

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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

The Honorable Christina Klinger, Circuit Court Judge presiding.

BRIEF OF APPELLEE SHERIFF KEVIN THOM

Robert L. Morris
Morris Law Firm, Prof. LLC
P.O. Box 370
Belle Fourche, SD 57717-0370
*Attorney for Plaintiff/Appellee
Sheriff Kevin Thom*

Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
Redstone Law Firm, LLP
1300 W. 57th Street, Suite 101
Sioux Falls, SD 57108
*Attorneys for Plaintiff/Appellee
Colonel Rick Miller*

Brendan V. Johnson
Timothy W. Billion
Robins Kaplan LLP
140 N. Phillips Ave., Suite 307
Sioux Falls, SD 57104
*Attorneys for Intervenor
Defendants/Appellants
South Dakotans for Better Marijuana
Laws, Randolph Seiler, William Stocker,
Charles Parkinson, and Melissa Mentele*

Patrick J. Lee-O'Halloran
Thompson Tarasek Lee-O'Halloran PLLC
7101 York Avenue S., Suite 255
Edina, MN 55435
patrick@ttlolaw.com
*Attorney for Amici Curiae Cato Institute,
The DKT Liberty Project, Due Process
Institute, and Reason Foundation*

Grant Flynn
Matthew W. Templar
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Attorneys for Defendant Steve Barnett

NOTICE OF APPEAL FILED FEBRUARY 17, 2021

TABLE OF CONTENTS

Table of Cases and Authorities ii

Preliminary Statement.....1

Jurisdictional Statement.....1

Statement of Legal Issues2

 1. 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?.....2

Statement of the Case.....2

Statement of the Facts.....3

Standard of Review.....4

Argument5

 A. Sheriff Thom Has Standing to Challenge Constitutional Amendment A.....5

 B. Sheriff Thom is Challenging a Constitutional Amendment That Violates The South Dakota Constitution – Not a Statute That is Alleged to Be Unconstitutional.....5

 C. The Office of Pennington County Sheriff Was Not Created by the South Dakota Legislature.....7

 D. Sheriff Thom’s Oath and SDCL 7-12-1 Give Him Real Party in Interest Status....7

Conclusion9

Certificate of Service10

Certificate of Compliance11

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bd. of Supervisors of Linn County v. Dept. of Rev.</i> , 263 N.W.2d 227 (Iowa 1978)	6
<i>Biegler v. Am. Family Mut. Ins. Co.</i> , 2001 S.D. 13, 621 N.W.2d 592.....	8
<i>Collier v. Frierson</i> , 24 Ala. 100 (1854)	5
<i>Edgemont School Dist. 23-1 v. South Dakota Department of Revenue</i> , 1999 SD 48, 593 N.W.2d 36.....	2, 5, 6, 7
<i>Ellingson v. Ammann</i> , 2013 S.D. 32, 830 N.W.2d 99.....	2, 8
<i>Exira Community Sch. Dst. v. State</i> , 512 N.W.2d 787 (Iowa 1994)	6
<i>Huterville Hutterian Brethren, Inc. v. Waldner</i> , 2010 S.D. 86, 791 N.W.2d 169.....	3
<i>Polk County v. Iowa State Appeal Bd.</i> , 330 N.W.2d 267 (Iowa 1983)	6
<i>Vander Vorste v. Northwestern Nat'l Bank</i> , 81 S.D. 566, 138 N.W.2d 411 (1965)	2, 8
 <u>Statutes</u>	
SDCL 7-12-1.....	2, 4, 7, 8
SDCL 15-6-17(a).....	2, 8
 <u>Constitutional Provisions</u>	
S.D. Const. art. XXI, § 3.....	2, 7
S.D. Const. art. XXIII.....	3, 4, 9

PRELIMINARY STATEMENT

Contemporaneous with this brief, Appellee Sheriff Kevin Thom, pursuant to SDCL 15-26A-67, will file a joinder and joins in the Brief of Appellee Colonel Rick Miller filed in Appeal No. 29546 as to all issues. Sheriff Thom files this brief to address the issue of his standing to contest the validity of Constitutional Amendment A.

Throughout this brief, Sheriff Kevin Thom is referred to as “Sheriff Thom.” Appellants South Dakota for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentele are referred to as “Proponents.” Constitutional Amendment A will be referred to as “Amendment A.”

Citations to the settled record appear as “SR.” References to the Proponents’ Brief appear as “Proponents’ Brief.”

JURISDICTIONAL STATEMENT

Sheriff Thom agrees with the Jurisdictional Statement set forth in the Proponents’ Brief. Proponents’ Brief at 1.

STATEMENT OF LEGAL ISSUES

- 1. 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.

Relevant Cases:

Edgemont School Dist. 23-1 v. South Dakota Department of Revenue, 1999 SD 48, 593 N.W.2d 36;

Ellingson v. Ammann, 2013 S.D. 32, 830 N.W.2d 99;

Vander Vorste v. Northwestern Nat'l Bank, 81 S.D. 566, 138 N.W.2d 411 (1965).

Relevant Statutes and Constitutional Provisions:

S.D. Const. art. XXI, § 3;

SDCL 7-12-1;

SDCL 15-6-17(a).

- 2. Sheriff Thom joins in Colonel Miller's presentment of the issues as to issues 2 through 6.**

STATEMENT OF THE CASE

Sheriff Thom joins in the Statement of the Case as outlined by Colonel Miller.

STATEMENT OF FACTS¹

Sheriff Thom is the elected Sheriff of Pennington County. Pennington County was formed in 1875 and named for the then Governor of the Dakota Territory, John L. Pennington. The first Sheriff of Pennington County² was Frank P. Moulton, who served from 1877 to 1880.

Sheriff Thom was first elected Sheriff in 2010. He was re-elected in 2014 and 2018. After each election to the Office of Sheriff, he took an Oath that he would support the Constitution of the United States and the Constitution of the State of South Dakota. He brings his claims challenging Amendment A in his official capacity as the elected Sheriff of Pennington County and not on behalf of or in representation of Pennington County. No County funds are being expended on his behalf in pursuit of the claims made against Amendment A.

Sheriff Thom brought claims challenging Amendment A as the process to amend the South Dakota Constitution, as addressed in Article XXIII, was not followed by the Proponents/Appellants. He brought such claims in his official capacity as Sheriff, as he

¹ Sheriff Thom joins in the Statement of Facts of Colonel Miller. This Statement of Facts is particular to Sheriff Thom on the standing issue and is derived from Exhibit A, Affidavit of Sheriff Kevin Thom (SR 376-379), attached to the Affidavit of Robert L. Morris (SR 373-375). It is noted that at the Circuit Court level that the Proponents suggested that the Court should disregard Sheriff Thom's Affidavit. (SR 396). Proponents did not move to strike the Affidavit. The Proponents' standing challenge challenges subject matter jurisdiction. When subject matter jurisdiction is challenged on a factual basis, affidavits may be considered in resolving the dispute. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 175.

² As the Court is well aware, South Dakota did not become a State until November 2, 1889. As such, the Office of Sheriff of Pennington County was established prior to statehood and the adoption of the State Constitution.

took an oath to support the South Dakota Constitution. The Proponent/Appellants violated the South Dakota Constitution by failing to follow the requirements of Article XXIII.

As Sheriff, Sheriff Thom is statutorily required, pursuant to SDCL 7-12-1 to keep and preserve the peace within Pennington County. Decriminalization of marijuana presents challenges for law enforcement - one of which is highway safety. If marijuana use is legalized, highway safety is affected due to an increase in intoxicated or drugged driving. With an increase in drugged driving, is the need to test and confirm marijuana intoxication.

No marijuana test exists that is like an alcohol blood test. Marijuana testing that does exist is complicated in that traces of marijuana can remain in the body for days. This causes challenges to law enforcement who are trying to determine an individual's level of intoxication, even from the legal ingestion of marijuana.

Unless a drugged driver is so obviously impaired and a danger to the public, Sheriff Thom is concerned that law enforcement officers will be unable to detain and arrest drivers impaired by the legal use of marijuana. As such, his Office of Sheriff of Pennington County is affected by the increased cost of law enforcement and possible liability exposure to him as Sheriff and the Pennington County Sheriff's Office if marijuana is decriminalized in Amendment A in its present form.

STANDARD OF REVIEW

Sheriff Thom joins in the Standard of Review as outlined by Colonel Miller.

ARGUMENT

A. Sheriff Thom Has Standing to Challenge Constitutional Amendment A.

1. Summary of the Argument

The Constitution is the supreme and paramount law. The rules by which amendments are to be made under it is clearly defined. To what purpose do these rules serve if they can be dispensed with? To dispense with such rules violates the very instrument which grants the Proponents the right to attempt to amend the Constitution. "... and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." *Collier v. Frierson*, 24 Ala. 100, 109 (Ala. 1854).

Sheriff Thom has standing to bring to the attention of the Court those very rules prescribed by the fundamental law which the Proponents of Amendment A violated in submitting Amendment A to the voters. His standing is conferred upon him in his official capacity as Sheriff, due to his oath of office and due to the requirement of statute that he keep and preserve the peace in Pennington County. He meets the requirement of a real party in interest and has standing to join Colonel Miller in challenging the validity of Amendment A.

B. Sheriff Thom is Challenging a Constitutional Amendment That Violates the South Dakota Constitution – Not a Statute That is Alleged to Be Unconstitutional.

In *Edgemont School Dist. 23-1 v. South Dakota Department of Revenue*, 1999 SD 48, 593 N.W.2d 36, the School District and County appealed the Circuit Court's decision claiming that the Circuit Court erred in interpreting SDCL 10-28-16, or in the alternative, that SDCL 10-28-16 was unconstitutional in violation of Article XI, Section 2 of the

South Dakota Constitution. *Edgemont*, 1999 SD 48, ¶4; 593 N.W.2d at 38. After upholding the Circuit Court’s decision on the interpretation of SDCL 10-28-16, this Court turned to the constitutional challenge by the County and School. The Appellees claimed that the School District lacked standing to challenge the statute and this Court agreed. *Edgemont*, 1999 SD 48, ¶5; 593 N.W.2d at 39.

The Court noted that counties are political subdivisions of states and are not sovereign entities. Counties are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions. *Edgemont*, 1999 SD 48, ¶14; 593 N.W.2d at 40. The Court then concluded that the School District and County “are creations of the legislature and lack standing to challenge the constitutionality of SDCL 10-28-16.” *Edgemont*, 1999 SD 48, ¶15; 593 N.W.2d at 40.

In support of its legal conclusion, the Court string cited to various Iowa cases as follows:

See Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 790 (Iowa 1994) (stating: “The well-settled rule in Iowa is that school districts, as political subdivisions of the state, **lack standing to mount a constitutional attack against a state statute.**”); *Polk County v. Iowa State Appeal Bd.*, 330 N.W.2d 267, 271 (Iowa 1983) (stating: “Our cases have held uniformly that **a county lacks standing to challenge the constitutionality of state statutes.**”); *Bd. of Supervisors of Linn County v. Dept. of Rev.*, 263 N.W.2d 227, 234 (Iowa 1978) (stating: “A county and its ministerial officers ordinarily have no right, power, authority, or standing to question **the constitutionality of a state statute.**”).

Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40. [Emphasis supplied].

In *Edgemont* and the Iowa cases cited by the Court, the rule developed is that creations of the Legislature could not challenge the constitutionality of state statutes, which are created by the Legislature. *Edgemont* did not create a rule that a constitutional

amendment, alleged to be in violation of the South Dakota Constitution, could not be challenged by an instrumentality created by the Legislature.

C. The Office of Pennington County Sheriff Was Not Created by the South Dakota Legislature.

Even if one were to stretch the rule developed in *Edgemont* that creations of the Legislature could not challenge a constitutional amendment as being in violation of the South Dakota Constitution, such rule would be inapplicable to Sheriff Thom. The Office of Sheriff of Pennington County was first served by Frank P. Moulton, who served from 1877 to 1880. South Dakota became a State and adopted its Constitution in 1889, some 12 years after the Office of Sheriff of Pennington County was established. Sheriff Thom, having served as the elected Sheriff since 2010, serves in an office that was not created by the Legislature. As such, there exists nothing to prevent him, in his official capacity, from challenging a constitutional amendment he asserts is in violation of the South Dakota Constitution.

D. Sheriff Thom's Oath and SDCL 7-12-1 Give Him Real Party in Interest Status.³

South Dakota Constitution Article XXI, §3 provides:

Every person elected or appointed to any office in this state, except such inferior offices as may be by law exempted, shall, before entering upon the duties thereof, take an oath or affirmation to support the Constitution of the United States and of this state, and faithfully to discharge the duties of his office.

³ It is noted that the Attorney General did not challenge the standing of Sheriff Thom at the Circuit Court. Only the Proponents challenged his standing. Proponents continued challenge ignores the Preamble to the Constitution which provides "We, the people of South Dakota, . . . establish this Constitution for the state of South Dakota." Sheriff Thom, whether in his official capacity or in any other capacity, as a citizen of South Dakota should be able to challenge the legality of Amendment A.

When Sheriff Thom was first elected Sheriff in 2010, he accepted this mandate required of his elected capacity as Sheriff. He has taken the oath to uphold the Constitution of the State of South Dakota each time since 2010, when he was re-elected as Sheriff. In addition to taking the Oath, as required by the South Dakota Constitution, SDCL 7-12-1 requires Sheriff Thom to keep and preserve the peace within Pennington County. No one can argue that such mandate does not include public safety in the County, in keeping Pennington County citizens and visitors to the County safe – whether on property or on the roadways in the County.

Sheriff Thom’s oath and SDCL 7-12-1 give him real party in interest status. The law requires “[e]very action shall be prosecuted in the name of the real party in interest.” SDCL 15–6–17(a). *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d 99, 101. The real party in interest rule is satisfied “if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action.” *Vander Vorste v. Northwestern Nat’l Bank*, 81 S.D. 566, 572, 138 N.W.2d 411, 414 (1965). “The purpose of the real party in interest provision is 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.” (internal citations omitted). *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 27, 621 N.W.2d 592, 600.

Sheriff Thom is obligated to keep and preserve the peace in Pennington County. Decriminalization of marijuana raises public safety challenges for law enforcement. Sheriff Thom believes that his office will be personally affected by the increased cost of law enforcement. In addition, he has liability concerns pertaining to law enforcement being able to properly test marijuana intoxication in order to protect the public from

marijuana impaired drivers. Sheriff Thom has a real, actual, material, and substantial interest in whether Amendment A was a valid amendment to the South Dakota Constitution.

CONCLUSION

The South Dakota Constitution is the fundamental law of our State. The Proponents sought to amend the fundamental law. That is their right. But their right to amend is limited by the rules prescribed by Article XXIII. Sheriff Thom is within his rights, acting in his official capacity, to challenge the validity of Amendment A as not being in compliance with the rules prescribed by the fundamental law.

Sheriff Thom respectfully requests this Court affirm the Circuit Court's decision.

Dated this 24th day March, 2021.

MORRIS LAW FIRM, PROF. LLC
Attorneys for Appellee Sheriff Kevin Thom

By: /s/ Robert L. Morris
Robert L. Morris
P.O. Box 370
Belle Fourche, SD 57717-0370
Phone: (605) 723-7777
bobmorris@westriverlaw.com

ORAL ARGUMENT IS RESPECTFULLY REQUESTED