

STATE OF SOUTH DAKOTA )  
 )SS  
COUNTY OF MINNEHAHA )

IN CIRCUIT COURT  
  
SECOND JUDICIAL CIRCUIT

DAVID OWEN and JAMES HOLBECK,  
  
Plaintiffs,

v.

STEVE BARNETT, in his official capacity  
as South Dakota Secretary of State, and  
BEN KYTE, in his official capacity as  
Minnehaha County Auditor,

Defendants.

CIV. # \_\_\_\_\_

**COMPLAINT**

Plaintiffs David Owen and James Holbeck, for their Complaint against the above-named Defendants, state and allege as follows:

**INTRODUCTION AND CASE SUMMARY**

1. South Dakotans have long retained for themselves the power to initiate legislation and constitutional amendments, to refer legislation to a vote of the people, and to vote on constitutional amendments proposed by the legislature. These fundamental rights are part of South Dakota's long history of placing public trust in its voters as the ultimate source of sovereign power.

2. At its statehood, South Dakota's constitution required that each proposed constitutional amendment be voted on separately. Following various amendments, South Dakota's constitution now contains two requirements that work in tandem: a single

subject requirement and a separate vote requirement. Both requirements ensure that voters will not be forced to vote on multiple constitutional changes in a single vote.

3. On March 9, 2021, the South Dakota Legislature delivered to the Secretary of State House Joint Resolution 5003. The constitutional amendment proposed by HJR 5003 would require that any initiated constitutional amendment, initiated measure, constitutional amendment proposed by the legislature, or measure referred to the people by the legislature that increases taxes or fees must be approved by 60 percent of votes cast. Currently, such measures require only a majority vote to pass. This is the “taxation supermajority requirement.”

4. The constitutional amendment proposed by HJR 5003 also would require that any initiated constitutional amendment, initiated measure, constitutional amendment proposed by the legislature, or measure referred to the people by the legislature “that obligates the state to appropriate funds of ten million dollars or more in any of the first five fiscal years after enactment, to be annually adjusted for inflation as determined by the Legislature” must also be approved by 60 percent of votes cast, regardless of the source of the funding, whether it be new sources of revenue, reallocation from existing programs or grants, or existing budget surplus. Currently, such measures require only a majority vote pass. This is the “spending supermajority requirement.”

5. The taxation supermajority requirement is entirely separate and distinct from the spending supermajority requirement. Neither is necessary to the other.

6. Instead, the Legislature engaged in a classic example of logrolling: it is attempting to force voters that may support a taxation supermajority requirement to also

vote for the spending supermajority requirement, and vice versa. Many voters, including the Plaintiffs here, would prefer to vote on these supermajority requirements separately – and they have the constitutional right to do so.

7. Because the constitutional amendment proposed by HJR 5003 (hereinafter, “Amendment C”) contains more than a single subject, Amendment C is itself unconstitutional and must not be submitted to South Dakota voters.

### PARTIES

8. Plaintiff David Owen is an individual who resides in Minnehaha County, South Dakota. Mr. Owen is registered to vote in the state of South Dakota and is entitled to vote on Amendment C in the primary election scheduled on June 7, 2022.

9. Plaintiff James Holbeck is an individual who resides in Minnehaha County, South Dakota. Mr. Holbeck is registered to vote in the state of South Dakota and is entitled to vote on Amendment C in the primary election scheduled on June 7, 2022.

10. Defendant Steve Barnett is the South Dakota Secretary of State. Secretary Barnett is the state official charged with administering elections in South Dakota. Among other responsibilities, Secretary Barnett is charged with determining which proposed constitutional amendments will appear on each ballot, and with submitting those amendments to county auditors. Secretary Barnett is named as a defendant in his official capacity only.

11. Defendant Ben Kyte is the Minnehaha County Auditor. Auditor Kyte is responsible for administering elections in Minnehaha County. Among other responsibilities, Auditor Kyte receives proposed constitutional amendments from the

Secretary of State, advertises them as required by statute, and prepares and counts ballots cast in Minnehaha County. Auditor Kyte is named as a defendant in his official capacity only.

## JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to S.D. Const. art. 5, § 5, SDCL 16-6-9, and SDCL 15-7-2.

13. This Court has jurisdiction and authority to declare Amendment C unconstitutional and void pursuant to SDCL chapter 21-24. It also has authority to issue injunctive relief under SDCL chapter 21-8.

14. Venue is proper under SDCL 15-5-2 and 15-5-6. Plaintiffs' causes of action arise, in part, out of the fact that they will be forced to vote, or not vote, on Amendment C in Minnehaha County. Plaintiffs, as voters, have a right to vote only on single-subject amendments, and to vote separately on each amendment. The violation of those rights is occurring, and will continue to occur, in Minnehaha County. Defendant Auditor Kyte is also a resident of Minnehaha County and performs his official duties in Minnehaha County.

## FACTS

I. **The South Dakota Constitution requires that constitutional amendments only embrace a single subject and that each amendment be voted on separately.**

15. In 2018, South Dakota voters ratified Amendment Z. As amended, the South Dakota Constitution prohibits proposed amendments from embracing more than one subject, regardless of whether the amendment is proposed by the Legislature or by

initiative. *See* S.D. Const. Art. XXIII, § 1. In addition, if more than one amendment is submitted, “each amendment shall be prepared and distinguished that it can be voted upon separately.” *Id.*

16. To constitute a single subject, each part of a proposed amendment must be necessarily connected to each other and to the proposed amendment’s single purpose. *Thom v. Barnett*, 2021 S.D. 65 ¶¶ 49-53, 967 N.W.2d 261 (Nov. 24, 2021).

17. The single-subject rule serves as a safeguard to ensure that the people are able to vote separately on each change to the fundamental law of this state. *See id.* ¶ 45. The South Dakota Supreme Court has warned against the “‘pernicious practice’ of combining unrelated provisions into one amendment to ensure passage of a provision that might otherwise fail had the provisions been submitted separately.” *Id.* ¶ 56 (quoting *State ex rel. Adams v. Herried*, 72 N.W. 93, 96, 10 S.D. 109 (S.D. 1897)). That practice is commonly referred to as “logrolling.”

18. Logrolling can result in voter confusion. *Id.* ¶ 56. It can also harm voters by forcing them “to decide on more than one separate and distinct proposition with a single vote.” *Id.* ¶ 57.

## **II. The history of HJR 5003.**

19. HJR 5003, entitled “A Joint Resolution Proposing and submitting to the voters at the next primary election a new section to Article XI of the Constitution of the State of South Dakota, relating to a three-fifths vote requirement for certain initiated or Legislature-proposed constitutional amendments and initiated or Legislature-referred

measures,” was first introduced on January 28, 2021, and referred to the House State Affairs Committee on February 2, 2021.<sup>1</sup>

20. On February 10, 2021, the House State Affairs Committee amended HJR 5003 to place Amendment C on the general election ballot rather than the primary election ballot, and then passed HJR 5003. On February 16, 2021, the House adopted a style and form amendment and then passed HJR 5003.

21. The Senate State Affairs Committee passed HJR 5003 on March 1, 2021. On March 2, 2021, the Senate suspended Joint Rule 6A-1(3), amended HJR 5003 to place Amendment C back on the June 7, 2022 primary ballot rather than the November 2022 general election ballot, and passed HJR 5003 as amended. The House concurred in the Senate amendment on March 4, 2022, and HJR 5003 was delivered to the Secretary of State on March 9, 2021.

22. The Attorney General’s office prepared a title and explanation for Amendment C, responded to public comment, and then finalized the title and explanation. The final text of the title, explanation, and language of Amendment C, as submitted to the Secretary of State, are attached hereto as Exhibit 1.<sup>2</sup>

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<sup>1</sup> All legislative history is taken from <https://sdlegislature.gov/Session/Bill/22243> (last visited January 14, 2022).

<sup>2</sup> It is also available online at <https://sdsos.gov/elections-voting/assets/HJR5003AttorneyGeneralStatement.pdf> (last accessed January 14, 2022).

III. Amendment C contains more than one subject.

23. Amendment C unconstitutionally contains two distinct subjects: a supermajority requirement for tax increases, and a supermajority requirement for spending.

24. Raising taxes is distinct from spending money. South Dakota voters may support a taxation supermajority requirement, but may not support a spending supermajority requirement, and vice versa.

25. Mr. Owen has an extensive background in policies that impact business development. He may support a supermajority requirement for tax increases, but is unlikely to support a supermajority requirement for spending initiatives because such a rule could hamper or eliminate important development opportunities.

26. Mr. Holbeck believes in the importance of education. While he may support a supermajority requirement for tax increases, he is reluctant to vote in favor of a supermajority requirement for spending because it could jeopardize education-related initiatives and reforms. He is also concerned that the language of the spending supermajority requirement in Amendment C could lead to confusion about whether education-related initiatives trigger the spending supermajority requirement.

27. For voters like Mr. Owen and Mr. Holbeck, who may support the taxation supermajority requirement and oppose the spending supermajority requirement, they are put in the difficult position of having to decide which subject is more important to them—their opposition to the spending supermajority requirement or their support of the taxation supermajority requirement. So too are those voters who may support the

spending supermajority requirement but oppose the taxation supermajority requirement. These are precisely the scenarios that the Constitution's single-subject rule is designed to prevent.

28. Nonetheless, Amendment C forces voters, including but not limited to Mr. Owen and Mr. Holbeck, to vote on the taxation supermajority requirement and the spending supermajority requirement as a package. Voters may not vote separately for just one or the other.

29. The two different supermajority requirements in Amendment C are not necessary to each other. Many measures or amendments may impose a tax or fee, but not appropriate more than \$10 million. Similarly, various measures or amendments may cause an appropriation over \$10 million without imposing a tax or fee.

30. Other evidence confirms that the taxation supermajority requirement is a separate and distinct subject from the spending supermajority requirement.

- a. Legislators supporting HJR 5003 compared that resolution to the existing supermajority requirements for legislative tax increases and spending. Those two different subjects are found in two different sections of the Constitution. Article XI, section 14 of the Constitution imposes a two-thirds supermajority requirement on the legislature to impose a new tax (although it clearly states that no supermajority is required if the people vote to increase taxes via an initiative). By contrast, Article XII, section 2 of the Constitution authorizes the passage of the general appropriation bill by



a simple majority, but requires that other appropriations be made in separate bills, embracing a single subject, with a two-thirds majority.

- b. Sponsor testimony in support of HJR 5003 criticized the recent Amendment A for containing multiple subjects. Among the multiple subjects identified were “spending” and “taxation.”<sup>3</sup> Of course, if spending and taxation were distinct subjects for purposes of Amendment A, they must also be distinct subjects for purposes of Amendment C.
- c. The Attorney General’s explanation of Amendment C itself treats these two subjects as distinct, providing separate explanations for the taxation supermajority and spending supermajority requirements.

31. The Supreme Court held that Amendment A contained multiple subjects because a voter who wanted to vote to legalize hemp had no choice but to also vote to legalize recreational marijuana. Similarly, a voter who wanted to legalize medical marijuana had no choice but to also legalize recreational marijuana. *Thom*, 2021 S.D. 65 ¶ 59.

32. If Amendment C is placed before the voters, a voter who wants to establish a taxation supermajority requirement for initiated measures and amendments must also vote for the spending supermajority requirement. Conversely, a voter who supports the spending supermajority requirement must also support the taxation supermajority requirement.

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<sup>3</sup> See <https://sdpb.sd.gov/SDPBPodcast/2021/sst29.mp3#t=2099> from 44:15 to 45:40.

33. Amendment C combines the two distinct supermajority requirements in an effort to aggregate votes, thereby increasing the chance that the two supermajority requirements pass, not based on their own individual merits, but because the two measures are presented as a package. Such vote aggregation violates the single subject and single vote requirements in South Dakota's Constitution. *Id.* ¶ 60.

34. Amendment C's logrolling is particularly "pernicious" in this instance. Under the guise of trying to keep taxes low, Amendment C is designed to undermine the already-begun voter initiative process for the November 2022 election.

35. The Legislature suspended its rules to place Amendment C on the June 7, 2022 primary ballot rather than the November 2022 general election. As a result, the taxation and spending supermajority provisions, if adopted, would be in effect for the November 2022 election and ostensibly would apply to measures on the November 2022 ballot.

36. The Legislature's logrolling in Amendment C is further exacerbated by the vague terms and mechanics of the spending supermajority requirement. For example, who determines whether the \$10 million threshold is reached by a particular measure? When is that determination made? How is it made? Does only newly appropriated money count toward the threshold?

37. Amendment C supplies none of the answers to these questions. Yet voters who may want a supermajority for tax increases must also blindly vote for the vague and confusing spending supermajority requirement, thereby enshrining this problematic and confusing language in our state's fundamental legal document.

38. Moreover, because the two different supermajority requirements are tied together in the same proposed amendment, it will be impossible to determine the intent of the voters with respect to either of the two different supermajority requirements.

#### COUNT I DECLARATORY JUDGMENT

39. Plaintiffs reallege all prior paragraphs of this Complaint.

40. Amendment C violates Article XXIII, § 1 of the South Dakota Constitution because it includes at least two different subjects: the taxation supermajority requirement and the spending supermajority requirement.

41. Amendment C violates Article XXIII, § 1 of the South Dakota Constitution because it does not permit the voters to vote separately on the taxation supermajority requirement and the spending supermajority requirement.

42. Because Amendment C violates Article XXIII, § 1, it may not be submitted to the voters or included in the Constitution.

43. Pursuant to SDCL chapter 21-24, this Court should declare that Amendment C is unconstitutional.

#### COUNT II INJUNCTIVE RELIEF

44. Plaintiffs reallege all prior paragraphs of this Complaint.

45. Amendment C violates Article XXIII, § 1 of the South Dakota Constitution because it includes at least two different subjects: the taxation supermajority requirement and the spending supermajority requirement.

46. Amendment C violates Article XXIII, § 1 of the South Dakota Constitution because it does not permit the voters to vote separately on the taxation supermajority requirement and the spending supermajority requirement.

47. Because Amendment C violates Article XXIII, § 1, it may not be submitted to the voters or included in the Constitution.

48. Pursuant to SDCL chapter 21-8, this Court should permanently enjoin Defendant Barnett from placing Amendment C on the June 2022 primary ballot, and should permanently enjoin him from placing Amendment C into the South Dakota Constitution.

49. Pursuant to SDCL chapter 21-8, this Court should permanently enjoin Defendant Kyte from submitting Amendment C to the voters in Minnehaha County on the June 2022 primary ballot.

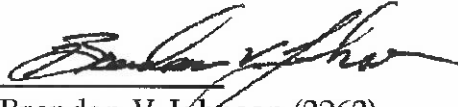
WHEREFORE, Plaintiffs respectfully pray for judgment against Defendants as follows:

- (1) Declaring that Amendment C is unconstitutional in that it consists of more than a single subject in violation of Article XXIII, § 1 of the South Dakota Constitution and is void and of no effect;
- (2) Declaring that Amendment C is unconstitutional in that it does not allow voters to vote on each subject separately in violation of Article XXIII, § 1 of the South Dakota Constitution and is void and of no effect;

- (2) Entering a permanent injunction prohibiting Defendants from submitting Amendment C to the voters and prohibiting Defendant Barnett from including Amendment C as part of the South Dakota Constitution; and
- (3) Awarding such other and further relief as the Court deems just and equitable.

ROBINS KAPLAN LLP

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