STATE OF SOUTH DAKOTA) SS.		IN CIRCUIT COURT
COUNTY OF HUGHES		SIXTH JUDICIAL CIRCUIT
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, v. STEVE BARNETT, in his official capacity as Secretary of State for the State of South Dakota, Defendant, AND SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Intervenors/Defendants.		32 CIV 20-187 BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS UNDER SDCL 15-6-12(c)

The Secretary of State Steve Barnett, by and through Assistant Attorneys General Grant Flynn and Matthew W. Templar, submits this brief in support of his Motion for Judgment on the Pleadings, which is filed under separate cover.

APPROPRIATENESS OF MOTION

There are no disputed facts in this case. Amendment A was submitted to the South Dakota electorate during the November 2020 election. 225,260 voters approved that Amendment, and 190,477 opposed it. *See* Exhibit 2 of

Thom and Miller's Complaint. Thom and Miller now challenge Amendment A on the grounds that it violates Article XXIII, §§ 1 and 2 of the South Dakota Constitution. This case presents only legal issues for consideration, namely whether Amendment A is a valid and effective constitutional amendment. Therefore, a Judgment on the pleadings is appropriate. *Slota v. Imhoff and Associates, P.C.*, 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873 (recognizing a judgment on the pleadings is "'an appropriate remedy to resolve issues of law when there are no disputed facts.'" (quoting *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3, 723 N.W.2d 694, 695))). Plus, a "'Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings[,]'" *Loesch*, 2006 S.D. 93, ¶ 3, 723 N.W.2d at 695 (quoting *M.S. v. Dinkytown Day Care Center, Inc.*, 485 N.W.2d 587, 588 (S.D. 1992)).

SUMMARY OF ARGUMENTS

Secretary Barnett asserts that Amendment A is an amendment, not a revision as defined by Article XXIII, § 1 and embraces only one subject. For these reasons, Amendment A was ratified in accordance with the South Dakota Constitution. And it is a valid and effective constitutional amendment.

PRINCIPALS OF CONSTITUTIONAL CONSTRUCTION

"[T]he object of constitutional construction is 'to give effect to the intent of the framers of the organic law and the people adopting it.'" *Davis v. State*, 2011 S.D. 51, ¶ 77, 804 N.W.2d 618, 643 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 12, 680 N.W.2d 302, 307 (Gilbertson, C.J., concurring). To accomplish that task, a "constitutional provision must be read giving full effect to all of its

parts." *Breck v. Janklow*, 2001 S.D. 28, ¶ 10, 623 N.W.2d 449, 454 (citing *South Dakota Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984)). Thus, when the constitutional provision's language is "quite plain," then it is "construe[d] according to its natural import." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 16, 720 N.W.2d 670, 675. Secondary sources are used only if the constitutional provision's language is ambiguous. *Id.* (citations omitted).

Our Supreme Court recognizes that "[c]onstitutional amendments are adopted for the purpose of making a change in the existing system and we are 'under the duty to consider the old law, the mischief, and the remedy, and interpret the constitution broadly to accomplish the manifest purpose of the amendment.'" *Doe*, 2004 S.D. 62, ¶ 15, 680 N.W.2d at 308 (quoting *South Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 697 (S.D. 1981)). Despite that dictate, the courts "will not construe a constitutional provision to arrive at a strained, unpractical[,] or absurd result." *Brendtro*, 2006 S.D. 71, ¶ 30, 720 N.W.2d at 680 (quoting *Breck*, 2001 S.D. 28, ¶ 12, 623 N.W.2d at 455).

AMENDMENT A IS A VALID CONSTITUTIONAL AMENDMENT UNDER ARTICLE XXIII, § 1

Plaintiffs challenge Amendment A on the grounds that it is a constitutional revision, not an amendment. Pursuant to Article XXIII, the South Dakota Constitution, may be amended by initiative under § 2 or revised by constitutional convention under § 3. Amendment A was passed by initiative during the general election held on November 3, 2020. Plaintiffs allege that

Amendment A was a revision that could only be enacted through the process found in Article XXIII § 3.

Whether Amendment A constitutes an "amendment" or a "revision" to the Constitution under Article XXIII hinges on how those terms are defined. The South Dakota Supreme Court has not defined "amendment" or "revision" in the context of Article XXIII. Absent specific direction from our own high Court, South Dakota courts often look to states with similar laws for assistance in interpreting our own. In this case, several states provide helpful guidance with interpreting the constitutional provisions at issue here. In following that guidance, this Court must inevitably arrive at the conclusion that Amendment A is, in fact, an amendment and was proposed and passed in compliance with Article XXIII of the South Dakota Constitution.

"One of the primary rules of statutory and constitutional construction is to give words and phrases their plain meaning and effect." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984).

What are the plain meanings of "amendment" and "revision" in the Article XXIII context? The Answer to this question begins with Black's Law Dictionary, which defines "amendment" as "[a] formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording." *Black's Law Dictionary* 1434 (9th ed. 2009). "Revision" is defined as "[a] general and thorough rewriting of a governing document, in which the entire document is open to amendment." *Id.* at 94. Amendment A is

an addition to the Constitution that does not result in a thorough rewriting of that document, so these definitions strongly point to Amendment A being correctly categorized as an amendment.

Although our Supreme Court has not defined "amendment" and "revision" in the context of constitutional changes, it has said that "Constitutional amendments are adopted for the purpose of making a change in the existing system." *In re Issuance of Summons Compelling Essential Witness To Appear & Testify in State of Minnesota*, 2018 S.D. at ¶ 14 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 15, 680 N.W.2d 302, 308). With this statement of purpose for the amendment process, the court starts us down the path of interpreting our Constitution in a manner consistent with the interpretations of other states.

California began the process of delineating the difference between an amendment and a revision to the Constitution in 1895 with *Livermore v. Waite*, 102 Cal. 113, 36 P. 424 (1894). In that case, the California Supreme Court analyzed methods of altering their Constitution to determine whether a measure drafted by the legislature changing the seat of government was properly submitted to voters. Contrasting the terms revision and amendment, the court described the nature of the Constitution, stating

> The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an

> improvement, or better carry out the purpose for which it was framed.

Id. 118-19.

The court in *Livermore* withheld the proposal to change the seat of government from San Francisco to San Jose from the voters. *Id.* at 121. Relocation was contingent on money and land being donated to fund the project which prevented it from becoming an effective part of the Constitution immediately upon adoption. *Id.* at 121. The court concluded that the Legislature was not authorized to submit an amendment for contingent action to the voters. *Id.* at 122. But of particular relevance here, the court found that the question of changing the location of the State Capitol constituted an amendment to the constitution properly considered via referendum. *Id.* at 119-20.

The California Supreme Court reached the opposite conclusion in *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787 (1948). *McFadden* involved an alteration to the Constitution brought by initiative that, according to the court, offered a "wide and diverse range of subject matters." *Id.* at 345. Among the subjects addressed in the proposed amendment were a bill of rights, pensions, gaming, taxes, oleomargarine, civic centers, the legislature, public lands, and surface mining. *Id.* at 334-40. The court further determined that the proposal would affect most of the already existing Articles within the Constitution. *Id.* at 345. In support of its direction to the Secretary of State to not submit the measure to the voters, the court explained its concerns:

> The proposal is offered as a *single amendment* but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder.

Id. at 346. (emphasis in original). Ultimately, the court held that such a "revised Constitution" as was presented in the proposal could only be submitted to the voters by a constitutional convention. *Id*. at 350.

Later, the California Supreme Court developed the "qualitative and quantitative" test for determining whether a constitutional change constitutes a revision or an amendment in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281 (1978). Similar tests have since been adopted by Alaska and Oregon. *See Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999); *Martinez v. Kulongoski*, 220 Or. App. 142, 185 P.3d 498 (2008).

A quantitative revision occurs when "an enactment is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution. . ." *Amador*, 22 Cal. 3d at 223. However, a qualitative revision could result from "even a relatively simple enactment" that accomplishes "far reaching changes in the nature of our basic governmental plan . . ." *Id*. The court held that the proposed plan limiting the assessment and taxing powers of state and local governments did not constitute a qualitative or quantitative revision, despite the measure including limitations on real property tax rates,

restrictions on the assessed value of real property, limitations on the method of changing state taxes, and restriction on local taxes. *Id.* at 220.

The California Supreme Court again applied it's qualitative and quantitative analysis to determine whether a constitutional amendment was actually a revision in *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274 (1982). California voters approved "The Victims' Bill of Rights" which created, among other things, a right to restitution for crime victims; created a right to safe schools for students; created a new provision regarding bail, which replaced a prior provision; created the right to unlimited use of prior felony convictions for impeachment or sentencing; abolished the defense of diminished capacity; mandated that prior felonies provide a sentence enhancement that must be served consecutively; created the right for victims to be heard at all sentencings and parole hearings; and created limitations for plea bargains. *Id.* at 240-45.

The court recognized that the measure substantially changed the state's criminal justice system but determined that "even in combination these changes fall considerably short of constituting 'such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . .'" *Id.* at 260. The court ultimately held that the measure did not constitute a revision because "nothing contained in [the measure] necessarily or inevitably [altered] the basic governmental framework set forth in [California's] Constitution." *Id.* at 261.

The California Court also concluded, under the qualitative and quantitative analysis, that a measure passed by the voters setting term, budget, and pension limits for state legislators was appropriately offered as a constitutional amendment, not a revision. *Legislature v. Eu*, 54 Cal. 3d 492, 502-03 and 512, 816 P.2d 1309, 1313-14 and 1320 (1991). Petitioners asserted that the Legislature would be unable to perform its duties as the Constitution intended due to the budget cuts and term limits, creating a profound change in the structure of government that constituted a revision. *Id.* at 507. But the court held that, even though the changes may affect the particular legislators and staff participating in the process, "the basic and fundamental structure of the Legislature as a representative branch of government [was] left substantially unchanged. . ." *Id.* at 508.

The California Court struck down one measure in a proposition adopted by the voters in *Raven v. Deukmejian*, 52 Cal. 3d 336, 355, 801 P.2d 1077 (1990). There, the court considered a measure entitled the "Crime Victims Justice Reform Act." *Id.* at 342. This measure eliminated post-indictment preliminary hearings, prevented California courts from interpreting their Constitution to afford greater rights to defendants than those afforded by the federal Constitution, created speedy trial and due process rights for victims and the public in general, prevented the Constitution from being construed to bar joinder of criminal cases, authorized admissibility of hearsay testimony at preliminary hearings, altered discovery procedures, added provisions regarding voir dire, added additional grounds for felony-murder, adjusted provisions

regarding the special circumstance murder statutes, added a crime of torture, adjusted court-appointed counsel provisions, and mandated timelines for felony trials and continuances. *Id.* at 342-45.

Performing the qualitative and quantitative analysis, the court concluded that only the provision limiting the rights of defendants to those found in the federal Constitution qualified as a revision. *Id.* at 355. The court determined that this provision "would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." *Id.* at 352. The court held that this provision restricted the power of the judiciary "in a way which severely [limited] the independent force and effect of the California Constitution." *Id.* at 353. These "devastating" effects on the authority of the California courts constituted "far reaching changes in the nature of [the] basic governmental plan," effectively accomplishing a revision of the Constitution. *Id.* at 351-52. But the remainder of the provisions were severed and upheld as appropriately adopted amendments under the qualitative and quantitative analysis. *Id.* at 355.

The Alaska Supreme Court adopted California's qualitative and quantitative analysis for differentiating between constitutional amendments and revisions. *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999) (concluding that "a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively."). In reviewing three challenged measures, the Alaska Supreme Court concluded that when determining whether a constitutional change constitutes a revision,

"[t]he core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole." *Id.* at 987.

The first proposal considered in *Bess* was similar to the one struck down in *Raven*. It limited the rights and protections, and the extent of those rights and protections, of prisoners convicted of crimes to those afforded under the Constitution of the United States. *Id.* The second prevented the state from recognizing same sex marriages. *Id.* at 988. The third removed the power to reapportion legislative districts from the Executive Branch and gave it to a neutral third party. *Id.*

The court affirmed that the second and third provisions were appropriately offered as amendments. *Id.* at 988-89. But it held that the restriction of the rights of prisoners would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." *Id.* at 988 (quoting *Raven*, 52 Cal. 3d at 338.) Based on this substantial alteration as well as the significant number of constitutional sections the proposal would alter, the court found it to be a revision under both the qualitative and quantitative analysis. *Id.*

The Oregon Court of Appeals also acknowledged qualitative and quantitative considerations when distinguishing constitutional amendments and revisions. *Martinez*, 220 Or. App. at 149. Following its state's own precedent and declining to adopt California's qualitative and quantitative test, the *Martinez* Court concluded that for a constitutional change to amount to a

revision it must be "fundamental" and "far reaching". *Id.* at 150 (*quoting Lowe v. Keisling*, 130 Or.App. 1, 13, 882 P.2d 91 (1994) *rev. dismissed*, 320 Or. 570, 889 P.2d 91 (1994)). The court ultimately held that the voter-initiated measure prohibiting recognition of same-sex marriages was an amendment rather than a revision. *Id.* at 156.

The Delaware Supreme Court, when answering a question from the Governor that would amount to a request for a declaratory judgment, determined that "to be a 'revision' the result must be to effect a change in the basic philosophy which has cast our government in its present form." *Opinion of the Justices*, 264 A.2d 342, 346 (Del. 1970). The court stated that "a constitutional 'revision' makes substantial, basic, fundamental changes in the plan of government; it makes extensive alterations in the basic plan and substance of the existing document; it attains objectives and purposes beyond the lines of the present Constitution." *Id.* Yet alterations "making no substantial and fundamental change or alteration in the basic structure of State government" may be accomplished by amendment. *Id.*

Finally, the Michigan Supreme Court seemingly went a step further than the other courts mentioned, adopting "The New Constitution Test." *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 503 Mich. 42, 75, 921 N.W.2d 247, 261 (2018). When tasked with determining whether a voter-initiated proposal reestablishing a commission to oversee legislative redistricting was an amendment or revision to the Constitution, the Michigan Court found that the difference between the constitutional revision and

amendment process is that "the former can produce a proposed constitution, while the latter is limited to proposing less sweeping changes." *Id.* at 79. The court continued, stating "changes that significantly alter or abolish the form or structure of our government, in a manner equivalent to creating a new constitution, are not amendments." *Id.* at 81. Changes that do not create a new constitution, then, are amendments. *Id.*

While different states have adopted a variety of tests to determine when a constitutional change is an amendment or a revision, they have consistently held that the authority of the citizens to alter their governing document is paramount; and the courts should only subvert the people's will in the narrowest of circumstances.[1] Further underscoring this point, "[t]he initiative power is one of the most precious rights of a state's democratic process, and the courts resolve any reasonable doubts about an initiative in favor of the exercise of that power. Courts will construe voter initiatives broadly so as to

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[1] *See McFadden,* 32 Cal. 2d at 332 (holding "[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter."); *Brosnahan*, 32 Cal. 3d at 241 (holding "'[the] power of initiative must be *liberally construed* . . . to promote the democratic process.' Indeed. . . it is our solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process.' Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.*") (internal citations omitted) (emphasis in original); *State v. Cooney*, 70 Mont. 355, 225 P. 1007, 1009 (1924), *overruled on other grounds by Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (holding that when reviewing a measure adopted by the voters "[t]he question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it, and we shall not condemn it unless in our judgment its nullity is manifest beyond a reasonable doubt.") (citations omitted).

preserve them whenever possible." 42 Am. Jur. 2d Initiative and Referendum § 43. The high regard given to the will of the voters is consistent with South Dakota's policy in *Duffy,* 497 N.W.2d at 439 (holding "It is not the policy of the State of South Dakota to disenfranchise its citizens of their constitutional right to vote.").

Whether this Court chooses to adopt the qualitative and quantitative test, "The New Constitution Test", the Delaware Court's test, or an entirely new test, analyzing the qualitative and quantitative aspects of Amendment A brings into clear focus the fact that it constitutes an amendment, not a revision to the South Dakota Constitution.

In their Complaint, Plaintiffs make reference to the number of sections and subsections found in Amendment A. Plaintiffs state that Amendment A contains fifteen sections and fifty-five subsections, asserting that this number of changes is appropriate only for a revision and not an amendment. Complaint, pg. 3; 7-8. Relative to the twenty-five articles and two hundred and forty-five sections currently in the Constitution, the fifteen sections included in Amendment A do not constitute a significant number of changes sufficient to constitute a quantitative revision. Further, Amendment A does not purport to alter or impact any other articles currently in the Constitution, beyond those mentioned in the Amendment.

Nor does Amendment A constitute a revision of the constitution under a qualitative analysis. As elaborated more thoroughly below, Amendment A address only one topic, which is cannabis. Qualitative revisions occur when a

constitutional change accomplishes "far reaching changes in the nature of our basic governmental plan. . ." *Amador*, 22 Cal. 3d at 223. Amendment A makes no such far reaching changes to South Dakota's government.

Plaintiffs assert that Amendment A is a revision because a) it embraces more than one subject; b) it establishes an entirely new article of the Constitution, rather than amending an existing article or articles; c) it addresses new subjects that are not related to the subjects of any existing article; d) it imposes broad and comprehensive changes to the Constitution that will have vast implications for our system of government; and e) it results in a fundamental alteration of the structure of the Constitution and the powers afforded to each respective branch of government. Complaint, pg. 7.

None of these assertions constitute a revision under the analysis used by any of the courts that have considered the difference between a revision and an amendment, and some of them are patently untrue.

First, Amendment A, as explained below, embraces only one subject, cannabis.

Second, establishment of a new article nor addressing subjects not found in an existing article do not automatically turn a constitutional amendment into a revision. In *Amador*, the California Voters added a new article to their Constitution which the California Supreme Court upheld because it "operate[d] functionally within a relatively narrow range to accomplish a new system of taxation." *Amador*, 22 Cal. 3d at 228. Similarly, Amendment A functions within a narrow range to legalize cannabis and develop an industry for its sale,

and it does so within the administrative state that already exists in South Dakota. In addition, Article XXIII § 1 states 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 (emphasis added). This language is permissive and does not require that amendments can only be made to existing articles as Contestants claim.

Finally, other than a fleeting reference to constitutionally decreed fines, Plaintiffs offer no support for their claims that Amendment A imposes broad and comprehensive changes to the Constitution that will have vast implications for our system of government or that Amendment A results in a fundamental alteration of the structure of the Constitution and the powers afforded to each respective branch of government. The administrative authority bestowed on the Department of Revenue in Amendment A includes the same types of responsibilities often delegated to state agencies by the Legislature.

Bearing in mind the analysis conducted by competent courts of other jurisdictions with schemes of constitutional alteration similar to that found in South Dakota, Amendment A was appropriately submitted to the South Dakota voters as an amendment.

AMENDMENT A ONLY EMBRACES ONE SUBJECT AND COMPLIES WITH ARTICLE XXIII, § 1

Article XXIII, § 1 prohibits proposed constitutional amendments that "embrace more than one subject." Because this is a newer addition to the State's Constitution (Amendment Z, approved by the voters in 2018), there are no decisions on when a proposed amendment contains more than one subject.

Yet, this is not a completely foreign issue to South Dakota courts because the Constitution prohibits legislative bills from embracing "more than one subject . . . ." S.D. Const. Art. III, § 21.

The purpose of the Article III, § 21 restriction is threefold:

> (1) Prevent combining into one bill several diverse measures which have no common basis except, perhaps their separate inability to receive a favorable vote on their own merits;
> (2) prevent the unintentional and unknowing passage of provisions inserted in a bill which the title gives no intimation; and
> (3) fairly apprise the public of matters which are contained in the various bills and to prevent fraud or deception of the public as to matters being considered by the legislature.

Simpson v. Tobin, 367 N.W.2d 757, 767 (S.D. 1985)(quoting *Independent Community Bankers Ass'n v. State*, 346 N.W.2d 737, 740 (S.D. 1984)). These restrictions protect South Dakota legislative enactments from the infamous pork barrel and rider legislation that plagues Congress. Indeed, the South Dakota Supreme Court said, "[t]he first purpose given for [Article III, § 21] is the basis for the one-subject requirement." *Independent Community Bankers Ass'n*, 346 N.W.2d at 740. *See Doe*, 2004 S.D. 62, ¶ 15, 680 N.W.2d at 308.

In the context of legislative enactments "[t]he subject of a law is the public or private concern for which it is enacted[.]" *Meierhenry v. City of Huron*, 354 N.W.2d 171 (S.D. 1984). And "[i]f the provision[s] of the Act fairly relates to the subject, it will meet constitutional requirements." *Simpson*, 367 N.W.2d at 767. In other words, "[t]he provisions of an act must be 'parts of it, incident to it, or in some reasonable sense auxiliary to the object in view.'" *Meierhenry*, 354 N.W.2d at 182 (quoting *State v. Morgan*, 48 N.W. 314, 317 (1891)).

Applying the decisional law on the legislative single subject restriction to the newly adopted single subject restriction on constitutional amendments is prudent. It affords consistency across South Dakota's legal spectrum for adopting, passing, and enacting laws. *See Anatha v. Clarno*, 461 P.3d 282, 284 (Or. Ct. App. 2020)(reiterating that the single subject requirement for legislative acts and the single subject requirement for initiated measures "'should be given the same meaning.'" (quoting *OEA v. Phillips*, 727 P.2d 602, 609 (Or. 1986))).

Likewise, applying our Supreme Court's decisional law on the legislative single subject requirement aligns with other courts' decisions that have addressed their respective jurisdictions' single subject restrictions. For example, in *Anatha*, the court reiterated that it must ask whether there is "a 'unifying principle logically connecting all provisions' in the measure . . . ." 461 P.3d at 284-85 (quoting *State ex rel. Caleb v. Beesley*, 949 P.2d 724, 729 (Or. 1997)). If that unifying principle exists, then all "other matters" in the measure fall under that single subject if they "are 'properly connected' to the unifying principle . . . ." *Anatha*, 461 P.3d at 285 (citing *Oregon Educ. Ass'n v. Phillips*, 727 P.2d 602 (Or. 1986)(*En Banc*)).[2]

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[2] Other courts have followed Oregon's lead: *Steele v. Thurston*, 2020 WL 6073285, *5 (Ark.)(recognizing an amendment satisfies the single subject rule if "all of the amendment parts are reasonably germane to each other and to the general subject of the amendment." (citing *Martin v. Humphrey*, 558 S.W.2d 370 (Ark. 2018))); *Advisory Op. to Atty. Gen. re Water and Land Conservation*, 123 So.3d 47, 51 (Fla. 2013)("'A proposed amendment meets th[e single subject] test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or

The *Anatha* Court faced three initiated measures that dealt with amending "the Forest Practices Act and other statutory provisions addressing forestry." 461 P.3d at 283. In essence, the measures included eight substantive provisions that:

1. Limits clearcut [sic] logging activity near certain bodies of water;
2. Direct the Board of Forestry to adopt rules regulating clearcut [sic] logging that apply to small tract forestlands;
3. Prohibits the aerial application of pesticides within 500 feet of all forest waters;
4. Creates public notice requirements for certain forest operations involving the aerial application of pesticides to forestland;
5. Increases the buffer (from 60 feet to 500 feet) governing the aerial application of pesticides for forest operations adjacent to dwellings and schools;
6. Restricts logging operations in high-hazard landslide zones;
7. Reduces financial conflicts of interest in the Board of Forestry in implementing the act; and
8. Creates a funding mechanism.

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scheme. Unity of object and plan is the universal test.'" (quoting *Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions & Exclusions Serve a Public Purpose*, 880 So.2d 630, 634 (Fla. 2004))); *Fulton County v. City of Atlanta*, 825 S.E.2d 142, 146 (Ga. 2019)(Georgia's single subject rule "requires courts to determine 'whether all of the parts of the constitutional amendment are germane to the accomplishment of a single objective.'" (quoting *Wall v. Bd. of Elections of Chatham County*, 250 S.E.2d 408, 413 (Ga. 1978))); *Oklahoma Oil & Gas Assoc. v. Thompson*, 414 P.3d 345, 349-50 (Okl. 2018)(reiterating that the single subject rule requires a determination of whether all parts of an amendment are "germane to a singular common subject and purpose or are essentially unrelated to one another." (citing *In re Initiative Petition No. 363*, 927 P.2d 558 (Okl. 1996))); *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986)("A bill satisfies the unity of subject requirement[, a/k/a the single subject rule], even if it contains numerous provisions, however diverse, as long as these provisions relate directly or indirectly to the same general subject and have a mutual connection." (citing *Robinson v. Hill*, 507 S.W.2d 521, 524 (Tex. 1974))).

Id. at 283-84 (citations omitted). Ultimately, the court concluded all these provisions concerned one unifying principle: the regulation and protection of Oregon's forests. *Id.* at 286.

In the present case, Amendment A embraces only one subject: the regulation of cannabis[3] in South Dakota. All of its provisions are parts of that regulation, incident to it, or a reasonable auxiliary to that regulation. *Meierhenry*, 354 N.W.2d at 182. It is inconsequential that Amendment A deals with recreational marijuana, medical marijuana, and hemp separately. They are all part of the same "group or class"—cannabis. *Meierhenry*, 354 N.W.2d at 182 ("The subject is singular 'when a number of things constituting a group or class are treated as a unit for general legislation.'" (quoting *State v. Youngquist*, 13 N.W.2d 296, 297 (S.D. 1994))). In other words: cannabis is cannabis is cannabis; just like corn is corn is corn. Marijuana and hemp come from the same general plant, regardless of the specific strain—such as a strain bred for a high THC concentration (marijuana) or a strain bred for a low THC concentration (hemp[4]). The same goes for corn, regardless of if we are talking

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[3] Marijuana and hemp are both derived from the cannabis plant. *See* Amendment A, § 1(2)(defining hemp as "the plant of the genus cannabis. . . .); Amendment A, § 1(4)(defining marijuana as "the plant of the genus cannabis . . . .); SDCL 22-42-1(7)(defining marijuana as "all parts of any plant of the genus cannabis . . . .); SDCL 34-20B-1(12)(defining marijuana as "all parts of any plant of the genus cannabis . . . .); SDCL 38-35-1(2)(defining hemp as "the plant Cannabis sativa L. . . . .).

[4] Cannabis is considered "hemp" if it has "a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis[.]" SDCL 38-35-1(2).

about sweet corn, field corn, or a strain bred to create another corn product, like corn syrup.

Additionally, the fact that the scope of the Amendment's regulation is wide-reaching is not even problematic, let alone a fatal flaw. *Independent Community Bankers Ass'n*, 346 N.W.2d at 741 ("[W]hile the subject must be single, provisions to accomplish the objective of an act may be multifarious." (citing *Morgan*, 48 N.W. 314). This is especially true when the subject regulated had previously been wholly prohibited. *See* S.D. Sess. Laws 2020, Ch. 176, §§ 1-32 ("An Act to legalize the growth, production, and transportation of industrial hemp in the state, to make an appropriation therefor, and to declare an emergency."). In short, a wide-ranging enactment is necessary because the regulation of a previously prohibited subject cannot exist in a vacuum and does not have just a singular and limited effect on the State, its operation, and its citizens.

Simply put, Amendment A regulates the use, possession, sale, and taxation of cannabis. And it is similar to the legislative acts at issue in *Independent Community Bankers Ass'n*, *Meierhenry*, and *Mettet v. City of Yankton*, 25 N.W.2d 460 (S.D. 1946)(*Per curiam*). In *Independent Community Bankers Ass'n*, the act at issue dealt with subject of "the regulation of 'certain banks and their subsidiaries.'" 346 N.W.2d at 740. "The concern for which [the bill] was enacted was the regulation, e.g., 'ownership, powers, operation and taxation of banks and their subsidiaries, e.g., insurance companies, and each section of the bill relates directly to that concern." *Id.*

Similarly, in *Meierhenry*, the court concluded that a bill dealing with "[m]unicipal bond registration and tax incremental financing" were not two separate subjects. 354 N.W.2d at 182. Instead, they were "merely elements of the large subject of municipal finance." *Id.*

In *Mettet*, the court addressed an act dealing with the purchase of an Interstate toll bridge. 25 N.W.2d at 463. The court determined that the provisions of that act, "which classify a municipally owned interstate toll bridge as a public utility, and authorize the city to borrow money for the purchase of it, secured solely by the revenue of the bridge according to the terms of the general statute relating to revenue bonds. . ." were "germane to the subject of the Act . . . ," namely, the purchase and operation of that bridge. *Id.*

Finally, the conclusion that Amendment A only embraces a single subject—the regulation of cannabis—become even more evident when compared with an act that actually contained disparate provisions that amounted to two different subjects. In *Simpson*, the court concluded HB 1266 violated the single subject requirement. 367 N.W.2d at 786. That Bill contained six sections dealing "with professional service contracts with political subdivisions, and with the part-time state's attorney's duties as a public official of the county." *Id.* But it also contained a seventh section that sought "to limit taxpayer remedies in all cases . . . ," not just taxpayer remedies in the misuse of public funds in connection to public service contracts and public officials. *Id.* The court concluded HB 1266 violated the single subject restriction in

Article III, § 21 because it sought to affect matters reaching far beyond public service contracts. *Simpson*, 367 N.W.2d at 786.

CONCLUSION

Plaintiffs Complaint should be dismissed on the merits as Amendment A is properly defined as a constitutional amendment under Article XXIII § 1, and it embraces only one subject.

Dated this 23rd day of December, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Brief in Support of Motion for Judgment on the Pleadings Under SDCL 15-6-12(c) in the above-captioned matter was served electronically through the Odyssey File and Serve System upon Matthew S. McCaulley, at matt@redstonelawfirm.com; Robert Morris, at bobmorris@westriverlaw.com; Lisa Prostrollo, at lisa@redstonelawfirm.com; Christopher Sommers, at Chris@redstonelawfirm.com; Timothy W. Billion, tbillion@robinskaplan.com; and Brendan Johnson, Bjohnson@robinskaplan.com, this 23rd day of December, 2020.

/s/ *Grant Flynn*
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