STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
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 South Dakota Secretary of State,

Defendant,

and

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

Intervenor Defendants.

32 CIV 20-000187

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS BY SOUTH DAKOTANS FOR BETTER MARIJUANA LAWS, RANDOLPH SEILER, WILLIAM STOCKER, CHARLES PARKINSON, AND MELISSA MENTELE

INTRODUCTION

"Ballots, not briefs, decide elections." *Donald. J. Trump for President, Inc. v. Sec'y of Pa.*, No. 20-3371, 2020 WL 7012522, at *9 (3rd Cir. Nov. 27, 2020) (unpublished).

On November 3, 2020, South Dakota voters legalized marijuana. Disappointed with the results of that election, Plaintiffs Sheriff Kevin Thom and Colonel Rick Miller—purportedly acting in their official capacities—now ask this Court to overturn the will of the voters. The Court should reject this undemocratic attempt to disenfranchise the hundreds of thousands of South Dakotans who voted in favor of Amendment A.

Plaintiffs' lawsuit fails for a number of reasons. The Plaintiffs lack standing to bring these claims in their official capacities. Moreover, the Plaintiffs should have presented these arguments well before the November 2020 election, and may not wait until after the results are in to pull the rug out from under South Dakota's voters. Finally, the Plaintiffs' arguments are simply wrong on the merits: Amendment A only involved a single subject and did not require a constitutional convention.

The Court should dismiss this declaratory judgment action.

FACTS

On November 4, 2019, the sponsors of Amendment A timely submitted a petition initiating Amendment A to the South Dakota Secretary of State for validation. (Compl. ¶ 7.) On January 6, 2020, the Secretary of State announced that Amendment A received sufficient signatures and would be placed on the ballot at the November 3, 2020 general

election. (*Id.* ¶ 8.) The deadline to challenge this decision was Wednesday, February 5, 2020 at 5:00 p.m. central time.[1]

At the general election held on November 3, 2020, South Dakota voters approved Amendment A, with 54.2% of voters voting in favor of adopting Amendment A. (Compl. ¶ 12 & Ex. 2.)

Plaintiffs Sheriff Kevin Thom and Colonel Rick Miller filed this declaratory judgment action on November 20, 2020. They explicitly brought this action in their official capacities only, as Pennington County Sheriff and South Dakota State Highway Patrol Superintendent, respectively.

LEGAL STANDARD

Like a motion to dismiss, motions for judgment on the pleadings "provide[ ] an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Burlington N. R.R. v. Strackbein*, 398 N.W.2d 144, 145 (S.D. 1986) (internal quotation omitted). Judgment on the pleadings is appropriate where there are no issues of fact and where the moving party is entitled to judgment as a matter of law. *See id.*; *see also Lekanidis v. Bendetti*, 2000 S.D. 86, ¶ 15, 613 N.W.2d 542, 545. Whether a defense bars a claim as a matter of law is appropriate for resolution by a motion for judgment on the

[1] The Secretary of State's January 6, 2020 announcement is located at https://sdsos.gov/elections-voting/assets/ConstitutionalAmendmentAPressRelease.pdf (last accessed December 12, 2020).

pleadings. *See Lekanidis*, 2000 S.D. 86, ¶ 34, 613 N.W.2d at 549 (entering judgment on the pleadings because a claim was time-barred by a statute of limitations).

ARGUMENT

I. Plaintiffs lack standing to bring this lawsuit.

"A litigant must have standing in order to bring a claim in court." *Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 13, 951 N.W.2d 284, 289-90. Plaintiffs bear the burden to show that they have standing to bring this lawsuit. *See id.* ¶ 14.

A. Plaintiffs, as officials, lack standing to sue the state.

Both Plaintiffs have purportedly brought this lawsuit only in their official capacities. The law is clear, though, that neither Plaintiff may sue the state in his official capacity. Subdivisions of the state lack standing to sue the state, and they lack standing to challenge the constitutionality of a state law. *Edgemont Sch. Dist. 23-1 v. S.D. Dep't of Revenue*, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40 ("District and County are creations of the legislature and lack standing to challenge the constitutionality of [a statute].").

In *Edgemont*, the South Dakota Supreme Court looked to Iowa law, which also establishes that officials such as a county sheriff and the state highway patrol superintendent lack both standing and authority to challenge state law in their official capacities. *See Polk Cnty. v. Iowa State Appeal Bd.*, 330 N.W.2d 267, 271 (Iowa 1983) ("Our cases have held uniformly that a county lacks standing to challenge the constitutionality of state statutes."); *Bd. of Supervisors of Linn Cnty. v. Dep't of Rev.*, 263 N.W.2d 227, 234

(Iowa 1978) ("A county and its ministerial officers ordinarily have no right, power, authority, or standing to question the constitutionality of a state statute.").

This rule makes good sense: both Sheriff Thom and Superintendent Miller have sworn to uphold the law, which includes laws passed by voters. Allowing officials to challenge laws they do not like undermines the rule of law and improperly injects the state into the election process. Law enforcement officers may not pick and choose which laws they will uphold in their official capacities, and they may not use their offices to play politics.

This is particularly concerning where, as here, the state appears to be paying at least some of the legal fees to allow a state official to sue the state. *See* Arielle Zionts, *Legal team to fight for ballot measure that legalized marijuana in South Dakota*, Rapid City Journal, Nov. 25, 2020 ("Gov. Kristi Noem—who is opposed to recreational and medical marijuana—approved state funds for Miller's legal fees, according to her spokesman Ian Fury."). The Plaintiffs have not identified any basis—statutory or otherwise—for the expenditure of public funds to oppose election results. As a result, the Court is confronted with a scenario in which the state is essentially suing itself to determine whether it can avoid a law the voters passed. This Court should not allow the Plaintiffs to undermine the ballot initiative process in this manner.

Sheriff Thom and Superintendent Miller may not sue the state in their official capacities. Because Plaintiffs brought this declaratory judgment action in their official capacities only, it must be dismissed in its entirety.

B. Plaintiffs have not, and cannot, articulate a concrete and particularized injury that can be remedied by this lawsuit.

The South Dakota Supreme Court routinely applies the familiar federal requirements for standing: a litigant must show (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision. *See, e.g.*, *Black Bear v. Mid-Central Educational Coop.*, 2020 S.D. 14, ¶¶ 11-12, 941 N.W.2d 207, 212-13 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).[2] Standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Bognet v. Secretary Commonwealth of Pa.*, 980 F.3d 336, 347 (3rd Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)).

"To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests." *Bognet*, 980 F.3d at 348. "When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as 'generalized grievances' that cannot support standing." *Id.* at 349. In *Bognet*, the Third Circuit found that the plaintiffs did not have standing to pursue a claim that an election should have been conducted in a different manner because that complaint amounted to a generalized grievance. *Id.* at 348-363 (rejecting various alleged injuries by different plaintiffs for lack of standing).

[2] For the same reasons, Plaintiffs are not the real parties in interest. *See* SDCL 15–6–17(a); *see also Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue*, 1999 S.D. 48, ¶ 13, 593 N.W.2d 36, 39–40 ("Standing is established through being a 'real party in interest' and it is statutorily controlled.")

The Complaint in this case alleges no harm whatsoever that the Plaintiffs have suffered in their official capacities. Indeed, after the opening paragraphs identifying the parties, the Complaint is silent on why Sheriff Thom and Superintendent Miller brought this lawsuit, how they are injured in their official capacities, how that alleged injury is causally connected to the violations they allege, or how the requested relief will remedy the purported injury. In short, Plaintiffs have not alleged or substantiated a single one of the elements they must ultimately prove to establish standing. The absence of any facts whatsoever relating to standing compels dismissal of this action.

Plaintiffs, as state officials suing in their official capacities only, may not rely on general taxpayer standing. In *Edgemont*, the South Dakota Supreme Court specifically rejected the ability of a county and a school district to sue on behalf of the taxpayers in their districts. *See Edgemont*, 1999 S.D. 48, ¶¶ 13-16. Even if individuals could demonstrate standing to bring the claims alleged by Plaintiffs in this case—which Proponents do not concede—the Plaintiffs in their official capacities unquestionably cannot demonstrate standing.

Plaintiffs must also prove any harm they have or will suffer, and speculative harm is insufficient. *See Black Bear*, 2020 S.D. 14, ¶ 11, 941 N.W.2d at 212-13. Plaintiffs have not alleged any harm. Even if Plaintiffs were to allege a generic harm via a theoretical increase in law enforcement costs or challenges due to new marijuana laws, such harm would not establish standing for several reasons. First, it is not supported by any factual allegations in the Complaint. Second, any such harm is speculative—it is

unclear whether and how law enforcement costs may increase, and any increase in costs would be offset by increases in revenue and by decreases in the costs and difficulties of enforcing current criminal prohibitions on marijuana. Third, this justification would apply to literally every law, thereby giving law enforcement "standing" to challenge every single law. Finally, any social harm from legalized marijuana is inherently speculative and unsupported. Accepting that position would render meaningless the constitutional limits on this Court's jurisdiction. It would also act as an end run around the voters of South Dakota, who rejected precisely these political arguments made during the campaign against Amendment A.

Because the Plaintiffs have not articulated any harm they personally have suffered in their official capacities, they have also failed to demonstrate a causal connection between the harm and the challenged conduct. Plaintiffs have also failed to establish that the injury is redressable by a favorable decision. Wishing that the voters decided an issue differently does not confer standing.

II. Plaintiffs may not bring these claims after the November 2020 general election.

This declaratory judgment action alleges that Amendment A violated the South Dakota Constitution and thus was void from the outset. Plaintiffs do not challenge the substantive constitutionality of legalized marijuana—indeed, there is no basis to argue that the subject matter of Amendment A is unconstitutional. Instead, Plaintiffs' lawsuit centers on the process by which Amendment A was initiated.

Plaintiffs should—and could—have challenged the Secretary of State's decision to include Amendment A on the November 2020 ballot. They did not. Because they failed to act when they could have, and should have, Plaintiffs' claims are barred by statute. Plaintiffs waived the present claims, and are barred from presenting them by the equitable doctrine of laches. This Court should reject the Plaintiffs' untimely attempts to overturn the will of South Dakota's voters.

A. S.D.C.L. § 2-1-17.1 bars Plaintiffs' claims.

It is undisputed that the full text of Amendment A as submitted to the voters was available no later than January 6, 2020—the date the Secretary of State approved Amendment A for submission to the voters. On January 6, 2020, the Secretary of State informed the citizens of South Dakota that "any citizen may challenge the Secretary of State's validation of the measure under [S.D.C.L.] § 2-1-17.1. . . . For this measure, the deadline to file a challenge is Wednesday, February 5, 2020 at 5:00 p.m. central time." *See* Secretary of State, Press Release January 6, 2020, *available at* https://sdsos.gov/elections-voting/assets/ConstitutionalAmendmentAPressRelease.pdf (last accessed December 12, 2020) (emphasis added).[3] This type of challenge is exactly what happened in *State ex rel. McNally v. Evnen*, 948 N.W.2d 463 (Neb. 2020), where opponents of three initiated measures submitted letters to the

[3] Neither the Secretary of State nor the Legislative Research Council, which reviews every initiated constitutional amendment pursuant to S.D.C.L. § 12-13-24, raised a concern that Amendment A may violate the single-subject rule or may require a constitutional convention.

Nebraska Secretary of State, objecting to the legal sufficiency of the petitions based on an alleged violation of the single-subject rule, among other objections.[4] *See id.* at 468.

The Plaintiffs could have challenged the Secretary of State's approval of Amendment A under S.D.C.L. §§ 2-1-17.1 or 2-1-18.[5] They did not file a petition under S.D.C.L. § 2-1-17.1 within the 30-day timeframe required by law. Instead of submitting a timely challenge as required under South Dakota law, the Plaintiffs chose to take their chances and campaign against Amendment A (which both Plaintiffs openly did).

This deadline is not optional. If a challenger wants to take advantage of the remedy made available by the statute, he or she must file the challenge within the statutory timeframe. Courts must enforce this plain deadline established by the legislature. *See Kolb v. Monroe,* 1998 S.D. 64, ¶ 11, 581 N.W.2d 149, 151 (holding that a defendant waived his right to a change of venue by missing the statutory deadline to file a motion seeking a change of venue); *Burns v. Kurtenbach*, 327 N.W.2d 636, 638 (S.D.

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[4] As another example, Oklahoma employs a similar procedure requiring pre-election challenges to the form of an initiated measure, including alleged violations of the single-subject rule. *See, e.g.*, *Okla. Indep. Petroleum Ass'n v. Potts*, 414 P.3d 351 (Okla. 2018).

[5] S.D.C.L. § 2-1-17.1 states: "Not more than thirty days after a statewide petition for an initiated amendment to the Constitution . . . has been validated and filed, any interested person . . . may submit a sworn affidavit to the Office of the Secretary of State to challenge the petition." S.D.C.L. § 2-1-18 provides that "Nothing . . . prohibits any interested person . . . from challenging in circuit court . . . any other information required on a petition by statute or administrative rule[.]"Alternatively, if the Plaintiffs believed that they did not have a speedy pre-election statutory remedy, they could have sought a writ preventing the Secretary of State from placing Amendment A on the ballot. They did not do this either.

1982) ("However attractive it might be to liberally construe a statute to avoid a result that may appear harsh, we will not so act when such action would do violence to the plain language of the statute."). Allowing voters to challenge the decision of the Secretary of State to include an initiated measure on the ballot after the election thwarts the purpose of S.D.C.L. § 2-1-17.1—to require timely adjudication of ballot disputes well in advance of an election. Because Plaintiffs have presented this challenge outside the statutory 30-day window, S.D.C.L. § 2-1-17.1 bars their untimely claim.

B. The doctrine of laches bars Plaintiffs' claims.

The doctrine of laches also bars the Plaintiffs' complaints after the election. Laches will bar an action where a party (1) has full knowledge of the facts, (2) regardless of that knowledge, the party unreasonably delayed before seeking relief in court, and (3) it would be prejudicial to proceed with the action. *See In re Admin. of the C.H. Young Revocable Living Trust*, 2008 S.D. 43, ¶ 10, 751 N.W.2d 715, 717-18.

As a matter of law, the Plaintiffs' delay bringing this lawsuit was unreasonable because they waited until after the election. The Plaintiffs' delay prejudiced the sponsors and supporters of Amendment A, prejudiced the voters of South Dakota, and prejudiced the taxpayers in that, if Plaintiffs prevail, the taxpayers bore the burden of funding an election that was void from the outset. Allowing voters to vote on a measure, only to have the will of the voters undone in court undermines faith in the democratic process, the initiative process, and in the judiciary itself. Indeed, granting the relief the Plaintiffs request would disenfranchise hundreds of thousands of South

Dakota voters. *See, e.g., Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *9-11 (D. Ariz. Dec. 9, 2020) (rejecting a claim based on laches and finding that prejudice in the potential disenfranchisement of Arizona voters would be "extreme" and "unprecedented").

The application of laches is particularly compelling where, as here, a complaining party seeks to void the results of an election that it opposed. Recently, in *Kelly v. Commonwealth of Pennsylvania*, a group of petitioners who an election result filed a petition for review, seeking to invalidate Pennsylvania's universal mail-in voting as unconstitutional and void *ab initio*. The Pennsylvania Supreme Court resoundingly rejected this attempt to reverse judicially the results of an election:

> We hereby dismiss the petition for review with prejudice based upon Petitioners' failure to file their facial constitutional challenge in a timely manner. Petitioners' challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment. It is well-established that laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another.
>
> The want of due diligence demonstrated in this matter is unmistakable. . . . At the time this action was filed on November 21, 2020, millions of Pennsylvania voters had already expressed their will . . . with the results becoming seemingly apparent. . . . [I]t is beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim. Equally clear is the substantial prejudice arising from Petitioners' failure to institute promptly a facial challenge to the mail-in voting statutory scheme, as such action would result in the disenfranchisement of millions of Pennsylvania voters.

Kelly v. Commonwealth, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020) (per curiam) (internal citation omitted), *cert. denied*. In a separate concurring statement,

Justice Wecht, stated bluntly that "[i]t is not our role to lend legitimacy to such transparent and untimely efforts to subvert the will of [the] voters." *Id.* at *5 (Wecht, J., concurring).

Similarly, the Wisconsin Supreme Court recently held that laches barred various challenges to certain ballots. *Donald J. Trump v. Joseph R. Biden*, No. 2020AP2038, 2020 WI 91, 2020 WL 7331907 (Wis. Dec. 14, 2020). The Court noted that "laches has particular import in the election context." *Id.* at ¶ 11; *see also id.* at ¶ 12 & n. 7 (stating that this "principle appears to be recognized and applied universally" and collecting cases). In that case, the Campaign raised a challenge centered on "Democracy in the Park" events held on September 27, 2020 and October 3, 2020, where city election inspectors collected completed absentee ballots. *See id.* ¶ 19. Even though these events took place only a little over a month before the November 2020 election, the Wisconsin Supreme Court applied the doctrine of laches to bar the claim, stating "[t]he Campaign offers no justification for this delay; it is patently unreasonable." *Id.* at ¶ 21. The Court emphatically declared "[t]he time to challenge election policies such as these is not after all ballots have been cast and the votes tallied." *Id.* at ¶ 22.

The Secretary of State approved Amendment A for circulation on September 11, 2019. The Secretary of State validated Amendment A and approved it for the November 2020 ballot on January 6, 2020, and notified South Dakotans that any challenge to the validity of signatures should have been presented by February 5, 2020. The Plaintiffs did nothing until after the election. The doctrine of laches bars this lawsuit.

C. Plaintiffs waived their claims by failing to bring them prior to the November 2020 election.

A party waives a right when, with full knowledge of the material facts, that party does or forbears the doing of something inconsistent with the intention to rely on that right. *See Kolb,* 1998 S.D. 64, ¶ 11, 581 N.W.2d at 151; *see also Western Cas. & Sur. Co. v. Am. Nat'l Fire Ins. Co.*, 318 N.W.2d 126, 128 (S.D. 1982). South Dakota courts have recognized for over a century that allegedly invalid petitions should be challenged before an election, or the invalidity of the petition is waived. *See Noel v. Cunningham*, 5 N.W.2d 402, 404 (S.D. 1942) ("This Court has already indicated that a candidate desiring the challenge the nomination of his opponent must act with some diligence. . . . The American authorities are almost unanimous in holding that objections to irregularities in the nomination of a person for office must be taken prior to the election, and that thereafter it is too late."); *State ex rel. Pryor v. Axness*, 139 N.W. 791, 793 (1913).

The Plaintiffs knew the text of Amendment A no later than January 6, 2020. They knew they had 30 days under state statute to challenge the Secretary of State's approval of Amendment A. They knew that, absent a pre-election challenge, Amendment A would be presented to voters on November 3, 2020. A pre-election challenge to Amendment A was ripe for adjudication any time after January 6, 2020.

Rather than challenge the petitions supporting Amendment A as void or arguing that the Secretary of State should not have approved Amendment A for inclusion on the November 2020 ballot, the Plaintiffs waited until after the 2020 election to raise their

arguments. Such delay constitutes a clear and unequivocal waiver of any challenge to the validity of the petitions submitting Amendment A to the voters.

Had Amendment A been defeated at the polls, the Plaintiffs would not have filed this lawsuit. Put differently, had the electorate voted in the way that Plaintiffs preferred, the Plaintiffs would happily abide by the results of the same election they now claim was void from the outset. The reality that this lawsuit materialized only after the election demonstrates that the Plaintiffs' challenge is not aimed at the validity of the measure on the November 3, 2020 ballot, but rather targets the results of that election.

The Plaintiffs chose to "[l]ay by and gamble upon receiving a favorable decision of the electorate." *See Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) (noting that, even in the context of racial discrimination, a party had an obligation to bring a timely challenge forward for pre-election adjudication). They lost that gamble, and may not retroactively revisit that choice. By sitting on their arguments related to Amendment A until after the general election, the Plaintiffs waived any ability to raise these arguments post-election.

D. Plaintiffs could have presented their claims prior to the November 2020 election.

Procedural challenges to the form and legal sufficiency of a petition are ripe for pre-election review. The Nebraska Supreme Court recently explained the distinction between procedural and substantive challenges to an initiative. Procedural challenges are "challenges to the form of a ballot measure or the procedural requirement to its placement on the ballot, which are challenges to whether the measure is legally

sufficient to be submitted to the voters[.]" *Christensen v. Gale*, 917 N.W.2d 145, 158 (Neb. 2018). Procedural challenges are ripe for review prior to an election, while substantive challenges are not. *See id.* Importantly, the *Christensen* court addressed and rejected a single-subject rule challenge pre-election as a procedural challenge. *Id.* at 156-58.

South Dakota State Federation of Labor AFL-CIO v. Jackely does not excuse the Plaintiffs' failure to bring this lawsuit before the 2020 general election. In that case, the Court expressed skepticism that it could "anticipate conditions which may never exist" and so declined to rule on the substantive constitutionality of an amendment before it was adopted. *See* 2010 S.D. 62, ¶ 12, 786 N.W.2d 372, 376-77. Challenges to the substantive constitutionality of a statute or amendment necessarily relate to future lawsuits, such that the issue is not properly before the court until a plaintiff with standing articulates a challenge. Until then, any judgment on the substantive constitutionality of a law would amount to an advisory opinion.[6]

That rationale does not apply to challenges such as those that the Plaintiffs seek to bring here. The text of Amendment A, as it would appear on the ballot, was known on January 6, 2020. A challenge based on the grounds Plaintiffs now present would not have depended on a resolution of any future or contingent facts, nor would such a

[6] *Hoogestraat v. Barnett*, on which *Jackley* relies, reinforces the conclusion that courts abstain from hearing contingent challenges based upon hypothetical facts. 1998 S.D. 104, 583 N.W.2d 421. In that decision, the Court noted that whether Amendment E would result in future successful lawsuits against the state of South Dakota was "conjecture as to possible consequences of a change in existing law." 1998 S.D. 104, ¶ 13, 583 N.W.2d at 424.

decision have amounted to an advisory opinion. And once the election is over, the precise harm alleged here ceased—Amendment A will not be on the ballot again. Thus, the Plaintiffs' present challenge falls outside the *Jackley* rule.

Another illustration of the rule that procedural challenges to a ballot initiative can—and should—be brought before an election is a decision from the Nebraska Supreme Court on which the Plaintiffs have patterned their challenge here: *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244 (Neb. 2020). In that case, a group submitted a petition initiating a constitutional measure to allow medicinal marijuana. Prior to the election, a voter challenged the Nebraska Secretary of State's determination that the ballot initiative was sufficient. Specifically, the challenger argued that the initiative violated Nebraska's single-subject rule. *See id.* at 251. The Nebraska Supreme Court agreed, and enjoined placement of the measure on the ballot for the general election. Before reaching that conclusion, however, the Court determined that it could adjudicate that challenge before the election:

> A challenge to a voter ballot initiative based on substantive provisions of law is not ripe before an election because "[a]n opinion on the substantive challenge based on the contingent future event of the measure's passage would be merely advisory." In contrast, a preelection challenge based on the "procedural requirements to [a voter ballot initiative's] placement on the ballot" is ripe for resolution.

Id. at 252 (alterations in original). Although *Wagner* is distinguishable from this case on the merits,[7] its procedural holding unquestionably applies here: the Plaintiffs could, and should, have brought this challenge before the 2020 general election.

The rule that alleged procedural defects must be raised prior to an election is also recognized in treatise authority:

> [T]here are two exceptions to the rule that judicial review of the constitutionality of an initiative is unavailable until after it has been enacted by the voters: First, where the initiative is challenged on the basis that it does not comply with the state's constitutional and statutory provisions regulating initiatives, and second, where the initiative is challenged as clearly unconstitutional or unlawful.

16 Am. Jur. 2d *Constitutional Law* § 41 (Nov. 2020 update). Because the instant declaratory judgment action only relates to whether Amendment A could properly be placed on the ballot, this challenge falls under the first exception to the general rule articulated in *Jackley*.[8]

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[7] In addition, as discussed below, other courts have determined that marijuana initiatives do not violate the single subject rule. In that sense, the *Wagner* decision is an outlier.

[8] *Gooder v. Rudd* is also inapposite. In that case, a petition was filed on February 5, 1916, to hold a township election. 160 N.W. 808, 808-09 (S.D. 1916). The election occurred on March 7, 1916. *Id.* at 809. Subsequently, the plaintiff commenced an action arguing that the petition calling the election lacked a sufficient number of signatures. *Id.* The Supreme Court determined that no valid election occurred. *Id.* at 810. Under applicable law, a challenge to the sufficiency of signatures on a petition must occur within thirty days of the Secretary of State's validation of the signatures. *See* S.D.C.L. §§ 2-1-17.1 and 2-1-18. Moreover, the *Gooder* decision involved whether a township had authority to call any election in the first place. Here, there is no question that the November 2020 general election was properly held; the Plaintiffs simply object to the inclusion of one issue on the ballot.

In addition, a purported respect for separation of powers does not counsel waiting until after an election to bring procedural challenges to a proposed amendment. While a court may properly wait to adjudicate a substantive constitutional claim until after the legislature (or the electorate) has expressed its view and a plaintiff with standing brings a ripe challenge, it need not wait to address procedural challenges. In fact, forcing courts to address procedural challenges after the results of an election are apparent creates its own separation of powers problem: courts are forced into the position of potentially reversing the results of an election and overriding the will of the voters, thereby undermining faith in elections and the courts—exactly as the Plaintiffs here ask this Court to do.

Granting any form of relief to the Plaintiffs in this case would create significant and ongoing problems from a public policy perspective. In 2005, Professor Richard Hasen published a prescient warning about the dangers of post-election efforts to overturn election results in court. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937 (2005). Professor Hasen argued that, among other problems, post-election legal challenges invite litigants to take a second bite at the apple (i.e., the election and the ensuing court case), and puts judges in the difficult position of deciding a political question when the results of the election are already clear. *Id.* at 993-94. Post-election litigation undermines the integrity of the electoral and judicial processes and imposes unnecessary costs on the public. *Id.*; *see also Lewis v. Cayetano*, 823 P.2d 738, 741 (Haw.

1991) ("[E]fficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.").

The grounds for this purported declaratory judgment action were known nearly a year ago. The Plaintiffs should have raised their current arguments well before the November 2020 general election. The Court should not reward the Plaintiffs' delay in bringing their challenges.

III. Plaintiffs' attempt to repeal an adopted constitutional amendment using the courts is itself unconstitutional.

On November 3, 2020, South Dakota voters adopted Amendment A as part of the Constitution. Once approved by a majority of the voters, Amendment A is part of the Constitution. See Art. XXIII, § 3 ("Any constitutional amendment or revision must be submitted to the voters and shall become a part of the Constitution only when approved by a majority of the votes cast thereon."). The language of Article XXIII, section 3 is mandatory: once the voters approved Amendment A, it "shall" be a part of the Constitution.[9] *See McIntyre v. Wick*, 558 N.W.2d 347, 364 (S.D. 1996) (Sabers, J.,

[9] S.D.C.L. § 2-1-12 is not to the contrary. Even if Amendment A does not formally take effect until July 1, 2021, the language of Article XXIII, section 3 is clear and mandatory that Amendment A "shall" become part of the Constitution. Moreover, to the extent that S.D.C.L. § 2-1-12 conflicts with Article XXIII, section 3, the constitutional provision controls.

dissenting) ("When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning.").

The Plaintiffs are free to disagree with Amendment A, and they have every right, as voters, to try to repeal it. But they may only repeal an adopted constitutional amendment by using one of the mechanisms provided in Article XXIII.[10] Plaintiffs may not circumvent Article XXIII and request that this Court judicially revise the Constitution by striking a portion of the Constitution Plaintiffs dislike. Doing so would itself violate Article XXIII, section 3 of the Constitution by inviting the Court to circumvent the terms of the Constitution and to invade the power granted to the voters.

IV. Amendment A does not violate the Constitution.

A. The Plaintiffs bear the burden to show that Amendment A is clearly unconstitutional.

"The adoption of a constitutional amendment by electors constitutes the exercise of a sacred American right, and a court will not invalidate the amendatory language except under the most extreme circumstances." 16 Am. Jur. 2d *Constitutional Law* § 43; *see also City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 131 (S.D. 1994) (noting that courts uphold laws "unless they are clearly and unmistakably unconstitutional"). Legislative enactments are "presumed constitutional and the challenger has the burden

[10] This reinforces the reality that the Plaintiffs should have brought this challenge prior to the election. Once the voters approved Amendment A, it is part of the constitution.

to prove beyond a reasonable doubt that a statute violates a constitutional provision." *State v. Rolfe*, 825 N.W.2d 901, 905 (S.D. 2013).

B. Amendment A complies with the minimal requirements for legislation to embrace a single subject.

Many states have rules, whether statutory or constitutional, requiring that a legislative bill or ballot initiative contain only a single subject. The public purposes behind the single-subject rule are to (1) prevent logrolling, or the combining of otherwise unpopular measures with other popular measures to force a single vote on all the measures combined; (2) prevent the unintentional passage of a provision that is not listed in the title; and (3) fairly apprise the public of what is in the measure and avoid fraud or deception. *See Kanaly v. State*, 368 N.W.2d 819, 827 (S.D. 1985). This is not a case where a special interest engaged in logrolling by combining a measure that voters want with a wholly unrelated measure that would not pass on its own. Moreover, it is undisputable that the title of Amendment A described every portion of the amendment, so there is no concern regarding unintentional passage of a provision not listed in the title, and no concern about deception of voters.

Article XXIII, § 1 of the South Dakota Constitution 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; however, no proposed amendment may embrace more than one subject." South Dakota courts have not yet interpreted this "single subject" rule, which was added to the Constitution in 2018. They have, however interpreted a similar constitutional provision, Article III § 21,

which provides: "No law shall embrace more than one subject, which shall be expressed in its title."

The South Dakota Supreme Court has repeatedly stated that "[s]ound policy and legislative convenience dictate a liberal construction of title and subject matter." *See, e.g., Accounts Mgmt., Inc. v. Williams*, 484 N.W.2d 297, 302 (S.D. 1992) (citing *State v. Morgan*, 48 N.W. 314, 317 (S.D. 1891)). This rule of liberal construction also applies to initiated petitions. S.D.C.L. § 2-1-11; *Baker v. Atkinson*, 2001 S.D. 49, ¶ 18, 625 N.W.2d 265, 271. Thus, "[o]bjections to an act on the basis that it embraced more than one subject and was not adequately expressed in its title should be grave, and the conflict between the statute and the constitution plain and manifest, before it may be justifiably declared unconstitutional and void." *Indep. Cmty. Bankers Ass'n of S. Dakota, Inc. v. State*, 346 N.W.2d 737, 742 (S.D. 1984) (citing *Morgan*, 48 N.W. at 318); *see also* 16 Am. Jur. 2d Constitutional Law § 36 ("Courts are, however, reluctant to overturn a legislative determination that a proposed amendment involves only one general object or purpose."). The Plaintiffs cannot carry this heavy burden.

The 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, 182 (S.D. 1984). "The constitution does not restrict the scope or magnitude of the single subject of a legislative act." *Id.* South Dakota courts employ a broad interpretation of what falls under a single subject:

> [W]e are of the view that the [single subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, *all parts which are reasonably germane*.

> The provision was not enacted to provide means for the overthrow of legitimate legislation. Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute *a single scheme* may be properly included within a single act.

Baker, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273 (italics in original) (quoting *Amador Val. Joint Union H. Sch. Dist., Etc.*, 583 P.2d 1281, 1290 (Cal. 1978)).

Amendment A involves the subject of marijuana, and it directs particular attention to several subcategories of marijuana activity: medical, agricultural (hemp) and non-medical (or "recreational" as it is commonly described). The title of Amendment A describes each of these subcategories in setting forth the purpose of the Amendment: "Title: 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." (Compl., Ex. 1.) Notably, "the subject of a statute 'is singular when a number of things constituting a group or class are treated as a unit for general legislation.' " *Indep. Cmty. Bankers Ass'n*, 346 N.W.2d at 741 (quoting *State v. Youngquist*, 13 N.W.2d 296, 297 (1944)); *Mettet v. City of Yankton*, 25 N.W.2d 460, 463 (S.D. 1946). Construing Amendment A liberally, as the Court must, the title of Amendment A expresses a single general purpose for legislation.

Each section of Amendment A is reasonably germane to the purpose expressed in its title. "[W]hile the subject must be single, the provisions to accomplish the objective of an act may be multifarious. . . . When the title of a legislative act expresses a

general subject or purpose which is single all matters which are naturally and reasonably connected with it and all measures which will or may facilitate the accomplishment of the purpose so stated, are germane to its title." *Accounts Mgmt.*, 484 N.W.2d at 302. Indeed, the permissive "may facilitate the accomplishment of the purpose" underscores the liberal standard for germaneness. Because each section of Amendment A fairly relates to the purpose expressed in its title, Amendment A does not violate the single-subject rule.

Moreover, one purpose of the single-subject rule is to minimize the risk of voter confusion and deception. *See Baker*, 2001 S.D. 49, ¶ 24, 625 N.W.2d at 273. In *Baker*, the Court noted "the circumstances and publicity surrounding the circulation and signing of the petition" in that case. *Id.* at ¶ 27, 625 N.W.2d at 274. The Court emphasized that "the circuit court found no evidence of confusion, corruption, or fraud" and noted that the publicity surrounding the petition supported that finding. *Id.* As in *Baker* (and *Amador*, on which *Baker* relied), the "public attention" directed at Amendment A "dilute[s] the risk of voter confusion or deception." *See id.*

Other courts have determined that marijuana amendments embraced only a single subject. In *Hensley v. Attorney Gen.*, 53 N.E.3d 639 (Mass. 2016), the Court considered whether an initiative petition that would legalize marijuana violated Massachusetts' "related subject" rule. The petition had fourteen sections, that would legalize the possession, use, and cultivation of marijuana and products containing marijuana concentrate by adults over 21. *Id.* at 644. The petition also contained

provisions for the licensing, operation, and regulation of marijuana-related businesses, created a cannabis control commission and cannabis advisory board within the Department of the State Treasurer, and provided for the taxation of the sale of marijuana. *Id.* The court explained that "the related subjects requirement is met where "one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane." *Id.* at 647 (internal quotations omitted). It held that the petition "easily" satisfied the requirement because the petition's different provisions were all part of an integrated scheme to legalize and regulate marijuana.

In Florida, a proposed constitutional amendment would have allowed individuals with debilitating diseases to use marijuana medically, and would have exempted them, their caregivers, their doctors, and their marijuana providers from civil or criminal liability under Florida law. It would have also required the Department of Health to promulgate regulations for the production and distribution of medical marijuana. The Florida Supreme Court found that this constitutional amendment, although multi-faceted, involved a single subject. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786 (Fla. 2014).[11] Specifically, the court held that the proposed amendment did not violate the single-subject rule because it had "a logical and natural oneness of purpose—namely, whether Floridians want a

[11] The Florida Supreme Court addressed a very similar proposed constitutional amendment in 2015. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Med. Conditions*, 181 So. 3d 471 (Fla. 2015). It reached the same conclusion. *Id.* at 477.

provision in the state constitution authorizing the medical use of marijuana, as determined by a licensed Florida physician, under Florida law." *Id.* at 796.

The Supreme Court does not take a hypertechnical or exacting approach in determining whether provisions of an act are germane to its title. *See, e.g., Meierhenry*, 354 N.W.2d at 182 (finding that "[m]unicipal bond registration and tax incremental financing" were "merely elements of the larger subject of municipal finance"). This Court should resist the Plaintiffs' invitation to take an overly technical approach in this case.

To the extent that the Court finds any provisions of Amendment A fall outside the general purpose expressed in its title, the proper remedy is to separate those provisions and allow the rest of Amendment A to stand. *See, e.g., Simpson v. Tobin*, 367 N.W.2d 757, 768 (S.D. 1985). Here, the voters specifically expressed their intent that the provisions of Amendment A be severable. (Amendment A, § 15.)

Given the liberal construction of petitions, the Plaintiffs cannot carry their heavy burden to show beyond a reasonable doubt that Amendment A violates the single-subject rule.

C. Amendment A was properly submitted as a constitutional amendment.

Article XXIII provides two avenues for altering the Constitution. Under § 1: "Amendments to this Constitution may be proposed by initiative or by a majority vote of all members of each house of the Legislature." Art. XXIII, § 1 (emphasis added). And

under § 2: "A convention to revise this Constitution may be called by a three-fourths vote of all the members of each house." Art. XXIII, § 2 (emphasis added).

Plaintiffs contend that Amendment A was unconstitutionally ratified because—in their view—it created a new article, therefore it is a revision rather than an amendment, and therefore it was required to be passed by constitutional convention. But Plaintiffs' unsupported chain of reasoning is inconsistent with the text, structure, and history of the South Dakota Constitution, as well as the plain language of Article XXIII.

Plaintiffs first argue that Amendment A is a revision because they contend an amendment may not add a new article to the Constitution, or relate to a subject not previously addressed by an existing article. But these purported limitations appear nowhere in the text of the Constitution.

Rather, Article XXIII defines the permissible scope of an amendment broadly. It provides: "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." S.D. Const. art. XXIII, § 1. Article XXIII does not limit amendments to only amending one or more existing articles of the Constitution. Had the people intended amendments to be so limited, they plainly could have said so. The only limitation Article XXIII places on constitutional amendments is that they embrace a single subject, which—as discussed

supra in Section IV.B—Amendment A does. Article XXIII contains no suggestion that an amendment may not create a new article, or relate to new subject matter.

Nothing in Article XXIII suggests that sections 1 and 2 are mutually exclusive or mandatory for a certain type of change. In fact, both sections contain the same permissive language: amendments may be proposed by initiative, and a constitutional convention may be called by the legislature.

Further, the arbitrary distinction the Plaintiffs draw between amendments and revisions is inconsistent with the structure of the South Dakota Constitution. Article XXI, titled "Miscellaneous," includes nine sections, which address everything from the state seal and coat of arms, to the rights of married women, to hail insurance. Under Plaintiffs' reasoning, Amendment A would be a valid amendment if it added new sections to Article XXI instead of creating a separate article, even if its substance was unchanged. The framers of the Constitution could hardly have intended such an absurd, formalistic result.

Numerous historical examples also disprove Plaintiffs' argument that amendments may only address existing articles. South Dakota has adopted—and repealed—constitutional articles by amendment rather than constitutional convention throughout its history.

In 1900, Article XXVIII, which relates to farm loans, was adopted via amendment. S.D. Const. art. XXVIII, Historical Note; 1899 S.D. Session Laws, ch. 63; *Constitution of South Dakota 1917 Annotated by Justice J.H. Gates*, (hereinafter "*Gates*

Constitution")[12] at 125 ("Article 28 was proposed by the legislature by ch. 63, '99 as an amendment to the Constitution, and was at the general election hold in November, 1900, adopted[.]"). In 1918, Article XXIX, which relates to the construction of elevators and warehouses for marketing agricultural products, was adopted via amendment. S.D. Const. art. XXIX § 1, Historical Note; 1917 S.D. Session Laws, ch. 168; *Gates Constitution,* at 131 ("New Article XXIX proposed by ch. 168 '17 to be voted on Nov. 1918.").

South Dakota has also dealt with the legality of intoxicating substances by adopting and repealing articles via constitutional amendment on several occasions. Article XXIV, which prohibited making and selling alcohol, was originally included in the South Dakota Constitution when it was adopted in 1889. S.D. Const. art. XXIV, Historical Note. Voters repealed Article XXIV by constitutional amendment in November 1896. *Id.*; *Gates Constitution*, at 119. In 1916, Article XXIV, which prohibited making and selling alcohol, was again adopted pursuant to an amendment. S.D. Const. art. XXIV, Historical Note; 1915 S.D. Session Laws, ch. 231. And in 1934, it was repealed—again by amendment. S.D. Const. art. XXIV, Historical Note; 1933 S.D. Session Laws, ch. 128.

Other articles have been the subject of extensive change by amendment. In 1972, the electors approved a series of amendments that made wide-ranging changes to the Constitution. One amendment altered the entirety of Article IV, relating to the executive

[12] This resource is accessible online at https://babel.hathitrust.org/cgi/pt?id=hvd.hl464k&view=1up&seq=6.

department, by reorganizing it, deleting sections, and making "numerous" other substantive changes throughout. S.D. Const. art. IV, Historical Note; 1972 S.D. Session Laws, ch. 1. Another amendment that same year made significant changes to Article V, relating to South Dakota's judicial system. It established a unified judicial system, reorganized the entire article, and made other substantive changes to more than a dozen sections. S.D. Const. art. V, Historical Note; 1972 S.D. Session Laws, ch. 2.

A third amendment in 1972 combined Article IX and Article X into a new Article IX—which addresses the organization of local government—and repealed Article X. S.D. Const. art. X, Historical Note; 1972 S.D. Session Laws, ch. 3. And the fourth rewrote Article XXIII, splitting up one section into two, adding a provision for proposal of amendments by initiative, and making other substantive changes to the law regarding constitutional amendments and revisions. S.D. Const. art. XXIII § 1, Historical Note; 1972 S.D. Session Laws, ch. 4. Separately and together, the 1972 amendments made changes far more significant to the structure of government, separation of powers, and rights of the people of South Dakota than Amendment A—all without a constitutional convention.

In short, the history of South Dakota's Constitution plainly contradicts Plaintiffs' novel argument that a constitutional amendment may not create a new article. Rather, the record is replete with examples of South Dakota voters approving the adoption, repeal, and extensive rewriting of entire articles by amendment without holding constitutional conventions.

Amendment A also does not fall under the plain-language definition of a "revision." Black's Law Dictionary defines "revision" as: "1. A reexamination or careful review for correction or improvement. 2. *Parliamentary law*. A general and thorough rewriting of a governing document, in which the entire document is open to amendment." Black's Law Dictionary (11th ed. 2019) (emphasis added). This definition confirms that whether an enactment constitutes an amendment or a revision depends not on distinctions of form or location, but on whether it works a comprehensive change to the constitution.

Several states have reached the same conclusion based on similar constitutional language. For example, North Dakota's Supreme Court has held that an alteration to the constitution is a mere "amendment"—which does not require a constitutional convention—unless it is "of such a character as to call for a reconsideration of the whole Constitution." *State v. Taylor*, 22 N.D. 362, 133 N.W. 1046, 1048–49 (1911).

Other states have looked to whether the proposed amendment requires extensive revisions of several separate parts of the constitution, affects the fundamental structure of state government, or is equivalent to creating a new constitution. *See, e.g.*, *Citizens Protecting Michigan's Constitution v. Sec'y of State*, N.W.2d 247, 261–65 (Mich. 2018) ("Therefore, 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 under Article 12, § 2."); *Bess v. Ulmer*, 985 P.2d 979, 987 (Alaska 1999) ("The 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."); *Brosnahan v. Brown*, 651 P.2d 274, 288 (Cal. 1982) (explaining that a proposition was an amendment, rather than a revision, where it was not "so extensive as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions" (internal quotations, alterations, and citations omitted)).

Implicitly acknowledging the reasoning of these authorities, Plaintiffs argue that Amendment A is a "drastic revision of the Constitution with implications that extend far beyond the legalization of marijuana." On the contrary, Amendment A does not call for reconsideration of the whole Constitution, or reconfigure the fundamental structure of South Dakota's government. Instead, it merely provides for the legalization, regulation, and taxation of marijuana and the passage of laws regarding certain subcategories of marijuana use (hemp and medical). It does not alter a single other constitutional article or section. It does not shift power from one branch of government to another. And its authorization for administrative development of implementing rules and regulations is no different than any other piece of legislation, whether constitutional or statutory. The Plaintiffs' characterization of Amendment A as a radical change is long on rhetoric but woefully short on substance.

Again, courts interpret initiatives liberally to accomplish their purpose, without hypertechnical dissection. *See* S.D.C.L. § 2-1-11; *Baker*, 2001 S.D. 49, ¶ 18, 625 N.W.2d at 271. The initiative power is a foundational part of South Dakota's constitution and democratic ideals. It should not be undermined or curtailed by hypertechnical

interpretations or linguistic chicanery. The Plaintiffs cannot carry their burden to establish beyond a reasonable doubt that the Constitution required Amendment A to be enacted only via a constitutional convention.

CONCLUSION

Plaintiffs affirmatively chose to bring this lawsuit in their official capacities only. The law is clear, however, that they may not sue the state in their official capacities. Even if they could, they have not made any effort to plead any element of standing.

Plaintiffs should have brought this action prior to February 5, 2020. Their failure to timely raise these arguments forecloses their ability to raise these arguments now, particularly after the voters passed Amendment A.

Finally, Plaintiffs are simply wrong on the merits. Their thin legal arguments fall woefully short of carrying their burden to show beyond a reasonable doubt that Amendment A is unconstitutional.

The voters spoke on November 3, 2020. Plaintiffs may disagree with the results of the election, but they may not reverse the results of the election in court.

Respectfully,

DATED: December 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020 I electronically filed and served the Proponents' foregoing memorandum with the Clerk of the Court for the South Dakota Circuit Court for the Sixth Judicial Circuit by using the Odyssey File & Serve system, which constitutes service on:

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