaction between the initiated measure and other statutes that regulate a complex industry. Appellant's Br. 21–22. This rule of law cannot stand.

The circuit court also erred by holding that judicial notice is inapplicable in ballot explanation cases. Adjudicative facts not subject to reasonable dispute establish that the Attorney General's ballot explanation fails to adequately educate voters about the purpose and effect of the initiated measure.

Basic knowledge about money lending reveals that the Attorney General's ballot explanation is manifestly misleading. The explanation references a 36% rate limit, which is in purpose and effect a disguised ban on short term money lending. Appellant's Br. 18–20, 29–31 ("Both sides agree [the 36% rate limit] would shut down payday lending in South Dakota."). The "limitation" deceptively implies that types of loans covered by the measure may continue to exist when the purpose and effect of "limitation" is to ban such loans. The fact that the Attorney General's ballot explanation, standing alone, is manifestly misleading distinguishes this case from *AFL-CIO v. Jackley*. *South Dakota State Fed'n of Labor AFL-CIO v. Jackley, et al.*, 2010 SD 62, 786 N.W.2d 372.

Appellant's Opening Brief highlighted three problems with the circuit court's decision: (1) the circuit court improperly limited the record in a ballot explanation case that challenges whether the explanation educates voters; (2) the circuit court incorrectly stated that the Attorney General could disregard relevant evidence; and (3) the circuit court erred when it held the Attorney General's explanation educates voters about the initiated measure's purpose, effect, and legal consequences. Appellant's Br. 1–2. The Attorney General's Brief reordered and recast the issues. Appellee Br. 9. Appellant will address each of the Attorney General's arguments in the order outlined in the Attorney General's Brief.

I. THE CIRCUIT COURT ERRED IN RULING THAT THE ATTORNEY GENERAL'S STATEMENT EDUCATES VOTERS OF THE PROPOSED INITIATED MEASURE'S PURPOSE AND EFFECT (APPELLANT'S ISSUE III)

SDCL § 12-13-25.1 requires that the Attorney General's statement be an "objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure[.]" The Attorney General's Brief fails to controvert that "the Attorney General may not merely describe the law, but must describe the result, outcome-, or consequence-in-fact." Appellant's Br. 24–25. The end of short-term money lending is the direct, necessary consequence of a 36% rate limitation.

The first twenty-three pages of the Attorney General's Brief confirm that the Attorney General followed standard procedure in this case by paraphrasing or summarizing the initiated measure. Appellee Br. 17–20. The

Attorney General's argument fails to meet the substance of Appellant's contention that when an initiated measure is misleadingly drafted—as is the case here, Appellant's Br. 8–9, 18–20, 27–31—paraphrasing the four corners of the measure's text can (and did) result in a manifestly misleading ballot explanation. *See Schulte v. Long*, 2004 SD 102 at ¶ 27, 687 N.W.2d 501, 502 (quoting *Gormley v. Lan*, 88 N.J. 26, 438 A.2d 519, 525–26 (1981)). Arguably, paraphrasing text sufficed when the Attorney General was merely tasked with describing the purpose and legal effect of a measure, but the Attorney General's approach fails to appreciate the legislature's more recent command that the ballot explanation educate voters about the purpose and effect-in-fact of an initiated measure.

The Attorney General's ballot explanation misleads voters by implying that a rate limitation would function as a price ceiling, rather than a ban. Appellant's Br. 9 ("When a price ceiling is set well below suppliers' marginal costs, we know the price ceiling is a de facto ban."). While the ballot explanation need not address tangential or supplemental issues, the explanation cannot obfuscate the measure's primary and predominant purpose and effect. Similarly, the ballot explanation cannot imply that "certain State-licensed money lenders" will simply make cheaper loans when the parties agree that the measure acts as an economic ban on all such State-licensed money lenders.

The closest the Attorney General's Brief comes to refuting these arguments is a one-sentence statement: "Ageton's proposed language presents a position that may be subject to debate." Appellee Br. 19. That there "may be" a debate, however, does not mean that there "is," or has ever been, a debate; neither proponents nor opponents of the initiated measure dispute that the measure bans short-term money lending. Appellant's Br. 18–20, 27–31. No reasonable dispute exists as to whether the initiated measure constitutes a ban; arithmetic, a basic understanding of the costs of running a business, and the effect of other laws that regulate the industry resolve any reasonable dispute. Appellant's Br. 8–9, 18–20, 27–31. Appellant presented the trial court with sufficient admissible evidence to determine that a 36% rate limit is a de facto ban. The circuit court erred when it upheld a ballot explanation that misleads voters about the central purpose and effect of the measure.

II. THE CIRCUIT COURT ERRED IN LIMITING THE RECORD, REFUSING TO TAKE JUDICIAL NOTICE, AND RULING THAT THE ATTORNEY GENERAL CAN KNOWINGLY DISREGARD RELEVANT EVIDENCE WITHOUT CONDUCTING A REASONABLE INQUIRY (APPELLANT'S ISSUES I & II)

When the legislature adopted SDCL § 12-13-9.2, the legislature provided for "an action in circuit court challenging the adequacy of the [Attorney General's ballot] statement." The legislature made no reference to the term "certiorari," and the circuit court erred when it held that the traditional scope of equitable certiorari review prevented consideration of

facts not contained in the few documents the Attorney General had self-certified as the "record." Appellant's Br. 9–20. Even if the scope of review concerning certiorari is generally applicable in a statutory challenge to the adequacy of the Attorney General's ballot explanation, the circuit court failed to follow the correct procedure when it limited the scope of review before it decided whether to issue a writ of certiorari. SDCL § 21-31-4 (providing for certification of record *after* a writ is issued). Furthermore, the circuit court erred when it held that judicial notice is unavailable in certiorari proceedings.

A. The Circuit Court Erred in Refusing to Take Judicial Notice of Adjudicative Facts

Even if the circuit court correctly determined the scope of the record generally, no legal or practical basis supports the circuit court's conclusion that judicial notice is inappropriate in certiorari proceedings. *See* SDCL §§ 19-19-201, 12-13-9.2; *Cole I*, 1999 SD 54, ¶¶8–11, 592 N.W.2d at 177. The Attorney General's Brief misconstrues the applicability of *Grant County Concerned Citizens v. Grant County Board of Adjustments*. 2015 S.D. 54, 866 N.W.2d 149 [hereinafter *Grant County*]. In *Grant County*, this Court cited well-settled case law stating that "[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding[.]" *Accord Grant County*, 2015 S.D. 54 ¶¶17, 41 866 N.W.2d at 156, 163 (alterations in original) (citations omitted). Appellant challenges whether the Attorney General's ballot explanation complies with the law, which is a mixed question

of law and fact. Appellant does not challenge any factual finding. R. at 281. To the extent the Attorney General argues that the purpose and effect of a proposed initiated measure are factual findings not subject to review on certiorari, the Attorney General's argument proves too much. *See* SDCL § 12-13-9.2 (providing an action to challenge the adequacy of a ballot explanation).

The Attorney General's Brief confuses the circuit court's two decisions regarding judicial notice. The circuit court's ruling found that the "opinions and conclusions" in Appellant's exhibits were not appropriate material for judicial notice. R. at 199–200. Separately, the circuit court also ruled that judicial notice is inappropriate in certiorari proceedings. *Id.* This latter ruling is the only basis for the lower court's decision relative to the judicial notice Appellant actually requested in Appellant's Reply Brief and oral argument. R. at 187–90, 250–52, 278 (requesting judicial notice of certain indisputable general knowledge about how lending works and information about prices and costs of such activity). Appellant conceded opinions and conclusions are generally inappropriate for judicial notice. R. at 250–52. Appellant asked for judicial notice of basic facts concerning lending, including arithmetic and other facts not subject to reasonable dispute about the costs of running a business. R. at 187–90, 250–52, 278.[2] Due to the limited timeframe and

[2] To the extent the circuit court's decision might be read to find that the Appellant's Exhibits contained no facts generally known or capable of accurate and ready determination by sources whose accuracy cannot by

inability to present evidence directly to the Attorney General, judicial notice particularly suits ballot explanation actions.

In arguing that judicial notice was inappropriate in this case, the Attorney General's Brief incorrectly applies this Court's decision in *Dorsey and Whitney Trust Co. In re Dorsey and Whitney Trust Co., LLC* , 2001 S.D. 35, ¶19, 623 N.W.2d 468, 474. *Dorsey and Whitney Trust Co.* provides no support for the Attorney General's position because Appellant asked the circuit court to take judicial notice of indisputable background facts, not expert opinions. Appellant's Br. 6. *Dorsey and Whitney Trust Co.* concerned the difference between adjudicative and legislative facts. *See Dorsey and Whitney Trust Co., LLC*, 2001 S.D. 35, ¶19 (citing Fed. R. Evid. 201, advisory committee's note (explaining the difference between adjudicative and legislative facts)). Appellant requested that the circuit court take judicial notice of adjudicative facts: how annual percentage rates work, the amount a lender may charge under a 36% rate limitation on a two-week loan, and basic facts about the costs of operating a business. Appellant's Br. 6, 17–20.

A factfinder must, on request, take judicial notice of adjudicative facts in appropriate circumstances. SDCL § 19-19-201; *see Dorsey and Whitney Trust Co., LLC*, 2001 S.D. 35, ¶19. The Attorney General's Brief glosses over

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reasonably questioned, the circuit court's decision was clearly erroneous. R. at 17–153. Further, such background knowledge, such as arithmetic (i.e., the way in which annual percentage rates ("APR") work, and the amount of revenue derived from a specific loan when a fixed APR is applied) and how short-term money lending works, is appropriate for judicial notice because it is generally known.

the fact that the record below does not indicate whether the circuit court ever reviewed Appellant's exhibits, much less considered whether some or all of the background material contained therein was appropriate for judicial notice. Appellant's Br. 17–20. The circuit court did not hold that basic facts about lending money were inappropriate for judicial notice; the circuit court held judicial notice was inappropriate in certiorari cases and summarily noted that opinions and conclusions are inappropriate for judicial notice in any event.

B. South Dakota Law Demands Meaningful Review of Whether a Ballot Explanation Educates Voters of the Measure's Purpose and Effect

The Attorney General's citation to cases predating SDCL § 12-13-9.2 are helpful to the extent they define South Dakota's historical approach to ballot explanation actions, but such cases cannot rewrite words the legislature used when it amended the relevant statutes. This Court has issued one decision—*Jackley*—that addresses a ballot explanation challenge after the legislature's enactment of SDCL § 12-13-9.2. *South Dakota State Fed'n of Labor AFL-CIO v. Jackley, et al.*, 2010 SD 62, 786 N.W.2d 372. *Jackley* did not cite SDCL § 12-13-9.2, but refers to the action provided as certiorari. *See id.* Equitable certiorari is a general judicial remedy available when "there is no writ of error or appeal nor, in the judgment of the court, any other plain, speedy, and adequate remedy." SDCL § 21-31-1. The plain meaning of the word "action" suggests a distinct judicial remedy that allows

review separate from the traditional limits of certiorari in equity. SDCL § 12-13-9.2. This action has a statute of limitations—seven days—and a timeframe for a decision by the circuit court—fifteen days. SDCL § 12-13-9.2. The action is expressly permitted to directly "challeng[e] the adequacy of the statement," not only whether the Attorney General "has regularly pursued [his] authority." *Compare* SDCL § 12-13-9.2 *with* SDCL § 21-31-8.

The truncated timeframe for the challenge—fifteen days from filing to ruling—reflects the necessity of quick decisions in these cases. However, fifteen days is sufficient time to review basic facts not subject to reasonable dispute that would inform the circuit court about a complex industry that an initiated measure proposes to regulate. The action merely challenges work the Attorney General is already supposed to have completed pursuant to SDCL § 12-13-25.1. If this process imposes any burden upon the Attorney General or litigants, its true source is the underlying statutory responsibility or the complexity of the proposed changes to the law, not the ballot explanation action.

Applying the words the legislature used does not transform the circuit court or this Court into a "literary editorial board," *Schulte v. Long*, 2004 SD 102, ¶ 11, 687 N.W.2d 495, but it does require that South Dakota courts review whether the Attorney General's ballot explanation adequately educates voters pursuant to SDCL § 12-13-25.1; *see* SDCL § 12-13-9.2 (stating the actions test the ballot explanation, not whether the Attorney

General regularly pursued his authority). Accordingly, South Dakota courts must ensure ballot explanations comply with SDCL § 12-13-25.1, even in cases where the Attorney General makes every effort to do what is correct, but falls short for some reason (namely, when the author of an initiated measure conceals the measure's purpose- and effect-in-fact).

C. Following the Words the Legislature Used does not Result in a De Novo Trial on the Merits

The Attorney General's concerns about opening ballot statement proceedings to a de novo trial are unfounded. It is not unreasonable to expect the Attorney General to consider general knowledge or obtain a basic understanding of an industry to be regulated when educating voters of the purpose and effect of a measure. This is particularly true when an initiated measure proposes a price ceiling in a financial services market that is already subject to a complex web of statutes and regulations.

Moreover, entering into evidence basic facts about how an industry works—facts that are themselves susceptible of judicial notice—is not "a de novo trial on the merits." The cases cited by the Attorney General and the circuit court regarding the limits of certiorari contemplate review of a lower tribunal or officer's decision where parties develop a record. That does not happen when the Attorney General drafts a ballot explanation. The Attorney General only establishes a record in drafting the ballot explanation when his staff reviews substantive documents and statutes that guide the drafting of a ballot explanation, or when parties submit evidence to assist the Attorney

General in performing his duty. The Attorney General now asserts that virtually all of that record is privileged under the deliberative process and attorney work product privileges. Appellee Br. 27–28. Despite the purported unavailability of this relevant evidence (surprisingly, revealed for the first time in an appellate brief), this Court need not hold that expert opinions or testimonial evidence are generally available under SDCL § 12-13-9.2; judicial notice pursuant to SDCL § 19-19-201 suffices to demonstrate that the Attorney General's statement is manifestly misleading.

Courts should tread carefully when preferring common law concerning equitable certiorari over a modern legislative enactment. SDCL § 12-13-9.2 provides an "action." The legislature should not have to amend the statute to ensure courts comply with its express directive in SDCL § 12-13-9.2.

D. The Attorney General's Construction of the Applicable Record Eviscerates Any Opportunity for Meaningful Review

The action provided by SDCL § 12-13-9.2 helps avoid the irreconcilable conflict that arises when the state's lawyer is compelled by law to disclose all information considered in drafting a ballot explanation. *See* SDCL § 21-31-4. The Attorney General drafts ballot explanations, which are essentially a legal opinion created as the attorney for the State of South Dakota. *Jackley*, 2010 SD 62, ¶22 (citing SDCL § 1-11-1). Equitable certiorari review requires the Attorney General to certify "a transcript of the record and proceedings," pursuant to SDCL § 21-31-4. However, the entire "record and proceeding" is the drafting of the legal opinion. A plain reading of the record certification

requirement, provided in SDCL § 21-31-4, creates tension with certain privileges the Attorney General claims to ordinarily enjoy.

At the same time the Attorney General advocates for a limited scope of review on certiorari, Appellee Br. 20–27, the Attorney General's Brief implies that he should not even be subject to the minimal requirement imposed by such review. Appellee Br. 27–28. This interpretation layers one prohibition upon another to preclude any meaningful review of the Attorney General's ballot explanation.

Why is this so? The Attorney General now clarifies its true position on appeal: the office seeks to exclude "information [that] was considered when the [the Attorney General's] Explanation was researched, developed and drafted[.]" Appellee Br. 26. The Attorney General states for the first time that "requiring the Attorney General to certify all of the information that he and his lawyers 'consider' when drafting the explanation would invade their duties as lawyers for the State." Appellee Br. 28. Specifically, the Attorney General now says, "The matters considered by lawyers in the drafting of a legal opinion—which a ballot explanation represents—implicate attorney work product and deliberative process principles." Appellee Br. 28. The Attorney General's office now states that it failed to include any such materials when he certified "a transcript of the record and proceedings,"

pursuant to SDCL § 21-31-4.[3] Pushing a step beyond this, the Attorney General contends that the record in a ballot explanation case cannot include any other substantive documents apart from the text of the proposed measure. This appears to seal the deal, making it impossible to litigate the question of whether the Attorney General has educated the public about the actual effects of a proposed measure.

This troubling new position cannot be correct. First, there is no reason to believe that a "certified record," or the scope of evidence admitted in a ballot explanation challenge, cannot contain documents disclosing facts that may inform the Attorney General and the public about the effect of a measure. Even if the Attorney General is correct that certiorari procedures must be strictly followed, SDCL § 21-31-4 may well act as a statutory waiver of the Attorney General's assertion of any privilege. Additionally, the Attorney General's new, absolutist view is difficult to square with this Court's decision in *Jackley v. AFL-CIO*, which did not disapprove of a record that included another substantive document in the Attorney General's possession. R. at 198.

Aside from the legal viability of the Attorney General's proposed rule, the history of this case provides reason to be concerned about a process

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[3] The Attorney General's Verified Return to the Application for Writ of Certiorari purported to certify "the records on file relevant to the statutory duties performed by [the Attorney General] in this matter." R. at 165, 168. The Attorney General's Verified Return failed to apprise the court or any party that records on file considered by the Attorney General's staff may be withheld under a claim of privilege. *See* R. at 164–174.

whereby the arguments parties are allowed to make are entirely determined by a "record" that is prematurely self-certified by the Attorney General and expanded or restricted on an ad-hoc basis. For example, the Attorney General recognizes that the Appellant successfully expanded the record below to include a substantive, relevant letter from Appellant. Appellee Br. 7-9 ("The [circuit] court expanded the record to include the Frankenstein letter and reserved ruling on whether it would consider the other documents. SR 246 (T 7)."). The circuit court only expanded the record over the Attorney General's objections because Appellant fortuitously knew that the Attorney General had received the letter in question. The circuit court found that the Attorney General had the document and the document should be included in the record. R. at 202; 198. But even now, neither Appellant, nor the circuit court below, has knowledge of what other documents, if any, the Attorney General unilaterally excluded from the record (and under the Attorney General's view, from the scope of the arguments themselves) on the basis of privilege.

Indeed, the confusion surrounding what—apart from the text of the proposed initiated measure—comprises the "transcript of the record and proceedings" in a ballot explanation action crystallizes the need for this Court to clarify the scope of review in this case. A few principles should guide the Court's decision. First, any "return" must occur at the time a writ of certiorari is granted and not before. SDCL § 21-31-4. Before the court grants the writ of certiorari, the court may not exclude otherwise admissible evidence. Second,

if the court grants a writ of certiorari, the Attorney General must alert other parties and the court to any omitted materials that were relevant to the Attorney General's statutory duties. *See* SDCL § 21-31-4 (requiring the Attorney General to "certify fully to the court . . . and annex to the writ a transcript of the record and proceedings[.]"). The Attorney General may prepare a privilege log for documents withheld under a claim of privilege. Third, the ultimate focus for the court is whether the ballot explanation is adequate. SDCL § 12-13-9.2. Judicial notice must be permitted in this determination. *See* SDCL § 19-19-201. Some of the materials the Attorney General correctly withholds as privileged may well contain essential information for a court to determine whether the ballot explanation adequately educates voters.

These are not mere matters of procedure. Given the Attorney General's newly articulated position, they have turned out to be essential to preserving the integrity of the statutory scheme. As noted above, the Attorney General is required to educate voters about the practical effect-in-fact of measures, but his office now argues that none of those facts can be considered—whether through judicial notice of common knowledge, or otherwise—if they are not somewhere in the record the Attorney General certifies. On top of this, the Attorney General argues that even the certified record will be useless, scrubbed of almost all documents that have any meaning. Whittled down to this meager core, very little remains to litigate other than an argument about

the legal meaning of the proposed text. But as discussed above, the Attorney General's duties—and therefore the arguments for challenging the Attorney General's performance of those duties—are now far broader. In short, if the Attorney General is correct, the "action in circuit court challenging the adequacy of the statement" that is provided to South Dakota citizens under SDCL § 12-13-9.2 is not a real challenge, not a real remedy, and not a real action.

CONCLUSION

The Attorney General's arguments fail to controvert Appellant Ageton's contention that the Attorney General's ballot explanation inadequately educates the voters of the initiated measure's purpose and effect. SDCL § 12-13-25.1. The Attorney General's Response Brief also highlights why this Court should clarify the scope of the record in ballot explanation actions pursuant to SDCL § 12-13-9.2 and reverse the circuit court's denial of certiorari based on the factual averments in Appellant's exhibits before the circuit court. This Court's intervention is necessary to ensure that South Dakota citizens are able to use the robust challenge procedure and enjoy the toughened ballot explanation standards that were recently provided by their legislature. With clarification by this Court, voters themselves will have a real opportunity to review the Attorney General's explanations and thereby ensure that their fellow citizens are truly "educated" when circulators ask them to sign petitions.

Dated this 9th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Reply Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellant's Reply Brief, including footnotes, contains 4,787 words. I have relied upon the word count of our word processing system as used to prepare this Appellant's Reply Brief. The original Appellant's Reply Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify on November 9, 2015, I emailed a true and correct copy of **APPELLANT'S REPLY BRIEF** and mailed two copies by U.S. Mail, first-class postage prepaid to the following:

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