IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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

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

Notice of Appeal filed on February 17, 2021

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

The Honorable Christina Klinger
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Table of Contents

Page

INTRODUCTION 1

ARGUMENT 1

I. Thom does not have standing. 2

A. Thom falls squarely under the *Edgemont* rule. 2

B. Thom's oath of office does not give him standing. 3

II. Miller does not have standing. 5

A. *Edgemont* precludes Miller's lawsuit. 5

B. Miller's allegations about Amendment A's impact on the Highway Patrol do not establish standing. 6

C. Miller may not exercise the power of the governor to establish standing. 8

D. Public importance does not eliminate the standing requirement. 11

III. Miller and Thom—and the Governor—passed up multiple opportunities to challenge Amendment A prior to the election, and may not belatedly raise those arguments now. 13

IV. Miller and Thom have failed to show that Amendment A plainly and palpably involves subjects that have no relationship to each other. 17

A. This Court should not overrule *Barnhart* and impose a heightened single-subject test. 18

1. South Dakota law is clear: the single-subject rule only requires a "reasonably germane" connection. 19

2. This Court should not overrule Barnhart and others based on cases from other jurisdictions. 19

3. Miller's argument about the scope of the subject is a red herring. 23

B. Miller and Thom have not shown how or why Amendment A contains multiple unrelated subjects. 24

1. Miller has failed to show that the allegedly different subjects in Amendment A do not relate to each other. 24

2. Miller and Thom's contention that the voters did not understand Amendment A is contrary to the law...............26

V. Amendment A did not require a constitutional convention. 27

A. Amendments may add a new article to the Constitution. 28

B. The Department of Revenue is not a fourth branch of government. 28

C. The other "far-reaching and multifarious changes to the Constitution" Miller and Thom outline are imaginary. 30

D. South Dakotans—not Miller and Thom—get to decide what is in their Constitution. 32

VI. South Dakota law favors separability. 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Fed'n of State, Cnty., and Mun. Emps. v. State, Pub. Emp. Rels. Bd.,
372 N.W.2d 786 (Minn. Ct. App. 1985) 8

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

Bd. of Supervisors of Linn Cnty. v. Dep't of Revenue,
263 N.W.2d 227 (Iowa 1978) 3

Brendtro v. Nelson,
2006 S.D. 71, 720 N.W.2d 670 31

Byre v. City of Chamberlain,
362 N.W.2d 69 (S.D. 1985) 31, 32

Cable v. Union Cnty. Bd. of Cnty. Comm'rs,
2009 S.D. 59, 769 N.W.2d 817 .... 4, 12

Californians for an Open Primary v. McPherson,
134 P.3d 299 (Cal. 2006) 20

State ex rel. Cranmer v. Thorson,
68 N.W.2d 202 (S.D. 1896) 14

Dakota Sys., Inc. v. Viken,
2005 S.D. 27, 694 N.W.2d 23 .... 33, 34

Danforth v. City of Yankton,
25 N.W.2d 50 (S.D. 1946) 12

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

H&W Contracting, LLC v. City of Watertown,
2001 S.D. 107, 633 N.W.2d 167 .... 11, 12

Hensley v. Attorney Gen.,
53 N.E.3d 639 (Mass. 2016) 23

In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions,
132 So. 3d 786 (Fla. 2014) 23

In re Initiative Petition No. 314,
625 P.2d 595 (Okla. 1980) 22

In re Initiative Petition No. 420, State Question No. 804,
458 P.3d 1088 (Okla. 2020) 23

Johnson v. John Deere Co.,
306 N.W.2d 231 (S.D. 1981) 4

Kneip v. Herseth,
214 N.W.2d 93 (S.D. 1974) 12, 13

Kreisers Inc. v. First Dakota Title Ltd P'ship,
2014 S.D. 56, 852 N.W.2d 413 19

Larkin v. Gronna,
285 N.W.59 (N.D. 1939) 27

Legislature of Cal. v. Eu,
816 P.2d 1309 (Cal. 1991) 31, 34

Meierhenry v. City of Huron,
354 N.W.2d 171 (S.D. 1984) 18, 24

Montana Ass'n of Cntys. v. State,
404 P.3d 733 (Mont. 2017) 20, 21, 22

Noel v. Cunningham,
5 N.W.2d 402 (S.D. 1942) 14, 15

Olson v. Guindon,
2009 S.D. 63, 771 N.W.2d 318 6

Raven v. Deukmejian,
801 P.2d 1077 (Cal. 1990) 34

S.D. Educ. Ass'n/NEA v. Barnett,
1998 SD 84, 582 N.W.2d 386 ... 33

Sioux Falls Mun. Emps. Ass'n, Inc. v. City of Sioux Falls,
233 N.W.2d 306 (S.D. 1975) ... 12

In re Tod,
81 N.W. 637 (S.D. 1900), *overruled on other grounds by Grogan v. Welch*, 227 N.W. 74 (1929) ... 10

State ex rel. Wagner v. Evnen,
948 N.W.2d 244 (Neb. 2020) ... 22

Watland v. Lingle,
85 P.3d 1079 (Haw. 2004) ... 17

Constitutions

S.D. CONST. art. V, § 5 ... 13

S.D. CONST. art. XXIII, § 1 ... 16, 21

Statutes

S.D.C.L. Chapter 1-26. (App.3, § 12.) ... 29

S.D.C.L. § 2-1-17.1 ... 14

S.D.C.L. § 2-1-18 ... 14

S.D.C.L. § 16-16-18 ... 3

S.D.C.L. § 32-2-7 ... 7

Other Authorities

Hearing on H.J.R. 1006, 93rd S.D. Legis. Sess. (2018) (Senate floor debate, statement of Sen. Rusch at 2:22:02-2:24:25), https://sdpb.sd.gov/SDPBPodcast/2018/sen34.mp3#t=8417 ... 22

Hearing on H.J.R. 1006, 93rd S.D. Legis. Sess. (2018) (House floor debate, statements of Reps. Rosen and Lust at 1:48:04-1:50:07), https://sdpb.sd.gov/SDPBPodcast/2018/hou27.mp3#t=6230 22

INTRODUCTION

Miller and Thom's lawsuit does far more than simply enforce constitutional limitations on the initiative process, as they claim. Rather, their arguments warp constitutional and legal rules in an effort to strike down the results of a democratic election. Paradoxically, Miller and Thom ask this Court to uphold the people's right to sovereignty and self-government by dramatically limiting the people's sovereign right to govern themselves through constitutional amendments.

Miller and Thom offer no consistent or coherent rules of law that can meaningfully apply in future elections. That absence lays bare the reality that this lawsuit is not about the rule of law. It is about achieving a particular political goal—the defeat of Amendment A. If elections are to be decided by voters and not by courts, this Court should not follow the path Thom and Miller offer.

ARGUMENT

Miller's response brief is notable for three repeated failures.[1] First, Miller fails to engage with, or even directly acknowledge, the exceedingly high burden of proof required to overturn an amendment adopted by the

[1] For clarity, this reply brief will refer to Miller's brief and Thom's brief separately, although Thom joined Miller's arguments in their entirety.

voters. Second, Miller largely fails to defend the circuit court's decision or reasoning, a tacit admission that this Court should not follow the reasoning of the circuit court. Third, Miller fails to offer substantive analysis showing why Amendment A violates the law, instead relying on bare assertions, convenient interpretations, and frequent repetition of both.

For the reasons below, and the reasons set forth in the Proponents' opening brief, this Court should reverse the decision of the circuit court and uphold the voters' adoption of Amendment A.

I. Thom does not have standing.

Thom cannot bring this lawsuit in his official capacity because county officials cannot sue the state. Thom did not plead or prove any legally-protected interest to or adversarial relationship in this lawsuit related to his official capacity. (Prop. Br. pp.11-17.) Thom's arguments otherwise are unpersuasive.

A. Thom falls squarely under the *Edgemont* rule.

Thom's attempt to distinguish *Edgemont* misses the mark. (Thom Br. pp.5-7.) *Edgemont* did not turn on whether the challenged provision was statutory or constitutional. Instead, the core of the holding was that political subdivisions of the state, such as counties and their officials, may not sue the state because they are subordinate to the state. *Edgemont Sch.*

Dist. 23-1 v. S.D. Dep't of Revenue, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40; *see also Bd. of Supervisors of Linn Cnty. v. Dep't of Revenue,* 263 N.W.2d 227, 234 (Iowa 1978).

Edgemont itself disproves Thom's argument about the timing of Pennington County's creation. (Thom Br. p.7.) Fall River County—the county at issue in *Edgemont*—was founded in 1883, six years before South Dakota's statehood. The date a political subdivision or subordinate to the state was originally created is irrelevant to the rule set forth in *Edgemont*. The relevant inquiry focuses on the nature of the plaintiff's relationship with the state. *S*ubordinates of the state, including their officials like Thom, cannot sue the state.

B. Thom's oath of office does not give him standing.

Thom's oath of office does not establish standing. (Thom Br. p.7-9.) Thom has yet to explain why this Court should allow any person who takes an oath to later challenge a law or amendment. Nor has Thom addressed the fact that his duties do not involve enforcing the laws he claims Amendment A violated.

Every elected or appointed official in South Dakota takes an oath. (App.7 n.2.) Every attorney admitted to the bar in South Dakota takes a similar oath. *See* S.D.C.L. § 16-16-18. Can every attorney and every official

challenge any law, simply because they took oaths? If this Court finds that Thom has standing, it must also answer that question affirmatively.

Thom has no legally-protected interest in enforcing a certain set of laws. His job is to uphold the law, however the people or the legislature may enact it, and his office is not harmed by doing so. If sheriffs can challenge laws simply because it may require time and money to enforce them, sheriffs could challenge any law.

Amendment A explicitly allows Thom to continue enforcing all laws relating to driving under the influence of marijuana. (App.1.) In essence, Thom's argument suggests that, after Amendment A's passage, there might be more people driving under the influence of marijuana. This is quintessentially speculative, and insufficient to establish standing. *See Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825-26. In addition, Thom's office will not be investigating and making arrests for many low-level drug offenses, which will free up significant law enforcement time and resources. Furthermore, the relative degree of difficulty enforcing laws does not provide a sheriff with standing to challenge them.[2]

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[2] Thom mentions, but does not attempt to explain, his reference to potential liability. (*See* Thom Br. p.8.) The Court need not address this undeveloped and speculative argument. *See, e.g., Johnson v. John Deere Co.,*

Finally, Thom's argument that he may have standing in his individual capacity is irrelevant. (Thom Br. p.7 n.3.) Whether he could have sued individually or not, Thom made the strategic choice to bring this lawsuit in his official capacity only. Whatever his tactical reason, he is bound to that decision. Thom may not claim standing for a hypothetical lawsuit he chose not to bring.

II. Miller does not have standing.

Miller initially brought this lawsuit in his official capacity. After the Proponents challenged his standing, he offered an executive order from Governor Noem, stating that Miller's lawsuit was really brought at her direction and under her authority. Miller continues to argue both positions, claiming that he is bringing this lawsuit, and at the same time claiming that he is merely the Governor's delegated agent. Both cannot be simultaneously true. Miller must pick one story and stick to it.

A. *Edgemont* precludes Miller's lawsuit.

Miller's efforts to distinguish *Edgemont* reinforce why *Edgemont's* holding bars him from suing the state in his official capacity. Miller first argues that the Highway Patrol is not a school district or a political

306 N.W.2d 231, 239 (S.D. 1981) (noting that issues not properly briefed or argued on appeal are abandoned).

subdivision, so *Edgemont* does not apply. (Miller Br. p.10.) Miller reads *Edgemont* too narrowly. The fact that the Highway Patrol is a subordinate agency within the executive branch itself underscores the reality that Miller's official capacity is subordinate to the state. Miller points to no case authorizing a suit similar to the one he purports to bring in this case. Accordingly, *Edgemont* bars his official-capacity suit.

Olson v. Guindon, 2009 S.D. 63, 771 N.W.2d 318, does not help Miller. (Miller Br. p.10.) The key to *Olson's* holding that a school district had standing was the fact that the Constitution itself created the school district. *Id.* ¶ 16, 771 N.W.2d at 323 (stating that "school districts are not mere creatures of statute. Instead, they are creations of the Constitution via Article VIII"). The Highway Patrol is not a constitutional entity like a school district, it is a subordinate agency within the executive branch. Furthermore, as discussed in the next section, Miller has never shown that the Highway Patrol will suffer a direct, material harm to a legally-protected right, as the school district did in *Olson*. *See id.* at ¶¶ 14-16, 771 N.W.2d at 322-23. *Olson* is too legally and factually distinct to help Miller.

B. Miller's allegations about Amendment A's impact on the Highway Patrol do not establish standing.

Miller only mentions his oath of office in passing. (Miller Br. p.12.) As with Thom, that oath does not give Miller standing.

Instead, Miller alleges infringement of the Highway Patrol's authority to enforce all laws on the highways under S.D.C.L. § 32-2-7. (Miller Br. pp.11-12.)[3] In fact, if Miller were to refuse to enforce marijuana laws on the highways, he would violate his oath of office.

Miller's argument is plainly contrary to the text of Amendment A itself, which explicitly states:

> [T]his article does not limit or affect laws that prohibit or otherwise regulate . . . [o]perating or being in physical control of [any vehicle] while under the influence of marijuana; [c]onsumption of marijuana while operating or being in physical control of [any vehicle] while it is being operated; [and s]moking marijuana within a [vehicle] while it is being operated.

(App.1 § 2.) Amendment A also does not limit or affect laws that prohibit or regulate conduct that endangers others. (*Id.*) Miller offers no response to this reality, other than to repeat—without further analysis or development—his assertion that the Department of Revenue will be a new, unchecked fourth branch of government. Miller's repetition of this argument does not make it true. (*See* Section V.B, *infra*.)

Miller's passing citation to *American Federation* also does not explain why he has standing in his official capacity. (Miller Br. p.11.) That case

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[3] Miller's conclusion that he could not enforce any laws related to marijuana on the highways is contradicted by Thom's apparent intent to enforce those laws.

involved a collective bargaining agreement between a union and a county. *Am. Fed'n of State, Cnty., and Mun. Emps. v. State, Pub. Emp. Rels. Bd.*, 372 N.W.2d 786, 790 (Minn. Ct. App. 1985). With little discussion, the court found the county had standing because "it questions its own rights in the collective bargaining agreement and stands to suffer an adverse effect if a statute is applied." *Id.* at 789-90. The dispute was between the bargaining unit on one hand, and the state public relations board and county, on the other. *American Federation* does not authorize an official like Miller to sue the state.

C. Miller may not exercise the power of the governor to establish standing.

Miller argues that his action is effectively brought in the name of the state, and that requiring the governor to actually bring this lawsuit in the name of the state elevates form over substance. (Miller Br. p.14.) Miller's position demonstrates why *Edgemont* prevents him, as a subordinate state official, from suing the state. His argument also ignores the point the Proponents made. If this is indeed a lawsuit brought by Governor Noem, she should have brought it. Miller never explains why the Governor needed his involvement. This Court should not condone a rule that would allow governors to conceal their exercises of constitutional authority by directing unelected subordinates to exercise those powers.

Miller next argues that he technically did not sue the legislature or the voters, so Article IV, § 3's limitation on claims against the legislature does not apply. (Miller Br. p.14.) But if Miller prevails, he will void the exercise of the people's retained legislative authority. The fact that he sued the Secretary of State to prevent the placement of Amendment A in the Constitution does not provide a workaround.[4] Otherwise, a governor could circumvent the express limitation in Article IV, § 3, and restrain the legislature's actions by suing the Secretary of State in each instance.

Most troublingly, Miller argues that the governor has an unlimited ability to farm out her constitutional duties. (Miller Br. pp.15-16.) That is not the law, and it is a dangerous untethering of power from accountability.

A governor need not personally perform every executive task. For example, the governor does not write the entire state of the state address, but the governor delivers it. The governor does not review every application for a judicial appointment, but the governor makes the appointment. Similarly, Governor Noem need not draft the pleadings or

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[4] Miller's insistence that this suit under Article IV, § 3 is directed at the Secretary of State reinforces the conclusion that this lawsuit should have been brought well before the election, when the Secretary of State placed Amendment A on the ballot.

briefs in this lawsuit, but she must be the one exercising her power under Article IV, § 3.

Miller argues that a governor has broad authority to delegate tasks, citing *Opinion of the Justices to the Council*. (Miller Br. p.16.) In that case, a council proposed candidates for judicial nominations to the governor. 334 N.E.2d 604, 606 (Mass. 1975). Of course, that type of delegation is permissible, "as long as [the governor] does not surrender to them his responsibility to select a candidate and to make the nomination and appointment." *Id.* at 609. That case does not authorize the total delegation of a constitutional function, which is prohibited as recognized in *In re Tod*, 81 N.W. 637, 640 (S.D. 1900), *overruled on other grounds by Grogan v. Welch*, 227 N.W. 74 (1929). The Governor may not simply hand off a constitutional responsibility entirely to an unelected subordinate.

Compounding that deficiency, Miller argues that he may exercise Governor Noem's constitutional authority without any type of delegation or guidance from the Governor. (Miller Br. p.16.) That dramatic concession is at odds with established law requiring that delegations of authority be accompanied by intelligible standards to guide the exercise of delegated power. (*See* Prop. Br. p.21.) Notably, Miller does not argue that the Governor provided any type of guidance here. Rather, he argues that he

does not need any guidance because no authority specifically requires it. This Court should reject Miller's position.

Finally, Miller's ratification argument misses the point. (Miller Br. p.17.) If this is the Governor's lawsuit, then Miller and Thom are irrelevant and she indisputably could have brought it prior to the 2020 election. Any ratification does not solve the other infirmities: that this lawsuit is not permitted under Article IV, § 3 and it is an improper delegation of authority.

D. Public importance does not eliminate the standing requirement.

Miller may not avoid his burden to prove standing simply by claiming this is an issue of public importance. (Miller Br. pp.17-19.) The cases Miller cites do not eliminate the standing requirement simply because an issue is a matter of public importance.

H&W Contracting, LLC v. City of Watertown, 2001 S.D. 107, ¶ 9, 633 N.W.2d 167, 171, recognized that a plaintiff must ordinarily show some actual or threatened injury. It noted the exception that in certain circumstances a taxpayer can institute an action to protect public rights. *Id.* ¶ 11, 633 N.W.2d at 171-72. The case also recognized a limited exception for disappointed bidders on public contracts, which does not apply here, and then found that the plaintiff did not fall under that exception. *Id.*

¶¶ 12, 15, 633 N.W.2d at 172-73.

Here, Miller did not bring this action as a taxpayer. And even if he did, he has not established any injury to himself as a taxpayer. In *Danforth v. City of Yankton*, a taxpayer did not have standing because "[t]he action of the commission will in no way increase the burden of taxation upon property within the municipality. This being true, plaintiff can not [sic] possibly be affected as a taxpayer." 25 N.W.2d 50, 54 (S.D. 1946). In other words, some type of injury is still required, even when challenging a public policy. *See also Cable*, 2009 S.D. 59 at ¶¶ 46-47, 769 N.W.2d at 831-832 (discussing standing and distinguishing *Sioux Falls Mun. Emps. Ass'n, Inc. v. City of Sioux Falls*, 233 N.W.2d 306, 307-09 (S.D. 1975)). Here, the only evidence in the record shows that Amendment A will provide significant additional tax revenue. (*See* R.284 (Amendment A fiscal note stating that Amendment A will generate revenue and decrease incarceration costs).) Miller has not established general taxpayer standing.

Miller's reference to *Kneip v. Herseth*, 214 N.W.2d 93 (S.D. 1974), fares no better. That lawsuit was brought by one of the candidates, who unquestionably had a personal interest in appearing on the ballot and associating with the political party and voters of his choice. *Id.* at 99. The Court found that a declaratory judgment could provide a pre-election

remedy to remove uncertainty and avoid disenfranchising voters—a far cry from allowing any person to challenge a law regardless of its impact on him or her. *See id.* at 97.

In a last-ditch effort, Miller suggests that this Court should overlook his lack of standing because someone else could bring the lawsuit instead. (Miller Br. p.19.) This Court need not address speculative future lawsuits now. And it makes no difference how well Miller presents his arguments—standing is jurisdictional and may not be waived simply because someone can afford the lawyers to make an argument.

III. Miller and Thom—and the Governor—passed up multiple opportunities to challenge Amendment A prior to the election, and may not belatedly raise those arguments now.

Miller never addresses why Governor Noem did not seek an opinion from this Court regarding Amendment A's constitutionality prior to the election, other than to incorrectly infer a contradiction that does not exist. (Miller Br. pp.21-22.) Article V, § 5 allows a governor to request an opinion from the Supreme Court. S.D. Const., art. V, § 5. As the Proponents pointed out, the Supreme Court will answer these questions, where otherwise appropriate, without regard to whether they present an "advisory" opinion, i.e., whether they are based on future occurrences. (Prop. Br. pp.23-24.) If Governor Noem felt that Amendment A violated

the Constitution, she could have asked for an opinion from this Court well before the election occurred. She did not, and she may not do so (or instruct subordinates to do so) now.

Miller claims that S.D.C.L. §§ 2-1-17.1 and 2-1-18 do not apply, but provides no explanation supporting his position. (Miller Br. p.22.) If the form of Amendment A's petition violated the Constitution, the Secretary of State should not have placed it on the ballot. Miller and Thom could have challenged the Secretary's decision to do so. Furthermore, if those statutes do not apply, then Miller and Thom could have sought injunctive or declaratory relief. (*See* Prop. Br. pp.24-25.) Either way, Miller and Thom could have alleged that Amendment A was void from the outset before the election. Having declined to raise that issue, they may not do so now. *See Noel v. Cunningham*, 5 N.W.2d 402, 404 (S.D. 1942).

The Proponents' brief explained why *State ex rel. Cranmer v. Thorson*, 68 N.W.2d 202 (S.D. 1896), does not preclude pre-election procedural challenges. (Prop. Br. pp.29-31.) Miller's brief only addresses this issue in a single paragraph, which is not responsive to any of the substantive arguments the Proponents put forth. (Miller Br. p.22.) Courts may hear pre-election procedural challenges.

Miller next argues that, even if he and Thom could have brought this

case prior to the election, nothing requires that they do so. (Miller Br. p.23.) The fact that declaratory relief is available as an alternative remedy does not mean that declaratory judgments can be sought at any time. Miller's argument that this Court routinely considers post-election challenges appears to be based on cases involving election contests. (*Id.*) Of course, courts can hear challenges to violations of the law relating to the manner in which an election is conducted after the election. But this lawsuit is not such a challenge. It could have been brought a year before the election.

Miller's assertion that equitable defenses do not apply to challenges such as his is also misplaced. (Miller Br. pp.23-24.) For example, *Noel* found that a challenge to a candidate's nomination was waived because it was brought after the election. *Noel*, 5 N.W.2d at 404. Other cases have applied the doctrine of laches in the election context. (*See* Prop. Br. pp.27-28.)[5] Miller's position would logically mean that a plaintiff could now challenge, for example, the procedures by which South Dakota's 1972

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[5] Miller argues that the Proponents' citations to other cases stemming from the 2020 election are "wildly misplaced." (Miller Br. p.24 n.5.) The Proponents certainly do not accuse Miller or Thom of anything like fabricating claims of voter fraud. Relevant to this litigation, though, these cases illuminate (1) that challenges to election procedures must be timely brought, or they will be barred by laches, and (2) post-election litigation of pre-election claims disenfranchises voters.

constitutional amendments were adopted. This Court should not set such a rule.

Finally, Miller argues that the legislative history of Amendment Z (the single-subject rule now part of Article XXIII, § 1) indicates that the legislature intended for single-subject challenges to be brought after the election was over. (Miller Br. p.25.) Amendment Z is silent on the timing of challenges. The cited portion of the legislative history simply expressed, briefly and with no explanation, one individual's belief regarding ripeness of legal claims, to which this Court owes no deference.[6] Furthermore, the legislature has subsequently made clear that it did not intend for single-subject challenges to be raised post-election by enacting a statute requiring pre-election enforcement of Article XXIII, § 1. (Miller Br. p.24 n.6.)

Miller fails to address the numerous policy reasons counseling against permitting post-election litigation, other than offering unsupported reassurance that such a "hypothetical parade of horribles simply will not come to fruition." (Miller Br. p.24.) Respectfully, they already are occurring. The circuit court and this Court are placed in the exceedingly difficult (and unnecessary) position of deciding litigation after the results

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[6] This opinion on judicial ripeness of claims is wrong, as explained in the Proponents' opening brief. (Prop. Br. pp.29-31.)

of the election are known. And if Miller and Thom prevail, the state will have unnecessarily incurred the costs of a void election and South Dakota voters will have their votes taken away from them. In addition, Miller never addresses the problem that courts will become an extraconstitutional mechanism for repealing adopted amendments and circumventing voters.

Ultimately, Miller never provides this Court with a reason not to follow the rule in *Watland v. Lingle*: "[t]he general rule is that[,] if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward." 85 P.3d 1079, 1087 (Haw. 2004) (alterations in original) (quoting *Lewis v. Cayetano,* 823 P.2d 738, 741 (Haw. 1992)). Because Miller and Thom could have raised these issues well before the election, they may not take a second bite at the apple after they were disappointed with the outcome of the election.

IV. Miller and Thom have failed to show that Amendment A plainly and palpably involves subjects that have no relationship to each other.

Throughout this litigation, Miller and Thom have ignored the extremely high burden placed on a plaintiff challenging an adopted constitutional amendment. Miller's response brief repeats its refrain that

Amendment A included a litany of unrelated subjects, but never makes an effort to explain *why* the allegedly different parts of Amendment A do not relate to each other, or *how* Miller and Thom meet the high threshold required to strike down Amendment A. Miller's bare assertions of his desired conclusion are not an acceptable substitute for meaningful analysis, nor do they gain additional force simply by repetition.

"When considering a constitutional amendment after its adoption by the people, the question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it." *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (cleaned up). An amendment passed by the people "should be sustained unless is 'plainly and palpably appear(s) to be invalid.' " *Id.* Miller and Thom have failed to meet that standard.

A. This Court should not overrule *Barnhart* and impose a heightened single-subject test.

The circuit court, citing *Baker v. Atkinson*, 2001 S.D. 49, 625 N.W.2d 265, and *Meierhenry v. City of Huron,* 354 N.W.2d 171, 192 (S.D. 1984), applied the well-established standard for single-subject challenges: Whether the parts of Amendment A were reasonably germane. (App.11.) Miller now argues that the circuit court should have applied a new, higher standard. (Miller Br. pp.27-34.)

As an initial matter, Miller and Thom did not present to the circuit

court any argument for a heightened standard, whether based on legislative history or Montana law. Instead, they pointed the circuit court to South Dakota cases addressing the legislative single-subject rule. Accordingly, they failed to fully present this issue to the circuit court and may not present it now. *See Kreisers Inc. v. First Dakota Title Ltd P'ship*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425 (declining to address an issue when it was not "fully presented" to the circuit court).

1. *South Dakota law is clear: the single-subject rule only requires a "reasonably germane" connection.*

Barnhart dealt with a single-subject challenge to a voter-approved constitutional amendment. The Court's holding was clear: the provisions in the amendment only had to be "rationally related to [the amendment's] general purpose." 222 N.W.2d at 135. That standard controls here.

The circuit court correctly relied on other cases applying the single-subject rule in the legislative context because those cases applied the same standard as *Barnhart*. (*See* Prop. Br. pp.37-40.) Although courts have used different terms to flesh out the contours of this rule, its application is straightforward. If the different parts of Amendment A rationally relate to Amendment A's general purpose, they do not run afoul of the single-subject rule.

2. *This Court should not overrule* Barnhart *and others based on*

cases from other jurisdictions.

Miller urges the Court to apply Montana law rather than South Dakota law, pointing the Court to *Montana Ass'n of Cntys. v. State*, 404 P.3d 733 (Mont. 2017). The Court should not follow *Montana Ass'n* for several reasons.

Montana Ass'n expressly found that the single-subject requirement does not apply in Montana to constitutional amendments. *Id.* at 193 ("We now directly consider whether the single-subject requirement applies to constitutional amendments proposed by initiative and decide that it does not."). Instead, *Montana Ass'n* applied a different rule: that state's version of the single-vote rule. Miller and Thom may not reframe their single-subject challenge as a single-vote challenge simply to try to take advantage of more favorable case law from other jurisdictions.

Montana Ass'n also represents a minority position described as "dormant." *See Californians for an Open Primary v. McPherson*, 134 P.3d 299, 322 (Cal. 2006) (describing the functional, closely-related test for the separate-vote requirement as "an essentially dormant minority position"). As far as the Proponents can tell, *Montana Ass'n* has not been followed by any court. By contrast, the "vast majority" of states interpret single-subject and single-vote requirements in the same manner. *McPherson*, 134 P.3d at

324.[7] This Court has followed California courts in the past, and should do so here. It should not overrule *Barnhart* or change course to follow *Montana Ass'n*.

Montana Ass'n's strict limitation and its "implied constitutional change" theory is contrary to Article XXIII, § 1, which recognizes that an amendment "may amend one or more articles and related subject matter in other articles . . . ." S.D. Const. art. XXIII, § 1. In addition, it is unclear how voters would ever be able to separately vote on every implied change that a challenger could later think up. Furthermore, it ignores the reality that, while the legislature may pass as many bills as it wants, or submit as many amendments to the voters as it wants, voter-initiated amendments each require tens of thousands of signatures simply to make it to the ballot. Requiring sponsors to place every arguably separate change—explicit and implicit—on the ballot separately is not feasible, and would only serve to increase voter confusion. Effectively, the *Montana Ass'n* rule squeezes initiated amendments into nonexistence.[8] This Court should not interpret

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[7] *Montana Ass'n* itself recognizes great variance among states, and concedes that many states do not meaningfully distinguish between the single-subject and single-vote rule. 404 P.3d at 741.

[8] *Montana Ass'n* dealt with Marsy's Law, a subject of two different constitutional amendments in South Dakota. Adopting *Montana Ass'n* would likely also invalidate both of those past constitutional amendments.

initiated amendments out of South Dakota's Constitution.

Miller argues that the legislature intended to create a heightened standard similar to that used in *Montana Ass'n* when it submitted Amendment Z to the voters. (Miller Br. pp.29-30.) The legislative history Miller cites resoundingly rejects Miller's conclusion. Legislators repeatedly stated that Amendment Z merely extended the existing single-subject limit on legislative action already found in Article III, § 21 to initiated constitutional amendments.[9] That rule is the permissive "reasonably germane" test that Miller and Thom seek to avoid.

Nor should this Court follow *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244 (Neb. 2020) or *In re Initiative Petition No. 314*, 625 P.2d 595 (Okla. 1980). *Wagner* involved a pre-election challenge, and the subject of the proposed amendment was narrower than Amendment A. Its holding is inapplicable, and its test differs from established South Dakota law. The Oklahoma Supreme Court clarified that the test set forth in *In re Initiative Petition No. 314* applies only when the amendment at issue does not

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[9] *See, e.g.*, *Hearing on H.J.R. 1006*, 93rd S.D. Legis. Sess. (2018) (Senate floor debate, statement of Sen. Rusch at 2:22:02-2:24:25), https://sdpb.sd.gov/SDPBPodcast/2018/sen34.mp3#t=8417; *Hearing on H.J.R. 1006*, 93rd S.D. Legis. Sess. (2018) (House floor debate, statements of Reps. Rosen and Lust at 1:48:04-1:50:07), https://sdpb.sd.gov/SDPBPodcast/2018/hou27.mp3#t=6230.

propose a new article. *In re Initiative Petition No. 420, State Question No. 804*, 458 P.3d 1088, 1098 (Okla. 2020). When an amendment by article is proposed, its provisions need only be germane to the same general subject matter. *Id.*

If this Court wants to look to out-of-state decisions, it should look to *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014). There, the Florida Supreme Court addressed a proposed constitutional amendment that would have legalized medical marijuana and required regulations regarding the production and distribution of marijuana. The Court held the proposed amendment did not violate the single-subject rule because it had "a logical and natural oneness of purpose." *Id.* at 796; *see also Hensley v. Attorney Gen.*, 53 N.E.3d 639, 647 (Mass. 2016). Miller and Thom never distinguish these cases or their reasoning.

Miller and Thom need this Court to apply out-of-state law because Amendment A clearly meets the "reasonably germane" test. This Court should decline that invitation to rewrite established South Dakota law.

3. Miller's argument about the scope of the subject is a red herring.

Miller's argument that the scope of the subject must be narrowly drawn is contrary to the law. (Miller Br. pp.32-34.) "The constitution does

not restrict the scope or magnitude of the single subject of a legislative act." *Meierhenry*, 354 N.W.2d at 182 (citing *Morgan*, 48 N.W. at 317).

Miller invites the Court to describe Amendment A's general purpose in granular terms, but he never rebuts the numerous cases where South Dakota courts have used broad language to define a law's general purpose. In *Barnhart*, for example, this Court upheld a multi-part constitutional amendment with the strikingly general goal of "making the executive branch of state government more efficient and responsible." *Barnhart*, 222 N.W.2d at 135-36; *see also* Prop. Br. pp.37-38 (collecting cases). In addition, Miller never rebuts the liberal interpretation afforded to petitions and the strong presumption in favor of constitutionality. (*See* Prop. Br. pp.37-40.) Again, Miller and Thom fall short of proving that Amendment A plainly and palpably violates the Constitution.

B. Miller and Thom have not shown how or why Amendment A contains multiple unrelated subjects.

Miller's response brief barely touches on why the parts of Amendment A he identifies do not relate to each other. (Miller Br. pp.34-36.) Nor does Miller even mention the circuit court's conclusions in pages 34 to 36, much less defend them.

1. Miller has failed to show that the allegedly different subjects in Amendment A do not relate to each other.

Amendment A legalizes and regulates adult marijuana use in South Dakota. (App.1-3; App.11.) Civil penalties and taxes are rationally related to regulating adult marijuana use—they directly relate to the legalized activity, and are necessary components of effective regulation. Amendment A also distinguished between recreational marijuana on one hand and medical marijuana and hemp on the other hand to ensure that regulations meant for one did not inadvertently apply to the others. (*See* Prop. Br. pp.41-49.) Miller never rebuts any of this reasoning.

Miller argues that a "myriad" of different subjects in Amendment A do not relate to each other. (Miller Br. p. 36.) But this single paragraph, consisting of only three examples with no analysis, is devoid of any real reasoning or authority showing why his position is right.

The alleged subjects Miller identifies are, in fact, connected.[10] For example, the personal right to use marijuana depends on the ability to acquire marijuana. Amendment A provides a structure for the commercial sale of marijuana, or alternatively, personal growth of marijuana. Marijuana use could not occur without those provisions. Similarly, the taxation of marijuana directly relates to its regulation—the taxation funds

[10] Miller makes passing reference to "countless other examples" but never provides any. This Court need not hunt through Amendment A to find support for Miller and Thom's argument.

the regulation. As the Proponents previously explained, Amendment A's references to medical marijuana and hemp are not separate subjects. (Prop. Br. pp.42-45.)

Miller never attempts to distinguish or argue against other cases that have found marijuana measures to be single subjects. (*See* Prop. Br. pp.50-51.) This Court should follow those well-reasoned opinions.

2. Miller and Thom's contention that the voters did not understand Amendment A is contrary to the law.

Miller again calls Amendment A "a classic case of logrolling." (Miller Br. pp.36-37.) Despite having invoked that phrase repeatedly, Miller has yet to explain why or how, beyond speculating that hypothetical voters may have weighed portions of Amendment A differently. Voters are free to weigh pros and cons of any measure however they choose. This speculation is unsupported, irrelevant, and falls short of Miller and Thom's burden to prove that Amendment A is plainly and palpably unconstitutional.

Amendment A is not logrolling because all of its parts relate to its general subject, for the reasons set forth above. There is also no indication whatsoever that voters were confused, misled, or fooled by Amendment A. "The people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications,

and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people." *Larkin v. Gronna*, 285 N.W.59, 63 (N.D. 1939).

Finally, Miller and Thom's characterization of Amendment A as a scheme by "private lawyers and special interest groups" fundamentally overlooks a reality that Miller and Thom repeatedly choose to ignore: *South Dakotans voted for Amendment A*. In fact, 32,991 of Sheriff Thom's constituents voted in favor of Amendment A, and only 23,367 voted against it. (App.42.) Amendment A was not a scheme; no one was tricked or forced into voting for it. The people of South Dakota chose to adopt Amendment A, and that choice should be respected.

V. Amendment A did not require a constitutional convention.

Miller argues that constitutional conventions provide transparency, public input, and debate. He overlooks that Amendment A had all of those features. The draft of Amendment A was reviewed by the Legislative Research Council, as required by law. Amendment A was available to voters for over a year before the election, was circulated and received sufficient signatures to be placed on the ballot. Supporters and opponents debated Amendment A over a year-long campaign. Amendment A was not some secret foisted upon an unsuspecting public.

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

Miller's brief continues to press the argument that amendments may not add new articles to the Constitution. (Miller Br. pp.40-44.) Miller maintains his contention that constitutional conventions did not exist until 1972. (*Id.* p.41.) As both the Attorney General and the Proponents pointed out before the circuit court, that is mistaken. (*See, e.g.*, R.297-98 (Attorney General's Jan. 8, 2021 Br. at pp.12-13).) Indeed, Miller's appendix, at page 3, includes the 1967 version of Article XXIII, § 2—which provides for constitutional revisions by convention prior to 1972.

The remainder of Miller's arguments are addressed in the Proponents' opening brief. (Prop. Br. pp.53-54.) The circuit court correctly rejected this argument, and Miller never explains why that determination should be reversed.

B. The Department of Revenue is not a fourth branch of government.

The majority of Miller and Thom's laundry list of implicit changes to South Dakota's government derive from their repeated reference to a single appearance of the word "exclusive" in Amendment A. While Miller glibly argues that "exclusive means exclusive," his argument takes the word entirely out of context and ignores other sections of Amendment A. Furthermore, Miller's argument avoids any engagement with the

exceedingly high standard of proof he bears: if there is any way to interpret Amendment A in a more favorable manner than Miller presents, his challenge must fail.

As the Proponents pointed out, Amendment A designates the Department of Revenue, or its successor agency, as the exclusive agency charged with administering the various licensing and regulatory requirements of Amendment A. Amendment A provides clear and specific guidance as to what the Department of Revenue must do. All of the Department's actions are subject to review under S.D.C.L. ch. 1-26. (App.3, § 12.) Amendment A never gives the Department of Revenue the power to legislate, as Miller suggests. (*See* Miller Br. p.48 (claiming the Department has the exclusive power "to pass laws").)

Miller never answers many of the arguments the Proponents put forth in their opening brief. For example, the Proponents pointed out that the Legislative Research Council advised the sponsors of Amendment A to remove language relating to the legislature because it was unnecessary. (Prop. Br. p.60.) Furthermore, there is simply no need to decide future hypothetical questions of whether legislation or other action may conflict with Amendment A. Miller and Thom's recasting of the Department of Revenue as a fourth branch of government is unsupportable.

C. The other "far-reaching and multifarious changes to the Constitution" Miller and Thom outline are imaginary.

Miller largely recycles his previous arguments, but in so doing he never meaningfully addresses the various reasons the Proponents provided that his concerns are unfounded. (*See* Prop. Br. pp.54-67.)

Amendment A did not deprive the legislature of the power to establish civil penalties. (Prop. Br. pp.62-63.) Amendment A did not limit the power of the executive branch to reassign functions internally. (Prop. Br. pp.64-65.) Amendment A did not establish a new cause of action. (Prop. Br. pp.65-66.)

Miller incorrectly assumes that Amendment A deprives this Court of the power to discipline attorneys. (Miller Br. p.52-53.) It does not. This Court still regulates the practice of law in South Dakota. Amendment A simply clarifies that one previously illegal activity is no longer illegal. This furthers the purpose of Amendment A. (Prop. Br. pp.46-47.) Furthermore, Miller never explains how or why this amounts to a fundamental restructuring of the government. It does not rise to the level of a plain and palpable constitutional violation.

Amendment A also does not infringe on the legislature's authority to tax and appropriate revenue. Again, Miller fails to acknowledge that the people may exercise this power—their power is concurrent with the power

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

Miller's brief also never addresses the fact that, if this Court adopts his theory on amendments versus revisions, it will in effect invite the repeal of the 1972 amendments, among others. Miller and Thom may only seek to strike down Amendment A, but a ruling in their favor would actually constitute a fundamental change in the state constitution and structure of government.

Miller and Thom deserve credit for creativity. They have scoured Amendment A to conjure up every possible fear and doubt they can manage, a tactic that should be rejected. *See Legislature of Cal. v. Eu*, 816 P.2d 1309, 1315 (Cal. 1991) ("We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged

measure, and that their 'fears and doubts' are not highly authoritative in construing the measure." (citation omitted)). The thin nature of their arguments only reinforces the conclusion that Amendment A is simple and straightforward: it legalizes and regulates marijuana. It does not fundamentally reform the structure of South Dakota's government. They simply cannot carry their burden to demonstrate that Amendment A plainly and palpably violated the constitution.

D. South Dakotans—not Miller and Thom—get to decide what is in their Constitution.

Miller makes the assertion that the constitution is not the place for Amendment A because it should be a statute instead. (Miller Br. p.57.) The people get to decide what goes into their constitution. In so doing, they may make policy determinations, just as the Legislature itself may do. *See Byre*, 362 N.W.2d at 79. Other states have also put marijuana policies into their constitutions. (Prop. Br. p.68.) South Dakotans voted to put Amendment A in the Constitution to protect those rights from legislative repeal. That choice is the peoples' to make.

VI. South Dakota law favors separability.

Miller essentially ignored the separability issue, providing only a single paragraph directing this Court to Montana law while ignoring South Dakota precedent. (Miller Br. pp.57-58.)

As the Proponents explained in their opening brief, South Dakota law favors separability, and requires courts to separate unconstitutional material where possible. (Prop. Br. pp.71-74.) In fact, this Court has held that the proper remedy for violation of the legislative single-subject rule is to separate and sever any unconstitutional provisions. *Dakota Sys., Inc. v. Viken*, 2005 S.D. 27, ¶ 20, 694 N.W.2d 23, 32.

Miller never addresses that case, or South Dakota's preference for separability. Miller never raises an argument about the factors courts weigh when considering separability. In short, Miller made no effort to carry his burden to show that Amendment A is not separable. *See S.D. Educ. Ass'n/NEA v. Barnett*, 1998 SD 84, ¶ 33, 582 N.W.2d 386, 394.

This Court should not create a new rule that voter-initiated constitutional amendments are outside the doctrine of separability, as Miller urges based on Montana law. Miller's position is contrary to South Dakota's preference for separability. *See S.D. Educ. Ass'n*, 1998 S.D. 84 at ¶ 33, 582 N.W.2d at 394 (noting that other states that strike an entire enactment are "clearly at odds with our own precedent on this issue").

Miller's argument that Amendment A rises or falls as a whole because that is how it was submitted to voters would apply equally to the legislature, contrary to established South Dakota law set forth above.

Furthermore, Miller's reasoning would only apply to the single-subject argument; it would not apply in the event this Court affirms only on the constitutional revision issue.

Courts need not strike down amendments as a whole. For example, in *Legislature of the State of Cal. v. Eu*, the California Supreme Court severed unconstitutional provisions of a voter-initiated constitutional amendment that imposed term limits on incumbent legislators. 816 P.2d 1309, 1335-36 (Cal. 1991). Similarly, the California Supreme Court severed one provision of a constitutional amendment that should have been a constitutional revision, while upholding the remainder of the initiative. *See Raven v. Deukmejian*, 801 P.2d 1077, 1089-90 (Cal. 1990).

Given the circuit court's finding about the primary purpose of Amendment A, it could have separated and severed any unrelated matters, as instructed in *Viken*. 2005 S.D. 27, ¶ 20, 694 N.W.2d at 32. If this Court determines that Amendment A violated the Constitution, it should preserve as much of the voters' intent as it can.

CONCLUSION

Amendment A involves a single subject, and is not a constitutional revision. Longstanding judicial policy requires resolving all doubts in favor of preserving Amendment A. Miller and Thom's speculations,

implications, and unfounded assertions fall short of showing a plain and palpable constitutional violation.

The power to initiate constitutional amendments is a precious part of South Dakota's democratic process. The result urged by Miller and Thom would severely restrict that fundamental right. This Court should let stand the choice made by the voters of South Dakota.

Respectfully,

DATED: April 5, 2021

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Certificate of Compliance

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court's February 26, 2021 order. This brief was prepared and printed in a proportionally spaced typeface using Microsoft Word 2016 in Book Antiqua font, size 13. This brief contains 7,449 words, including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, and certificates of counsel.

Dated this 5th day of April, 2021

/s/ Timothy W. Billion
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Certificate of Service

The undersigned hereby certifies that on April 5, 2021, the foregoing brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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

IN THE MATTER OF ELECTION CONTEST AS TO AMENDMENT A, 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.	)	Appeal No. 29547

APPELLANT SHERIFF KEVIN THOM'S JOINDER
IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER

Contestant/Appellant Sheriff Kevin Thom, by and through his undersigned counsel and pursuant to SDCL 15-26A-67, hereby joins in the Reply Brief of Appellant Colonel Rick Miller filed in Appeal No. 29547 as to all issues. In addition, particular to the issue of Sheriff Thom's standing raised by Appellants in their Reply Brief in Appeal No. 29547, Sheriff Thom hereby adopts by reference the arguments and authorities he set forth in the Response Brief that he filed in Appeal No. 29546 on March 24, 2021.

Dated this 5th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **APPELLANT SHERIFF KEVIN THOM'S JOINDER IN REPLY BRIEF OF APPELLANT COLONEL RICK MILLER,** upon the persons herein next designated, on the date below shown, as follows:

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Dated this 5th day of April, 2021.

<u>/s/ Robert L. Morris</u>
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