IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, THE DKT LIBERTY PROJECT, DUE PROCESS INSTITUTE, AND REASON FOUNDATION

Notice of Appeal filed on February 17, 2021

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

The Honorable Christina Klinger
Circuit Court Judge

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STATEMENT OF THE CASE

Before this Court is the issue of the state constitutionality of Amendment A, passed by South Dakota voters in November 2021.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review* and files *amicus* briefs.

The DKT Liberty Project is a non-profit organization based in Washington, D.C. Its mission is to protect and defend the civil liberties of citizens against overreaching by the government. Like Justice Brandeis, the Liberty Project believes that violations of civil liberties in the cause of law enforcement are especially worrying: "Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The **Due Process Institute** is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system.

And **Reason Foundation** is a nonpartisan and nonprofit public policy think tank,

founded in 1978 to advance a free society by developing, applying, and promoting libertarian principles, including individual liberty, free markets, and the rule of law.

Each *amicus curiae* has participated in cases presenting significant legal and constitutional issues involving government overreaching, including many of the leading cases concerning the advancement of individual liberties before the United States Supreme Court.

In enacting Amendment A, the voters of South Dakota broke with the federal orthodoxy of marijuana prohibition and followed many of its sister states by legalizing adult use of marijuana (also called "cannabis") and requiring the state to establish a comprehensive regulatory system for its manufacture, distribution, sale and taxation. This case arises from the efforts of state officials who, having vehemently disagreed with the substance of Amendment A but having failed to persuade the state's electorate to adopt their views, now seek to set aside the will of the voters and to overturn the constitutional provisions endorsed and enacted by South Dakotans. This case implicates matters of central concern to *amici*, not least the interests of all citizens to advance laws that indisputably increase their individual liberties and freedoms even when doing so diverges from the policies, preferences and practices of the federal government.

ARGUMENT

I. Over the Past Half-Century, Most States Rejected Federal Marijuana Policy in Favor of Their Own Approach.

In 1937, the U.S. Congress passed the Marihuana Tax Act, which effectively outlawed marijuana under federal law by imposing a prohibitive tax. Later, the 1952 Boggs Act and the 1956 Narcotics Control Act established mandatory sentences for drug-

related violations; a first-time offense for marijuana possession carried a minimum sentence of 2–10 years in prison and a fine of up to $20,000.00.[1] Although those penalties were largely repealed by the early 1970s, the Anti-Drug Abuse Act of 1986 reinstated stiff federal penalties for various marijuana offenses.

The possession, use, and distribution of marijuana is controlled at the federal level through the Controlled Substances Act ("CSA"), which classifies drugs into one of five "schedules" (i.e., categories) depending upon their medicinal value, potential for abuse, and psychological and physical effects on the body. *See* 21 U.S.C. §§ 811-812. Congress placed marijuana into Schedule I, which is the most severely restricted category. *Id.* at § 812(b)(1). To be listed on Schedule I, a drug must have "no currently accepted medical use and a high potential for abuse" as well as a risk of creating "severe psychological and/or physical dependence." 21 U.S.C. § 812(b)(1). Among those drugs listed on Schedule II, which are less restricted than marijuana, are cocaine, codeine, OxyContin and methamphetamine. 21 C.F.R. §§ 1308.11-12. The federal government bans the manufacture, distribution and possession of Schedule I drugs, including marijuana. *See* 21 U.S.C. §§ 829, 841, 844. Scholars have long observed that in enacting the CSA, Congress dramatically expanded federal powers, particularly those arising under Article I, Section 8 of the U.S. Constitution, and that various provisions of the CSA exceed the common-sense bounds of the Commerce Clause.[2]

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[1] Office on Drugs and Crime, "Traffic in Narcotics, Barbiturates and Amphetamines in the United States," United Nations, January 1, 1956, https://bit.ly/3rm8Ae1.

[2] *See., e.g*., Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 Cath. U. L. Rev. 586, 593 (1973); Ilya Shapiro, *This is Your Constitution on Drugs*, National Affairs (Summer 2020) https://bit.ly/3ef2XdY.

Nevertheless, federal statutes tell only a small part of the story. Beginning about 50 years ago, individual states began to depart from the federal approach on marijuana. Between 1973 and 1978, 11 states decriminalized the possession or use of small amounts of marijuana. By the mid-1990s, in the face of mounting scientific evidence pointing to marijuana's medicinal benefits—including its efficacy in treating glaucoma, reducing pain, nausea, and seizures, and alleviating debilitating symptoms associated with various other medical conditions—many states began to legalize marijuana for medicinal purposes.[3] Since 1996, 33 states and the District of Columbia have authorized marijuana for medical use.[4]

South Dakota is a recent participant in this nationwide, state-by-state rethinking of and dissension from federal marijuana law and policy, both with respect to medical and adult use. And for sound reasons. Between 2009 to 2018, 31,883 people were arrested for marijuana in South Dakota, 95 percent of them for possession offenses.[5] In 2018, roughly one out of every ten arrests in South Dakota were for marijuana. What is more, the vast majority of marijuana arrests involved less than seven grams of the drug, and over 40

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[3] *See, e.g.*, Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, Open Neurology J. 6 (2012): 18–25; Janet E. Joy, Stanley J. Watson, and John A. Benson Jr., eds., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Washington: National Academies Press, 1999). *See generally*, *State Medical Marijuana Laws*, Nat'l Conf. of State Leg., November 10, 2020, https://www.ncsl.org/ research/health/state-medical-marijuana-laws.aspx.

[4] A comprehensive listing and description of the state-level marijuana law reforms discussed herein can be found at the State Policy section of The Marijuana Policy Project ("MPP") website, https://www.mpp.org/states/.

[5] The statistics in this paragraph can be found in Jon B. Gettman, *Marijuana Arrests in South Dakota* (2018) (compiling data from U.S. Department of Justice's Uniform Crime Reporting (UCR) Program), available at https://bit.ly/3eh1sf8.

percent of all such arrests involved just one gram or less. Nor was marijuana possession by persons in South Dakota indicative of other criminal activity: 98.2 percent of marijuana violations in South Dakota from 2007 to 2016 were standalone offenses, meaning the individual was not charged with any other crime, and in 99.1 percent of marijuana arrests, no weapons were seized by police.

These and other metrics reveal the level to which state law enforcement resources were devoted to addressing a single type of low-level non-violent drug offense involving a plant-based controlled substance with no known potential for fatal overdose but proven therapeutic benefits across a broad panoply of illnesses and medical conditions.

To exacerbate matters, the state's enforcement of marijuana laws, and a constellation of negative consequences that afflict persons arrested for drug offenses, fell most heavily on South Dakota's youth. Persons under the age of 25 accounted for roughly 63 percent of all marijuana arrests. Further, the fiscal burdens on state taxpayers of the state's law enforcement practices were substantial. Based on the percentage of arrests made for marijuana compared to the overall law enforcement costs for South Dakota, each marijuana arrest cost the state of South Dakota an estimated $4,000.00.[6]

Like the majority of U.S. citizens, South Dakotans determined that they, their families, their communities and their pocketbooks would be better served by cannabis (i.e., marijuana) policies that departed from the federal government's commitment to marijuana prohibition. As of this writing, 15 states have legalized marijuana for adult use.[7] Nearly every state that has legalized marijuana for adult use has done so through a

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[6] Gettman, *supra.*

[7] *See* MPP website, *supra*., https://www.mpp.org/states/.

citizen-led ballot initiative.

No state that has eliminated criminal and civil penalties for either the medicinal or general adult use of marijuana has reverted to re-criminalizing marijuana, even in part.

II. By Legalizing Marijuana Through the Citizen's Ballot, South Dakota Has Embraced Federalism and Joined the Long and Growing Procession of States Choosing to Refashion Marijuana Policies Tailored to and Reflective of State Circumstances.

As Justice Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

To be sure, the people of South Dakota are courageous. In 1898, South Dakota became the first state in the Union to provide for popular initiative and referenda for enacting and rejecting legislation. Ninety years later, South Dakota, through constitutional amendment, removed its legislature altogether from the initiative process.[8]

But when it comes to experimenting with marijuana law reform, the residents of South Dakota are neither singular nor unconventional. Or even risk-takers. Indeed, this particular terrain is well-trod, and the state of South Dakota follows a path paved by other states that have diverged from the federal CSA, bucked federally ordained policy, and reversed marijuana prohibition, often in sweeping and profound ways.

Beginning in 1996 with California's legalization of cannabis for medical use,

[8] *See* South Dakota Secretary of State Website, https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/general-ballot-question-information.aspx.

states across the country have advanced marijuana reforms nearly every year since. To date, 33 states and Washington, D.C., have legalized marijuana for medical use; 24 states along with Washington, D.C., have decriminalized marijuana possession;[9] and, at the time of writing, Virginia is on the cusp of becoming the 16th state to legalize adult use.[10] Moreover, the governors of no fewer than 11 states began 2021 by publicly advocating for some type of marijuana law reform.[11] All told, only one state (Idaho) lacks any kind of law easing criminal sanctions in recognition of marijuana's therapeutic value or the problems associated with penalizing adult use.[12]

Thirteen of the 15 states — 87 percent — that have changed their state laws to legalize the adult use of cannabis did so, like South Dakota, through a ballot initiative. And, like South Dakota, many states have enacted marijuana law reform by amending their state constitutions rather than rely exclusively on statutory code. Over the past two decades, six states have turned to their constitutions to establish the right to use medical marijuana within their borders,[13] and two states, aside from South Dakota, have chosen to

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[9] *See* MPP website, *supra*., https://www.mpp.org/states/.

[10] Ana Ley, *Marijuana will be Legal in Virginia after Historic Vote, with Dispensaries Opening in 2024*, The Virginia Pilot, https://bit.ly/3rldAQ9.

[11] *See* Kyle Jaeger, *Governors Across the U.S. Push for Marijuana Reform in 2021 Speeches and Budget Plans*, Marijuana Moment, https://www.marijuanamoment.net/governors-across-u-s-push-for-marijuana-reform-in-2021-speeches-and-budget-plans/.

[12] *See State Policy, Idaho*, Marijuana Policy Project, https://www.mpp.org/states/idaho/.

[13] *See* Arkansas's Issue 6, a ballot initiative approved by 53 percent of state voters in 2016; Colorado's Amendment 20, an initiative passed with 54 percent of the vote in 2000; Florida's Amendment 2, approved by 71 percent of the electorate in 2016; Missouri's Amendment 2, enacted with 66 percent of the popular vote in 2018; Nevada's

embed in their constitutions the authority and bulwark for legalizing, regulating and taxing the adult use of marijuana.[14]

In short, South Dakota's Amendment A, while perhaps "experimental" in terms of its drug laws, from a national perspective is in no way "novel," in either subject matter or form. In seeing fit to secure marijuana law reform in the state's constitution, the voters of South Dakota embraced solid and long-standing precedent.

These experiments have met with considerable success. No state that has enacted marijuana law reforms has reversed course. Quite the opposite. Of the states that have legalized medical marijuana, many have enhanced the breadth and offerings of their systems. It has become commonplace for states to enact an initial law that establishes the boundaries of a medical and/or adult use scheme, and then for state agencies through regulatory rule making, state legislatures through hearings and follow-up legislation, or state executives through executive orders, to flesh out and build upon those laws in order to further promote public health and safety consistent with the will of the voters.[15]

Some may regard this state-led experiment with cannabis reform to be a "happy incident" of our federalist system. *New State Ice Co.*, 285 U.S. at 211 (Brandeis, J., dissenting). But it is no accident that the innovations in which South Dakota now partake got off the ground and have continued apace: the opportunity for states to serve as

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Question 9, first endorsed by 65 percent of voters in 1998; and Initiative 65 which Mississippians passed in 2020.

[14] *See* Colorado Amendment 64 (2012); New Jersey Question 1 (2020).

[15] *See* Robert A. Mikos, *On the Limits of Supremacy: Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421 (2009) (describing methods states have used to legalize that which the federal government forbids.)

laboratories of marijuana policy experimentation is baked into our federal structure. *See Gonzalez v. Raich*, 545 U.S. 1, 42 (O'Connor, J., dissenting) (observing that a state's legalization of marijuana for medicinal purposes "*exemplifie*s the role of States as laboratories") (emphasis supplied). As the Tenth Amendment to the U.S. Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X; *see also* The Federalist No. 45, 292–93 (C. Rossiter ed. 1961) ("The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.")

It is within this constitutionally created space that the "revolution in marijuana law" has taken place, which has resulted in a "dramatic transformation" of how marijuana is possessed, manufactured and distributed within states. It is a revolution, moreover, that has occurred notwithstanding "the shadow of a strict federal ban on the drug."[16]

Our federalist structure, of which the Tenth Amendment is part, places restrictions on what the federal government can require of the states. For example, it is beyond dispute, and Supreme Court precedent makes clear, that federal law makers cannot "commandeer" states to jettison state-level reforms that fail to hew to federal prohibitionist practices. *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress

[16] Robert Mikos, *The Evolving Federal Response to State Marijuana*, 26 Widener L. Rev. 1, 2–3 (2020).

may not simply . . . commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (stating it is "fundamentally incompatible with our constitutional system of dual sovereignty" for the federal government to commandeer state or local government officials to "administer or enforce a federal regulatory program").[17]

The anticommandeering principle was recently reinforced by the U.S. Supreme Court in *Murphy v. Nat'l Collegiate Athl. Ass'n*, 138 S. Ct. 1461 (2018), the facts and holding of which are instructive. In 2011, 64 percent of New Jersey voters chose to amend the state constitution to allow sports gambling. The legislature then drafted and received voter approval of a sports-wagering constitutional amendment and repealed state laws banning sports gambling. Federal law, however, stood in the way. The 1992 Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq*., prohibited state-sanctioned sports gambling. *Murphy*, 138 S. Ct. at 1471. When sports leagues sued to enjoin New Jersey's legal scheme, the Supreme Court sided with the New Jersey electorate, holding that PASPA violates the anticommandeering rule because it "unequivocally dictates what a state . . . may and may not do." *Id*. at 1478. To the extent it is claimed that the CSA prevents South Dakotans from amending their state constitution to legalize that which federal statute prohibits, *Murphy*, addressing an analogous argument under PASPA, puts such a claim to rest, observing, "[j]ust as Congress lacks the power to order a state . . . not to enact a law authorizing sports

[17] *See also* Mikos, *On the Limits of Supremacy*, *supra*, at 1446.

gambling, it may not order a state . . . to refrain from enacting a law licensing sports gambling." *Id.* at 1483.

Relatedly, and consistent with the federalist anti-commandeering principle, state officials cannot be federally conscripted to enforce the federal CSA, which, by its own "vague and unspecific" terms, *Raich*, 545 U.S. at 55 (O'Connor, J., dissenting), does not compel state authorities to effectuate its provisions or embrace its principles.

To be sure, the federal government retains the authority and power to enforce federal laws against individuals who violate federal law even while acting in compliance with contrary state law.[18] And there is no question that the federal government remains free to publicly and vehemently criticize state policies that depart from federal orthodoxy. But it is surely out of respect for our federalism, as embodied by the Tenth Amendment, that federal authorities across political administrations have chosen not to argue that the many state experiments in marijuana law reform are preempted or supplanted by federal law. Thus, while using on occasion their bully pulpit to decry states' decisions to roll back marijuana prohibitions, federal officials consistently have allowed, if only through non-intervention, the wide diversity of reforms to proceed.[19]

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[18] *Raich*, 545 U.S. at 12 (affirming the authority of federal officials to enforce the CSA); *see* Mikos, *On the Limits of Supremacy*, *supra*, at 5 (describing the "hostile" "first phase" federal response to early state reforms.)

[19] *See, e.g.*, *Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys* (Aug. 29, 2013) (setting forth federal enforcement restraints regarding state legalization laws); *Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys* (Oct. 19, 2009) (same); Confirmation Hearing on The Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Sen. Hrg. 116-65 (Jan. 15-16, 2019) (promising continued federal restraint) https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm.

Irrespective of the personal views, preferences or "wisdom" of elected officials, when the people of a state, out of "concer[n] for the[ir] lives and liberties," "experiment with medical marijuana" laws, "federalism principles . . . require that room for experiment be protected." *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting). The past quarter-century of steady marijuana law reform undertaken by virtually every state in the Union, often over and against the vocal disapproval of elected and appointed federal officials, underscores the depth and vibrancy of these bedrock principles upon which our nation was founded.

In sum, South Dakota is not now under, and has not previously shouldered, any constitutional obligation to divert its own resources to assist Congress in achieving federal objectives — "[n]o matter how powerful the federal interest involved," *New York,* 505 U.S. at 178. Amendment A rests squarely within a rich tradition of states pursuing important state interests, and eschewing long-standing federal interests, even with respect to the regulation and control of federally prohibited marijuana.

III. South Dakota's Voters Recognized That South Dakota Would Reap Myriad Benefits by Rewriting the State's Marijuana Laws.

Opponents of Amendment A, like their counterparts in other states that have engaged in marijuana reform, have trotted out a parade of horribles in support of maintaining punitive policies. These dire predictions have run the gamut, from an

imminent marijuana-related "drug use epidemic,"[20] to rampant marijuana-fueled crimes,[21] to an onslaught of marijuana-induced injuries and deaths.[22]

But these gloomy forecasts have not come to pass. Since the first state authorized the medical use of marijuana in 1996, through the openings of the first providers for medical use in 2007, the advent of retail outlets for adult cannabis use in 2014, and then the proliferation of such outlets in Oregon, Alaska, Nevada, Massachusetts, California, Michigan and Maine between 2015 and 2020, researchers have mined health and criminal law data to assess the impacts of cannabis policy reform on the physical and fiscal well-being of persons living in reform jurisdictions.[23] By November 2020, when South

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[20] *See* David. W. Murray and John P. Walters, *The Devastation That's Really Happening in Colorado*, Weekly Standard, July 10, 2014.

[21] *See* James Conklin, *et al*., *Contact High: The External Effects of Retail Marijuana Establishments on House Prices*, Cato Institute Research Briefs No. 122 (July 18, 2018) (noting "a primary concern of [marijuana legalization] opponents is that legalizing marijuana will increase crime in local communities.")

[22] *See* Kevin A. Sabet, *SABET: Colorado Will Show Why Legalizing Marijuana is a Mistake*, Washington Times, January 17, 2014; D. Mark Anderson, *et al*., *High on Life? Medical Marijuana Laws and Suicide*, Cato Institute Research Briefs No. 17 (Jan. 2015) (noting opponents of marijuana legalization "argue that marijuana use increases the likelihood of depression, anxiety psychosis, and schizophrenia" [citations omitted]).

[23] *See, e.g.*, Angela Dills, *et al*., *The Effect of State Marijuana Legalizations: 2021 Update*, Cato Institute Policy Analysis No. 908 (February 2, 2021) (noting "[r]eviews of the literature on the first wave of marijuana decriminalizations in the 1970's" show that "marijuana use did not change in response to relaxed restrictions" [citation omitted]); Benjamin Hansen, *et al*., *Early Evidence on Recreational Legalization and Traffic Fatalities*, Cato Institute Research Briefs No. 125 (Aug. 8, 2018) (finding that "since legalizing marijuana, Colorado and Washington have not experienced significantly different rates of marijuana- or alcohol-related traffic fatalities"); D. Mark Anderson, *et al*., *supra*. (concluding that the legalization of medical marijuana "leads to few suicides among young adult males"); David J. Bier, *How Legalizing Marijuana is Securing the Border*, Cato Institute Policy Analysis No. 860 (Dec. 19, 2018) (finding "[s]tate-level marijuana legalization . . . has decreased the amount of drug smuggling into the United States across the southwest border.")

Dakota's voters were given the opportunity to consider Amendment A, there simply was no evidence to bolster claims that marijuana legalization caused more problems than it solved or created greater harms than it alleviated.[24]

To the contrary, a solid and growing body of research indicated that South Dakotans would reap tangible benefits by repudiating the state's punitive marijuana laws. At the very least, residents could put an end to expansive, costly and highly intrusive police practices directed at marijuana users and redirect limited and valuable law enforcement resources towards addressing serious crimes that cause real harm to others. Moreover, South Dakota voters did not have to look far for encouragement to replace marijuana prohibition with nuanced marijuana regulation.

In fact, all signs indicated that if South Dakota regulated and taxed the adult use of marijuana, it would swell state coffers with new revenues from marijuana sales to the tune of tens of millions of dollars each year. As South Dakotans were well-aware, the states of Colorado, Washington, Oregon, and California each impose excise taxes on adult-use marijuana within their borders, as well as standard state sales taxes, various local taxes and licensing fees. Colorado collects almost $20 million *per month* from

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[24] *See, e.g.*, John Hickenlooper & Cynthia Coffman, *Letter to Hon. Jefferson B. Sessions re: Marijuana Legalization in Colorado* (Aug. 24, 2017) (summarizing the evidence of Colorado's ability to enforce violations of state and federal marijuana law; describing "multiple data sources" indicating that "youth marijuana use" has shown "no increase . . . following legalization;" highlighting published evidence that youth marijuana use has in fact decreased; reporting a "21 percent" drop in impaired driving in the first six months of 2017 compared to the same period one year earlier; and noting a steady decrease in marijuana-related emergency department visits due to effective consumer education campaigns and the state's tighter regulation of edibles), https://bit.ly/2MTorli; Conklin, et al., *supra*, (finding that retail marijuana sales have "a large positive effect on neighboring property values.")

regulating the non-medical adult-use of marijuana.[25] In Washington, taxation of adult-use marijuana generated approximately $70 million during the state's first year of sales—double the original revenue forecast.[26] For its part, Oregon, which began taxing adult-use marijuana in January 2016, reports revenues of $10 million per month, well above the initial estimate of $2 million to $3 million for the entire calendar year.[27] California collects more than one-half billion dollars in annual marijuana tax revenues.[28] Using Colorado as a reference, and after adjusting for the difference in population, it is reasonable for South Dakota's voters to expect that their state could consistently reap nearly $40 million in tax revenues each year after the successful implementation of Amendment A.

And there is further benefit that South Dakotans could reasonably expect to receive after the passage of Amendment A: that of increased societal consensus on a formerly divisive issue. In virtually every jurisdiction that has reformed its marijuana laws, those reforms have resulted in wider and deeper public acceptance of marijuana regulation and taxation, leading persons who once opposed or seriously questioned such change to rethink their positions and find common ground with reformers.[29] Put simply,

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[25] "Marijuana Tax Reports," Colorado Department of Revenue, https://bit.ly/3sTfKXA.

[26] *Recreational and Medical Marijuana Taxes*, Wash. State Dep't. of Revenue, https://bit.ly/3uXMUqO; and *Seeing Green: Washington Rakes in Revenue from Marijuana Taxes*, RT (July 13, 2015).

[27] *Marijuana Tax Program Update*, Jt. Int. Cmte. on Marijuana Legalization, OR Dep't. of Revenue (May 23, 2016).

[28] *Cannabis Tax Revenues*, Cal. Dep't. of Tax and Fee Admin., https://www.cdtfa.ca.gov/dataportal/charts.htm?url=CannabisTaxRevenues.

[29] *See, e.g.*, Ashley Killough, *Fiery Senate Speech on Pot Spotlights GOP Sen. Cory*

legalization has shifted public opinion because plain evidence makes clear that the legal reforms, while perhaps not perfect, have resulted in improvements in the administration of justice, access to important medicine, the protection of personal liberties and respect for individual autonomy.

When South Dakotans went to the polls in November 2020, they had been exposed to the fiscal, policy and human costs of South Dakota's marijuana enforcement practices; indeed, many had felt the impact of those practices first-hand, or through the experiences of family, friends, neighbors and co-workers. Moreover, they had watched, over a series of years, the experiences of the many states, small and large, red, blue and purple, that have legalized marijuana and established robust and profitable regulatory systems for cultivating, packaging, selling, and taxing it. Against this backdrop, the voters of South Dakota voiced their strong support for Amendment A and, as is their legal right, chose to amend their state's constitution to fully effectuate their will.

CONCLUSION

For the reasons stated above, this Court should reject the challenge to Amendment A and honor the will of South Dakota's voters.

Gardner, CNN (Jan. 5, 2018) (noting Republican Senator Gardner of Colorado opposed legalizing marijuana in 2012 but now staunchly supports Colorado's law), https://cnn.it/30nsSaV; Patricia Calhoun, *John Hickenlooper, Three More Governors with Legal Pot Send Letter to Jeff Sessions*, Westword, (Apr. 3, 2017) (reporting the governors informed the U.S. Attorney General of their "apprehensions before our states adopted current laws," but voicing full support for those laws), https://bit.ly/3kW4y9J. *See generally* Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, Gallup (Nov. 9, 2020) (documenting the "stee[p]" rise since 2000 in public support for marijuana legalization across almost every demographic), https://bit.ly/3bknwnh. *See also* Mikos, *On the Limits of Supremacy*, *supra*, at 1477 (describing how state changes in marijuana laws not only reflect popular public opinion but further shift societal norms.)

Dated: March 9, 2021 By /s/ Patrick J. Lee-O'Halloran

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