IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29546

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 and Appellees,

vs.

STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE,

and

SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE,

Defendants and Appellants.

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

THE HONORABLE CHRISTINA KLINGER,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE COLONEL RICK MILLER

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PRELIMINARY STATEMENT

Throughout this brief, Colonel Rick Miller is referred to as "Colonel Miller." Sheriff Kevin Thom is referred to as "Sheriff Thom." Sheriff Thom and Colonel Miller are collectively referred to as "Thom and Miller." Appellants South Dakota for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are referred to as "Proponents." Defendant Steve Barnett, in his official capacity as the South Dakota Secretary of State, is referred to as "Secretary of State." The State of South Dakota is referred to as "State." Constitutional Amendment A will be referred to as "Amendment A."

Citations to the settled record appear as "SR." Citations to the Appendix appear as "Appx." Citations to the Proponents' Appendix appear as "Pr.App." Exhibits to documents within the record will be referred to as "Ex." followed by the exhibit number. References to the Proponents' Brief appear as "Proponents' Brief." References to the Circuit Court's Memorandum Decision on page 515 of the settled record appear as "Memorandum Decision."

JURISDICTIONAL STATEMENT

Colonel Miller agrees with the Jurisdictional Statement set forth in the Proponents' Brief. (Proponents' Brief, 1).

STATEMENT OF ISSUES

I. Whether the circuit court correctly concluded that Sheriff Thom had standing to bring this declaratory judgment action in his official capacity as the Pennington County Sheriff.

The circuit court concluded that Sheriff Thom had standing in his official capacity as Pennington County Sheriff.

II. Whether the circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action in his official capacity as Superintendent of the South Dakota Highway Patrol.

The circuit court concluded Colonel Miller had standing in his official capacity as Superintendent of the South Dakota Highway Patrol.

Relevant Cases:
Olson v. Guindon, 2009 S.D. 63, 771 N.W.2d 318;
Dan Nelson, Auto., Inc. v. Viken, 2005 S.D. 109, 706 N.W.2d 239;
McConkey v. Van Hollen, 783 N.W.2d 855 (Wis. 2010).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. IV, § 3;
S.D. Const. art. XXIII, §§ 1-2;
SDCL 15-6-17(a).

III. Whether the circuit court correctly concluded that Sheriff Thom and Colonel Miller appropriately commenced this declaratory judgment action after the election.

The circuit court concluded that the declaratory judgment action could be commenced after the election.

Relevant Cases:
S.D. State Fed'n of Labor AFL-CIO v. Jackley, 2010 S.D. 62, 786 N.W.2d 372;
Danforth v. Egan, 119 N.W. 1021, 1022 (S.D. 1909);
Stander v. Kelley, 250 A.2d 474, 477 (Pa. 1969);
Mont. Ass'n of Counties v. State ex rel. Fox, 404 P.3d 733 (Mont. 2017).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, §§ 1-2

IV. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it violated the one-subject rule in Article XXIII, § 1 of the South Dakota Constitution.

The circuit court concluded that Amendment A encompassed multiple subjects and was therefore void and of no effect.

Relevant Cases:

State ex rel. Adams v. Herried, 72 N.W. 93, 96 (S.D. 1897);

Mont. Ass'n of Counties v. State ex rel. Fox, 404 P.3d 733 (Mont. 2017);
State ex. rel. Wagner v. Evnen, 948 N.W.2d 244 (Neb. 2020);
In re Initiative Petition No. 314, 625 P.2d 595 (Okla. 1980).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 1;
S.D. Const. art. III, § 21.

V. Whether the circuit court correctly concluded that Amendment A was an unconstitutional amendment because it was a revision cloaked as an amendment and therefore could not be an initiated amendment under Article XXIII of the South Dakota Constitution.

The circuit court concluded that Amendment A was a revision with far-reaching effects on the basic nature of South Dakota's governmental system required to be submitted through a constitutional convention and was therefore void and of no effect.

Relevant Cases:
State v. Wilson, 2000 S.D. 133, 618 N.W.2d 513;
McFadden v. Jordan, 196 P.2d 787 (Cal. 1948);
Bess v. Ulmer, 985 P.2d 979, 983 (Alaska 1999).

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 2.

VI. Whether the circuit court correctly concluded it could not sever Amendment A and decide which portions to retain.

The circuit court concluded it could not assume which of Amendment A's multiple subjects the voters approved and therefore ruled severability was not appropriate.

Relevant Cases:
Marshall v. State ex rel. Cooney, 975 P.2d 325, 332 (Mont. 1999)

Relevant Statutes and Constitutional Provisions:
S.D. Const. art. XXIII, § 1

STATEMENT OF THE CASE

Colonel Miller and Sheriff Thom commenced this declaratory judgment action by serving the Summons and Complaint on the Secretary of State and the South Dakota Attorney General. (SR 1-38). Colonel Miller and Sheriff Thom alleged in the Complaint that Amendment A was unconstitutionally submitted to the South Dakota electorate because it embraced more than one subject in violation of Article XXIII, § 1 of the South Dakota Constitution, and because it was a revision under Article XXIII, § 2 that could not be submitted as an initiated amendment. (SR 7-13). This declaratory judgment action was filed contemporaneously with a separate election contest seeking similar relief in the same court, which is the subject of Appeal No. 29547.

Proponents filed an uncontested motion to intervene, which the circuit court granted. (SR 39-41). The Secretary of State and Proponents filed separate answers to the Complaint denying the allegations. (SR 54, 63). Colonel Miller and Sheriff Thom thereafter filed a motion for summary judgment. (SR 143). The Secretary of State and Proponents filed separate motions for judgment on the pleadings. In support of their motion, Proponents presented arguments not raised by the Secretary of State, including that Colonel Miller and Sheriff Thom lacked standing, and that the declaratory judgment action should have been brought before the election. (SR 110-127). The Secretary of State took no position on standing and disagreed with Proponents' arguments regarding the timeliness of this action. (SR 288-292). A hearing was held on all pending motions before the Honorable Christina Klinger on January 27, 2021.

On February 8, 2021, the circuit court issued a Memorandum Decision and Order granting Colonel Miller's and Sheriff Thom's motion for summary judgment in its entirety. (SR 515-527). The circuit court rejected Proponents' procedural arguments and concluded that Amendment A was void because it embraced more than one subject and was a revision cloaked as an amendment. (*Id.*). Judgment was entered on February 10, 2021, and Notice of Entry was filed and served on February 11, 2021. (SR 535-538).

Proponents filed a Notice of Appeal on February 17, 2021. The Secretary of State did not appeal. Pursuant to the Stipulation and Joint Motion of the parties, this Court ordered expedited briefing and consolidated this appeal with Appeal No. 29546 for purposes of briefing and submission to the Court for decision.

STATEMENT OF THE FACTS

On September 11, 2019, counsel for Proponents, Brendan Johnson, filed a form for an "Initiated Constitutional Amendment Petition" ("Petition") with the South Dakota Secretary of State. (SR 4, 15-18; Pr.App.2). The Petition sought approval to circulate a Petition proposing a change to the South Dakota Constitution entitled, "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." (*Id.*). Mr. Johnson later submitted signed petitions to the Secretary of State for validation. (SR 5). On January 6, 2020, the Secretary of State announced that the Petition received 36,707 valid signatures, which allowed the Petition to be validated and submitted to South Dakota voters for approval. (SR 5; SR 176).

The Petition was entitled "Constitutional Amendment A" ("Amendment A") and was certified by the Secretary of State to be placed on the 2020 General Election ballot. (SR 5; SR 176; Pr.App.88). A "Yes" vote was a vote to adopt the amendment in its entirety. (SR 174). A "No" vote was to reject the amendment in its entirety and leave the Constitution as it was. (*Id.*). Amendment A ultimately received 225,260 "Yes" votes and 190,477 "No" votes. (SR 34).

Amendment A, as it was submitted to South Dakota voters, purports to add a new article to the South Dakota Constitution. The new article is comprised of 15 sections and 55 subsections that, among other things: decriminalizes the possession and use of small amounts of marijuana for personal recreational use; sets forth a comprehensive regulatory scheme governing the commercial manufacturing and sale of recreational marijuana and grants the Department of Revenue the exclusive power to govern all matters connected therewith; imposes a tax on marijuana sales and appropriates revenues; imposes various civil penalties; establishes a cause of action against the Department of Revenue; and mandates the Legislature to pass laws ensuring access to medical marijuana and regarding hemp (which, under Amendment A, is not marijuana) beyond the provisions of Amendment A. (SR 15-18; Pr.App. 1-3).

Colonel Miller and Sheriff Thom subsequently brought this action seeking to enforce Article XXIII of the South Dakota Constitution by requesting that the circuit court declare that Amendment A was unconstitutionally submitted to the voters. (SR 1-38). Governor Noem authorized Colonel Miller to bring the action in his official capacity as the Superintendent of the Division of Highway Patrol,

which was memorialized and ratified in Executive Order 2021-02. (Pr.App.110-111).

STANDARD OF REVIEW

Proponents' motion for judgment on the pleadings and Colonel Miller's motion for summary judgment both require de novo review of a constitutional amendment. *Slota v. Imhoff and Associates*, P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873; *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *State ex rel. Dep't of Transp. v. Clark,* 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). An amendment passed by the people "is accorded a presumption in favor of validity and propriety" and should be struck down only if it "plainly and palpably appear(s) to be invalid." *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (internal quotations omitted). However, this presumption must be applied in conjunction with the principle that when the Constitution sets forth specific procedures for its own amendment, "strict observance of every substantial requirement is essential to the validity of the proposed amendment." *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1146 (Md. 1982) (citation omitted).

ARGUMENT

Proponents claim this case is "about the future of the initiative process in South Dakota." (Proponents' Brief, 8). And that is true: This case presents the question whether private lawyers and special interest groups can use the initiative process to circumvent the requirements set forth in the South Dakota Constitution. These requirements exist for a reason—to ensure that our State's founding document cannot be revised without the transparency, public input,

and legislative debate that accompanies a constitutional convention. Proponents ignored these requirements when they placed Amendment A on the ballot. In doing so, they defied the self-imposed limitations voters have placed on their power of initiative through the Constitution and deprived them of the opportunity to have Amendment A properly scrutinized and presented for ratification.

The initiative process can only exist within the framework the Constitution establishes. The voters "cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed" by our State's Constitution. *Lehman v. Bradbury*, 37 P.3d 989, 1000-01 (Or. 2002) (citation omitted). Despite Proponents' hyperbolic claims, no "great damage" can be done to the "integrity of the initiative process" simply by enforcing the constitutional limitations that apply to it. (Proponents' Brief, 10). To the contrary, placing the outcome of an election on an initiated amendment above the Constitution would undermine the integrity of our entire democratic system of government.

Despite the many baseless procedural arguments Proponents have raised in an attempt to distract from the merits, Amendment A remains an unprecedented, multi-subject revision that was drafted in secret and placed on the ballot in violation of the Constitution itself. Because Amendment A was submitted to the voters in violation of the Constitution itself, it is void. *See Mont. Ass'n of Ctys. v. State by & through Fox*, 404 P.3d 733 (Mont. 2017); *Water Works v. Bd. of Water*, 141 So. 3d 958, 964 (Ala. 2013) (noting an amendment may be a nullity even if the electorate voted in favor of the amendment). "Any other course would be revolutionary[.]" *Moore v. Brown*, 165 S.W.2d 657, 659-60

(Mo. 1942) (citations omitted). Therefore, the circuit court's ruling should be affirmed.

I. The circuit court correctly concluded that Colonel Miller had standing to bring this declaratory judgment action.

Proponents have raised various standing arguments,[1] all of which are based upon the spurious proposition that the State has no business protecting the Constitution upon which it is formed; and that government officials (who took oaths to uphold the Constitution) have no right to challenge an invalid constitutional amendment, even when it would have a direct and injurious effect on the government entities they represent. The circuit court properly concluded that Colonel Miller had standing to bring this declaratory judgment action because "[t]he consequences Amendment A would have for the Division of Highway Patrol to carry out its duties under the law, as well as Colonel Miller's duty to support South Dakota's Constitution, give him a 'real, actual' interest in this suit." (Memorandum Decision, 4). As explained in more detail below, Colonel Miller's interest in this declaratory judgment action is more than sufficient to satisfy the liberal standards for establishing standing under SDCL 21-24-14. Therefore, Proponents' arguments to the contrary should be rejected.

A. Colonel Miller has standing because Amendment A will have a direct and injurious effect on the Highway Patrol.

Proponents mistakenly rely on *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, 593 N.W.2d 36, in support of their argument that Colonel Miller lacks standing to seek a declaratory judgment in his official capacity. In

[1] This brief will not separately address Sheriff Thom's Standing. However, Colonel Miller by this reference joins in Sheriff Thom's separate Appellee Brief.

Edgemont, this Court held that a school district and county lacked standing to challenge the constitutionality of a statute because, as a school district and political subdivision created by the Legislature, they were not a "real party in interest" under SDCL 15-6-17(a). *Id.*

The rule in *Edgemont* does not apply to Colonel Miller in his official capacity as Superintendent of the Division of Highway Patrol ("Highway Patrol"). The Highway Patrol is not a school district or political subdivision of the State. *See* SDCL 34-48A-1 (defining "political subdivision"); SDCL 6-1-12 (defining "local government"). Rather, it is part of an executive agency that is under the supervision and direction of the Governor, who has authorized and ratified this action. S.D. Const. art. IV, § 9; Exec. Order 2021-02 (Pr.App. 110-111).

Moreover, in *Olson v. Guindon*, this Court recognized an important exception to the general rule described in *Edgemont*. 2009 S.D. 63, 771 N.W.2d 318. In *Olson*, school district board members brought an action for declaratory relief against state officials to determine the constitutionality of South Dakota's public-school funding system. *Id.* This Court held that the school districts had standing to bring the declaratory judgment action because the South Dakota Constitution accorded school districts the right to certain funds under Article VIII. *Id.* ¶ 16. Consequently, the school districts were facing an "actual or threatened injury" to their rights under the Constitution, meaning their legal interest in the lawsuit was not based solely on their "status as representatives of constituent students and taxpayers." *Id.* ¶¶ 5, 16. The same logic applies in this case.

Amendment A purports to grant the Department of Revenue the *exclusive power* to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," as well as the *exclusive power* to "administer and enforce" those rules. (SR 16; Pr.App.2). If allowed to stand, then Amendment A would strip powers that the Legislature delegated to the Highway Patrol and transfer them to the Department of Revenue.

Specifically, the Legislature and Governor have granted the Highway Patrol the authority to enforce "all laws, police regulations, and rules governing the operation of motor vehicles and motor carriers over and upon the highways of this state." SDCL 32-2-7. The Highway Patrol's power to enforce "all laws" upon State highways includes the power to enforce laws regulating "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state." Yet if Amendment A is upheld, this power would be diverted to the Department of Revenue. This change would have a direct and injurious effect on Colonel Miller and the Highway Patrol because they would be forced to forsake their previously established duties and authority to comply with the contradictory provisions of Amendment A. *See Am. Fed'n of State, Cty., & Mun. Emps. v. State, Pub. Emp. Rels. Bd.*, 372 N.W.2d 786, 790 (Minn. Ct. App. 1985) (finding that county had standing because it was "not challenging a statute which charges it with the performance of a ministerial duty," but was, rather, challenging a statute that would adversely affect "its own rights").

Proponents claim that Colonel Miller and the Highway Patrol "can still legally enforce every law on the books," even if Amendment A is upheld. (Proponents' Brief, 16). This claim is simply inaccurate. By granting the

Department of Revenue the "exclusive power" to enforce laws and regulations governing the transport of marijuana in the State, Amendment A would alter the hierarchical structure of our governmental system and materially restrict the authority granted to the Highway Patrol.

Indeed, with respect to marijuana regulations, the Highway Patrol would be entirely subject to the dictates of the Department of Revenue, rather than the Legislature and Governor. The Department of Revenue would have the "exclusive power" to delegate the enforcement of marijuana laws and regulations however it saw fit. Thus, Colonel Miller's interest in this lawsuit is not based on his status as a representative of constituent taxpayers; it is based upon the infringement of the constitutional duties and authority that would result from Amendment A divesting authority from the Highway Patrol to the Department of Revenue.[2] Moreover, Colonel Miller took "an oath or affirmation to support the Constitution of the United States and of this state," which is expressly required under Article XXI, § 3 of the Constitution. As the circuit court recognized, this oath to "support the Constitution" justifies bringing an action to ensure that an unconstitutional amendment is not implemented in violation of the Constitution. (Memorandum Decision, 3).

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[2] The Court's ruling in *Edgemont* was based, in part, upon the fact that the plaintiffs were a school district and political subdivision that were both subordinate to the state entity whose actions they were challenging. Colonel Miller is not challenging a statute enacted by the Legislature—or any other action of a principal State entity. Nor is he asking this Court to decide whether an act taken by one of the other branches of government was unconstitutional. Rather, he is challenging a revision to the South Dakota Constitution that would fundamentally alter the powers and functions of the state entity he represents.

Colonel Miller and the Highway Patrol have a direct interest in the outcome of this litigation and will suffer an adverse effect if Amendment A is upheld. Therefore, the general rule of *Edgemont* does not apply, and Colonel Miller has standing.

B. Colonel Miller had standing to bring this declaratory judgment action in his official capacity as an executive officer.

The circuit court correctly ruled that Colonel Miller had standing to bring this declaratory judgment action because of the effect Amendment A would have on the Highway Patrol, and because Colonel Miller took an oath to support the South Dakota Constitution. (Memorandum Decision, 4). Because Colonel Miller had a "substantial" and "real" interest in this lawsuit, the circuit court found it unnecessary to address the remaining grounds upon which Colonel Miller has standing. One of these grounds is based upon Colonel Miller's status as an executive officer subordinate to the Governor.

Article IV, § 3 of the South Dakota Constitution provides that the Governor

> may, by appropriate action or proceeding brought in the name of the state, 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.

As an officer of the executive branch, Colonel Miller is under the Governor's supervision. By bringing this action in his official capacity, Colonel Miller has effectively brought the action in the name of the State pursuant to the constitutional authority vested in the Governor under Article IV, § 3.

Proponents argue that this action does not fall under Article IV, § 3 because it was not captioned in the name of the State. (Proponents' Brief, 19). This argument places form over substance. "[T]he caption is not determinative as to the identity of the parties to the action." 5A C. Wright & A. Miller, Federal Practice and Procedure § 1321, p. 388 (3d ed. 2004). "The court will look behind and through the nominal parties on the record, to ascertain who are the real parties in interest." *United States v. Fletcher*, 231 F. 326, 330 (D. S.D. 1916), *aff'd,* 242 F. 818 (8th Cir. 1917). Indeed, "it is well-settled that suits against officers of the state in their official capacity, are in reality suits against the State itself." *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 23, 706 N.W.2d 239, 247. The same reasoning applies to suits initiated by officers of the State in their official capacity.

Proponents note that Article IV, § 3 prohibits actions against the Legislature and then draw the strained conclusion that this prohibition would somehow "also apply to voters when they legislate via initiative." (Proponents' Brief, 19-20). There are two flaws in this argument. First, Colonel Miller has not brought an action against the Legislature or the voters. Second, by its plain terms, Article IV, § 3 does not bar an action challenging the constitutionality of an initiated amendment (or a legislatively enacted statute, for that matter). To the contrary, Article IV, § 3 states that the Governor is responsible for the "faithful execution of the law." Bringing a declaratory judgment action challenging the validity of an unconstitutional amendment is one method of ensuring "the faithful execution of the law." If this Court affirms the circuit court's declaratory judgment, then the effect will be to "restrain violation" of our

Constitution by "any officer, department or agency" that would otherwise have implemented an unconstitutional amendment.

In a final attempt to avoid a decision on the merits, Proponents argue that Amendment A is not subject to suit under Article IV, § 3 because "voters are not a state officer, department, or agency." (Proponents' Brief, 20). Again, the obvious flaw in this argument is that Colonel Miller has not initiated an action against the voters. Instead, he brought this declaratory judgment action against the Secretary of State – the executive official charged with custody of the "enrolled copy of the Constitution," SDCL 1-8-2; and overseeing and administering the initiative process, SDCL chs. 2-1, 12-13. Colonel Miller's claims that Amendment A was submitted to the voters in violation of the Constitution implicates both of these duties. Accordingly, this is an action to enforce compliance or restrain a violation of the Constitution "by any officer, department or agency of the state." *See* S.D. Const. art. IV, § 3. As an executive officer operating under the direction of the Governor, Colonel Miller had standing to bring this action under Article IV, § 3.

i. The Governor may delegate the prosecution of this action to Colonel Miller.

Proponents contend that the Governor cannot delegate her authority under Article IV, § 3 and, therefore, Colonel Miller cannot prosecute this action on her behalf. (Proponents' Brief, 20-21). To be sure, the *decision* to bring this action—like the decision to issue an extradition warrant in *In re Tod*, 81 N.W. 637 (S.D. 1900)—is a power personal to the Governor. However, to suggest that the Governor must be personally involved from start to finish in every action brought

under her constitutional authority is akin to saying that the Governor must also personally arrest and extradite a fugitive. The executive branch is tasked with executing and enforcing a vast array of laws touching nearly every facet of our state government. Delegation of authority within the executive branch is necessary to ensure the government can function appropriately. *See Woodard v. Rasmussen*, 700 P.2d 675, 692-93 (Or. 1985) (noting that governor "is not the only person who can exercise the state's executive authority" and that without delegation, "Governor's job would be impossible, thousands of state employees would be acting illegally and, as a practical matter, the state could not function").

"[T]he Governor has broad discretion to select the means [s]he will use in executing [her] constitutional duty." *See Op. of the Justices to the Council*, 334 N.E.2d 604, 609 (Mass. 1975). In exercising this discretion, the Governor may allocate the "functions, powers and duties" of "offices, agencies and instrumentalities" as "necessary for efficient administration." S.D. Const. art. IV, § 8. That is precisely what the Governor has done in authorizing Colonel Miller to initiate this lawsuit. Exec. Order 2021-02 (Pr.App. 110-111).

Proponents also contend the Governor needed to supply "intelligible standards" when authorizing Colonel Miller to bring this action. (Proponents' Brief, 21). Although intelligible standards are necessary when the Legislature delegates authority to the executive branch to avoid violating separation of powers, *State v. Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d 598, 606, Proponents have cited no authority that such standards are required when delegating authority *within* the executive branch.

ii. The Governor ratified the commencement of this declaratory judgment action.

Even if Colonel Miller himself is not a real party in interest, the Governor has ratified this action through her issuance of Executive Order 2021-02. SDCL 15-6-17(a) specifically prohibits the dismissal of an action "until a reasonable time has been allowed after objection for ratification of commencement of the action" by a real party in interest. This procedure for ratification exists "to assure that a defendant is required only to defend an action brought by a proper party plaintiff and that such an action must be defended only once." *Id*. (citation omitted). If the action is ratified, then it "shall have the same effect as if the action had been commenced in the name of the real party in interest." *Id*.

With the issuance of Executive Order 2021-02, the Governor expressly ratified Colonel Miller's commencement of this declaratory judgment action. The Governor's ratification has "the same effect as if the action had been commenced" in the name of the State or the Governor. SDCL 15-6-17(a). Thus, Proponents' argument is rendered entirely moot.

C. Colonel Miller has standing in this lawsuit because it presents a question of great public importance.

Even if the Court were to conclude that Colonel Miller had no standing to bring this action in his official capacity, that this was not an action brought pursuant to the Governor's authority under Article IV, § 3, and that the Governor could not delegate authority to prosecute this action to Colonel Miller, this Court should still hold that Colonel Miller has standing because this case presents a question of great public importance. This Court, like courts in many

jurisdictions,[3] may dispense with the technical requirements of standing if the case presents a question of great public importance. *See Olson*, 2009 S.D. 63, ¶ 15, 771 N.W.2d at 323 (holding that school districts had standing to challenge funding of public education based, in part, upon fact that "education is a matter of great public importance"); *H & W Contracting, LLC v. City of Watertown*, 2001 S.D. 107, ¶ 14, 633 N.W.2d 167, 172-73 (recognizing that bidder on public contract may have standing "based on the protection of public interests"); *Sioux Falls Mun. Emp. Ass'n, Inc. v. City of Sioux Falls*, 233 N.W.2d 306, 309 (S.D. 1975) (holding that municipal employees association had standing to challenge amendment to ordinance despite its failure to show that it suffered actual adverse consequences because "the case presents questions of significant public interest"). In fact, the Court has specifically declared that "the Declaratory Judgment Act . . . should allow . . . the decision of present rights or status which are based upon future events when a good-faith controversy is brought before the courts," and that this is particularly true when the case "presents matters involving the public interest in which timely relief is desirable." *Kneip v. Herseth*, 214 N.W.2d 93, 96-97 (S.D. 1974).

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[3] *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward,* 715 N.E.2d 1062, 1082 (Ohio 1999) ("This court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."); *accord State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974); *Davis v. Richland Cty. Council*, 642 S.E.2d 740, 742 (S.C. 2007); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980).

In this case, the Court is presented with a question of significant public importance: Whether a constitutional amendment was validly adopted in compliance with the mandated procedure set forth under Article XXIII of the South Dakota Constitution. Given the impact Amendment A could have on our State's citizens and system of government, if this case were dismissed for lack of standing, then it is likely that another party will simply initiate an identical suit, which would be a waste of judicial resources. The plaintiff in that identical suit would not be in a better position to educate the Court on the issues than Colonel Miller is in this case. *See McConkey v. Van Hollen*, 783 N.W.2d 855, 860-61 (Wis. 2010) (finding that plaintiff had standing under public importance exception after considering several factors, including likelihood of identical suit and whether plaintiff had competently framed issues). In fact, Colonel Miller did not object to Proponents' Motion to Intervene because he recognized Proponents would be able to competently frame the issues and zealously argue their case, thus ensuring that this litigation contains "that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Id.* at 860 (citation omitted).

The citizens of South Dakota deserve to have this important issue of constitutional law resolved. A final decision from this Court will uphold the integrity of our Constitution and serve as guidance for citizen initiatives moving forward. Because this case presents a question of significant public importance, Colonel Miller has standing, and the circuit court properly adjudicated the merits of Colonel Miller's motion for summary judgment.

II. Colonel Miller has timely commenced this proceeding.

Proponents argue that this action is untimely because it was not brought before the election. (Proponents' Brief, 22-23). They claim that "[b]y waiting until after the results of the election went against them, Thom and Miller are belatedly seeking, in effect, to undermine the democratic process." (Proponents' Brief, 22-23). This incendiary accusation is inappropriate and entirely unfounded.

The South Dakota Constitution is the foundation of our State's democratic process. It is the ultimate expression of the will of the people. Within our State's foundational document, South Dakota citizens imposed constraints on their power of initiative. These self-imposed constraints must be given effect. *See State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 260 (Neb. 2020) ("The people's reserved power of the initiative and their self-imposed [requirements of procedure in exercising that power] are of equal constitutional significance."). "Any other course would be revolutionary." *Moore*, 165 S.W.2d at 659-60. Indeed, the surest way to "undermine the democratic process" is to disregard the constitutional principles upon which it is based. *See Danforth v. Egan*, 119 N.W. 1021, 1022 (S.D. 1909) ("While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limit of this, it is the duty of the court to interfere, and by judicial checks afford the people time for reason and reflection.").

Constitutional restraints on the amendment and initiative procedure cannot be overridden and rendered ineffectual through the passage of time. *See Lehman*, 37 P.3d at 1000-01 ("[T]he people cannot give legal effect to an

amendment which was submitted in disregard of the limitations imposed by the constitution."). The Pennsylvania Supreme Court has eloquently articulated the absurdity of such an argument:

> [T]he foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is justiciable if decided by the Courts one week or one day prior to the election, but is not justiciable one day after the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated.

Stander v. Kelley, 250 A.2d 474, 477 (Pa. 1969).

Voter approval cannot cure constitutional invalidity. *Water Works*, 141 So. 3d at 963; *Mont. Ass'n of Counties v. State ex rel. Fox*, 404 P.3d 733, 737 (Mont. 2017); *Duggan v. Beermann*, 515 N.W.2d 788, 794 (Neb. 1994); *Lehman*, 37 P.3d at 1000-01. If it could, then the constitutional mandates under Article XXIII would be meaningless. Any procedure could be invoked so long as it culminated in voter approval. Accordingly, Proponents' claims that this action was untimely are without merit and should be rejected.

A. The pre-election procedures Proponents cite are inapplicable and irrelevant.

Citing Article V, § 5 of the Constitution, Proponents claim that the Governor "could have asked the Supreme Court to issue an advisory opinion on the constitutionality of Amendment A before the November 2020 election." (Proponents' Brief, 23). Yet Proponents later contradict their own argument, stating that a judicial "decision before November 2020" would not "have amounted to an advisory opinion." (Id., 33). Accordingly, the suggestion that the

Governor should have requested an advisory opinion—a unilateral, non-adversarial process—before the election is without merit.

Proponents next argue that Colonel Miller could have challenged Amendment A under SDCL 2-1-17.1 or SDCL 2-1-18. However, proceedings under those statutes are limited to challenging the quality and quantity of signatures obtained on petitions, as both statutes reference "any interested person who has researched the signatures contained" in a petition. SDCL 2-1-17.1; SDCL 2-1-18. The statutes do not apply when challenging the legal sufficiency of a proposed amendment under Article XXIII.

Finally, Proponents argue that Colonel Miller could have "sought a writ preventing the Secretary of State from placing Amendment A on the ballot." (Proponents' Brief, 24). But this Court has been reluctant to engage in a pre-election analysis of the substance of proposed amendments. For example, in *S.D. State Federation of Labor AFL-CIO v. Jackley,* the Court concluded that matters such as deciding "whether any change in the constitution has been legally effected" are best left until after the election. 2010 S.D. 62, ¶¶ 11-12, 786 N.W.2d 372, 376-77 (quoting *State ex rel. Cranmer v. Thorson*, 68 N.W. 202, 203-204 (S.D. 1896)). Although Colonel Miller is not alleging that Amendment A is substantively unconstitutional, the nature of his claims are quasi-substantive because they require this Court to interpret the substance of Amendment A to ascertain whether it was submitted to the voters in violation of Article XXIII. That is fundamentally different from the analysis required to determine, for example, whether a petition was supported by enough signatures.

Even if Colonel Miller could have brought a pre-election challenge, nothing in South Dakota law suggests that this was his only available remedy, or that post-election challenges are precluded. Indeed, the "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." SDCL 15-6-57; *Agar Sch. Dist. No. 58-1 Bd. of Educ. v. McGee*, 527 N.W.2d 282, 287 (S.D. 1995) (stating declaratory relief is appropriate to challenge legality of tax despite existence of payment and protest statutory remedy). In fact, this Court has repeatedly considered post-election challenges, even when the defects were known and could have been addressed before the election.[4] Accordingly, Proponents' claims that this action was untimely are without merit and should be rejected.

B. The doctrines of waiver and laches do not bar this proceeding.

Proponents next argue that the doctrines of waiver and laches bar this lawsuit. These are both equitable defenses. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 12, 806 N.W.2d 615, 619. Equitable defenses cannot be employed to override express constitutional mandates. *See Sears v. Treasurer & Receiver General*, 98 N.E.2d 621, 632 (Mass. 1951). If this Court were to allow

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[4] *See Bienert v. Yankton Sch. Dist. 63-3*, 507 N.W.2d 88 (S.D. 1993) (recognizing, in post-election proceeding seeking injunctive relief, that post-election contest procedure under SDCL ch. 12-22 provided speedy remedy at law to address assertion that election did not meet statutory guidelines for bond elections); *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808 (S.D. 1916) (entertaining post-election injunction proceeding raising concerns that petition did not comply with statutory provisions). *See also Water Works*, 141 So. 3d 958; *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Fulton County v. City of Atlanta*, 825 S.E.2d 142 (Ga. 2019); *Lehman*, 37 P.3d at 1000-01; *City of Burien v. Kiga*, 31 P.3d 659, 662 (Wash. 2001) (en banc).

Amendment A to stand based on the doctrines of waiver or laches, then it would mean that any party could effectuate changes to the Constitution without regard for the requirements that are set forth in the Constitution itself. *See Stander*, 250 A.2d at 477. In effect, this Court would be establishing an alternative method of ratifying amendments based solely on the timing of litigation.[5]

C. The law does not preclude post-election challenges.

Proponents advance a number of arguments advocating that this Court should allow a party to bring a declaratory judgment action in a pre-election challenge. These arguments are completely irrelevant to the issues before this Court because the availability of pre-election challenges does not preclude post-election challenges.[6] Post-election challenges are already subject to heightened scrutiny. *Barnhart*, 222 N.W.2d at 136. Proponents' hypothetical parade of horribles simply will not come to fruition. (*See* Proponents' Brief, 34-35). To prohibit post-election challenges altogether would be to endorse disregarding the Constitution. *Cf. Egan*, 119 N.W. at 1022.

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[5] Proponents' reliance on *Bowyer v. Ducey* and *Trump v. Biden* in support of their laches argument is wildly misplaced. Neither of these cases involved a post-election challenge to the validity of a proposed constitutional amendment. Instead, both cases involved attempts to alter the result of the presidential election by challenging the validity of specific groups of ballots. *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *16 (D. Ariz. Dec. 9, 2020); *Trump*, 951 N.W.2d 568, 570 (Wis. 2020).

[6] The Legislature has now established procedures for pre-election enforcement of Article XXIII by mandating that the Secretary of State make a determination of proposed amendments and granting an appeal of that decision directly to this Court. SB 86, 96th S.D. Legis. Sess. (2021). The Governor signed SB 86 into law on March 18, 2021.

Finally, the legislative committee hearings on H.J.R. 1006 (2018), which proposed amending the Constitution to add the one-subject and separate-vote rules to Article XXIII, § 1 (which was placed on the ballot as Amendment Z), all but confirm the propriety of post-election challenges. During the hearings, Representative Mark Mickelson, the prime sponsor, explicitly stated that court challenges would be brought *after* the election—even if doing so had the result of nullifying an election.[7] Despite this, the Legislature approved H.J.R. 1006 being placed on the ballot as Amendment Z, which was subsequently ratified by the voters. Accordingly, a post-election challenge such as this declaratory judgment action is proper.

III. Amendment A violates the One-Subject Rule.

In 2018, voters ratified Constitutional Amendment Z, which imposed new limitations on proposed constitutional amendments: First, "[N]o proposed amendment may embrace more than one subject" ("One-Subject Rule"); and second, "If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately" ("Separate-Vote Rule").

A nearly identical version of the Separate-Vote Rule existed in the South Dakota Constitution from its inception until 1972, when it was stricken from

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[7] *Hearing on H.J.R. 1006 before the S. Comm. on State Affairs*, 93rd S.D. Legis. Sess. (2018), at 45:57 (statement of Rep. Mark Mickelson in response to questions from Sens. Jim Bolin & Al Novstrup), https://sdpb.sd.gov/SDPBPodcast/2018/sst33.mp3#t=2757.

Article XXIII, § 1.[8] With the ratification of Amendment Z in 2018, the Separate-Vote Rule was re-established, and the One-Subject Rule (which had never previously been part of the Constitution), was also added as an additional requirement under Article XXIII, § 1. *Id*. Although this Court has interpreted the prior version of the Separate-Vote Rule, the interpretation of the One-Subject Rule is a question of first impression in South Dakota.

The circuit court ruled that Amendment A violated the One-Subject Rule. In its ruling, the court relied on the "reasonably germane" standard applicable to legislative enactments under the "single-subject rule" in Article III, § 21 ("Single-Subject Rule"). (Memorandum Decision, 7-8). The circuit court concluded that the subject of Amendment A was "the legalization of marijuana," and that several sections of Amendment A were not "reasonably germane" to this subject. The circuit court explained: "Allocating revenue from an excise tax of marijuana sales, forbidding differing professions from disciplining their members, and including a provision compelling the legislature to pass hemp, which is different than marijuana, are not part of the 'single scheme' of legalizing marijuana." (Memorandum Decision, 8). The circuit court then declared that "the infringement of the [One-Subject Rule] is so plain and palpable as to admit no reasonable doubt Amendment A is invalid." (Memorandum Decision, 8).

[8] *See* S.D. Const. art. XXIII, § 1 (1889) (Appx. 1-2); 2018 S.D. Sess. Laws ch. 4, § 2 (H.J. Res. 1006, approved Nov. 6, 2018). The 1889 version of the Separate-Vote Rule provided: "[I]f more than one amendment be submitted they shall be submitted in such manner that the people may vote for or against such amendments separately." (Appx. 3).

Although the circuit court reached the correct result, it applied the wrong standard. As shall be explained, a more exacting standard must apply to proposed constitutional amendments under Article XXIII, § 1 to protect the integrity of our State's foundational document.

A. The standard that applies to the One-Subject rule is more exacting than the broad "reasonably germane" standard applicable to legislative acts.

While the circuit court correctly concluded that Amendment A was invalid, the standard that applies to the One-Subject Rule is more exacting than the "reasonably germane" standard described in *Baker*.[9] The Single-Subject Rule in Article III, § 21 applies only to *legislative acts*. Legislative acts are subject to debate, deliberation, and veto before enactment and, as such, are given liberal construction to "facilitate legislation." *State v. Morgan*, 48 N.W. 314, 318 (S.D. 1891). This rationale does not translate to initiated amendments that would fundamentally alter our State's system of government, and that must be either ratified or rejected as a whole. *See State ex rel. Adams v. Herried*, 72 N.W. 93, 96 (S.D. 1897); *accord Mont. Ass'n of Ctys.*, 404 P.3d at 739 ("Voters do not have

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[9] It is important to note that *Baker* does not contain a complete recitation of the standard that this Court has applied when evaluating the Single-Subject Rule. For example, this Court has recognized that the purpose of the Single-Subject Rule is "to prevent the bringing together in one act subjects having no *necessary* connection or relation with each other[.]" *State v. Morgan*, 48 N.W. 314, 314 (S.D 1891) (emphasis added); *see State ex rel. Jensen v. Kelly*, 274 N.W. 319 (S.D. 1937) (same). This Court has also stated that "all provisions of the Act must *relate directly* to the same subject, have a *natural connection*, and not be foreign to the subject as stated in the title.'" *Simpson v. Tobin*, 367 N.W.2d 757, 768 (S.D. 1985) (quoting *McMacken v. State,* 320 N.W.2d 131 (S.D. 1981)) (emphasis added). This language is consistent with the test applied by the Nebraska Supreme Court in *State ex. rel. Wagner v. Evnen,* which is discussed in section III(A)(ii) of this brief. 948 N.W.2d 244, 253 (Neb. 2020).

the opportunity to consider, discuss, and potentially change constitutional amendments proposed by initiative in the same way the Legislature does those proposed by referendum.").

Moreover, the legislative Single-Subject Rule expressly states that the "subject" of a legislative act "shall be expressed in its title." In *Baker*, this Court considered whether the county referendum petition at issue had "one general object . . . fairly indicated in the title." 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273 (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1290 (Cal. 1978)). Article XXIII, § 1, by contrast, provides that amendments cannot "embrace more than one subject" and that separate amendments must be voted on separately. Thus, the One-Subject Rule must be separately interpreted in light of the distinct intent and legislative history behind Article XXIII, § 1.

i. The legislative history of Article XXIII, § 1 suggests a heightened standard must apply.

Because the One-Subject Rule was ratified concurrently with the Separate-Vote Rule, this Court must presume that it was intended to establish requirements for amendments that were greater to, or distinct from, the requirements established by the Separate-Vote Rule. *See Doe v. Nelson*, 2004 S.D. 62, ¶ 15, 680 N.W.2d 302, 308. This Court has described the standard that applies to the Separate-Vote Rule on more than one occasion.

For example, in *State ex rel. Adams v. Herried*, this Court explained that to constitute more than one amendment, "the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes,

not dependent upon or connected with each other." 72 N.W. at 97. In other words, each subject within a single amendment "must be incidental to and *necessarily connected* with the object intended." *Id*. (emphasis added). In *Barnhart v. Herseth*, this Court considered whether the amendment could be viewed as a single plan:

> If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment.

222 N.W.2d at 136 (citation omitted).

When the voters re-established the Separate-Vote Rule with the ratification of Amendment Z, they re-instituted the requirement that each provision within a single amendment "must be incidental to and necessarily connected with the object intended," and "logically viewed" as part of "a single plan." *Herried*, 10 S.D. 109, 72 N.W. 93; *Barnhart*, 222 N.W.2d 131. These standards were the minimum requirements imposed by the Separate-Vote Rule, which existed at a time when only the Legislature could propose constitutional amendments. Therefore, the One-Subject Rule must be interpreted as placing some *additional* requirement on amendments, or else its inclusion in Article XXIII, § 1 would be rendered entirely superfluous.

This conclusion is consistent with statements made during the legislative hearings on Amendment Z. These hearings reveal that the drafters of Amendment Z recognized that voters do not have the opportunity to consider and debate an initiated amendment in the same way that legislators consider and debate proposed legislation. *Hearing on H.J.R. 1006, supra*, at 31:38 (statement

of Rep. Mark Mickelson). For this reason, the One-Subject Rule was intended to place a more stringent standard upon initiated amendments than the Single-Subject Rule places on legislative acts.

In discussing the standard that applies to the One-Subject Rule, proponents of Amendment Z cited a test that the Supreme Court of Montana has applied when interpreting Montana's separate-vote requirement.[10] Under the Montana test, courts consider "whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related." *Mont. Ass'n of Ctys.*, 404 P.3d at 742. Changes are "substantive" if they are "[a]n essential part of constituent or relating to what is essential." *Id.* (citing *Black's Law Dictionary* 1429 (Henry C. Black ed., 6th ed. 1990)). In determining whether the provisions are "closely related," the following factors are considered:

> [W]hether various provisions are facially related, whether all the matters addressed by [the proposition] concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

Id. (quoting *McLaughlin v. Bennett*, 238 P.3d 619, 622 (Ariz. 2010)) (additional quotation omitted). As explained below, the Montana test is similar to the test applied by other courts that have interpreted comparable provisions in their respective state constitutions.

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[10] *Hearing on H.J.R. 1006*, *supra*, at 31:38 (statement of Rep. Mark Mickelson), https://sdpb.sd.gov/SDPBPodcast/2018/sst33.mp3#t=1890.

ii. Authorities from other jurisdictions require that subjects be "closely related" and have a "natural and necessary" connection.

Because the interpretation of the One-Subject Rule is a question of first impression in South Dakota, other courts' interpretations of comparable provisions in their respective state constitutions is instructive. For example, in *State ex. rel. Wagner v. Evnen*, the Nebraska Supreme Court struck down a voter-initiated constitutional amendment regarding medical marijuana because it violated the Nebraska one-subject rule applicable to initiated measures. 948 N.W.2d at 253; *see* Neb. Const. art. III, § 2 ("Initiative measures shall contain only one subject.").

In *Wagner*, the Court examined whether the various provisions of the challenged amendment had a "natural and necessary connection" to the constitutional right to produce and use medical marijuana. Defining "necessary" as "something 'on which another thing is dependent or contingent,'" the Court concluded that the amendment served impermissible secondary subjects not naturally and necessarily connected to the general subject, including:

> (1) The property right for private entities to legally grow and sell medical marijuana;
> (2) Civil and criminal immunity to private entities engaged in the production and sale of medical marijuana;
> (3) Provisions relative to the use of medical marijuana in public spaces, correctional facilities, motor vehicles, or other situations in which consumption would be negligent;
> (4) Not requiring employers to allow employees to work while impaired; and
> (5) Not requiring insurance coverage for medical marijuana.

Id. at 257-58.

Similarly, in *In re Initiative Petition No. 314*, the Oklahoma Supreme Court held that an initiated amendment related to the advertising, franchising, and sale of alcohol violated Oklahoma's one-subject rule. 625 P.2d 595 (Okla. 1980). In that case, the proponents argued that the detailed regulatory scheme within the initiated amendment was valid because the provisions related to the single subject of "control of alcoholic beverages." *Id.* at 600. The Court rejected this argument, noting that there was "no interdependence between proposals permitting advertising, franchising and liquor by the drink." Each of these proposals, the Court reasoned, had "its own purpose" and could "stand alone." *Id.* at 607.

Both the Oklahoma "interdependence test" and the Nebraska "natural and necessary connection test" focus on the interrelation between the separate provisions of an initiated amendment. For provisions to be considered part of one subject, there must be a necessary connection or interdependence among them. This is also true under the "substantive and closely related" test employed by the Montana Supreme Court, which requires provisions to be "essential" and "closely related." *Mont. Ass'n of Ctys.,* 404 P.3d at 742. Initiated amendments in South Dakota must be subject to the same minimum requirements in order to give effect to the One-Subject and Separate-Vote rules in Article XXIII, § 1.

iii. The scope of the subject must be specific enough to allow for meaningful review.

In keeping with their analogy to the legislative Single-Subject Rule, Proponents argue that there is no restriction on the "scope or magnitude" of the subject matter that can be addressed in an initiated amendment. (Proponents'

Brief, 40). Under Proponents' rationale, virtually any change to the Constitution could be "reasonably germane" so long as the general subject is framed broadly enough. For example, an initiated amendment could overhaul South Dakota's entire system of government by broadly framing "the scope or magnitude of the single subject" to be "an amendment to revise the constitution." *See Meierhenry*, 354 N.W.2d at 182. If this were permitted, then the One-Subject Rule would serve no meaningful purpose at all. Both the One-Subject Rule and the Single-Vote Rule would be stretched to the point of complete irrelevance.

In *Wagner*, the Nebraska Supreme Court addressed this issue when considering whether a voter-initiated constitutional amendment regarding medical marijuana violated Nebraska's single-subject rule. 948 N.W.2d 244. The Court noted that "a general subject must not be characterized too broadly when considering an amendment to the constitution." *Id*. at 254. "Instead, a general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the initiative's other purposes." *Id*. (internal citations omitted). The one-subject rule, the Court explained, "may not be circumvented" by selecting a general subject that is so broad as to evade a "meaningful constitutional check." *Id*. (citation omitted). The same rationale applies here.

The circuit court correctly identified Amendment A's general subject: legalizing the possession and ingestion of small amounts of marijuana (as defined by Amendment A). Amendment A violates both the One-Subject Rule and the Separate-Vote Rule because its provisions are not "reasonably germane" to this general subject, let alone "naturally and necessarily connected," *Wagner*, 948

N.W.2d at 253, "interdependent," *Initiative Petition No. 314*, 625 P.2d at 607, or "closely related," *Mont. Ass'n of Ctys.,* 404 P.3d at 742. Therefore, Amendment A is invalid as a matter of law.

B. Amendment A violates the One-Subject Rule, regardless of what standard this Court applies.

The expansive scope and effect of Amendment A is entirely unprecedented in our State's initiative history. Through its 15 sections, 55 subsections, and 2,280 words, Amendment A would (1) impose fundamental changes to the separate powers of the three branches of government; (2) elevate the Department of Revenue to a plenary agency with "exclusive power"; (3) create an entirely new legal cause of action against the Department of Revenue; (4) restrict this Court's authority to promulgate rules and discipline members of the South Dakota Bar; and (5) alter the Legislature's constitutional authority to assess taxes and appropriate revenue. Each of these subjects are separately addressed in Section IV(C) of this brief to illustrate the impact Amendment A will have on our State's Constitution and system of government. However, these subjects are equally relevant to this Court's analysis under the One-Subject Rule.

As the Montana Supreme Court has recognized, "if a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself." *Mont. Ass'n of Ctys.,* 404 P.3d at 742 (citing *Oregon v. Rogers*, 288 P.3d 544, 547 (Or. 2012)). Moreover, "if a measure has the effect of modifying an existing constitutional provision, it proposes at least one additional change to the constitution, whether that effect is express or implicit." *Id.* (citing *Rogers*, 288 P.3d at 548). In this case, Amendment A will

add at least five entirely new matters to the Constitution and impact at least 22 existing constitutional provisions. *See infra* Section IV(C). Such an extensive revision of our State's foundational document was certainly not "reasonably germane" to the legalization of marijuana. Nor was the public "fairly apprise[d]" of the content of Amendment A and the extensive impact it would have on our laws and governmental system. (*See* Proponents' Brief, 39 (noting that the intent of the One-Subject Rule is to "fairly apprise the public of what is in the measure") (citing *Kanaly v. State ex rel. Janklow*, 368 N.W.2d 819, 827 (S.D. 1985))).

The catalogue of subjects covered by Amendment A does not stop there. Even a cursory review of the text of Amendment A reveals at least five *additional* subjects:

(1) Creating an individual constitutional right to grow, possess, and use small amounts of marijuana (Section 4);

(2) Imposing civil penalties for failing to follow various restrictions on cultivating marijuana, for smoking marijuana illegally in a public place, and for the underage possession and use of marijuana (Section 5);

(3) Imposing a 15% excise tax on the commercial sale of marijuana, subject to change by the Legislature, and mandating how the revenue is appropriated (Section 10);

(4) Creating a constitutional right to medical marijuana "beyond what is set forth in" Amendment A by mandating that the Legislature pass laws ensuring access to medical marijuana (Section 14(1)); and

(5) Mandating that the Legislature pass laws regulating the cultivation, processing, and sale of hemp (Section 14(2)).

(SR 15-17; Pr.App.1-3).

None of the above subjects have a "natural and necessary connection with each other." *See Evnen*, 948 N.W.2d at 253. Nor are they "reasonably germane," *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 274, or "interdependent," *Initiative*

Petition No. 314, 625 P.2d 595, upon one another. Each of the above subjects has "its own purpose" and could "stand alone" as an entirely separate amendment. *See Initiative Petition No. 314*, 625 P.2d 595. For example, the *personal* right of possessing and ingesting marijuana, (SR 15; Pr.App.2, §4), is not reasonably germane or necessarily connected to licensing and taxing the *commercial* sale of marijuana, (SR 16-17; Pr.App.2-3, §§6-13). *Cf. Wagner*, 948 N.W.2d at 257-58. Nor is the taxation of marijuana, (SR 16; Pr.App.2, §10), reasonably germane or necessarily connected to its legalization. The same is true with respect to laws governing hemp, which is constitutionally distinct from marijuana under Amendment A, (SR 15; Pr.App.1, §§1, 14), as well as laws governing *medical* marijuana, which would extend "beyond what is set forth" in Amendment A itself, (SR 17; Pr.App.1, §14). There are countless other examples. Given the myriad of topics governed by Amendment A, it cannot be said that the voters were "fairly apprised" of its content or effects. (Proponents' Brief, 39).

C. Amendment A presents a classic case of logrolling.

Proponents acknowledge that one of the purposes of the One-Subject Rule is to "prevent logrolling," which 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." (Proponents' Brief, 50). Indeed, more than a century ago, this Court recognized that "nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter." *Herried*, 72 N.W. at 96. This Court has recognized that the reasons for preventing logrolling are even "more

forceful" when considering a constitutional amendment than when considering a legislative act. *Id.*; *accord Mont. Ass'n of Ctys.*, 404 P.3d at 739.

Given the multitude of subjects contained within Amendment A, it is likely that voters who sought to enact one provision of Amendment A tacitly accepted other provisions they disliked. For example, voters who supported securing tax funds for public schools may have grudgingly accepted the legalization of marijuana. Voters who supported the legalization of hemp or medical marijuana may have done the same. Even those voters who supported all of these subjects may have been reluctant to grant "exclusive power" to the Department of Revenue. Other provisions of Amendment A, including establishing an entirely new legal cause of action against the Department of Revenue and restricting this Court's authority to discipline members of the Bar, may have been reluctantly, or inadvertently, accepted by the voters with the litany of other subjects encompassed in Amendment A.

When considered as a whole, Amendment A was designed to aggregate the favorable votes from electors of many persuasions. *See Adams v. Gunter*, 238 So. 2d 824, 831 (Fla. 1970) ("Minorities favoring each proposition severally might, thus aggregated, adopt all."). In 2018, through the ratification of Amendment Z, South Dakota voters sought to preserve—not jeopardize—the sanctity of the initiative process by ensuring that they have the opportunity to cast a clear vote on each distinct subject put to them. *Initiative Petition No. 314*, 625 P.2d at 608. Under both the Separate-Vote Rule and the One-Subject Rule, Amendment A violates the self-imposed limitation voters placed on their power to amend their Constitution through the initiative process. Consequently, the circuit court

correctly ruled that Amendment A was unconstitutionally submitted to the voters and is void as a matter of law.

IV. Amendment A seeks to unconstitutionally "revise" the Constitution through the initiative process.

In South Dakota, the Constitution may only be changed by "amendments" or "revisions." The South Dakota Constitution recognizes substantive distinctions between these terms, and Article XXIII sets forth an entirely separate procedure for adopting each type of constitutional change. *See Holmes v. Appling*, 392 P.2d 636, 638 (Or. 1964) ("It is well established that when a constitution specifies the manner in which it may be amended or revised, it can be altered by those who favor amendments, revision, or other change only through the use of one of the specified means.") (citation omitted); *Adams v. Gunter,* 238 So. 2d 824, 831-32 (Fla. 1970) (discussing distinction between revisions and amendments and concluding that the terms, "if we follow elementary principles of statutory construction, must be understood to have a substantial field of application, not to be a mere alternative procedure in the same field").

A constitutional change that does not meet the narrow requirements of an "amendment" under Article XXIII, § 1, may be a "revision" to the Constitution under Article XXIII, § 2. Unlike an amendment, a revision requires a constitutional convention be called either by initiative or "a three-fourths vote of all the members of each house." S.D. Const. art. XXIII, § 2. Once a constitutional convention has been called, its members must be elected "on a nonpolitical ballot in the same districts and in the same number as the house of representatives."

Id. The elected members of the constitutional convention must then approve proposed revisions "by a majority" before the proposed revision can be "submitted to the electorate at a special election in a manner to be determined by the convention." *Id.*

The terms "revision" and "amendment" are not specifically defined in the South Dakota Constitution. However, this is not unusual. The constitutions of several other states recognize a distinction between a "revision" and "amendment" without expressly defining those terms.[11] Most courts have applied some variation of the following test for determining whether a proposed amendment should be deemed a revision:

1. What qualitative effect would the proposed amendment have on existing constitutional provisions and the governmental plan established by the Constitution as a whole?

   A proposed amendment will be deemed a revision if it results in a fundamental change to the structure of the Constitution and the governmental system it established.[12]

2. What quantitative effect would the proposed amendment have on existing articles or sections of the Constitution it would affect?

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[11] *See Bess v. Ulmer*, 985 P.2d 979 983-84 (Alaska 1999); *Adams*, 238 So. 2d at 831-32; (quoting *McFadden*, *v. Jordan*, 196 P.2d 787, 789 (Cal. 1948); *Raven*, 801 P.2d at 1085.

[12] *See Bess*, 985 P.2d at 987; *McFadden v. Jordan*, 196 P.2d at 789; *Strauss v. Horton*, 207 P.3d 48, 98 (Cal. 2009); *Op. of the Justices*, 264 A.2d 342, 346 (Del. 1970).

> A proposed amendment will be deemed a revision if it imposes far-reaching and multifarious changes to the Constitution.[13]

South Dakota's Constitution further limits proposed amendments in 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." S.D. Const. art. XXIII, § 1. Thus, under the plain language of Article XXIII, § 1, a proposed amendment must amend existing articles in the Constitution—it cannot add an entirely new article.

As explained below, Amendment A is a revision to the Constitution for three reasons: (A) it purports to add an entirely new article to the Constitution, (B) it would result in a fundamental change to the structure of the Constitution and the governmental system it establishes; and (C) it imposes far-reaching and multifarious changes to the Constitution. Because Amendment A is a revision to the Constitution, it could not be initiated and submitted to the voters without the requisite approval of members at a constitutional convention. S.D. Const. art. XXIII, § 2. In short, Amendment A is invalid because it was submitted to the voters in violation of the Constitution itself.

A. Amendment A is an unconstitutional revision because it adds a new article to the Constitution.

Article XXIII, § 1 provides that "[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to

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[13] *Citizens Protecting Mich.'s Constitution v. Secretary of State*, 761 N.W.2d 210, 229 (Mich. Ct. App. 2008), *aff'd in part, appeal denied in part*, 755 N.W.2d 157 (Mich. 2008); *Adams*, 238 So. 2d at 831-32; *McFadden*, 196 P.2d at 796-98.

accomplish the objectives of the amendment." This sentence limits the meaning of "amendment" under Article XXIII, § 1 and establishes that a constitutional change may only be ratified as an amendment if two conditions are met: (1) the changes proposed by the amendment are "necessary" to accomplish the amendment's "objectives"; and (2) the changes are made to "one or more articles and related subject matter in other articles." S.D. Const. art. XXIII, § 1.

Under the second requirement, an amendment can only change existing articles of the Constitution; it cannot create an entirely new article. In resisting this interpretation of Article XXIII, § 1, Proponents claim that the second requirement cannot be read to apply only to existing articles because the word "existing" is not expressly included. (Proponents' Brief, 53). But the drafters did not need to expressly include the word "existing" when they restricted amendments to "one or more articles"—the fact that those articles must "exist" is plainly implied.

Proponents also argue that Amendment A is valid because "South Dakota has adopted—and repealed—entire constitutional articles by amendment rather than constitutional convention throughout its history." (Proponents' Brief, 54). The obvious flaw in Proponents' argument is that the procedure for revising the Constitution under Article XXIII, § 2 did not exist until 1972, which is the same year that Article XXIII, § 1 was amended to require that proposed amendments "may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment." 1972 S.D. Sess. Laws ch. 4 (H.J. Res. 514, approved November 7, 1972); *compare* S.D. Const. art. XXIII, §§ 1-2 (1889) (Appx. 1-2) *with* S.D. Const. art. XXIII, §§ 1-2 (1973). These

changes were ratified following the Legislature's establishment of the Constitutional Revision Commission in 1969, which it established in response to a growing concern over inconsistencies that had resulted from numerous amendments to the Constitution over the years. *See State v. Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d 513, 516.

In fact, from 1889 to 1970, the South Dakota Constitution "was amended 79 times, each time adding more complexity to the document." *Id.* (citing *South Dakota Constitutional Revision Commission,* Third Annual Report 1 (1972)). The members of the Constitutional Revision Commission "were acutely aware of the inconsistencies caused throughout the years by heavily amending the 1889 Constitution." *In re Daugaard*, 2011 S.D. 44, ¶ 13, 801 N.W.2d 438, 442 (citation omitted). With this acute awareness, it is not surprising that the Constitutional Revision Commission recommended adding a sentence to Article XXIII, § 1 that allowed amendment by initiative only when changing existing articles, thereby forcing the drafter to carefully examine the existing structure of the Constitution to ensure that the proposed amendment does not irreconcilably conflict with other sections of the Constitution. *See McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948) (characterizing voter-approved amendment as improperly submitted revision that "went beyond the legitimate scope of a single amendatory article").

In a final effort to avoid the plain language of Article XXIII, § 1, Proponents note that Article XXI, titled "Miscellaneous," addresses various topics, including the State seal and coat of arms, the rights of married women, and hail insurance. (Proponents' Brief, 53). According to Proponents, "[i]t 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." (*Id.*). To the contrary, there is sensible policy behind this requirement.

Allowing amendment by initiative only when changing an existing article forces the drafter to carefully examine the structure of the Constitution to ensure that the proposed amendment does not conflict with other articles of the Constitution or create undue complexity and disorganization. It also makes it easier for voters to evaluate the effect that the proposed amendment will have on other constitutional provisions. To promote these underlying policy objectives, Article XXIII, § 1 prohibits modifying or supplementing the Constitution, including Article XXI "Miscellaneous," with an amendment that establishes an entirely new article. This prohibition preserves the integrity of the Constitution and guards against the inconsistencies and complexity that once plagued it. *See Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516.

The drafters of the South Dakota Constitution devoted many long and arduous hours to scrutinizing constitutional provisions and eliminating inconsistencies to ensure that the State of South Dakota has a workable, accordant, and homogenous Constitution. *See Wilson,* 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516; *Adams,* 238 So. 2d at 832 ("The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogenous and up-to-date document."). New articles should not be added to such a venerated text without being properly analyzed and vetted in a constitutional convention. *See Bess v. Ulmer*, 985 P.2d 979, 983 (Alaska 1999); *see* Jonathan L. Marshfield, *Forgotten*

Limits on the Power to Amend State Constitutions, 114 Nw. U. L. Rev. 65, 78 (2019) ("Approval of constitutional revisions through a constitutional convention preserves the integrity of the Constitution and the system of government that it creates by promoting transparency, public input, and informed debate and discussion.").

B. Amendment A is an unconstitutional revision because it fundamentally changes the Constitution and the governmental system it established.

In determining whether a constitutional change is a revision, courts have considered the qualitative effect it would have on existing constitutional provisions and the governmental plan established by the constitution as a whole. As one court has explained, "a constitutional 'revision' need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions[.]" *Legislature v. Eu*, 816 P.2d 1309, 1317 (Cal. 1991) (citations omitted). To the contrary, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision[.]" *Id.* (citations omitted); *see Amador*, 583 P.2d at 1284-89.

In this case, the circuit court appropriately concluded that Amendment A was an unconstitutional revision because it would impose "far reaching changes in the nature of our basic governmental plan." (Pr.App.14). Indeed, if allowed to stand, Amendment A would impact at least 22 separate constitutional provisions; impose fundamental changes to the delicate separation of powers among the legislative, executive, and judicial branches; and undermine the system of checks and balances that the drafters of our Constitution worked tirelessly to establish.

Therefore, the circuit court's ruling that Amendment A is an unconstitutional revision should be affirmed.

i. Amendment A granted the Department of Revenue the "exclusive power" to perform certain functions.

The Department of Revenue is one of the executive agencies established under Article IV, § 8. *See* SDCL 10-1-1. The scope of the powers and duties of the Department of Revenue are defined by SDCL ch. 10-1 and can be modified by the Legislature or Governor as authorized by the Constitution. In fact, the Department of Revenue, as it exists today, is the result of a 2011 executive order that abolished and replaced the previously established "Department of Revenue and Regulation" and reorganized various agencies under the executive branch.[14]

Amendment A significantly alters the separate powers of the legislative and executive branches by granting the Department of Revenue broad constitutional powers. Not only is the Department of Revenue granted the "exclusive power" to "promulgate rules and issue regulations," but it is also granted sole authority to "administer and enforce" those rules. (Pr.App.2). Neither the Legislature nor the Governor can invade the Department of Revenue's authority. Thus, the Department of Revenue becomes a co-equal fourth branch of government vested with the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state" with only limited exceptions applicable to local governments. (*Id.*).

[14] 2011 S.D. Sess. Laws ch. 1, §§ 34-35 (Exec. Order 2011-01).

ii. "Exclusive power" means "exclusive power."

Despite Amendment A's broad grant of constitutional authority to the Department of Revenue, Proponents claim that the word "exclusive" only modifies 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." (Proponents' Brief, 57). According to Proponents, the Department of Revenue would be "subject to the normal executive and judicial oversight as it would be in administering any other regulatory program." (Id., 56).

It is impossible to reconcile Proponents' argument with the plain language of Amendment A, which vests a constitutional and "exclusive power" in the Department of Revenue. Black's Law Dictionary defines "exclusive power" as "[a] power held by *only* one person or authoritative body." *Power*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *see also Constitutional Power*, Black's Law Dictionary (11th ed. 2019) ("A governmental authority or capacity that, in a government formed under a constitution, is enumerated or implied as being vested in a particular branch or official; a legislative, executive, or judicial power granted by or deriving from a constitution."). Applying this definition to the language of Amendment A, the "exclusive power" granted to the Department of Revenue cannot be exercised or overseen by any other governmental body, including the Legislature. The power is "exclusive" to the Department of Revenue

alone. Any other interpretation would require holding that "exclusive power" does not mean "exclusive power."[15]

Essentially, Proponents are urging this Court to judicially re-write Amendment A to state that the Department of Revenue is the exclusive *agency* to which power can be delegated. This is simply not the role of the judiciary. *State ex rel. Evans v. Riiff*, 42 N.W.2d 887, 888 (S.D. 1950) ("This court has power to determine . . . what the constitution contains, but not what it should contain."). Moreover, Proponents defeat their own argument by noting that "the responsibilities delegated to the Department of Revenue are not irrevocably placed there" because Amendment A defines "department" as "the Department of Revenue *or its successor agency*." (Proponents' Brief, 58). If the "exclusive power" of the Department of Revenue can be assigned to a "successor agency," then Amendment A obviously cannot be read as appointing the Department of Revenue as the exclusive *agency* to which power can be delegated.

Moreover, the assignment of "exclusive power" to the Department of Revenue was likely intentional, since Proponents claim Amendment A was purposefully designed to "ensure that the rights [voters] want to secure to themselves are not immediately undone by a state government hostile to those rights." (Proponents' Brief, 67). By vesting "exclusive power" in the Department

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[15] For example, § 7(6) of Amendment A requires the Department of Revenue to issue regulations for "[t]esting, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information." (Pr.App.2-3). Because the Department of Revenue is granted the exclusive constitutional power to administer and enforce Amendment A, the Legislature has no authority to enact statutes setting, for example, labeling requirements or maximum THC levels.

of Revenue, Amendment A sought to remove the "hostile" Legislature from the realm of marijuana regulation.

Finally, Proponents argue that "[e]ven if Amendment A did cement the administration of marijuana within the Department of Revenue, . . . [s]uch 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." (Proponents' Brief, 65). This argument is patently false. By granting the Department of Revenue the "exclusive power" to pass laws regulating "the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," as well as the "administration and enforcement" of those laws, Amendment A threatens to impact several other administrative agencies, including the Department of Health,[16] the Department of Public Safety,[17] and the Department of Agriculture and Natural Resources,[18] all of which would see the scope of their duties and authority limited as a result of Amendment A. It would also impact several professional licensing boards, which would be barred from promulgating rules or disciplining their members to the extent it would conflict with the terms of Amendment A. The impact Amendment A would have on our Constitution, statutes, and state agencies is severe and far-reaching.

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[16] SDCL 34-1-16 grants the Department of Health the power to make rules and regulations "as may be required in the interest of the public health."

[17] See *supra* Section I(A).

[18] SDCL 39-1-1, as recently amended, states that the Department of Agriculture and Natural Resources "shall have and may exercise all of its general powers and duties," including "rule and regulation making" and prosecution "for the purpose of administering and enforcing the provisions of" Title 39, which is entitled "Food and Drugs."

iii. Vested constitutional powers are distinct from a delegation of legislative authority.

Amendment A vests an exclusive, constitutional power in the Department of Revenue. Proponents attempt to equate this constitutional power to the delegation of legislative authority over the sale, purchase, distribution, and licensing of alcoholic beverages to the secretary of the Department of Revenue. (*Id.*). They also cite other pieces of legislation that have delegated "certain administrative authority to one agency and certain authority to another agency." *Id.* (citing 2020 S.D. Sess. Law ch. 176, 2020 HB 1008). According to Proponents, Amendment A is valid because "[l]egislation routinely delegates regulatory authority to agencies." (Proponents' Brief, 56).

Proponents' argument ignores the fundamental distinction between the Legislature's delegation of its own pre-existing constitutional power and the establishment of an entirely new constitutional power. Each of the pieces of legislation Proponents cite are examples of the Legislature delegating its own constitutional authority to a subordinate agency. Neither the Legislature nor the Constitution has ever granted a subordinate agency "exclusive power," nor has the Legislature ever relinquished final authority over rules promulgated by an executive or legislative agency. Doing so would violate the separation of powers doctrine and result in a drastic revision of our system of government.

C. Amendment A is an unconstitutional revision because it imposes far-reaching and multifarious changes to the Constitution.

When determining whether a proposed amendment is a revision to the Constitution, courts have considered not only the qualitative effect of the changes

it enacts, but also the quantity of existing articles or sections of the Constitution that it would disturb. *See Citizens Protecting Mich.'s Constitution v. Secretary of State*, 761 N.W.2d 210, 228-29 (Mich. Ct. App. 2008) (applying quantitative analysis to hold that proposal was impermissible revision to constitution, and noting that "the number of proposed changes and the proportion of current articles and sections affected by those proposed changes [were] very significant"); *Bess*, 985 P.2d at 987-88 (holding that proposed amendment was impermissible revision and noting that it "would potentially alter as many as eleven separate sections of our Constitution").

Here, by granting the Department of Revenue exclusive constitutional power, Amendment A would alter several constitutional provisions relating to the delegation of governmental powers.[19] Even more provisions would be altered by the establishment of an entirely new cause of action against the Department of Revenue and the restriction on the public's ability to obtain judicial review of the Department of Revenue's decisions (by requiring the public to seek relief through the administrative process).[20] Once the constitutional provisions impacted by Amendment A's alteration of the Legislature's constitutional authority to assess taxes and appropriate revenue are considered,[21] it becomes clear that

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[19] *See* S.D. Const. art. II; S.D. Const. art. III, § 1; S.D. Const. art. IV, § 1; S.D. Const. art. IV, § 3; S.D. Const. art. IV, § 8; S.D. Const. art. IV, § 9; S.D. Const. art. IV, § 4; S.D. Const. art. III, § 30.

[20] S.D. Const. art. III, § 27; S.D. Const. art. V, § 1; S.D. Const. art. V, § 4; S.D. Const. art. V, § 5.

[21] *See* S.D. Const. art. XII, § 1; S.D. Const. art. XII, § 2; S.D. Const. art. XI, § 1; S.D. Const. art. XI, § 2; S.D. Const. art. XI, § 8; S.D. Const. art. XI, § 9; S.D. Const. art.

Amendment A will impact at least 22 separate constitutional provisions. Among the more significant changes are: (i) divesting the Governor and Legislature of their authority to delegate tasks among executive agencies; (ii) restricting this Court's authority to promulgate rules and discipline attorneys; (iii) establishing a new cause of action against the Department of Revenue; (iv) altering the Legislature's authority to levy taxes and appropriate revenue; and (v) restricting the Legislature's ability to impose criminal and civil penalties.

i. Amendment A precludes the Governor and Legislature from delegating tasks to executive agencies.

Under the Constitution, the Governor is "responsible for the faithful execution of the law" and may "enforce compliance with any constitutional or legislative mandate." S.D. Const. art. IV, § 3. The Governor is also vested with the authority to "make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as [s]he considers necessary for efficient administration." S.D. Const. art. IV, § 8. If Amendment A is upheld, however, then the Governor will be stripped of this constitutional authority.

Proponents contend that Amendment A did not deprive the Governor of her ability to reallocate powers among executive agencies because Amendment A defines "department" as "the Department of Revenue *or its successor agency*." (Pr.App.1, § 1(1)) (emphasis added). Thus, Proponents reason, the Governor

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XI, § 13; S.D. Const. art. VI, § 17; S.D. Const. art. VIII, § 3; S.D. Const. art. VIII, § 15.

could still reassign the powers of the Department of Revenue to a successor agency. However, even under the language cited by Proponents, the Department of Revenue could only be replaced by one "successor agency." Neither the Legislature nor the Governor would have the authority to delegate tasks among several subordinate agencies, even if it were deemed "necessary for efficient administration." S.D. Const. art. IV, § 8. Thus, if Amendment A is upheld, then it will result in a constriction of the Legislature and Governor's powers to delegate among subordinate agencies.

Proponents note that "[o]ther portions of the South Dakota Constitution confer powers on specific entities." (Proponents' Brief, 64). However, both examples cited by Proponents assign specific duties to be conducted "as provided by law," i.e. with legislative direction. Neither provision grants an agency discretion to exercise an exclusive constitutional power of any kind.

Finally, Proponents note that the Colorado Constitution defines "Department" as "the department of revenue or its successor agency." (Proponents' Brief, 64). However, the Colorado Constitution does not grant the Colorado department of revenue "exclusive power" over marijuana. Nor does it distinguish between constitutional amendments and revisions. Thus, the fact that the Colorado Constitution references "the department of revenue or its successor agency" bears absolutely no relevance to this Court's analysis.

ii. Amendment A restricts this Court's authority to promulgate rules and discipline members of the Bar.

Rule 1.2(d) of the South Dakota Rules of Professional Conduct states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that

the lawyer knows is criminal or fraudulent[.]" Rule 1.2(d) is one of several rules established by this Court pursuant to its authority under Article V, § 12, which states:

> The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar. These rules may be changed by the Legislature.

S.D. Const. art. V, § 12.

Because marijuana remains illegal under federal law, the South Dakota Ethics Committee has concluded that under Rule 1.2(d), a lawyer "may not ethically provide legal services to assist a client in establishing, licensing, or otherwise operating a marijuana business." While this opinion is entirely consistent with Rule 1.2(d), it is incompatible with the express language of Amendment A, which states: "A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law."

Thus, if Amendment A is upheld, then it would specifically preclude this Court from disciplining attorneys for violating federal law under Rule 1.2(d) and more generally constrain this Court's authority to promulgate rules and discipline members of the South Dakota Bar.

iii. Amendment A establishes an entirely new legal cause of action against the Department of Revenue.

Amendment A establishes an entirely new cause of action that can be initiated against the Department of Revenue—a State agency:

> If by April 1, 2022, the department fails to promulgate rules required by this article, or if the department adopts rules that are inconsistent with this article, any resident of the state may commence a mandamus action in circuit court to compel performance by the department in accordance with this article.

(Pr.App.3, §12).

Under Article III, § 27 of the South Dakota Constitution, the State, its entities, and its employees are generally immune from suit, and *the Legislature* must "direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. art. III, 27; *see Hallberg v. S.D. Bd. of Regents*, 2019 S.D. 67, ¶ 12, 937 N.W.2d 568, 573 ("The [S]tate may . . . waive sovereign immunity by legislative enactment identifying the conditions under which lawsuits of a specified type would be permitted.") (quoting *Wilson v. Hogan*, 473 N.W.2d 492, 494 (S.D. 1991)). By establishing a new cause of action against a State agency, Amendment A unconstitutionally waives sovereign immunity—a function that our Constitution specifically reserves for the Legislature.

Proponents claim that "Amendment A did not establish anything new, it simply recognized the application of an existing remedy," because"a writ of mandamus is already available against the state and public officers." (Proponents' Brief, 65-66). This argument ignores the language of Amendment A, which expressly authorizes the public to bring a mandamus action against the Department of Revenue if it "fails to promulgate" the required rules by April 1, 2022. No such cause of action currently exists under South Dakota law. Indeed, if Amendment A were not establishing a new cause of action, there would be no reason to include language expressly authorizing a mandamus action against the Department of Revenue.

Moreover, Amendment A would confer standing upon "any resident" who desired to bring a mandamus action against the Department of Revenue, regardless of their interest in the lawsuit, and regardless of the availability of other "plain, speedy, and adequate" remedies. *Jensen v. Lincoln Cty. Bd. of Comm'rs*, 2006 S.D. 61, ¶ 5, 718 N.W.2d 606, 608 ("A writ of mandamus is appropriate only when there is not a plain, speedy, and adequate remedy in the ordinary course of law."); *Wagner v. Wagner*, 2006 S.D. 31, ¶ 10, 712 N.W.2d 653, 657 (noting that petitioner in mandamus proceeding "must have a clear legal right to performance of the specific duty sought to be compelled") (internal quotation omitted). This provision vastly expands the claims that could be brought under SDCL chapter 21-29, resulting in a waiver of sovereign immunity that the Legislature never authorized.

iv. Amendment A would alter the Legislature's constitutional authority to assess taxes and appropriate revenue.

Amendment A would also fundamentally alter the Legislature's constitutional authority to assess taxes and make appropriations. Specifically, Section 11 of Amendment A imposes "[a]n excise tax of fifteen percent . . . upon the gross receipts of all sales of marijuana sold by a person licensed by the [D]epartment[,]" and "[t]he Legislature has no authority to adjust this rate until after November 3, 2024." (Pr.App.3, §11). Article XI of the Constitution, however, specifically empowers *the Legislature* to levy taxes and to divide all property into separate classes for purposes of taxation.

By setting a fixed tax rate for marijuana sales, and by divesting the Legislature of its authority to adjust that tax rate for four years, Amendment A

alters Article XI's allocation of taxing authority to the Legislature. Indeed, to comply with Amendment A's tax provisions, the Legislature must either (1) tax all property in the same class as marijuana at 15%; or (2) create an entirely new class of property for marijuana sales.

In addition, Amendment A would alter the Legislature's constitutional authority to appropriate revenue by mandating that all revenue collected "shall be appropriated to the [Department of Revenue] to cover costs incurred by the [Department of Revenue] in carrying out its duties under this article, and that "[f]ifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund." (Pr.App.3). By setting forth a specific appropriation schedule, Amendment A impacts Article XII, § 1, which requires "appropriation by law" before money can be paid out of the treasury, as well as Article XII, § 2, which requires a two-thirds vote of all members of each branch of the Legislature before appropriations can be made for extraordinary expenses.[22]

v. Amendment A deprived the Legislature of the power 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. (Pr.App.15). Proponents contend that Amendment A merely "sets a maximum civil penalty for certain enumerated violations," and that [n]othing in Amendment A prevents the [L]egislature from establishing a civil penalty lower

[22] *See* S.D. Const. art. XII, § 1; S.D. Const. art. XII, § 2.

than the maximum" or from "set[ting] civil penalties in any other area." (Proponents' Brief, 62).

Proponents' argument ignores the fact that Amendment A enshrines *specific* dollar figures in the Constitution for maximum penalties on an array of civil offenses, none of which bear any relevance to the decriminalization of marijuana. The Legislature would have no authority to adjust these figures through legislation. Even the slightest monetary adjustment would require an entirely separate constitutional amendment.

This illustrates the fundamental flaw underlying all the arguments Proponents have advanced in defense of Amendment A—they fail to appreciate the distinction between a legislative act that is codified into law and an amendment that is enshrined into the Constitution, our State's founding document. The Constitution is not the place for a comprehensive regulatory scheme with detailed rules covering a multitude of subjects, right down to the maximum dollar figure for civil penalties. By failing to follow the proper constitutional procedure, Proponents deprived South Dakota voters of the opportunity to have Amendment A properly scrutinized at a constitutional convention. Amendment A is a revision to our Constitution that was placed on the ballot in violation of established constitutional procedure. Therefore, Amendment A is invalid as a matter of law.

V. Amendment A cannot be severed.

Proponents finally contend that this Court can substitute its own judgment for what the voters thought they voted on by severing the portions of Amendment A that violated Article XXIII. The notion that Amendment A can somehow be

severed is antithetical to the One-Subject and Separate-Vote Rules and fails to recognize that "the defect lies in the *submission* of" Amendment A to the voters in violation of Article XXIII of the South Dakota Constitution. *See Marshall v. State ex rel. Cooney*, 975 P.2d 325, 332 (Mont. 1999). Amendment A was void at its inception and should never have been submitted to the voters, meaning the entire amendment is invalid—including the severability clause. Simply put, Amendment A cannot be severed because there is nothing to sever. It was submitted to the voters in violation of Article XXIII and is therefore void in its entirety. *Cf. id.*; *Mont. Ass'n of Ctys.*, 404 P.3d at 474.

CONCLUSION

Colonel Miller has timely commenced this proceeding and has standing because he is an executive officer who swore to uphold the Constitution, Amendment A will have a direct and injurious effect on the Highway Patrol, and this case presents a question of great public importance.

As the circuit court properly concluded, Amendment A is void because it violates the One-Subject Rule and constitutes an invalid revision and was not submitted to the voters through the constitutional convention process set forth under Article XXIII, § 2. Therefore, this Court should affirm the ruling of the circuit court.

REQUEST FOR ORAL ARGUMENT

Colonel Miller respectfully requests the privilege of appearing before this Court for oral argument.

Dated this 24th day of March, 2021.

/s/ Lisa M. Prostrollo

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CERTIFICATE OF SERVICE

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