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SIXTH JUDICIAL CIRCUIT

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RE: 32CIV20-187: Kevin Thom, Pennington County Sheriff, Rick Miller, Superintendent of the South Dakota Highway Patrol vs. Steve Barnett, Secretary of State

FACTUAL BACKGROUND

The facts surrounding this matter are uncontested.

Amendment A was a proposed constitutional amendment that was voted on in the General Election, held November 3, 2020. The ballot text described Amendment A as: "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." The amendment contains fifteen primary sections and numerous subsections. The plain language of Amendment A includes: legalizing marijuana, taxing of marijuana, regulating marijuana, enacting civil penalties for marijuana, and allocating power to the Department of Revenue to "administer and enforce" the licensing and regulation of marijuana, among other things. In addition, § 14 compels the Legislature to pass laws regarding multiple

aspects of hemp. Marijuana and hemp are specifically defined as two different terms in § 1 of Amendment A.

Amendment A was timely submitted to the South Dakota Secretary of State for validation on November 4, 2019. The South Dakota Secretary of State announced on January 6, 2020 that Amendment A had received a sufficient number of signatures and would be placed on the ballot for the 2020 General Election. Amendment A passed with 225,260 votes while 190,477 voters opposed it. The 2020 General Election returns were officially canvassed on November 10, 2020.

Kevin Thom, Pennington County Sheriff (Sheriff Thom), and Colonel Rick Miller, South Dakota Highway Patrol Superintendent (Colonel Miller) (together, referred to as Plaintiffs), filed this declaratory judgment action in their official capacities on November 20, 2020. South Dakotans for Better Marijuana Laws, Melissa Mentele, Charles Parkinson, Randolph Seiler, and William Stocker (Intervenors) officially intervened in this action on December 8, 2020. Plaintiffs filed a Joint Motion for Summary Judgment on December 23, 2020. Defendant and Intervenors each filed a separate Motion for Judgment on the Pleadings on December 23, 2020. A Motions Hearing on the above matters was held on January 27, 2021.

ISSUES

1. **Whether Plaintiffs have standing to commence this action.**
2. **Whether Plaintiffs timely commenced this action.**
3. **Whether Amendment A violates the South Dakota Constitution.**

STANDARD OF REVIEW

A motion for judgment on the pleadings provides an "expeditious remedy to test the legal sufficiency, substance, and form of pleadings." *Burlington N. R. Co. v. Strackbein*, 398 N.W.2d 144, 145 (S.D. 1986) (further citations omitted). "It is a proper remedy only when no issue of fact is raised" and deals with "only questions of law arising from the pleadings." *Id*.

A motion for summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The standard for a motion for summary judgment is clear:

> Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We will affirm only when no genuine issues of material fact exist and the law was applied correctly. We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party.

Stromberger Farms, Inc. v. Johnson, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258. When additional evidence outside of the pleadings is considered without objection, a motion for judgment on the pleadings is considered as a motion for summary judgment. *Tiede v. CorTrust Bank, N.A.*, 2008 S.D. 31, ¶¶ 5-6, 748 N.W.2d 748, 750. The Court has considered evidence outside of the

pleadings in this matter. At the hearing, the parties agreed they received notice the Motions for Judgment on the Pleadings would be considered as Motions for Summary Judgment.

"Constitutional interpretation is a question of law." *Steinkruger v. Miller*, 2000 S.D. 83, ¶ 8, 612 N.W.2d 591, 595. "When considering a constitutional amendment after its Adoption by the people, the question is not whether it is possible to Condemn the amendment, but whether it is possible to Upheld [sic] it." *Barnhart v. Herseth*, 88 S.D. 503, 512, 222 N.W.2d 131, 136 (1974). An amendment has a strong presumption of constitutionality after it is passed by the people. *Id.* A constitutional amendment passed by the people should be sustained unless it "plainly and palpably appear(s) to be invalid." *Id.* "Legislative action is accorded a presumption in favor of validity and propriety and should not be held unconstitutional . . . unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt." *Meierhenry v. City of Huron*, 354 N.W.2d 171, 176 (S.D. 1984).

ANALYSIS

a. Standing

Intervenors argue neither Plaintiff has standing to commence this action because they brought this action in their official capacities. Plaintiffs contend they are able to sue in their official capacities. Sheriff Thom cites the fact that in his oath of office, he swore to uphold the South Dakota Constitution. Colonel Miller argues he has standing because of Governor Noem's issuance of Executive Order 2021-02[1] as well as having sworn to uphold the South Dakota Constitution.

"The real party in interest rule is satisfied 'if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action.'" *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d 99, 101 (quoting *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 27, 621 N.W.2d 592, 600). When Sheriff Thom took his oath of office, he swore to uphold the South Dakota Constitution.[2] A sheriff's duties include enforcing the laws of the State of South Dakota. SDCL 7-12-4. This naturally includes making DUI stops as well as enforcement of other laws on the roads and highways. Commencing an action on Amendment A, on the grounds it is unconstitutional, falls within Sheriff Thom's duty to uphold the South Dakota Constitution. In addition, Amendment A affects Sheriff Thom's ability to carry out his duties in enforcing the laws and keeping intoxicated drivers off of roads. Based on this, Sheriff Thom has standing because he has a "real, actual, material or substantial interest" in the subject matter of the current action. *Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d at 101.

Colonel Miller has a "substantial" and "real" interest in this suit. *Id.* Amendment A § 6, vests the "exclusive power" in the Department of Revenue to "administer and enforce" rules

[1] S.D. Exec. Order No. 2021-02 (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.pdf.

[2] All law enforcement officers must take an oath of office as required by SDCL 9-14-7 or 3-1-5. ARSD 02:01:02:01(8). SDCL 3-1-5 provides, in relevant part, "Every person elected or appointed to any civil office shall, before entering upon the duties thereof, qualify by taking an oath or affirmation to support the Constitution of the United States and of this state, and faithfully discharge the duties of his office, naming it; …".

regarding marijuana. This is contrary to authority given to the Division of Highway Patrol by the Legislature under SDCL 32-2-1, 32-2-1.1 and 32-2-7. SDCL 32-2-7 vests the Department of Public Safety with the authority to assist in the enforcement of all laws, police regulations, and rules governing motor vehicles and motor carriers over and upon the highways of this state."[3] Amendment A gives the Department of Revenue the "exclusive" authority to enforce regulations that govern the transport of marijuana in § 6. This directly interferes with the Division of Highway Patrol's ability to carry out its duty under South Dakota law.

In addition, Colonel Miller took an oath as a law enforcement officer to support the South Dakota Constitution. This duty to support the South Dakota Constitution includes commencing an action against Amendment A on the grounds it is unconstitutional. The consequences Amendment A would have for the Division of Highway Patrol to carry out its duties under the law, as well as Colonel Miller's duty to support South Dakota's Constitution, give him a "real, actual" interest in this suit. *Ammann*, 2013 S.D. 32, ¶ 6, 830 N.W.2d at 101.

Under the Uniform Declaratory Judgment Act, South Dakota courts are permitted to declare legal rights or relation before an actual injury happens. *Boever v. S. Dakota Bd. of Accountancy*, 526 N.W.2d 747, 749 (S.D. 1995). However, four jurisdictional requirements must be 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 protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. at 749-750 (citing *Danforth v. City of Yankton*, 25 N.W.2d 50, 53 (S.D. 1946) (further citations omitted)). These four elements are satisfied in the case at hand. Plaintiffs have a claim of right in assuring the Constitution is not violated by Amendment A and have asserted that claim against a proper party: the Secretary of State. The interests of the parties are adverse. Plaintiffs also have a legally protectible interest in the case: their interests in upholding the South Dakota Constitution. Finally, the controversy is ripe. Amendment A has been passed by the voters and will become effective on July 1, 2021. Since standing exists for both Sheriff Thom and Colonel Miller, the parties' remaining arguments on standing are moot and will not be addressed by this court.

b. <u>Timeliness</u>

Intervenors argue Plaintiffs did not timely commence this action. They argue this action was required to have been brought prior to the election. Plaintiffs and Defendant both assert timeliness was not an issue for Plaintiffs, stating courts cannot enjoin the submission of a constitutional amendment to the people of South Dakota.

[3] Under SDCL 32-2-1 and SDCL 32-2-1.1, the Division of Highway Patrol is within the Department of Public Safety.

Intervenors first argue SDCL 2-1-17.1 and 2-1-18 require challenges to Amendment A to have been brought by February 5, 2020. SDCL 2-1-17.1 details the procedure to challenging deficiencies of the petition that was submitted to the Secretary of State. Plaintiffs are not challenging the sufficiency of the petition itself, but rather are challenging provisions of the petition as unconstitutional.[4] SDCL 2-1-17.1 does not address constitutional challenges to the substantive provisions of the petition and is therefore, not applicable to this case.

SDCL 2-1-18 likewise is not applicable to this case. SDCL 2-1-18 addresses challenges to the signatures on a petition, the "veracity of the petition circulator's attestation, or any other information required on a petition." Plaintiffs are not challenging matters related to the signatures, the petition circulator's attestation, or other required information. They are challenging whether provisions of Amendment A are constitutional, not the sufficiency of items on the petition.

The South Dakota Supreme Court has stated challenges to the adoption of a constitutional amendment may not be heard until after it has been voted on. *State ex rel. Cranmer v. Thorson,* 9 S.D. 149, 68 N.W. 202, 202–03 (1896); *State ex rel. Evans v. Riiff,* 73 S.D. 348, 42 N.W.2d 887, 889 (1950). In *State ex. rel. Evans v. Riiff*, the Court opined:

> We think the delay incident to the requirement that litigation await the completion of the legislative process is a small price to pay to maintain inviolate the vital principle of separation of powers peculiar to our polity. And we think this principle of noninterference is as valid when applied to lawmaking at the highest level, viz., in the constitutional field, and in lawmaking under the powers reserved to the people by the initiative provisions of the constitution, as it is when applied to the functions of the legislature.

Riiff, 73 S.D. 348, 352, 42 N.W.2d at 889 (further citations omitted). Further, South Dakota's courts do not answer hypothetical questions, nor do they provide advisory opinions. *In re Estate of Ricard,* 2014 S.D. 54, ¶ 16, 851 N.W.2d 753, 758 (further citations omitted).

Based on the South Dakota Supreme Court's precedent, courts could not hear a pre-election challenge on the constitutionality of Amendment A. It would have violated the "principle of noninterference" in the initiative process. *Riiff*, 73 S.D. at 352, 42 N.W.2d at 889. Further, there was no guarantee that Amendment A would be approved by South Dakota voters. Any litigation on the constitutionality of Amendment A prior to the 2020 General Election would have required a court to provide what would amount to an advisory opinion or to answer hypothetical questions on the constitutionality of Amendment A. South Dakota courts are not allowed to provide these advisory opinions. *Ricard,* 2014 S.D. 54, ¶ 16, 851 N.W.2d at 758. Accordingly, Plaintiffs' current challenge was timely.

[4] An election contest, according to South Dakota Supreme Court precedent, is the proper procedure with which to challenge procedural issues in an election, including statutory requirements of a petition. *See* the court's memorandum decision in 32CIV20-186.

c. Constitutionality

i. History

South Dakota adopted its original constitution on October 1, 1889. *State v. Wilson*, 2000 S.D. 133, ¶ 8, 618 N.W.2d 513, 516. Between 1889 and 1970, the South Dakota Constitution was amended seventy-nine times, each amendment adding more complexity to it. *Id*. These amendments created inconsistencies within the Constitution and often addressed minor problems, leaving larger issues untouched. *Id*. (further citations omitted). The Legislature created a Constitutional Revision Commission in 1969 to study the Constitution and "determine ways and means to improve and simplify the constitution." *Id*. (further citations omitted). In drafting the 1972 Constitution, the commission sought to avoid any inconsistencies between provisions. *In re Daugaard*, 2011 S.D. 44, ¶ 13, 801 N.W.2d 438, 442.

A new version of Article XXIII was adopted in November of 1972. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 135 n.16. Article XXIII was most recently amended in 2018, when South Dakota voters passed Constitutional Amendment Z.[5] The effect of Amendment Z was to amend Article XXIII § 1, making it so proposed amendments to the South Dakota Constitution cannot "embrace more than one subject." S.D. Const. Art. XXIII, § 1; *see also*, 2018 General Election Canvass, 20 (explaining the purpose of Amendment Z). Single subject rules for proposed constitutional amendments are often adopted in part to prevent logrolling. *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 253 (Neb. 2020). "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." *Id*.

ii. Single Subject Rule

The single subject rule as it applies to Article XXIII, § 1 of the South Dakota Constitution is an issue of first impression in South Dakota. Although other states have interpreted their own versions of the single subject rule, this Court will rely upon the guidance of the South Dakota Supreme Court in approaching this question.[6] The South Dakota Supreme Court has interpreted Article III, § 21 of the South Dakota Constitution, which contains a single subject rule pertaining to legislative enactments. It states: "No law shall embrace more than one subject, which shall be expressed in its title." S.D. Const. Art. III, § 21. Counties have a similar statutory rule for ordinances. "An ordinance shall embrace only one subject, which shall be expressed in its title." SDCL 7-18A-3. Article XXIII, § 1 of the South Dakota Constitution states, in relevant part: "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;

[5] *2018 General Election Canvass*, 20. South Dakota Secretary of State (November 13, 2018) https://sdsos.gov/elections-voting/assets/2018GeneralElectionCanvassPDF.pdf.

[6] Other states that have interpreted their own single subject rule include Nebraska (*State ex rel. Wagner v. Evnen*, 163, 948 N.W.2d 244, 260 (2020) (holding that a proposed amendment to the Nebraska constitution violated the Nebraska single subject rule)), Florida (*In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 797 (Fla. 2014) (holding that a proposed Constitutional amendment did not violate Florida's single subject rule)), and Oklahoma (*Oklahoma Indep. Petroleum Ass'n v. Potts*, 414 P.3d 351, 360, as amended (Mar. 21, 2018) (holding a proposed amendment violated Oklahoma's single subject rule)).

however, no proposed amendment may embrace more than one subject." S.D. Const. Art. XXIII, § 1.

One of the purposes of a single subject rule is to "'minimize[s] the risk of voter confusion and deception' by requiring that a petition has only one subject." *Baker v. Atkinson*, 2001 S.D. 49, ¶ 24, 625 N.W.2d 265, 273 (citing *Amador Val. Joint Union H. Sch. Dist. v. State Bd. Of Equalization*, 583 P.2d 1281, 1291 (Cal. 1978)). The *Baker* Court noted that the single subject rule "has its foundation in both the South Dakota Constitution and statutory law." *Baker,* 2001 S.D. 49, ¶ 24, 625 N.W.2d at 273. A single subject provision should not be construed narrowly or technically in all cases; it is to be given a liberal construction to uphold proper legislation, '*all parts of which are reasonably germane* . . . 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." *Id*. at ¶ 25 (citing *Amador,* 583 P.2d at 1290) (italics in original). The subject of a law is the public or private concern for which it is enacted, and "all provisions of the Act must relate directly to the same subject, have a natural connection, and not be foreign to the subject as stated in the title." *Meierhenry*, 354 N.W.2d at 182 (citing *McMacken v. State,* 320 N.W.2d 131, 138 (S.D. 1982)) (internal quotations omitted).

"Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn." *S. Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 697 (S.D. 1981) (internal quotations omitted) (further citations omitted). Given the similarities between the three "single subject" provisions (Article XXIII, § 1, Article III, § 21, and SDCL 7-18A-3) and the South Dakota Supreme Court's guidance on the application of those provisions, this Court will apply the "reasonably germane" standard as adopted in *Baker*. *Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. Provisions of an act are "reasonably germane" if they are "governing projects so related and interdependent as to constitute a *single scheme* may be properly included within a single act." *Id.* (citing *Amador,* 583 P.2d at 1290).

The subject of Amendment A is: the legalization of marijuana. When applying the reasonably germane test, the question is whether the provisions of Amendment A are related and interdependent as to constitute a single scheme. The provisions of Amendment A that are related and interdependent as to constitute a single scheme with legalization of marijuana are: being able to possess and use marijuana, as defined in § 1 of Amendment A, at any point from its growth through consumption. Regulation of marijuana is also covered under this subject.

The title of Amendment A contains two distinct subjects: the legalization of marijuana and hemp. Amendment A defines marijuana and hemp as separate terms in § 1. Within Amendment A, § 14(2) provides "Not later than April 1, 2022, the Legislature shall pass laws to: . . . Regulate the cultivation, processing, and sale of hemp." Defendant and Intervenors argue Amendment A's main subject is cannabis, which would encompass both marijuana and hemp. However, neither the title of Amendment A nor the Attorney General's Explanation mention the word "cannabis." The only time "cannabis" appears in the entirety of Amendment A is in the definitions of "marijuana" and "hemp" in § 1. Although marijuana and hemp both originate from the cannabis plant, Amendment A clearly defines them as different subjects. "Cannabis" cannot

be retroactively inserted as the main subject of Amendment A. Based on Amendment A's definition, marijuana and hemp are two distinct subjects. Thus, hemp is not reasonably germane to the subject of legalization of marijuana. *Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273.

Amendment A contains several sections related to marijuana which are not "reasonably germane" to the legalization of marijuana. *Baker,* 2001 S.D. 49, ¶ 25, 625 N.W.2d 265, 273. Amendment A, § 5 sets civil penalties for violations included in § 4. These penalties range from monetary fines to an option for a person under twenty-one years of age to attend drug education or counseling. Specific penalties, such as those set forth in § 5 of Amendment A are not reasonably germane to the legalization of marijuana. *Id.*

Amendment A addresses discipline of professional or occupational licenses. Amendment A, § 9 mandates an individual "with a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law." Amdt. A, § 9. Mandating what various professions can and cannot discipline their members for is not a part of the "general object" of legalizing marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d 265, 273.

Amendment A addresses taxation. Amendment A, § 11 imposes a fifteen percent excise tax on the "gross receipts of all sales of marijuana sold by a person licensed by the Department pursuant to this article to a consumer." This section also allocates the revenue from said excise tax. The Department of Revenue is to receive the revenue necessary to cover the costs of administering Amendment A. *Id*. The remaining revenue is to be allocated evenly between supporting South Dakota public schools and being allocated to the state's general fund. Imposing a tax on marijuana sales and allocating the revenue derived from that tax are not "reasonably germane" to the overall topic of legalizing marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. Allocating revenue from an excise tax on marijuana sales is not part of the same "single scheme" as legalizing marijuana and does not constitute the same "scheme" as legalizing marijuana. *Id*.

While there may be more subjects contained within Amendment A, the identification of multiple subjects above is sufficient to determine the subjects contained within Amendment A are not reasonably germane to the legalization of marijuana. Allocating revenue from an excise tax of marijuana sales, forbidding differing professions from disciplining their members, and including a provision compelling the legislature to pass hemp, which is different than marijuana, are not part of the "single scheme" of legalizing marijuana. *Baker*, 2001 S.D. 49, ¶ 25, 625 N.W.2d at 273. As a result, Amendment A violates the single subject provision of Article XXIII § 1 of the South Dakota Constitution and is invalid. *See Barnhart*, 88. S.D. 503, 222 N.W.2d at 135 (discussing a proposed amendment's potential invalidity under Article XXIII § 1). Despite the strong presumption of constitutionality and presumption in favor of validity and propriety Amendment A receives, the infringement of the single subject rule in Article XXIII, § 1 is so plain and palpable as to admit no reasonable doubt Amendment A is invalid. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 136; *Meierhenry*, 354 N.W.2d at 176 (further citations omitted).

Although this finding invalidates the amendment, this court will consider further argument on the issue of whether Amendment A was an amendment or revision in the interest of efficiency and the public importance.

iii. *Amendment/Revision*

Article XXIII outlines the procedures for both amendments and revisions to the South Dakota Constitution. S.D. Const. art. XXIII, §§ 1, 2. "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. An amendment can be proposed either through the initiative process, or by a majority vote of the Legislature. *Id*. What constitutes a constitutional "amendment" is not specifically defined. *Id.*

A revision requires a constitutional convention, which must be approved by three fourths of both houses of the Legislature. S.D. Const. art. XXIII, § 2. The revision itself must be approved by a majority of both houses of the Legislature as well as the electorate. *Id*. The revision "shall be submitted to the electorate at a special election in a manner to be determined by the convention." *Id*. The term "revision" is not specifically defined. *Id.*

Plaintiffs argue an amendment to the South Dakota Constitution may not incorporate a new article to the constitution, pursuant to Article XXIII, § 1. "In the absence of ambiguity, the language in the constitution must be applied as it reads . . .." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 34, 720 N.W.2d 670, 681 (further citations omitted). A court is "obligated to apply its plain meaning." *Id*. (internal quotations omitted). Under the "plain meaning" of the text of Article XXIII, § 1, a proposed amendment is not barred from creating a new article of the Constitution. *Id*. As Intervenors state: "The plain language of Article XXIII does not limit amendments to only amending one or more existing articles of the Constitution." (Intervenors' Reply Br., 10).

Plaintiffs next contend that Amendment A is a revision to the Constitution, rather than an amendment. They argue Amendment A would result in substantial changes to certain functions of South Dakota's three branches of government. Defendants and Intervenors argue Amendment A does not drastically change functions of the branches of government and does not make extensive changes to the constitution.

The South Dakota Supreme Court has never directly ascertained the difference between an amendment and a revision. The two are clearly distinct terms; it is presumed that there is no surplusage inserted into constitutional provisions. *Wilson*, 2000 S.D. 133, ¶ 13, 618 N.W.2d at 518. To gain a better understanding of these terms, outside authority will be examined. An amendment to the constitution implies "such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Amador*, 583 P.2d at 1285 (internal quotations omitted).

A revision may be "an enactment which is so extensive in its provisions as to change directly the substantial entirety of the Constitution by the deletion or alteration of numerous existing provisions . . .." *Amador*, 583 P.2d at 1286. A revision may also be a simpler enactment,

as long as the enactment "may accomplish such far reaching changes in the nature of our basic governmental plan . . .." *Id*. In determining whether a constitutional enactment is a revision or an amendment, a court must examine both the quantitative and qualitative aspects of the enactment. *Amador*, 583 P.2d at 1286.

In *McFadden v. Jordan*, the Supreme Court of California dealt with the question of whether a proposed constitutional amendment was an amendment or a revision. 196 P.2d 787, 788 (Cal. 1948). The proposed amendment was nearly half as big as the California Constitution itself. *Id*. at 790. One of the sections of the proposed amendment created a "California Pension Commission." *Id*. The commission was to be delegated "far reaching and mixed powers" which were almost entirely "unchecked." *Id*. at 798. The California court considered the amendment a revision of their constitution. *Id*. at 799. In its reasoning, the court discussed the implications of what having a commission with such power would mean for the system of checks and balances that characterized California's governmental plan. *Id*. at 798.

Amendment A is not a drastic rewrite of the South Dakota Constitution. It is also not as extensive as the proposed amendment in *McFadden*. *McFadden*, 196 P.2d at 793-96. Amendment A does not make any written changes to the existing provisions of the South Dakota Constitution. However, it does institute "far reaching changes in the nature of our basic governmental plan." *Amador*, 583 P.2d at 1286. "The doctrine of separation of powers 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. Amendment A proposes far reaching changes that would change the nature of this governmental plan. *Amador*, 583 P.2d at 1286.

Under Article III, § 1, the "legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives." S.D. Const. art. III, § 1. "The Legislature cannot abdicate its essential power to enact basic policies into law or delegate such power to any other department." *State v. Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d 598, 606 (citing *State v. Moschell*, 2004 S.D. 35, ¶ 15, 677 N.W.2d 551, 558). Once broad policy is created by the legislature, it may delegate certain powers to executive agencies, but it must adopt standards to "guide those officers or agencies in the exercise of such powers." *Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d at 606. The Department of Revenue was established in 2011 through Executive Order, with approval from the Legislature. SDCL 10-1-1.

Amendment A, § 6 grants the Department of Revenue the "exclusive power" to license and regulate aspects of marijuana and to "administer and enforce" the rest of the article. Defendants and Intervenors argue this still leaves the Legislature with some power. "Exclusively" has been defined by the South Dakota Supreme Court as "only, solely, purely, wholly, to the exclusion of other things" and "to the exclusion of all others." *Volk*, 305 N.W.2d at 700 (internal citations omitted). Constitutions "should receive a consistent and uniform interpretation, so that they shall not … be taken to mean one thing at one time and another thing at another time, even though the circumstances may have changed as to make a different rule seem desirable. *Id*. (further citations omitted). Being as the South Dakota Supreme Court has defined the word "exclusively" in Article XI, § 8, this Court will apply that meaning to Amendment A. *Id*. The word "exclusive," as used in § 6, gives the Department of Revenue the

exclusive power to license and regulate aspects of marijuana. This means it has the sole authority to do so. Amendment A removes the Legislature's ability to create broad policy relating to the regulation of and licensing of marijuana and their ability to delegate authority over these matters to any other agency. This is a "far reaching" change to the "nature" of South Dakota's "governmental plan." *Amador*, 583 P.2d at 1286.

Amendment A, § 5 also removes power from the Legislature; it removes the ability of the Legislature to enact civil penalties to regulate § 4. The Legislature is not able to "abdicate its essential power to enact basic policies into law or delegate such power to any other department." *Outka*, 2014 S.D. 11, ¶ 25, 844 N.W.2d at 606. § 5 removes the ability of the legislature to implement civil penalties into law to regulate § 4, because there are already penalties in the Amendment. Further, the penalties in § 5 cannot be changed by anything other than another proposed constitutional amendment. If the Legislature wanted to reduce or increase the civil penalty for an individual who smokes marijuana in a public place, they would not be allowed to do so. Even the Department of Revenue is not able to change the penalties, as they are part of Amendment A. This changes the nature of the "basic governmental plan," as the Legislature now cannot delegate authority to the Department of Revenue to enact penalties pertaining to marijuana use. *Amador*, 583 P.2d at 1286.

Amendment A alters and removes the power of the Executive Branch to reallocate authority over the licensing and regulation of marijuana. Under Article IV, § 8 of the South Dakota Constitution, the Governor has the ability to make "changes in organization of the offices, boards, commission, agencies, and instrumentalities, and in *allocation of their functions, powers and duties*, as he considers necessary for efficient administration." (Italics added). Amendment A, § 6 gives the Department of Revenue the "exclusive" authority over licensing and regulating aspects of marijuana. This removes the ability of the Governor to transfer this authority to another agency, one that may be better fit for these tasks. Amendment A's § 6 is in direct conflict with the duties given to the Governor by the South Dakota Constitution under Article IV, § 8, and is a far-reaching change in the "nature of our basic governmental system." *Amador*, 583 P.2d at 1286.

Amendment A, § 12 establishes a new cause of action against the Department of Revenue. If the Department of Revenue fails to promulgate rules consistent with or required by Amendment A by April 1, 2022, any South Dakota resident would be able to commence a mandamus action to compel the department to do so. "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const. art. III, § 27. "The [S]tate may … waive sovereign immunity by legislative enactment identifying the conditions under which lawsuits of a specified type would be permitted." *Hallberg v. S. Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 12, 937 N.W.2d 568, 573 (further citations omitted). Amendment A unconstitutionally waives the State's sovereign immunity. This is in direct conflict with Article III, § 27, which specifically gives the Legislature the power to direct in what manner and court the State may be sued.

Although it does not make any written changes to other Articles of the South Dakota Constitution, Amendment A provides far-reaching changes to the nature of South Dakota's governmental plan and is therefore a revision. Several provisions of Amendment A implement

"far reaching changes" in the basic nature of South Dakota's governmental system by taking authority given to the Legislative and Executive branches and allocating it to the Department of Revenue. *Amador*, 583 P.2d at 1286. Despite the strong presumption of constitutionality that Amendment A has been given, its infringement of restrictions placed in Article XXIII is so "plain and palpable" that there is no reasonable doubt. *Barnhart*, 88 S.D. 503, 222 N.W.2d at 136; *Meierhenry*, 354 N.W.2d at 176 (further citations omitted).

iv. *Severance*

The Intervenors argued that if Amendment A was found to be unconstitutional, the proper remedy was to sever the unconstitutional sections. Despite this argument, the Intervenors failed to cite valid legal authority supporting the theory that this court has the authority to sever an amendment, effectively choosing which sections of the amendment it believes the voters intended to adopt. Due to the intermingling of multiple subjects within Amendment A, it is not possible for this court to ascertain which sections of the amendment the South Dakota voters supported. For example, the title itself contains two separate subjects – marijuana and hemp. Article XXIII, § 1 of the South Dakota Constitution prohibits a proposed amendment from embracing more than on subject. When more than one subject is included in an amendment, this court does not have authority to assume which subject the voters intended to adopt. As a result, this court cannot sever Amendment A in a manner that assures compliance with the intentions of the South Dakota voters.

CONCLUSION

Based on the analysis set forth above, Amendment A is unconstitutional as it includes multiple subjects in violation of Article XXIII, § 1and it is therefore void and has no effect. Furthermore, Amendment A is a revision as it has far-reaching effects on the basic nature of South Dakota's governmental system. As a result, Amendment A was required to be submitted to the voters through the constitutional convention process set forth in Article XXIII, § 2. The failure to submit Amendment A through the proper constitutional process, voids the amendment and it has no effect. Accordingly, Plaintiffs' Motion for Summary Judgment in this matter is granted.

BY THE COURT

Christina Klinger

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Christina Klinger
Circuit Court Judge