STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT 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 SOUTH DAKOTA SECRETARY OF STATE, and SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, and MELISSA MENTELE, Defendants.	32CIV20-000187 **BRIEF IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT**

This litigation does not call for adjudication of the wisdom of the public policy changes sought by the proponents of Amendment A. Rather, this litigation seeks to give meaningful effect to the self-imposed limitations on the people's power to amend their Constitution by initiative. *See State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 253, 260 (Neb. 2020) ("The people's reserved power of the initiative and their self-imposed [requirements of procedure in exercising that power] are of equal constitutional significance.") (alteration in original).

Amendment A is unconstitutional as a matter of law because it violates Article XXIII of the Constitution by attempting to revise the South Dakota Constitution through the initiative process, and by embracing more than one subject. By failing to follow the proper constitutional process, the proponents of Amendment A deprived South Dakota voters of the opportunity to have a substantial revision to the Constitution properly scrutinized and presented for ratification. Therefore, the Court should grant Plaintiffs' Joint Motion for Summary Judgment.

BACKGROUND

On September 11, 2019, Brendan Johnson filed a form for an "Initiated Constitutional Amendment Petition" ("Petition") with the South Dakota Secretary of State. (Compl. ¶ 8, Ex. 1). The Petition sought approval to circulate a Petition proposing a change to the South Dakota Constitution entitled, "An amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use." (*Id.*). Brendan Johnson later submitted signed petitions to the Secretary of State for validation. (Compl. ¶ 9). On January 6, 2020, the Secretary of State announced that the Petition received 36,707 valid signatures, which allowed the Petition to be validated and submitted to South Dakota voters for approval. (McCaulley Aff., Ex. D).

The Petition was titled Constitutional Amendment A ("Amendment A") and was certified by the Secretary of State to be placed on the 2020 General Election ballot scheduled for November 3, 2020. (*Id.*) A "Yes" vote was a vote to adopt the amendment in its entirety. (McCaulley Aff., Ex. C). A "No" vote was to reject the amendment in its

entirety and leave the Constitution as it was. (*Id.*) Amendment A ultimately received 225,260 "Yes" votes and 190,477 "No" votes. (Compl., Ex. 2.).

Amendment A, as it was submitted to South Dakota voters, unambiguously purports to add a new article to the South Dakota Constitution. The new Article is comprised of 15 sections and 55 subsections prescribing detailed and extensive rules and regulations across a multitude of different subjects:

1. Section 1 sets forth definitions for the terms Department, hemp, local government, marijuana, and marijuana accessory.

2. Section 2 enumerates various exceptions to the rights created by Amendment A by stating it "does not limit or affect laws that prohibit or otherwise regulate" certain activities, such as driving while under the influence of marijuana.

3. Section 3 clarifies that employers may restrict an employee's use of marijuana; that private property owners may prohibit marijuana on their property; and that state and local governments may prohibit marijuana in government-owned property.

4. Section 4 generally decriminalizes the individual possession and use of small amounts of marijuana, the individual cultivation and processing of up to three marijuana plants subject to certain restrictions, and the individual possession and use of marijuana paraphernalia.

5. Section 5 imposes specific civil penalties for failing to follow various restrictions on cultivating marijuana under section 4, for smoking marijuana illegally in a public place, and for the underage possession and use of marijuana.

6. Section 6 grants the Department of Revenue the "exclusive power . . . to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," and it mandates that the Department accept applications and issue licenses for commercial production of marijuana, for testing of marijuana, for wholesaling marijuana, and for retail sales.

7. Section 7 mandates that the Department of Revenue promulgate rules and issue regulations "necessary for the implementation and enforcement of" Amendment A, such as procedures for the issuance or revocation of licenses; license qualifications; testing, packaging, and labeling requirements; health and safety

requirements; restrictions on advertising; and creating civil penalties; among others.

8. Section 8 sets forth guidance on how many licenses the Department of Revenue may issue.

9. Section 9 decriminalizes actions and conduct of licenses under the provisions of Amendment A, precludes voiding contracts related to marijuana on the basis of federal law, and precludes professional discipline for advice or services related to marijuana on the basis of federal law.

10. Section 10 grants local governments the right to regulate licenses within their jurisdictions, including banning them altogether.

11. Section 11 imposes a 15% excise tax on all sales of marijuana that may not be changed until November 3, 2024; requires that revenue be first used to fund the Department's costs in implementing and enforcing Amendment A; and mandates that 50% of the remaining revenue be appropriated for the support of public schools, with the remainder being deposited into the general fund.

12. Section 12 requires administrative rules to be adopted in accordance with SDCL chapter 1-26; creating a right to appeal Department decisions; and allowing any resident to commence an action for a writ of mandamus if the Department fails to promulgate rules by April 2022.

13. Section 13 requires the Department to publish annual reports related to the implementation and enforcement of Amendment A.

14. Section 14 mandates that the Legislature pass laws:

    a. Ensuring access to marijuana "beyond what is set forth in this article by persons who have been diagnosed by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana"; and

    b. Regulating the cultivation, processing, and sale of hemp.

15. Section 15 provides that Amendment A is to be broadly construed; that it does not purport to supersede federal law; and that its provisions are severable.

(Compl., Ex. 1).

At least five separate subjects are identified in the title alone, which describes Amendment A as "[a]n amendment to the South Dakota Constitution to": (a) "legalize marijuana"; (b) "regulate marijuana"; (c) "tax marijuana"; (d) "require the Legislature to pass laws regarding hemp"; and (e) "require the Legislature to pass laws . . . ensuring access to marijuana for medical use." (*Id.*). Amendment A will purportedly go into effect on July 1, 2021.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). "If no issue of material fact exists, then any legal questions may be decided by summary judgment." *Estate of Williams ex rel. Williams v. Vandeburg*, 2000 S.D. 155, ¶ 7, 620 N.W.2d 187, 189 (citing *Bego v. Gordon*, 407 N.W.2d 801 (S.D. 1987)). The only material issue in this case is the "proper construction to be given to a provision of our constitution," which is a question of law that may be decided by summary judgment. *See Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 7, 578 N.W.2d 134, 135 (citing *Kyllo v. Panzer*, 535 N.W.2d 896, 897 (S.D. 1995)).

ARGUMENT

I. This Court should enter a judgment declaring that Amendment A was submitted to the voters in violation of the procedures set forth in the Constitution itself and is, therefore, invalid.

The South Dakota Constitution, as approved by the people, sets forth specific procedures for its own amendment, and "strict observance of every substantial requirement is essential to the validity of the proposed amendment." *Andrews v. Governor of Maryland*, 449 A.2d 1144, 1146 (Md. 1982) (citation omitted). If a proposed

amendment to the Constitution is submitted to and approved by the voters in violation of the Constitution itself, then the amendment is a nullity. *See In re Petition for Certiorari as to Determination of Election on Brookings School District's Decision to Raise Additional General Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d at 585-86 (citing *Larson*, 262 N.W.2d at 753); *Water Works v. Bd. of Water*, 141 So. 3d 958, 964 (Ala. 2013) (noting an amendment may be a nullity even if the electorate voted in favor of the amendment). That is because "the people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the constitution." *Lehman v. Bradbury*, 37 P.3d 989, 1000-01 (Or. 2002) (citation omitted). "Any other course would be revolutionary[.]" *Moore v. Brown*, 165 S.W.2d 657, 659-60 (Mo. 1942) (citations omitted).

This Court should enter a judgment declaring that Amendment A is invalid because it was submitted to the voters in violation of constitutional procedures and requirements. *See Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 27, 791 N.W.2d 645, 656 ("In examining South Dakota statutes and case law, it is apparent that a declaratory judgment action is not precluded even when there may be jurisdiction in another action."). South Dakota's Uniform Declaratory Judgment Act permits the Court to enter a declaratory judgment if four jurisdictional requirements are met:

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protect[a]ble interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Boever v. S. Dakota Bd. of Accountancy, 526 N.W.2d 747, 749-50 (S.D. 1995) (quoting *Danforth v. City of Yankton,* 25 N.W.2d 50, 53 (S.D. 1946) (additional citation omitted)).

Each of the above requirements are satisfied in this case. First, this case presents an adversarial controversy as to the validity of Amendment A that requires judicial determination. *See Danforth*, 25 N.W.2d at 53 (noting that "declaratory relief requires an adverse and legally protectable interest in the subject matter"). Additionally, there can be little question that Plaintiffs, as taxpayers, and as public officials who swore to uphold the Constitution, are entitled to bring this public action. *Id.* at 54 ("It may be admitted that a resident taxpayer has a sufficient interest under the Declaratory Judgment Law to test the constitutionality of a statute under which taxing authorities will proceed to levy taxes and make expenditures of public money."); S.D. Const. art. XXI, § 3.

Finally, with the passage of Amendment A, and with the Legislature's imminent consideration of the mandates that Amendment A sets forth, remedial rights have undoubtedly accrued. *See Danforth*, 25 N.W.2d at 54. Ratification of Amendment A would not only condone disregarding constitutionally mandated procedures, but also the enshrinement of statutory-type policies in the Constitution without regard for the effect such a change has on the system of government our Constitution creates.[1] In light of the substantial public importance of the issues that this case presents, adjudication of the issues presented will indisputably serve "a useful purpose." *See id.* at 53. Plaintiffs

[1] The Legislative Research Council cautioned the sponsors of Amendment A against enshrining such a "statutory-type structure" in the Constitution, stating:

> The purpose of a constitution is to provide a basic structure within which a government can function. The Constitution prescribes and limits the powers to be exercised by that government and sets forth the rights of the governed. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material.

(McCaulley Aff., Exhibit 1).

therefore properly seek a declaratory judgment that Amendment A is invalid for the reasons set forth below.

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

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

Amendments to the Constitution are addressed under Article XXIII, § 1, which provides that amendments "may be proposed by initiative or by a majority vote of all members of each house of the Legislature." Under Article XXIII, § 1, "[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; however, no proposed amendment may embrace more than one subject."

The express language of Article XXIII, § 1 establishes that an amendment cannot create an entirely new article to the Constitution; it may only amend one or more articles that already exist "as necessary to accomplish the objectives of the amendment." It also

establishes that an amendment may not "embrace more than one subject." These specific requirements will be addressed in detail later in this brief. As an initial matter, however, we can conclude from this language that the term "amendment" is intended to narrowly apply to constitutional changes that are simple and do not require broad or multifarious changes to the Constitution. *See* Judge John A. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding* §§ 540, 574(c) (Chicago, Callaghan and Company, 4th ed. 1887) (explaining that amendments include "changes which are few, simple, independent, and of comparatively small importance").

A constitutional change that does not meet the narrow requirements of an "amendment" may be a "revision" to the Constitution under Article XXIII, § 2. Unlike an amendment, a revision requires a constitutional convention be called either by initiative or "a three-fourths vote of all the members of each house." Once a constitutional convention has been called, its members must be elected "on a nonpolitical ballot in the same districts and in the same number as the house of representatives." S.D. Const., art. XXIII, § 2. The elected members of the constitutional convention must then approve proposed revisions "by a majority" before the proposed revision can be "submitted to the electorate at a special election in a manner to be determined by the convention." S.D. Const., art. XXIII, § 2.

In construing Article XXIII, this Court "must give regard to the whole instrument, must seek to harmonize the various provisions, and must, if possible, give effect to all the provisions." *S. Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 696 (S.D. 1981) (citing *Bd. of Regents v. Carter*, 89 S.D. 40, 228 N.W.2d 621 (1975)). Applying these elementary

principles of constitutional construction, Article XXIII, § 1 must be understood to have a separate field of application from Article XXIII, § 2, and the distinction drawn between "amendments" and "revisions" must be given effect. *Cf.State v. Wilson*, 2000 S.D. 133, ¶ 13, 618 N.W.2d 513, 518 (noting that when interpreting constitutional provisions, the Court must presume the drafters did not "insert surplusage" into their enactment) (quoting *Mid-Century Ins. Co. v. Lyon*, 1997 S.D. 50, ¶ 9, 562 N.W.2d 888, 892).

After all, the procedure for adopting "revisions" is more stringent than the procedure for adopting "amendments." As the Alaska Supreme Court explained when considering similar language in the Alaska Constitution, "[t]he Framers' decision to narrow the alternatives for adopting revisions by making constitutional conventions the sole permissible procedure demonstrates not only their awareness of the distinction between revisions and amendments, but also their desire to give the distinction substance, thereby ensuring that it would be observed by future generations of Alaskans." *Bess v. Ulmer*, 985 P.2d 979, 983 (Alaska 1999). *See McFadden v. Jordan*, 196 P.2d 787, 798 (Cal. 1948) ("The people . . . made it clear when they . . . made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision.").

The fact that the terms "revision" and "amendment" are not specifically defined in the South Dakota Constitution is not unusual. The constitutions of several other states recognize a distinction between a "revision" and "amendment" without expressly defining

those terms.[2] Most courts have applied some variation of the following test for determining whether a proposed amendment should be deemed a revision:

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

   A proposed amendment will be deemed a revision if it results in a fundamental change to the structure of the Constitution and the governmental system it established.[3]

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

   A proposed amendment will be deemed a revision if it imposes far-reaching and multifarious changes to the Constitution.[4]

In South Dakota, the Constitution's plain language provides a third basis to invalidate a proposed amendment. In particular, Article XXIII, § 1 provides 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." Thus, under the plain language of Article XXIII, § 1, a proposed amendment must amend existing articles

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[2] *See Bess*, 985 P.2d at 983-84 (explaining that "[t]he courts have held that constitutions which provide for both processes of amendment and revision express a distinction of substance," and that "[s]cholars have also concluded that a distinction exists between the two methods of constitutional change.") (citing *Jackman v. Bodine*, 43 N.J. 453, 205 A.2d 713, 725–26 (1964) (additional citations omitted)); *Adams*, 238 So. 2d at 831-32 (The separate terms "amendment" and "revision" to the Constitution "must be understood to denote, respectively, not only a procedure but also a field of application appropriate to its procedure.") (quoting *McFadden*, 196 P.2d at 789); *Raven v. Deukmejian*, 801 P.2d 1077, 1085 (Cal. 1990) ("Although the Constitution does not define the terms 'amendment' or 'revision,' the courts have developed some guidelines helpful in resolving the present issue.").

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

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

in the Constitution—it cannot add an entirely new article. *See Davis v. State*, 2011 S.D. 51, ¶ 77, 804 N.W.2d 618, 643 ("Where a constitutional provision is quite plain in its language, we construe it according to its natural import.") (quoting *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 16, 720 N.W.2d 670, 675).

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

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

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

Under the second requirement described above, an amendment can only change pre-existing articles of the Constitution; it cannot create an entirely new article. If the drafters had intended to allow amendments to establish an entirely new article, they would

have drafted Article XXIII, § 1 to state: "A proposed amendment may [create an article, or] amend one or more articles and related subject matter in other articles[.]" Instead, they drafted it to apply only to amendments that changed existing articles of the Constitution.[5] In interpreting Article XXIII, § 1, this Court must "assume the drafters said what they meant and meant what they said." *Brendtro,* 2006 S.D. 71, ¶ 36, 720 N.W.2d at 682 (citing *Gloe v. Union Ins. Co*., 2005 S.D. 30, ¶ 25, 694 N.W.2d 252, 260).

By comparison, Article XXIII, § 2 does not limit revisions to "amend[ing] one or more articles." It follows that the drafters intended to treat the creation of a new article as a revision to the Constitution that can only be implemented through the "formidable bulwark of a constitutional convention as a protection against improvident or hasty . . . revision." *See McFadden*, 196 P.2d at 798; *Brendtro,* 2006 S.D. 71, ¶ 34, 720 N.W.2d at 681-82 ("'In the absence of ambiguity, the language in the constitution must be applied as it reads' and this Court is obligated to apply its 'plain meaning.'") (quoting *In re Janklow*, 530 N.W.2d 367, 370 (S.D. 1995)).

This interpretation is consistent with the legislative history of Article XXIII. In particular, the procedure for revising the Constitution under Article XXIII § 2 did not exist until 1972, which is the same year that Article XXIII, § 1 was amended to require that proposed amendments "may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment." 1972 S.D. Sess. Laws ch. 4 (H.J. Res. 514, approved November 7, 1972); *compare* S.D. Const. art.

[5] *Cf.* Mo. Const. Art. III, § 50 ("Petitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article . . . ."); S.C. Const. Art. XVI, § 1 (allowing "revision of an entire article or the addition of a new article" only "for the general election in 1990").

XXIII, §§ 1-2 (1889), *with* S.D. Const. art.XXIII, §§ 1-2 (1973). These changes were ratified following the Legislature's establishment of the Constitutional Revision Commission in 1969, which it established in response to a growing concern over inconsistencies that had resulted from numerous amendments to the Constitution over the years. *See Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516.

In fact, from 1889 to 1970, the South Dakota Constitution "was amended 79 times, each time adding more complexity to the document." *Id.* (citing *South Dakota Constitutional Revision Commission,* Third Annual Report 1 (1972)). The members of the Constitutional Revision Commission "were acutely aware of the inconsistencies caused throughout the years by heavily amending the 1889 Constitution." *In re Daugaard*, 2011 S.D. 44, ¶ 13, 801 N.W.2d 438, 442 (citation omitted). With this acute awareness, it is not surprising that the Constitutional Revision Commission recommended adding a sentence to Article XXIII, § 1 that allowed amendment by initiative only when changing existing articles, thereby forcing the drafter to carefully examine the existing structure of the Constitution to ensure that the proposed amendment does not irreconcilably conflict with other sections of the Constitution. *See McFadden*, 196 P.2d at 797 (characterizing voter-approved amendment as an improperly submitted revision that "went beyond the legitimate scope of a single amendatory article").

By contrast, a drafter who seeks to establish an entirely new article of the Constitution must complete the more deliberative process for revising the Constitution that is set forth under Article XXIII, § 2. This ensures that revisions are properly scrutinized at a constitutional convention and the integrity of the Constitution is preserved. *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*,

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

Indeed, the drafters of the South Dakota Constitution devoted many long and arduous hours scrutinizing constitutional provisions and eliminating inconsistencies to ensure that the State of South Dakota had a workable, accordant, and homogenous Constitution. *See Wilson,* 2000 S.D. 133, ¶ 8, 618 N.W.2d at 516 (noting that the Constitutional Revision Commission entered into a "comprehensive study of the constitution of the State of South Dakota to determine ways and means to improve and simplify the [C]onstitution"); *Adams,* 238 So. 2d at 832 ("The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogenous and up-to-date document."). New additions to such a venerated text should not be effectuated without being properly analyzed and vetted in a constitutional convention. *See Bess*, 985 P.2d at 983.

In fact, since the inception of our Constitution in 1889, only five new articles have been added to the Constitution, *and not a single new article has ever been added by initiative*. Only two of the five articles that were added to the Constitution over the past 131 years remain in effect today. *See* Article XXVIII § 1 (addressing school and government bonds); Article XXIX § 1 (addressing agricultural products and warehouses, flouring mills and packing houses). Each of those articles are composed of a single

section containing just 75 words or less.[6] *See id*. Amendment A is comparatively vast, containing 15 sections, 55 subsections, and more than 2,280 words.[7] Regardless of the length and complexity of Amendment A, however, the simple fact is that the creation of an entirely new article of the Constitution by initiated measure is entirely unprecedented in our State's history.

Under the plain language of Article XXIII, § 1, Amendment A is an invalid revision to the Constitution because it establishes an entirely new article to the Constitution that has never been properly scrutinized in a constitutional convention. The pervasive effect of this lack of scrutiny will become apparent in the following sections of this Brief. It is important to note, however, that it would have been virtually impossible for voters to discern how Amendment A would impact our Constitution and system of government based on the 200-word description that was provided to them at the polls. (McCaulley Aff., Ex. B). Even if they had reviewed the entire text before arriving at the polls, Amendment A itself made "no attempt to enumerate the various and many articles and sections of our present Constitution which would be affected, altered, replaced, or repealed."[8] *McFadden*, 196 P.2d at 797. The sheer extent of this impact is staggering.

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[6] This word count does not include titles.

[7] The word count of just the definition section of Amendment A exceeds the total word count of Article XXVIII § 1 and Article XXIX § 1 combined.

[8] Curiously, the drafters of Amendment A did not even designate an article number for the new article. There is no procedure outside the amendment or revision process for designating Amendment A with a particular roman numeral (e.g., Article XXX), as doing so would change the Constitution without voter approval.

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

In determining whether a constitutional change is a revision, Courts have considered the qualitative effect it would have on existing constitutional provisions and the governmental plan established by the constitution as a whole. As one court has explained, "a constitutional 'revision' need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions[.]" *Legislature v. Eu*, 816 P.2d 1309, 1317 (Cal. 1991) (citations omitted). To the contrary, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision[.]" *Id.* (citations omitted); *see Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1284-89 (Cal. 1978).

In this case, the changes proposed by Amendment A would result in a fundamental change to the Constitution and our State's system of government. Rather than embracing the separate powers afforded to the legislative and executive branches of our government under the Constitution, Amendment A would vest in the Department of Revenue the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," with only limited exceptions applicable to local governments. (Compl., Ex. 1, § 6). This allocation of power represents a drastic departure from South Dakota's existing system of government. *See Bess*, 985 P.2d at 986 (recognizing that a proposed amendment is a revision if it "would affect a core function of one of the three branches of government").

The South Dakota Constitution establishes a system of government in which power is divided among three distinct branches: legislative (Article III), executive (Article IV), and judicial (Article V). S.D. Const. art. II. The powers and duties of each branch are specifically prescribed in the Constitution, and the separation of these powers among the three branches "has been a fundamental bedrock to the successful operation of our state government since South Dakota became a state in 1889." *Gray v. Gienapp*, 2007 S.D. 12, ¶ 19, 727 N.W.2d 808, 812.

Each branch is vested with distinct power and authority. Under Article III, the Legislature is vested with the authority to enact policies into law. S.D. Const. art. III, § 1 ("The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives.). Once the Legislature has enacted a policy, it may delegate "certain quasi-legislative powers or functions" to an executive or administrative agency to execute and implement the policy, so long as the Legislature adopts standards to guide the agency in the exercise of its delegated powers. *State v. Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d 598, 606 (quoting *State v. Moschell*, 2004 S.D. 35, ¶ 15, 677 N.W.2d 551, 558). Under Article IV, § 8, the Legislature must then allocate the powers and duties of these agencies among principal departments. The Governor, in turn, is vested with the authority to "make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration." S.D. Const. art. IV, § 8.

The Department of Revenue is one of the executive agencies established pursuant to Article III, § 1 and Article IV, § 8. SDCL 10-1-1. The scope of the powers and duties

of the Department of Revenue are defined by SDCL ch. 10-1 and can be modified by the Legislature or Governor as authorized by the Constitution. In fact, the Department of Revenue, as it exists today, is the result of a 2011 executive order that abolished and replaced the previously established "Department of Revenue and Regulation" and reorganized various agencies under the executive branch.[9]

Amendment A significantly alters the separate powers of the legislative and executive branches relating to the Department of Revenue. Not only is the Department of Revenue granted the *exclusive power* to "promulgate rules and issue regulations," but it is also granted sole authority to "administer and enforce" those rules. (Compl., Ex. 1, § 6). In effect, the Department of Revenue replaces both the legislative and executive branches of government for most aspects of marijuana regulation. Rather than a subordinate agency subject to the Legislature's or Governor's modification, the Department of Revenue becomes a co-equal fourth branch of government vested with the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," with only limited exceptions applicable to local governments.[10] (*Id.*).

Other courts have invalidated similar alterations of the separation of powers. For example, in *McFadden,* the California Supreme Court considered an initiated measure

[9] 2011 S.D. Sess. Laws ch. 1, §§ 34-35 (Exec. Order 2011-01).

[10] The Legislative Research Council cautioned the sponsors of Amendment A against enshrining such a "statutory-type structure" in the Constitution, stating: "The purpose of a constitution is to provide a basic structure within which a government can function. The Constitution prescribes and limits the powers to be exercised by that government and sets forth the rights of the governed. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material." (McCaulley Aff., Exhibit 1).

that would have established a new constitutional article covering a multitude of subjects, including the creation of a state pension commission with broad governmental powers. 196 P.2d 787. The *McFadden* Court held that the initiated measure was a revision to the California Constitution, noting that "the effect of adoption of the measure proposed . . . would be to substantially alter the purpose and to attain objectives clearly beyond the lines of the Constitution as now cast." *Id*. at 799. In reaching that conclusion, the *McFadden* court was particularly troubled by the broad authority that was afforded to the state pension commission under the initiated measure: "The delegation of far reaching and mixed powers to the commission, largely, if not almost entirely in effect, unchecked, places such commission substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." *Id*. at 798.

Other authority is further instructive. In *Citizens Protecting Michigan's Constitution*, the Michigan Court of Appeals considered a challenge to an initiative petition for a constitutional amendment that addressed a wide range of subjects, including legislative redistricting. 761 N.W.2d 210. In considering the challenge, the court took issue with the broad powers that the proposed amendment would have vested in a redistricting commission:

> [T]he proposal strips the Legislature of any authority to propose and enact a legislative redistricting plan. It abrogates a portion of the judicial power by giving a new executive branch redistricting commission authority to conduct legislative redistricting. It then removes from the judicial branch the power of judicial review over the new commission's actions.

Id. at 229. Rejecting the proposed amendment on the grounds that it was an invalid revision of the state constitution, the Court reasoned: "We agree with the Attorney General that the proposal affects the 'foundation power' of government by 'wresting from'

the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting."[11] *Id*.

And so it is here. Amendment A purports to delegate extensive power to the Department of Revenue that is "clearly beyond the lines of the Constitution as now cast." *See McFadden*, 196 P.2d at 799. Amendment A wrestles authority over marijuana from the legislative and executive branches and consolidates that power in a single independent agency with plenary authority.[12] It would bar any legislative or executive

[11] Similarly, in *Raven,* the California Supreme Court struck down an initiated measure for an amendment that would have required state courts to construe certain procedural rights of criminal defendants consistently with the Federal Constitution. 801 P.2d 1077. The *Raven* court determined that the initiated measure was an improper revision to the constitution because it deprived the state judiciary of its power to decide cases based upon an independent interpretation of the state Constitution. *Id*. at 1087. In reaching this determination, the *Raven* court noted that "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." *Id.* (quoting *Amador*, 583 P.2d at 1286).

[12] The extent to which a measure impacts the powers of a governmental branch has been a key factor that courts have considered in evaluating whether a measure is a constitutional revision. For example, in *Legislature v. Eu*, the California Supreme Court considered a proposed amendment that provided for term limits and restrictions on legislators' retirement benefits. 816 P.2d 1309. The *Eu* court determined that the proposed amendment was not a revision to the constitution based, in part, on the fact that it did not "affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate." *Id.* at 1318. The Court went on to explain:

> The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Id. Unlike the proposed amendment at issue in *Eu*, Amendment A would result in a limitation of legislative and executive authority with respect to marijuana policy. No longer would the Legislature be free to enact laws regulating marijuana, as this "exclusive power"

oversight of marijuana regulation and place the Department of Revenue "substantially beyond the system of checks and balances" that was previously established under South Dakota's governmental plan. *Id.* at 798.

Neither the Constitution nor South Dakota's system of government contemplates vesting "exclusive power" of any kind to an executive agency that the Legislature created to perform specific delegated functions. *See Opinion of the Justices*, 264 A.2d 342, 346 (Del. 1970) (recognizing that a revision "attains objectives and purposes beyond the lines of the present Constitution") (quotation omitted). Such a drastic change to the Constitution cannot—and should not—be effectuated without the informed debate and rigorous discussion that a constitutional convention provides. *See Bess*, 985 P.2d at 986 (holding that a proposed amendment is a revision if it would "fundamentally change [ ] and subordinate[ ] the constitutional role" of any governmental branch).

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

When determining whether a proposed amendment is a revision to the Constitution, courts have considered not only the qualitative effect of the changes it enacts, but also the quantity of existing articles or sections of the Constitution that it would disturb. *See Citizens Protecting Michigan's Constitution*, 761 N.W.2d at 228-29 (applying a quantitative analysis to hold that a proposal was an impermissible revision to the constitution, and noting that "the number of proposed changes and the proportion of current articles and sections affected by those proposed changes [were] very significant");

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is granted to the Department of Revenue. Nor would the executive branch have the authority to enforce the rules and regulations promulgated by the Department of Revenue, as the Department of Revenue is granted sole authority to "administer and enforce" those rules.

Bess, 985 P.2d at 987-88 (holding that a proposed amendment was an impermissible revision and noting that it "would potentially alter as many as eleven separate sections of our Constitution"). In this case, Amendment A would potentially alter at least 21 separate sections of the South Dakota Constitution.

1. The "exclusive power" granted to the Department of Revenue under Amendment A alters numerous constitutional provisions relating to legislative and executive power.

By granting the Department of Revenue the "exclusive power" to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state," as well as the sole authority to "administer and enforce" those rules, Amendment A alters several Constitutional provisions relating to the delegation of governmental powers, including:

1. S.D. Const. art. II ("The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.").

2. S.D. Const. art. III, § 1 ("The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives.").[13]

3. S.D. Const. art. IV, § 1 ("The executive power of the state is vested in the Governor.").[14]

4. S.D. Const. art. IV, § 3 ("The Governor shall be responsible for the faithful execution of the law" and may "enforce compliance with any constitutional or legislative mandate.").

[13] Amendment A divests the Legislature of its power to "regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana," and grants that "exclusive power" to the Department of Revenue. (Compl., Ex. 1, § 6).

[14] Amendment A divests the Governor of her executive power to enforce regulations that are promulgated by the Department of Revenue under Amendment A.

5. S.D. Const. art. IV, § 8 (vesting the Governor with the authority to make changes to agencies and their "functions, powers and duties," as "necessary for efficient administration").

6. S.D. Const. art. IV, § 9 ("Each principal department shall be under the supervision of the Governor.").[15]

7. S.D. Const. art. IV, § 4 (granting the Governor veto power and the power to "strike any items of any bill passed by the Legislature making appropriations.").

8. S.D. Const. art. III, § 30 (defining the circumstances under which the Legislature may empower a committee to "suspend rules and regulations promulgated by any administrative department or agency from going into effect until July 1 after the Legislature reconvenes.").

Amendment A also impacts many of the above constitutional provisions because it is incompatible with the Legislature's authority over the administrative rule-making process. Specifically, Amendment A mandates that "[a]ny rule adopted by the department pursuant to this article must comply with chapter 1-26 of the South Dakota Codified Laws." Chapter 1-26 sets forth a procedure that applies to rules promulgated by subordinate executive and legislative agencies; it is not designed for rules promulgated by an agency endowed with a constitutionally-decreed "exclusive power" unencumbered by legislative or executive review or oversight.

For example, when reviewing and making recommendations on a proposed rule, the Director of the Legislative Research Council ("Director") is required to ensure that the rule is "authorized by the standards provided in the statutes cited by the agency to promulgate the rule." SDCL 1-26-6.5. If the Director's recommendation is appealed, then the Interim Rules Committee is required to consider whether the rule is adverse to "the

[15] The Department of Revenue is one of the "principal departments" under the supervision of the Governor. By granting the Department of Revenue the "exclusive power" over most aspects of marijuana regulation, Amendment A would drastically restrict the Governor's supervisory authority.

legislative intent inherent in the powers, duties, and functions as established in the rule-making authority of the agency[.]" SDCL 1-26B-7(1). In fact, after the Interim Rules Committee has completed its review process, it is required to submit recommendations for the continuation of a rule to the Legislature. Under SDCL 1-26B-10, the Legislature "may vote to either reestablish, amend or terminate the rules of the agency under review and evaluation."

Under the above statutes, the Legislature is granted final authority over rules promulgated by an executive or legislative agency. This authority exists because Chapter 1-26 is intended to apply only to rules promulgated by agencies that derive their authority from the Legislature or executive branch. It is impossible to reconcile this well-defined structure with the "exclusive power" that Amendment A purports to grant to the Department of Revenue.

2. Amendment A impacts constitutional provisions relating to judicial authority.

Article V of the South Dakota Constitution vests the State's judicial power in the unified judicial system, and further provides that the Legislature is to establish any limitation on the court's jurisdiction or authority. S.D. Const. art. V, §§ 1, 5. Amendment A unconstitutionally limits judicial authority by vesting in the Department of Revenue the authority to review its own decisions. Specifically, Amendment A provides that "[a]ny person aggrieved by a decision of the [D]epartment is entitled to appeal the decision in accordance with chapter 1-26 of the South Dakota Codified Laws." (Compl., Ex. 1, § 12). This language effectively restricts the public's ability to obtain judicial review of the Department of Revenue's decisions.

Specifically, SDCL chapter 1-26 sets forth an administrative review process that

must be completed before a decision of an administrative agency can be appealed to the circuit court. SDCL 1-26-30.2. Under that procedure, a person aggrieved by a final decision of an agency in a contested case must exhaust "all administrative remedies available" before obtaining judicial review. SDCL 1-26-30. This requirement exists because the judicial powers and function of administrative agencies are the result of a delegation of legislative or executive authority. *Jundt v. Fuller*, 2007 S.D. 62, ¶ 10, 736 N.W.2d 508, 513 ("[T]he constitutional separation of powers between the executive branch and the judicial branch prevents courts from involvement in review of administrative decisions unless there exists specific legislative empowerment for the judiciary to act regarding executive branch functions[.]") (quoting *Perkins v. Dep't of Med. Assistance*, 555 S.E.2d 500, 502 (Ga. Ct. App. 2001)). Because Amendment A grants the Department of Revenue the "exclusive power" to make decisions on a broad range of topics related to the promulgation, administration, and enforcement of marijuana regulations, it ostensibly restricts the public's ability to obtain judicial review of those decisions through the administrative process set forth in SDCL ch. 1-26.

If the authority granted to the Department of Revenue were derived from the Legislature or Governor, then this restriction on judicial authority would be consistent with the separation of powers set forth in Article V of the Constitution. *See Bohlmann v. Lindquist*, 1997 S.D. 42, ¶ 11, 562 N.W.2d 578, 580-81 ("Under the doctrine of separation of powers, an administrative agency, a branch of the executive department[,] is empowered to determine its own jurisdiction.") (quoting *Rapid City Area Sch. Dist. No. 51-4 v. de Hueck*, 324 N.W.2d 421, 422 (S.D. 1982)). However, because the Department of Revenue's "exclusive power" is not subject to, or derived from, the legislative or

executive branches, Amendment A's limitation on the power of the judiciary to review the Department of Revenue conflicts with the separation of powers set forth in the Constitution and would result in a constriction of the judicial branch's authority.

But that is not all. Amendment A also unconstitutionally establishes an entirely new judicial cause of action that can be initiated against the Department of Revenue—a state agency:

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

(Compl., Ex. 1, § 12).

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

Finally, Amendment A may unconstitutionally establish an entirely new judicial cause of action against the Legislature itself. Section 14 of Amendment A also mandates that "[n]ot later than April 1, 2022," the Legislature must pass laws (a) ensuring access to marijuana "beyond what is set forth in this article by persons who have been diagnosed

by a health care provider, acting within the provider's scope of practice, as having a serious and debilitating medical condition and who are likely to receive therapeutic or palliative benefit from marijuana"; and (b) regulating the cultivation, processing, and sale of hemp." (Compl., Ex. 1, § 14). This Constitutional command places a strict deadline on legislative action. That deadline is meaningless unless it is inferred that a legal action can be commenced to compel the Legislature to act if it fails to do so.

To authorize a mandamus action against the Legislature, however, would represent a drastic departure from the separation of powers previously defined by our Constitution. Under our current system of government, the judicial branch "is without jurisdiction or authority to compel the Legislature, a co-ordinate branch of the government, to enact legislation required by constitutional provisions." *State ex rel. Flanagan v. S. Dakota Rural Credits Bd.*, 45 S.D. 619, 189 N.W. 704, 707 (S.D. 1922) (citing *State v. Bolte*, 52 S.W. 262 (Mo. 1899)); *see In re Certification of a Question of Law from U.S. Dist. Court, Dist. of S. Dakota, W. Div.*, 2000 S.D. 97, ¶ 12 n. 2, 615 N.W.2d 590, 596 n. 2 ("Observing the doctrine of separation of powers, this Court cannot compel the Legislature to perform its constitutional duties.") (citing *In re State Census,* 6 S.D. 540, 542, 62 N.W. 129, 130 (S.D. 1895) (interpreting SD Const. art. III, § 5)). By imposing a Constitutional mandate for the Legislature to act that could only be enforced by the judicial branch, Amendment A threatens the very structure of our Constitution and the system of checks and balances it was designed to preserve.

For the reasons set forth above, Amendment A directly impacts at least four additional constitutional provisions, bringing the total number of impacted provisions to twelve:

9. S.D. Const. art. III, § 27 (the State, its entities, and its employees are generally immune from suit, and *the Legislature* must "direct by law in what manner and in what courts suits may be brought against the state.").

10. S.D. Const. art. V, § 1 ("The judicial power of the state is vested in a unified judicial system . . . .").

11. S.D. Const. art. V, § 4 ("Courts of limited jurisdiction consist of all courts created by the Legislature having limited original jurisdiction.").

12. S.D. Const. art. V, § 5 ("The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature . . . . The circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature.").

3. Amendment A further effects constitutional provisions relating to taxation and appropriation.

Amendment A would also fundamentally alter the Legislature's constitutional authority to assess taxes and make appropriations. Specifically, Section 11 of Amendment A imposes "[a]n excise tax of fifteen percent . . . upon the gross receipts of all sales of marijuana sold by a person licensed by the [D]epartment[,]" and "[t]he Legislature has no authority to adjust this rate until after November 3, 2024." (Compl., Ex. 1, § 11). Article XI of the Constitution, however, specifically empowers *the Legislature* to levy taxes and to divide all property into separate classes for purposes of taxation.

By setting a fixed tax rate for marijuana sales, and by divesting the Legislature of its authority to adjust that tax rate for four years, Amendment A alters Article XI's allocation of taxing authority to the Legislature. Indeed, to comply with Amendment A's tax provisions, the Legislature must either (1) tax all property in the same class as marijuana at 15%; or (2) create an entirely new class of property for marijuana sales. In this way,

Amendment A directly impacts at least eight additional constitutional provisions, bringing the total number of impacted provisions to twenty.[16]

In addition, Amendment A would alter the Legislature's constitutional authority to appropriate revenue by mandating that all revenue collected "shall be appropriated to the [Department of Revenue] to cover costs incurred by the [Department of Revenue] in carrying out its duties under this article, and that "[f]ifty percent of the remaining revenue shall be appropriated by the Legislature for the support of South Dakota public schools and the remainder shall be deposited into the state general fund." (Compl., Ex. 1, § 11). This mandate conflicts with Article XII of the Constitution, which specifically vests the authority to appropriate funds in *the Legislature.* By setting forth a specific appropriation schedule, Amendment A impacts Article XII, § 1, which requires "appropriation by law"

[16] *See* S.D. Const. art. XI, § 1 ("The Legislature shall provide for an annual tax, sufficient to defray the estimated ordinary expenses of the state for each year . . . "); S.D. Const. art. XI, § 2 ("[T]he Legislature is empowered to divide all property including moneys and credits as well as physical property into classes . . . Taxes shall be uniform on all property of the same class[.]"); S.D. Const. art. XI, § 8 ("No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied . . . ."); S.D. Const. art. XI, § 9 ("All taxes levied and collected for state purposes shall be paid into the state treasury. No indebtedness shall be incurred or money expended by the state . . . except in pursuance of an appropriation for the specific purpose first made. The Legislature shall provide by suitable enactment for carrying this section into effect."); S.D. Const. art. XI, § 13 (addressing the rate of taxation and providing that it "shall not be increased unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature."); S.D. Const. art. VI, § 17 ("No tax or duty shall be imposed without the consent of the people or their representatives in the Legislature, and all taxation shall be equal and uniform."); S.D. Const. art. VIII, § 3 (providing that the proceeds of fines shall be distributed by the county treasurer "among and between all of the several public schools incorporated in such county in proportion to the number of children in each, of school age, as may be fixed by law."); S.D. Const. art. VIII, § 15 ("The Legislature shall make such provision by general taxation . . . as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state . . . Taxes shall be uniform on all property in the same class.").

before money can be paid out of the treasury, as well as Article XII, § 2, which requires a two-thirds vote of all members of each branch of the Legislature before appropriations can be made for extraordinary expenses.[17] This brings the grand total of constitutional provisions impacted by Amendment A to 22.

The far-reaching impact of the numerous provisions of Amendment A cannot be overstated. Through its 15 sections and 55 subsections, Amendment A would not only impact at least 22 separate Constitutional provisions, it would also impose fundamental changes to the delicate separation of powers among the legislative, executive, and judicial branches, and undermine the system of checks and balances that the drafters of our Constitution worked tirelessly to establish. *See Citizens Protecting Michigan's Constitution*, 761 N.W.2d at 228 (noting that "the number of proposed changes and the proportion of current articles and sections affected by those proposed changes [were] very significant"); *Bess*, 985 P.2d at 987-88 (holding that a proposed amendment was an impermissible revision because it "would potentially alter as many as *eleven* separate sections of our Constitution") (emphasis added).

By failing to follow the proper constitutional procedure, the proponents of Amendment A deprived South Dakota voters of the opportunity to have Amendment A, and its far-reaching and pernicious effects on our system of government properly scrutinized at a constitutional convention. Amendment A is a revision to our Constitution

[17] *See* S.D. Const. art. XII, § 1 ("No money shall be paid out of the treasury except upon appropriation by law and on warrant drawn by the proper officer."); S.D. Const. art. XII, § 2 ("The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.").

that was placed on the ballot in violation of established constitutional procedure. Therefore, Amendment A is invalid as a matter of law and Petitioners' Motion for Summary Judgment should be granted in its entirety.

III. Amendment A violates the Constitution's "one-subject" rule.

It is beyond question that any amendment to our Constitution cannot embrace more than one subject (the "one-subject" rule"), and that each amendment must be voted upon separately (the "separate-vote rule"). Both of these requirements are set forth under S.D. Const. art. XXIII, § 1, which states that amendments—whether proposed by the Legislature or by initiative—cannot "embrace more than one subject," and that, when "more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately." *Id.*

The separate-vote rule has existed in the South Dakota Constitution for most of its history. *See* S.D. Const. art. XXIII, § 1 (1889) (emphasis added). The one-subject rule, however, is a recent addition to the Constitution, having been instituted just two years ago with the ratification of Amendment Z. 2018 S.D. Sess. Laws ch. 4, § 2 (H.J. Res. 1006, approved Nov. 6, 2018). Although the interpretation of the one-subject rule is a question of first impression in South Dakota, an analysis of the South Dakota Supreme Court's interpretation of the separate-vote rule is instructive.[18]

For example, in *State ex rel. Adams v. Herried*, the South Dakota Supreme Court addressed the following iteration of the separate-vote rule, which was contained in the 1889 version of Article XXIII, § 1: "[I]f more than one amendment be submitted they shall

[18] The "one subject" rule is distinguishable from the "single subject" case law for legislative enactments under Article III, § 21 that are taken in public by elected officials, debated and provide multiple chances for public input.

be submitted in such manner that the people may vote for or against such amendments separately." Relying upon this prior version of the separate-amendment rule, the *Herried* Court analyzed whether a constitutional amendment that altered the powers of the regents of South Dakota educational institutions and abolished the trustees of those educational institutions violated the separate-amendment rule. 10 S.D. 109, 72 N.W. 93 (S.D. 1897).

In conducting its analysis, the *Herried* Court expressly recognized the importance of the separate vote requirement, declaring, "[I]t is hardly necessary to point out that the provision of the [C]onstitution requiring that amendments shall be so presented to the electors that they may vote upon each separately is one of the utmost importance, and one of substantial merit." *Id.* at 96. The Court went on to explain: "Since the foundation of the federal government, nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter." *Id*. The Court noted that the reasons for preventing this practice are "more forceful" when considering a constitutional amendment than when considering a legislative act. *Id*. The Court explained:

> In the legislature each member has an opportunity to offer amendments, and thus record his dissent to the objectionable features of any pending measure. It is not so with the elector. He must either ratify or reject the entire proposition as presented.

Id.

In concluding that the amendment did not violate the separate-vote rule, the Court considered whether it had "different objects and purposes in view." *Id*. at 97. In order to constitute more than one amendment, the Court explained, "the propositions submitted must relate to more than one subject, and have at least two distinct and separate

purposes, not dependent upon or connected with each other." *Id*. In other words, each change to the Constitution "must be incidental to and necessarily connected with the object intended." *Id*.

Ultimately, because the purpose of the amendment was to vest control of institutions in a single board, the Court concluded that abolishing the trustees who previously controlled the institutions was "incidental and necessarily connected with the object intended." *Id.* In reaching this conclusion, however, the Court specifically noted, "It must be conceded that courts and lawyers may easily differ regarding the result reached herein. The question is involved in serious doubt." *Id*. at 97.

In *Barnhart v. Herseth*, the South Dakota Supreme Court again applied the 1889 version of Article XXIII, § 1 when it considered whether an amendment that extended the term of the governor and other constitutional officers, reduced the number of executive departments, reorganized departments of state government, and deleted the office of the superintendent of public instruction violated the 1889 version of the separate-vote rule. 88 S.D. 503, 222 N.W.2d 131 (1974). In describing the test for determining whether a proposed change encompassed more than one amendment, the Court stated:

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

Id. at 512, 222 N.W.2d at 136 (quoting *Keenan v. Price*, 195 P.2d 662 (Idaho 1948)). In the end, the Court held that the proposed change to the Constitution was a single amendment because the matters contained within it were "rationally relate[d] to the overall

plan of making the executive branch of state government more efficient and responsible." *Id*.

Although the rules espoused in *Herried* and *Barnhart* are instructive, they were formulated based on a prior version of Article XXIII, § 1 that no longer exists. The cases were also decided long before the one-subject rule came into effect. Since the interpretation of the one-subject rule is a question of first impression in South Dakota, it is helpful to examine how other courts have interpreted their state's respective one-subject rules.

Courts in other jurisdictions with an analogous one-subject rule also analyze the relationship of an amendment's provisions to the amendment's general purpose to determine whether it encompasses more than one subject. In *State ex rel. Wagner*, the Nebraska Supreme Court considered whether a voter-initiated constitutional amendment regarding medical marijuana violated Nebraska's single-subject rule. 948 N.W.2d 244. *See* Neb. Const. art. III, § 2 ("Initiative measures shall contain only one subject."). The Nebraska Court began its analysis by identifying the general subject of the proposed amendment, and noted that "a general subject must not be characterized too broadly when considering an amendment to the constitution":

> An overly broad general subject might allow any secondary purpose to arguably be naturally and necessarily connected to it. Instead, a general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the initiative's other purposes.

Id. at 254 (internal citations omitted). The one-subject rule, the Court explained, "may not be circumvented" by selecting a general subject that is so broad as to evade a "meaningful constitutional check." *Id*. (quoting *Gregory v. Shurtleff*, 299 P.3d 1098, 1112 (Utah 2013)).

Through its analysis, the *Evnen* Court determined that the general subject of the initiative was to create a constitutional right for persons with serious medical conditions to produce and use cannabis under certain prescribed circumstances. *Id.* at 253.

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

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

Id. at 257-58.

In the Nebraska Court's view, individual rights to use medical marijuana were "fundamentally distinct" from the property rights to grow and sell medical marijuana for profit. *Id.* at 257. In the end, the Court concluded that the initiative at issue "demonstrate[d] precisely the logrolling scenario that Nebraska's voters sought to avoid" because it "combine[d] dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately." *Id*.

Similarly, the Oklahoma Supreme Court in *In re Initiative Petition No. 314* ruled that an initiated amendment related to the advertising, franchising, and sale of alcohol violated the Oklahoma Constitution's one-subject rule. 625 P.2d 595 (Okla. 1980). There, the initiated amendment at issue contained a detailed regulatory scheme with specific rules allowing certain alcohol franchise agreements, allowing on-premises sale and consumption of alcohol, and removing restrictions on alcohol advertising. *Id.* at 601-602. Proponents of the initiated amendment argued that its single subject was the "control of alcoholic beverages." *Id.* at 600.

The Oklahoma Supreme Court analyzed a number of its prior decisions as well as decisions from other jurisdictions and determined that "no matter how the courts characterize the test they apply, they examine the inherent nature of the provisions to determine whether they are subjects which are separate and independent from each other so that each could stand alone, or fall as a whole, leaving the constitutional scheme harmonious and independent on that subject." *Id.* at 607. Using this test, the Court concluded the initiated amendment violated the one-subject rule:

> There is no interdependence between proposals permitting advertising, franchising and liquor by the drink. Allowing franchising is not incidental or supplemental to permitting advertising, nor is it an administrative detail. They are certainly not so "interrelated and interdependent" that they form an "interlocking package" (Amador) and they do not have a common underlying purpose, as each proposal has its own purpose.

Id.

The Court believed the proposed amendment to be "logrolling of the worst type." *Id.* For example, voters who supported the "liquor by the drink" provisions were "not afforded freedom of choice" if they opposed unrestricted advertising or franchise agreements. *Id.* Finally, in response to the argument that the decision would "jeopardize[

] the sanctity of the initiative process," the Court took the "opportunity to point out that [the initiative process] may only be preserved by requiring the people to submit lawful initiatives." *Id.* at 608.

These out-of-state decisions adopt an analytical approach similar to the approach adopted by South Dakota courts on this issue. In applying South Dakota's separate-amendment rule, both *Herried* and *Barnhart* first identified the general objective or purpose of the proposed amendment and then analyzed how the various provisions of the amendments related to that objective or purpose. Likewise, in analyzing the application of their one-subject rule to proposed amendments, the Nebraska and Oklahoma courts used a similar structure: first identify a single general subject and then examine "the relationship of other details to [that] general subject." *Evnen*, 948 N.W.2d at 253 (asking whether "the limits of a proposed law" have a "natural and necessary connection with each other and, together, are part of one general subject"). *See Initiative Petition No. 314*, 925 P.2d at 607 (collecting cases that "examine the inherent nature of the provisions to determine whether they are subjects which are separate and independent from each other so that each could stand alone, or fall as a whole, leaving the constitutional scheme harmonious and independent on that subject").

A. Amendment A embraces more than one subject.

Amendment A must similarly be analyzed under this framework. As an initial matter, the Court must identify Amendment A's general subject with a level of specificity that allows for meaningful review. *See Evnen*, 948 N.W.2d at 253. "Marijuana" or even "cannabis" is far too broad of a subject and would completely subvert the purpose of the one-subject rule that the voters ratified in 2018. Even so, a review of the title and text of

Amendment A, however, make it clear that only the impermissibly broadly subject of "marijuana" can encompass the myriad of subjects that Amendment A contains. Indeed, a cursory review of Amendment A's text easily reveals at least five distinct general subjects:[19]

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

(2) Granting the Department of Revenue the exclusive power to promulgate rules regulating the commercial sale and licensing of marijuana, and mandating that the Department do so before a certain time (Sections 6, 7, 8, and 9);

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

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

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

(Compl., Ex. 1).

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[19] The initial draft of Amendment A expressly stated more than one purpose:

> Section 2. The purpose of this Amendment is to make marijuana legal under state and local law for adults twenty-one (21) years of age or older, and to control the commercial production and distribution of marijuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of limited amounts of marijuana by adults twenty-one (21) years of age or older; remove the commercial production and distribution of marijuana from the illicit market; prevent revenue generated from commerce in marijuana from going to criminal enterprises or gangs; prevent the distribution of marijuana to persons under twenty-one (21) years of age; prevent the diversion of marijuana to illicit markets; ensure the safety of marijuana and products containing marijuana; and ensure security of marijuana businesses. To the fullest extent possible, this Amendment shall be interpreted in accordance with the purpose and intent set forth in this section.

(McCaulley Aff., Ex. A).

None of these distinct primary purposes have a "natural and necessary connection with each other." *See Evnen*, 948 N.W.2d at 253. The individual right to lawfully possess one ounce of marijuana in Section 4(1) is not dependent or contingent upon the Department of Revenue having the exclusive power to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in South Dakota in Section 6. The personal right to grow three marijuana plants in Section 4(2) has no relation to the Legislature's obligation to pass laws ensuring access to marijuana for medical use by persons who are likely to receive therapeutic or palliative benefit from medical marijuana in Section 14(1), which under Amendment A's own terms, must go "beyond what is set forth in" Amendment A. The 15% excise tax on the commercial sale of marijuana in Section 10 is not incidental to the Legislature's obligation to pass laws regulating the cultivation, processing, and sale of hemp in Section 14(2).

Indeed, Amendment A fails no matter how this Court endeavors to define its broad subject. After all, one of Amendment A's apparent purposes is to require the Legislature to pass laws regarding hemp. And yet, hemp is explicitly excluded from the definition of "marijuana" in Section 1. (Compl., Ex. 1, § 1(4)). By Amendment A's own terms, a constitutional mandate that the Legislature pass laws regarding hemp is not rationally related to legalization of marijuana, as it is a subject conceptually distinct from "legalization of marijuana." *See Barnhart*, 88 S.D. at 512-13, 222 N.W.2d at 136.

It is not necessary for this Court to identify each and every subject embraced by Amendment A. Indeed, the Court need only identify two subjects to conclude that Amendment A violates Article XXIII's one-subject rule. By embracing more than one subject, Amendment A disregarded the requirements of Article XXIII, § 1, and is "plainly

and palpably . . . invalid." *Herried*, 10 S.D. 109, 72 N.W. at 97. "[T]he people cannot give legal effect to an amendment which was submitted in disregard of the limitations imposed by the constitution." *See Lehman*, 37 P.3d at 1000-09 . Because Amendment A was submitted to the voters in violation of the Constitution, the election as to Amendment A did not result "in a free and fair expression of the will of the voters," *Petition for Certiorari*, 2002 S.D. 85, ¶ 13, 649 N.W.2d at585-86, and the result of the election is "wholly void." *Bienert*, 507 N.W.2d at 90; *see also Water Works*, 141 So. 3d at 964.

Amendment A's severability clause further underscores the reality that it embraces multiple subjects. If a provision of Amendment A may be considered to be severable, then it necessarily follows that the severable provisions are "separate and independent from each other so that each could stand alone, or fall as a whole." *See Initiative Petition No. 314*, 625 P.2d at 607. For example, a court could conceivably conclude that decriminalizing possession of marijuana at the state level in Section 4 is preempted by federal law. But that court could also conclude that sanctioning the sale of marijuana and taxing the revenue in Sections 6 and 11 are not preempted and therefore sever the latter sections from Amendment A. This result is possible because, as previously discussed, the individual right to possess and use marijuana is a fundamentally distinct purpose from the ability to license, sell, and tax marijuana. *Cf. Evnen*, 948 N.W.2d at 257-58.

B. Amendment A exemplifies the malignant practice of "log-rolling."

The relevant authorities also reveal that one of the primary purposes of the one-subject rule is to prevent "logrolling" in constitutional amendments. *Fulton County v. City of Atlanta*, 825 S.E.2d 142, 146 (Ga. 2019) (citation omitted) (noting that the purpose of Georgia's one-subject rule was to "inhibit the passage of 'omnibus' or 'log-rolling' bills").

"Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's propositions." *Evnen*, 948 N.W.2d at 253. Indeed, more than a century ago, the South Dakota Supreme Court recognized that "nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter." *Herried*, 10 S.D. 109, 72 N.W. at 96.

Amendment A is a classic case of logrolling, which is precisely the evil that South Dakota voters sought to prevent when they ratified Amendment Z just two years ago. After all, one can easily imagine how a voter might have been willing to sacrifice his or her convictions in the wisdom of the legalization of recreational marijuana for the sake of securing additional state revenues, particularly when a substantial portion of those revenues would support South Dakota public schools. Alternatively, one can also imagine how a voter might have earnestly desired the legalization of marijuana, while being opposed, though perhaps to a lesser degree, to the accompanying erosion of the Legislature's taxation authority. In any event, Amendment A did not give the people of South Dakota an opportunity to express approval or disapproval severally as to each of the major changes it effectuates. Rather, it is designed to aggregate the favorable votes from electors of many persuasions. *See Adams*, 238 So. 2d at831 ("Minorities favoring each proposition severally might, thus aggregated, adopt all.").

Indeed, Amendment A's provisions relating to the State's tax power highlight the dangers of "logrolling." In *Kerby v. Luhra*, an action was brought to enjoin the placement of a proposed initiated amendment to the Arizona Constitution on the ballots. 36 P.2d

549 (Ariz. 1934). The proposed amendment generally imposed a license tax on copper mining; assessed taxes on tangible property of public services corporations engaged in the production, sale, or distribution of gas, water, or electricity; and created the State Tax Commission of Arizona. This proposed amendment was challenged on the ground that it substantively addressed at least three or more subjects. In addressing whether the proposed amendment violated the "single-subject rule," the Court held that this rule must be followed closely regarding matters of taxation, which must be addressed with the "utmost openness and fairness":

> Propositions relative to the taxing power of the state, and propositions to be voted upon by the plain people, must be plainly stated, and in single and substantial form. . . . And if we be called upon to assign a reason for this salutary rule, that reason would be that the taxing power of the state would be exercised with the utmost openness and fairness, and without opportunity for 'jockeying' and 'logrolling.' In other words, the courts of the country generally, in matters which to the exercise of the taxing power of the state, have been exceedingly cautious to see that such power was exercised by a fair expression at the election held for such purpose. The question is not whether a constitutional mandate has been followed, but whether the proposition submitted is one which tended within itself and upon its face to induce 'jockeying' and 'logrolling' in order to carry a combined proposition. That such things may be done is apparent to all thinking minds.

Id. at 552 (quoting *State ex. Rel. Pike Cnty. v. Gordon*, 188 S.W. 88 (1916) (en banc)). Ultimately, the Court concluded that the three subjects addressed in the proposed amendment were not "matters necessary to be dealt with in some manner, in order that the Constitution shall constitute a consistent and workable whole on the general topic embraced" and therefore affirmed the circuit court's issuance of the injunction. *Id*. at 554.

Examining the history of the South Dakota electorate with the more broad topic of cannabis is enlightening, with voters previously defeating three narrower measures:

> 2002: Initiated Measure 1 regarding Hemp was rejected;
> 2006: Initiated Measure 4 regarding Medical Marijuana was rejected; and

2010: Initiated Measure 13 regarding Medical Marijuana was rejected.

(Compl., ¶ 16). At the very least, Amendment A rolls two measures, previously considered separately by the South Dakota voters, together into one much larger, broader measure appealing to a more diverse group of voters.

Amendment A therefore violates voters' self-imposed limitation on their power to amend their Constitution through the initiative process. In 2018, through the ratification of Amendment Z, South Dakota voters sought to preserve—not jeopardize—the sanctity of the initiative process by ensuring that they have the opportunity to cast a clear vote on each distinct subject put to them. *In re Initiative Petition No. 314*, 625 P.2d at 608. "The people's reserved power of the initiative and their self-imposed [requirements of procedure in exercising that power] are of equal constitutional significance." *See Evnen*, 948 N.W.2d at 260. Consequently, because Amendment A violates the separate-amendment and one-subject rules enshrined in the Constitution, it is unconstitutional as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment ought to be granted.

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