IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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

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

Notice of Appeal filed on February 17, 2021

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

The Honorable Christina Klinger
Circuit Court Judge

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PRELIMINARY STATEMENT

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

JURISDICTIONAL STATEMENT

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

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

STATEMENT OF LEGAL ISSUES

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

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

Most relevant authority:

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

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

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

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

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

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

Most relevant authority:

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

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

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

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

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

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

Most relevant authority:

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

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

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

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

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

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

Most relevant authority:

S.D. Const. art. XXIII § 1.

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

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

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

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

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

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

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

Most relevant authority:

S.D. Const. art. XXIII §§ 1, 2.

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

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

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

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

Most relevant authority:

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

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

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. As with Thom, Miller has no standing.

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

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

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

B. The Executive Order cannot cloak Miller with standing.

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

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

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

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

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

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

2. The EO is an improper delegation of power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Waiver and laches preclude these claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Amendment A did not require a constitutional convention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Appellants respectfully request oral argument.

Respectfully,

DATED: March 10, 2021

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Certificate of Compliance

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

Dated this 10th day of March, 2021

/s/ Timothy W. Billion
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Certificate of Service

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

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