UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Dakotans for Health and Rick Weiland, Plaintiffs, v. Secretary of State Monae Johnson, in her official capacity only, Defendant.	)	Civ. 25-4050

Reply Memorandum in Support of
Motion for Preliminary and Permanent Injunction

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I. This reply brief in a nutshell

"The Court also holds that a filing deadline [for initiated laws] of six months before the election at which the initiative would receive a vote is the constitutional limit for how remote a deadline may be set from the election." *SD Voice v. Noem*, 557 F. Supp. 3d 937, 948 (D.S.D. 2021). Accordingly, the district court held South Dakota's one-year pre-election filing deadline "unconstitutional and unenforceable." *Id.* at 949. The Eighth Circuit affirmed the district court's holding that the one-year deadline was unconstitutional, extended it to proposed constitutional amendments, and held that only the South Dakota Legislature could set the new deadline. *SD Voice v. Noem*, 60 F.4th 1071, 1082-83 (8th Cir. 2023). In compliance with Judge Kornmann's holding, the Legislature set the deadline as the first Tuesday in May. SDCL §§ 2-1-1.1 and 2-1-1.2 (2023). This is virtually the same as six months. *SD Voice v. Noem*, Doc. 94 at 2, Declaration of James D. Leach in Support of Reply Memorandum ("Declaration"), Doc. 33 Ex. 1.

The 2025 Legislature set the filing deadline back to the first Tuesday in February. But the Eighth Circuit has ruled that an earlier petition deadline suppresses petition circulation. *SD Voice v. Noem*, *supra*, 60 F.4th at 1078 (one-year pre-election filing deadline "effectively prohibits circulating petitions during the

year prior to the election.") Petition circulation is "core political speech." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999). So HB 1184 survives only if it meets the applicable standard of review: strict scrutiny, or at the least, *Anderson/Burdick* scrutiny.

To attempt to justify HB 1184, the State argues one—and only one—alleged interest that it thought up *after* losing *SD Voice v. Noem*: that the February deadline is essential to allow for petition challenges to be completed before an election. This Court should not reach the merits of this argument, because it could have been made in *SD Voice v. Noem*, but was not made, so it is barred by collateral estoppel. Allowing a party to think up a new argument, and use it to challenge the result of a previous case, would mean that nothing would ever be settled.

If the court concludes that collateral estoppel does not apply, and reaches the merits, the State's argument fails both strict scrutiny and *Anderson/Burdick* review for multiple reasons:

- it abolishes three months of petition circulation—core political speech—for no good reason;

- the State in S.D.C.L. § 2-1-18 has disclaimed any interest in petition challenges, which conclusively disproves the alleged "important, if not compelling" interest it claims here;
- South Dakota allows petition challenges after an election, and the State has recently brought two such challenges, which contradicts its alleged "important, if not compelling" interest; and
- the statute cannot possibly accomplish its alleged purpose because a party that loses a petition challenge can appeal to the Supreme Court, so it is impossible to conclude a petition challenge before an election.

In sum, the State's newly-discovered alleged interest does not allow it to totally suppress petition circulation from the first Tuesday in February to the first Tuesday in May, which the Eighth Circuit ruled is a critical time for petition circulation. *SD Voice v. Noem*, *supra*, 60 F.4th at 1078-79 (benefits of longer petition circulation period include "more time to secure signatures," "more chances to speak with voters about issues and train circulators," more "ability to make [its political causes] the focus of statewide discussion," and "[i]t is common sense that cabining

core political speech in the form of petition circulation to a period no closer than a year before an election would dilute the effectiveness of the speech," so "the Supreme Court's reasoning that applied to the restriction in *Meyer* parallels the filing deadline here.") [first brackets by Eighth Circuit].

II. Dakotans for Health and Rick Weiland have standing

Standing is "an inescapable threshold question." *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 880 (D.S.D. 2019), quoting *Advantage Media, L.L.C. v. Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006). The State's argument on standing never goes beyond conclusions. The State does not explain how plaintiffs' ("DFH's") allegations of standing in Complaint ¶ 36 are insufficient. "When assessing standing at the preliminary injunction stage, this circuit has assumed the complaint's allegations are true and viewed them in the light most favorable to the plaintiff." *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022). And DFH does not rest on assumptions, instead supporting Complaint ¶ 36 with the Declaration of Cory Heidelberger, Doc. 4. The State does not provide any opposing evidence.

In addition, the State does not explain how plaintiffs could have standing in *SD Voice v. Noem*, *supra*, 60 F.4th 1071, but DFH not have standing here. The State conflates standing with the merits, arguing that "Because HB 1184 does not violate

Plaintiffs' First Amendment rights, they suffer no injury and lack standing to support the present suit." Doc. 25 at 5. "It is crucial, however, not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009).

III. Collateral estoppel precludes the State's attempt to relitigate whether the First Amendment allows South Dakota to establish a filing deadline earlier than the first Tuesday in May

The State argues that nonmutual offensive collateral estoppel does not apply to state governments. But *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1133-35 (8th Cir. 1982), applied nonmutual offensive collateral estoppel to Minnesota state government to preclude it from relitigating an issue already decided. The court recognized that "The Supreme Court has granted trial courts broad discretion in determining whether offensive collateral estoppel should be applied," citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), and affirmed the district court's application of the doctrine against the state. *White Earth Band of Chippewa Indians v. Alexander*, *supra,* 683 F.2d at 1134-35.

Likewise, in *Fond DU Lac Band of Chippewa Indians v. Carlson*, 1996 U.S. Dist. Lexis 23711 (D. Minn. 1996), defendant state officials argued that nonmutual

offensive collateral estoppel could not be applied against them. The court rejected their argument, stating that "Allowing state officials to avoid the preclusive effect of prior judgments in suits brought under *Ex parte Young* [209 U.S. 123 (1908)] would cripple that doctrine's purpose of ensuring that state officials comply with federal law." *Fond DU Lac Band of Chippewa Indians v. Carlson, supra*, 1996 U.S. Dist. Lexis 23711 * 55. The present case, like *SD Voice v. Noem*, is brought under *Ex parte Young*'s rule that a state may be sued in federal court by suing state officials in their official capacity. *Fond DU Lac Band of Chippewa Indians v. Carlson* canvasses multiple cases and finds the clear weight of authority on the side of applying nonmutual offensive collateral estoppel against state officials. 1996 U.S. Dist. Lexis 23711 * 55-57.

The 1985 case from the Eleventh Circuit that the State relies on appears to be the minority view. *DeCastro v. City of New York*, 278 F. Supp. 3d 753, 764 n.13 (S.D.N.Y. 2017) (collecting cases). Even if it were not, Eighth Circuit law controls. The State argues that it is unfair to apply nonmutual offensive collateral estoppel against it in this case because of the potentially large volume of litigation to which it may be subject, and because for strategic reasons it may decide not to appeal certain decisions. Perhaps this argument would make sense if DFH were attempting to apply the result of an unappealed small-dollar case to a much larger dispute. But

SD Voice v. Noem was the nuclear weapon of litigation: it sought to hold an important state statute unconstitutional. The State had every incentive to fight *SD Voice v. Noem* hard; the State fought it hard; and the State appealed to the Eighth Circuit and lost. The State could not have fought any harder. So it is fair to apply offensive nonmutual collateral estoppel to bar the State from relitigating an issue it lost in *SD Voice v. Noem*.

The State's other arguments against collateral estoppel fare no better. The State argues that DFH "could have easily joined in the first action." Doc. 25 at 10. But *SD Voice v. Noem* was filed on July 29, 2019. Doc. 33 Ex. 2. DFH was not organized as a ballot question committee until March 31, 2020. Doc. 33 Ex. 3. So DFH did not have standing until then to challenge the one-year filing deadline. By the time DFH was organized, *SD Voice v. Noem* was already on its way to the Eighth Circuit. Doc. 33 Ex. 4.

In addition, the State argues that collateral estoppel does not apply because in *SD Voice* the issue was a one-year pre-election deadline, and in this case it is a nine-month deadline. Doc. 25 at 11. But the case the State relies on, *Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 81 (2d Cir. 2019), proves the State wrong. In *Bifolck*, the district court refused to apply collateral estoppel because the issues were not

identical. The circuit reversed because "[i]t suffices that the issue decided in the prior proceeding is identical to the issue *as to which preclusion is sought*." 936 F.3d at 82 (emphasis in original). Here, the issue as to which preclusion is sought is Judge Kornmann's holding that six months is the constitutional maximum deadline. *SD Voice v. Noem*, *supra*, 557 F. Supp. 3d at 948 ("The Court also holds that a filing deadline [for initiated laws] of six months before the election at which the initiative would receive a vote is the constitutional limit for how remote a deadline may be set from the election.") The State is not entitled to relitigate whether six months is the constitutional limit, any more than if it loses this case, it can enact a ten-month or eleven-month deadline and argue that ten or eleven months is acceptable even though nine is not.

IV. If the court does not apply collateral estoppel, the State's newly-discovered alleged justification for HB 1184 fails factually and legally

A. The standard of review is strict scrutiny; if not strict scrutiny, it is *Anderson/Burdick*

"[W]e harbor doubt that the burden on the ability to engage in political speech as a result of the [South Dakota one-year] deadline is less than severe. But we need not decide this issue because we conclude the statute fails under scrutiny for burdens that are less than severe." *SD Voice v. Noem*, *supra*, 60 F. 4th at 1080. The

court's doubt was fully justified. HB 1184 totally suppresses the core political speech of petition circulation from the first Tuesday in February to the first Tuesday in May. No burden on speech is more severe than total suppression. So the burden is severe, and strict scrutiny applies. *SD Voice v. Noem*, *supra*, 60 F.4th at 1080 ("If the filing deadline imposes a severe burden on the ability to engage in political speech, strict scrutiny applies.")

The State does not argue that HB 1184 survives strict scrutiny. And for good reason: as shown below, the State's history of post-election litigation shows that its alleged interest in completing litigation before an election has never carried any weight, let alone been compelling. And if such an interest actually existed, other means exist that could address it without suppressing speech—such as requiring courts to complete all election litigation before an election. So HB 1184 fails strict scrutiny. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021).

The lower standard is "*Anderson/Burdick*," under which the court "weigh[s] the character and magnitude of the burden the State's rule imposes on First Amendment rights against the interest the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary." *SD Voice v. Noem*, *supra*, 60 F.4th at 1080, quoting *Miller v. Thurston*, 967 F.3d 727, 739

(8th Cir. 2020). *Accord*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (the *Anderson/Burdick* test "weigh[s] the character and magnitude of the burden the State's rule imposes . . . against the interests the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary.") (cleaned up).

If this Court concludes that the nine-month deadline fails the *Anderson/Burdick* standard, it need not decide whether strict scrutiny applies. *Dakotans for Health v. Noem*, 52 F.4th 381, 389 (8th Cir. 2022) and *SD Voice v. Noem*, 60 F.4th 1071, 1080 (8th Cir. 2023).

B. A court looks for the real purpose of a statute, rather than assuming that the alleged purpose is true

A court does not uncritically accept any party's argument. *DOC v. New York*, 588 U.S. 752 (2019), which refused to allow the government to include a citizenship question on the 2020 Census, relied on out-of-court statements by the measure's proponents that contradicted the government's alleged nondiscriminatory rationale. The out-of-court statements showed that "the VRA [Voting Rights Amendment] enforcement rationale—the [government's] sole stated reason—seems to have been contrived." *Id.* at 784. The Court could not "ignore the disconnect between the

decision made and the explanation given." *Id.* at 785. Judicial review is "more than an empty ritual." *Id.*

Similarly, in *SD Voice v. Noem*, 380 F. Supp. 3d 939, 944-45 (D.S.D. 2019), Judge Kornmann looked to a former Governor's published ballot statement in determining the purpose of an initiated measure in a First Amendment case. In *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 883-84 (D.S.D. 2019), another First Amendment case, Judge Piersol looked to the statements of another former Governor and her lobbyist in determining that "riot boosting" laws "are aimed at pipeline protests." And *Calzone v. Summers*, 942 F.3d 415, 423-24 (8th Cir. 2019) (*en banc*), evaluated and rejected Missouri's alleged interest in "transparency," Missouri's alleged "need to know who is speaking to determine how much weight to give the speech," and the public's alleged "right to know who is speaking so that it can hold legislators accountable for their votes and other actions," in yet another First Amendment case.

C. The Legislature and Speaker Hansen's history of restricting initiatives betrays the State's claim about the purpose of HB 1184

"The right of initiative is very important in states like South Dakota where the dominant political party controls, and has for 26 years, the office of the governor, the state House and the State Senate." *SD Voice v. Noem*, 380 F. Supp. 3d 939, 950 (D.S.D.

2019). Those 26 years are now 32 and counting. https://ballotpedia.org/Party_control_of_South_Dakota_state_government (last visited May 19, 2025).

Initiated measures are the only option for citizens when the Legislature will not act, or when citizens flat-out disagree with its actions. For over a century, initiated measures have been important in South Dakota. According to the Secretary of State's website, from statehood through 2012, citizens brought 63 initiated measures. https://sdsos.gov/elections-voting/assets/BallotQuestions.pdf (last visited May 20, 2025) (copy attached as Doc. 33 Ex.5 with initiatives highlighted). Then the pace quickened: from 2014 through 2022 they brought 16 more. Doc. 33 Ex. 5. This Court may take judicial notice of the Secretary's website. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016), quoting *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011), and DFH requests it do so.

In recent years, initiatives have significantly changed South Dakota's laws. Whether one agrees with any particular initiative, every initiative is citizens exercising their core First Amendment right to engage in political speech to seek political change, which is the "primary object of First Amendment protection." *McConnell v. FEC*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part). Recent successful initiatives include:

- a health care patients' rights law in 2014 (Initiated Measure 17);
- a minimum wage law in 2014 (Initiated Measure 18);
- a crime victims' rights law in 2016 (Constitutional Amendment S);
- a payday lending law in 2016 (Initiated Measure 21);
- campaign finance and lobbying laws in 2016 (Initiated Measure 22);
- medical marijuana legalization in 2020 (Initiated Measure 26);
- recreational marijuana legalization the same year (Constitutional Amendment A); and
- Medicaid expansion in 2022 (Constitutional Amendment D).

(Doc. 33 Ex. 5.)

In addition to these successful measures, many failed—a certainty in any competitive political system. Doc. 33 Ex. 5. Even though they failed, all furthered direct democracy, which South Dakota's constitution guarantees to its citizens, by allowing them to participate directly in making the laws they live under. Citizen participation in elections strengthens democracy. And unsuccessful initiatives today may become laws tomorrow, because they expose people to new ideas and to the

possibility of change. Many political ideas fail before they succeed. Just one example is the significant national expansion of health care that failed for decades before in 2010 it became the Affordable Care Act, and state Medicaid expansion that the Affordable Care Act authorized, but that was not enacted in South Dakota before being adopted by citizen initiative in 2022.

The South Dakota Legislature has repeatedly restricted or attempted to restrict the initiative process. Such attempts have included trying to increase the number of votes needed to approve an initiated constitutional amendment, which citizens rejected (Constitutional Amendment X in 2018) (Doc. 33 Ex. 5), and trying to increase the number of votes needed to approve ballot measures that impose taxes or fees or obligate over $10 million, which citizens again rejected (Constitutional Amendment C in 2022) (Doc. 33 Ex. 5).

Recent unconstitutional limitations on initiatives are *SD Voice v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019) (Speaker of the House of Representatives proposed a successful ballot initiative that prohibited out of state contributions to state ballot question committees, in violation of the First Amendment and the Commerce Clause); *SD Voice v. Noem*, 432 F. Supp. 3d. 991 (D.S.D., 2020), *appeal dismissed as moot* 987 F.3d 1186 (8th Cir. 2021) (South Dakota HB 1094 (2019) imposed registration

requirements on anyone who "solicits" signatures for an initiated petition, and required petition circulators to put extensive private information into a database that was accessible to the public while petitions were being circulated, all in violation of the First Amendment); *Dakotans for Health v. Noem*, 543 F. Supp. 3d 769 (D.S.D. 2021), *affirmed* 52 F.4th 381 (8th Cir. 2022) (SB 180 (2020) required paid petition circulators to put extensive private information into a database that was accessible to the public while petitions were being circulated; the federal district court preliminarily enjoined SB 180 because it violated the First Amendment; the Eighth Circuit affirmed; then the State agreed to a permanent injunction barring it from enforcing SB 180, and the court entered the requested permanent injunction). Doc. 33 Exs. 6 (Stipulation) and 7 (Judgment).

Speaker Hansen has an unparalleled record of trying to limit the citizen initiative process:

- In 2019 he was the prime House sponsor of HB 1093, which makes petition challenges easier. Doc. 33 Ex. 8. The bill was enacted. https://sdlegislature.gov/Session/Bill/9983 (last visited May 24, 2025).

- In 2019 he was the prime House sponsor of HB 1094. Doc. 33 Ex. 9. It was enacted and held unconstitutional, as just described.
- In 2020 he was the prime House sponsor of SB 180. Doc. 33 Ex. 10. It was enacted and preliminarily enjoined as unconstitutional, then the State stipulated to a permanent injunction, as just described.
- In 2021 he was a sponsor of SB 77, which requires the text of initiatives to be printed in 14-point font, which makes petitions physically bulkier. The bill was enacted. Doc. 33 Ex. 11. It is part of S.D.C.L. §§ 2-1-1.1 and 2-1-1.2.
- In 2021 he was the prime House sponsor of House Joint Resolution 5003, which proposed a constitutional amendment that would have increased from 50% to 60% the number of votes needed to approve ballot measures that impose taxes or fees or obligate over $10 million. The Legislature adopted it. Doc. 33 Ex. 12. Voters rejected it. Doc. 33 Ex. 5.
- In 2024 he was the prime House sponsor of HB 1244, which allowed voters who sign a ballot petition to later withdraw their

signatures. The bill was enacted. Doc. 33 Ex. 13. It is S.D.C.L. §§ 2-1-18.1 and 2-1-18.2.

In 2024, citizens brought four more initiatives to the ballot seeking to end the state sales tax on groceries, to establish a top-two system for primary elections, to legalize recreational marijuana, and—most controversially—to reinstate the limited right to abortion that existed from 1973, when *Roe v. Wade* was decided, until 2022 when it was overruled. https://sdsos.gov/elections-voting/assets/2024%20 Assets/2024GeneralBQPamphlet.FINALdocx.pdf (last visited May 20, 2025). (This Court may take judicial notice of the Secretary's website. *Missourians for Fiscal Accountability v. Klahr*, *supra*, 830 F.3d at 793. DFH asks it to do so.)

As Judge Lange stated during the campaign to reinstate *Roe v. Wade* rights, this is "perhaps the single most intractably divisive issue in the United States." *Dakotans v. Health v. Anderson*, 677 F. Supp. 3d 977, 990 (D.S.D. 2023). During the campaign, Representative Hansen organized a ballot question committee to oppose the measure. Judge Lange found that as part of his campaign, Hansen "wrote about frustrating Dakotans for Health's efforts as following: 'Beginning this November [of 2022], we must stand next to their petition circulators, explain to the public how radical this amendment is, and encourage our fellow citizens not to sign the

petition.'" *Id.* [citation omitted] (Judge Lange did not name Representative Hansen, instead describing him as "[t]he person listed as Chair of the Life Defense Fund." But Judge Lange cited *Dakotans for Health v. Anderson* Hearing Exhibit 10, which shows that Hansen is the person who made these statements, and who indeed described himself as a Chair of Life Defense Fund. *Dakotans v. Health v. Anderson*, *supra*, 677 F. Supp. 3d. at 990 and Doc. 33 Ex. 14. Hansen even caused "petition blockers" to attempt to prevent people from signing the *Roe v. Wade* petition. According to Judge Lange, this was "the first time in any witness's recollection" such a thing had occurred. *Dakotans v. Health v. Anderson*, *supra*, 677 F. Supp. 3d at 990.

In 2025, now elevated from House Speaker Pro Tempore (Doc. 33 Ex. 14, lower right) to Majority Leader, Representative Hansen and the 2025 Legislature struck back against the initiative process with a vengeance. Hansen sponsored and the Legislature passed measures to make citizen initiatives harder or impossible:

- He co-sponsored HB 1169, which would have crippled the initiated constitutional amendment process by requiring that a petition include signatures from at least five percent of the total votes cast for Governor in each of South Dakota's 35 legislative

districts. Doc. 33 Exs. 15 and 16. The Legislature passed the bill. The Governor vetoed it, and the Legislature did not override his veto. Doc. 33 Ex. 15 p. 2. The Governor's veto message explains why the bill was likely unconstitutional. Doc. 33 Ex. 17.

- He was the prime sponsor of HB 1256, which complicates the initiative petition process, creates more grounds for rejecting petition signatures, and bans circulators from correcting petition signer errors. The Legislature enacted the bill. Doc. 33 Exs. 18 and 19.
- And he was the prime sponsor of HB 1184. Doc. 25 (State's Brief) at 12 n.3 ("Speaker Hansen was the Prime Sponsor of HB 1184") and Doc. 25 at 23 ("Speaker Hansen introduced HB 1184").

The State asserts that these bills show that "South Dakota citizens take significant interest in the integrity of their elections[.]" Doc. 25 at 21. Actually they show that many South Dakota legislators, and in particular Speaker Hansen, will do everything they can to restrict the initiative process, and thereby to claw power back from the citizens of South Dakota.

D. The State prohibits itself from challenging a petition, instead shunting off the process entirely to private parties, thereby disproving its newly-discovered allegation that it has an "important, if not compelling" interest in such challenges

The State asserts that its "interest in allowing adequate time for meaningful court challenges to potentially invalid petitions is important, if not compelling." Doc. 25 at 25. But this is not so. The State has barred itself from challenging a petition, instead leaving the entire process to private individuals. So the State has eschewed any interest in the petition challenge process.

S.D.C.L. § 2-1-18 allows "any interested person" to "challeng[e] in circuit court the validity of any signature, the veracity of the petition circulator's attestation, or any other information required on a petition by statute or administrative rule, including any deficiency that is prohibited from challenge under § 2-1-17.1." Yet the fourth sentence of the statute prohibits the State from participating in this process, except to address the Secretary of State's signature verification: "Any appearance by the attorney general at a challenge under this section shall be limited to the process of signature verification by the Office of the Secretary of State under chapter 2-1." As the State says: "citizen challenges are the sole mechanism for questioning petitions in their entirety." Doc. 25 at 21.

So § 2-1-18 establishes that the State has no interest in the petition challenge process, other than with respect to the limited issue of the Secretary of State's "process of signature verification." The only interests are private. The State has *no* interest in the process (except as to the Secretary of State's signature verification), let alone an "important" or "compelling" one.

E. The State's actions in bringing post-election challenges prove that its words about the purpose of HB 1184 are—to use Chief Justice John Roberts's word in *DOC v. New York*—contrived

Actions always speak louder than words. Actions reveal what people actually mean; words are only what they say. Or as the vernacular has it: "talk is cheap." Only the State's *words* decry post-election challenges; its *actions* show it is fine with them; it has brought and won two in recent years.

In 2016, *after* voters enacted a campaign finance, ethics, and lobbying law (2016 Initiated Measure 22, Doc. 33 Ex. 5), twenty-four state legislators sued to hold the law unconstitutional. Doc. 33 Ex. 20. They won. Doc. 33 Ex. 21.

In November 2020, *after* voters approved a constitutional amendment to legalize recreational marijuana, two plaintiffs on behalf of the Governor sued to hold the measure unconstitutional. *Thom v. Barnett*, 2021 S.D. 65, ¶¶ 22-32, 967 N.W.2d 261, 269-272 (neither plaintiff had standing, but case could proceed because the

Governor was the real party in interest). The Supreme Court found the challenge timely: "we have previously considered post-election challenges where the defects were known and could have been addressed before the election. We therefore reject Proponents' claim that this action is untimely." [citation omitted]. *Thom v. Barnett*, *supra*, 2021 S.D. 65 ¶ 34, 967 N.W.2d at 272.

In *SD Voice v. Noem* the State *never argued* that the one-year pre-election filing deadline was justified by its alleged need to complete a petition challenge before the election. *SD Voice v. Noem*, *supra*, 60 F.4th at 1080 ("South Dakota argues its interests are sufficient to justify the restrictions. As best we can tell, South Dakota offers three distinct interests: election integrity, administrative efficiency, and the Legislature's ability to respond to petitions.") Not included is the alleged need to complete a petition challenge before the election.

A court is "not required to exhibit a naiveté from which ordinary citizens are free." *DOC v. New York*, 588 U.S. 752, 785 (2019), quoting *United States v. Stanchich*, 550 F. 2d 1294, 1300 (2d. Cir. 1977). It is impossible to believe that *after* litigating *SD Voice v. Noem*, *after* the successful *post*-election challenges in *Curd v. State* and *Thom v. Barnett*, and *after Thom v. Barnett* specifically again approved post-election challenges, the State suddenly discovered that it has an "important, if not

compelling" (Doc. 25 at 25) interest in having such challenges resolved *before* the election.

And having recently persuaded the South Dakota Supreme Court in *Thom v. Barnett* that a post-election challenge to an initiated measure is not a problem, the State is judicially estopped from claiming otherwise here. *Gustafson v. Bi-State Dev. Agency*, 29 F.4th 406, 410 (8th Cir. 2022) ("Whenever a party takes a position in a legal proceeding and succeeds in maintaining that position, the doctrine of judicial estoppel operates to prevent that party from later assuming a contrary position.")

The United States Constitution establishes guardrails on legislation. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Republican Party v. White*, 537 U.S. 765, 788 (2002) [ellipsis by Court], quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting.) HB 1184 smashes through First Amendment guardrails by prohibiting three months of core political speech during an election year for no legitimate reason.

If the State actually wanted litigation about initiatives to be concluded before Election Day, it could enact a statute so requiring. Its failure to do so, or even to

attempt to do so, proves that it has no such interest. Its only real interest is to try to disable the initiative process.

F. HB 1184 cannot possibly accomplish its alleged purpose, because a party that loses a petition challenge in circuit court can appeal to the South Dakota Supreme Court, so a challenge will not be resolved until after the election

The right of appeal from circuit court to the Supreme Court prevents HB 1184 from even possibly accomplishing its alleged purpose. If the losing side appeals a circuit court decision to the South Dakota Supreme Court, no petition challenge that begins in March, no matter how efficiently litigated in circuit court, can ever be completed including appeal before November.

A losing party in circuit court has thirty days after notice of entry of judgment to file a notice of appeal. S.D.C.L. § 15-26A-6. Then a party can order a transcript, the reporter prepares it, and the clerk assembles the record. S.D.C.L. § 15–26A-48 to 53. The appellant's brief is due forty-five days after the transcript is received, or forty-five days after the notice of appeal is served if a transcript has already been prepared or if none is ordered. S.D.C.L. § 15-26A-75(1). The appellee's brief is due forty-five days later. S.D.C.L. § 15-26A-75(2). The appellant's reply brief is due

fifteen days later. S.D.C.L. § 15-26A-75(3). Then the case may be set for argument. In due course the Supreme Court issues a decision. S.D.C.L. § 15-30-2.

The Supreme Court process takes at least a year, and usually much longer. As this brief is being written, the most recent Supreme Court decisions were filed on April 16, 2025. https://ujs.sd.gov/supreme-court/opinions/ (last visited May 20, 2025). The notice of appeal in one, *Christiansen v. Morrell*, 2025 S.D. 25, was filed March 29, 2024. Doc. 33 Ex. 22. The notice of appeal in another, *Brewer v. Tectum Holdings, Inc.*, 2025 S.D. 23, was filed July 18, 2023. Doc. 33 Ex. 23. The notice of appeal in the third, *Sturzenbecher v. Sioux County Ranch, LLC*, was filed December 14, 2022. Doc. 33 Ex. 24. So the times from *conclusion* of the circuit court case to Supreme Court decision in the three cases were twelve months, twenty-one months, and twenty-eight months.

No case can be litigated to conclusion from filing in the circuit court through decision in the Supreme Court in the nine months from early March to early November. And the appeal may reverse the circuit court's decision, as it did in *Thom v. Barnett*, 2021 S.D. 65, 967 N.W.2d 261, in which the State lost in the circuit court but won on appeal. (*Thom v. Barnett* was litigated from beginning to end in twelve months, but only that fast because, as the Supreme Court decision reflects,

the issues were purely legal. With no factual issues, there was no discovery, no depositions, no testimony, no trial, and no findings.) So in any petition challenge that is appealed to the Supreme Court, citizens cannot know what the outcome will be when they vote. The alleged purpose of HB 1184 is contrived.

G. In light of South Dakota's long history of allowing—or in some cases requiring—legal challenges to be brought after an election rather than before it, the alleged purpose of HB 1184, even if it were true, could not justify suppressing three months of core political speech

The State's argument that the First Amendment allows three months of core political speech to be suppressed so that parties can, instead, use those three months litigating whether the issue should appear on the ballot, leaves unanswered a critical question: what is the big deal about creating three more months for attorneys to litigate the case while it heads toward the Supreme Court? Or in legal terms, how is this a "compelling" state interest (if strict scrutiny applies) or a "necessary" one (if *Anderson*/*Burdick* applies)?

The answer is the alleged interest is neither "compelling" nor "necessary" because there is no reason to suppress three months of speech to get three more months of pre-election litigation. As the following cases show, either way the case can and will be decided by the Supreme Court after the election.

State ex rel. Cranmer v. Thorson, 68 N.W. 202 (S.D. 1896), was a pre-election attempt to preclude a vote on an amendment to the South Dakota constitution. The court ruled that it would not hear the issue until after the election. So the voters went to the polls without knowing if their votes would matter.

Gooder v. Rudd, 160 N.W. 808 (S.D. 1916), was a post-election challenge to a municipal election on the ground that an insufficient number of people had signed the petition calling for the election. Their opponents argued that they waited too long to file their challenge. The court disagreed, allowed the challenge, and overturned the election.

Barnhart v. Herseth, 222 N.W.2d 131 (S.D. 1974), was a post-election challenge to a constitutional amendment. The challenge could have been brought before the election. The voters did not know when they voted how the case would be decided. No one thought this was a problem, or at least not enough of one to mention.

Bienert v. Yankton Sch. Dist., 507 N.W.2d 88 (S.D. 1993), was a post-election challenge to a school district election. The challenge could have been brought before the election. The voters did not know when they voted how the case would be decided. No one thought this was a problem, or at least not enough of one to mention.

S.D. State Fedn. v. Jackley, 2010 S.D. 62, ¶¶ 10-11, 786 N.W.2d 372, 376, was a pre-election challenge to the constitutionality of a proposed state constitutional amendment; the court held that any such challenge would have to wait until after the election. Again the voters went to the polls without knowing whether their votes would matter.

Curd v. State, Civ. 16-230 (Hughes Co. Circuit Court), was a post-election challenge to an initiated law. Doc. 33 Ex. 20. The challenge could have been brought before the election. The voters did not know when they voted that there would be a case—let alone how it would be decided. No one thought this was a problem, or at least not enough of one to mention.

Most recently, *Thom v. Barnett*, 2021 S.D. 65, 967 N.W.2d 261, was a post-election challenge to a constitutional amendment. It could have been brought before the election. The voters did not know when they voted that there would be a case, or how it would be decided. The Supreme Court again ruled that this was not a problem. The Supreme Court did not even mention the fact that voters did not know when they voted that there would be a case, or how it would be decided.

Even Speaker Hansen agrees that election challenges can be resolved after the election. In *Life Defense Fund v. Dakotans for Health*, 49 CIV 24-002366, Hansen as

attorney for his organization Life Defense Fund, on behalf of his client, admitted this. Doc. 33 Ex. 25 (Memorandum Decision of October 28, 2024 at 4) ("As argued by DFH, the Plaintiff admits that this case can be resolved after the election.")

In summary, South Dakota has a long history of election challenges being resolved after elections. The alleged state interest in voters knowing, before they vote, how a challenge may be resolved did not exist until the 2025 Legislature and Speaker Hansen contrived it. Throughout South Dakota history, when voters go to the polls, they do not and cannot know whether the election result will be challenged, let alone what the result will be.

V. The State's remaining arguments lack merit

The State makes five additional arguments. *First*, the State argues that HB 1184 is valid on its face. Doc. 25 at 14-15, responding to Doc. 8 at 17-18. The issue is whether if HB 1184 is unconstitutional, it is unconstitutional only as applied to DFH, or unconstitutional as applied to all initiative petitioners. The State does not suggest any grounds that could justify holding HB 1184 unconstitutional as to DFH but constitutional as to other initiative petitioners. So if the law is unconstitutional as to DFH, it is unconstitutional as to all.

"The important point is that plaintiffs' claim and the relief that would follow" by issuance of an injunction "reach beyond the particular circumstances of these plaintiffs." *Doe v. Reed*, 561 U.S. 186, 194 (2010). In a First Amendment case, "a law may be invalidated as [facially] overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021), quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010). In this case, as in *Bonta*, 594 U.S. at 618, "the pertinent facts . . . are the same across the board[.]" So just as facial relief was appropriate in *Bonta*, facial relief is appropriate here.

Second, the State recycles false allegations by Speaker Hansen's organizations, Life Defense Fund (LDF) and South Dakota Right to Life, against DFH. Doc. 25 at 21-22. The Attorney General's letter of October 31, 2023, that the State cites was based on allegations by South Dakota Right to Life. Doc. 25-1 at 22, bottom of page showing "CC: SD Right to Life." Speaker Hansen is the Vice President of South Dakota Right to Life. Doc. 33 Ex. 14, lower right hand corner.

Dakotans for Health responded to the Attorney General's letter two days later, asking to see the evidence that SD Right to Life submitted. Doc. 33 Ex. 26. The

State does not claim that it ever filed any allegations of any kind, even civil, against anyone based on SD Right to Life's allegations.

The State falsely alleges that "[b]ased on these concerns"—i.e. alleged misconduct by DFH—"Speaker Hansen took it upon himself as a citizen and someone interested in the subject matter of Amendment G to independently review the petitions filed by Plaintiffs." Doc. 25 at 22. The State obviously is unaware that even before DFH circulated a single petition, Speaker Hansen published a screed citing his religious beliefs, asking for money, and announcing his intention to oppose the *Roe v. Wade* initiative by all means necessary. Doc. 33 Ex. 14. ("I truly believe the Lord will bless our effort if we answer his call to defend life. We're up against a lot, but if we work together and contribute what we can, we can prevail. Your donation at www.lifedefensefund.com will be used to fund this resistance campaign at every single step of the way.")

Before petition circulation began, Speaker Hansen promised to "sue [Roe v. Wade petition circulators] when they break our campaign finance and petition circulation laws." Doc. 33 Ex. 14. And sue them he did. Doc. 25-1 at 18, listing Hansen as co-counsel of record. DFH denied all charges. Doc. 33 Ex. 27. Hansen never proved a single allegation. And despite his request that "the Court declare

Dakotans for Health in violation of SDCL § 2-1-21 and prohibit Dakotans for Health and those who worked with or for it from being a petition sponsor or petition circulator and from performing any work for any ballot question committee for a period of four years" (Doc. 25-1 at 17), after the election he quietly dismissed the entire case, including this request. Doc. 33 Exs. 28 and 29. This mooted DFH's allegations of contempt against Life Defense Fund for instructing its witnesses to disobey deposition subpoenas. Doc. 33 Exs. 30 and 31.

Third, the State says that with three more months, the LDF's challenge to the DFH petition could "potentially" have been tried in October 2024, not January 2025. Doc. 25 at 23. Then it says that with three more months, "it is likely that [the parties] would have completed their court challenge and had resolution prior to the election." Doc. 25 at 25. Neither statement is true. Not even the circuit court portion of the case would have been completed in three more months. The trial was scheduled to begin Monday, January 27, 2025, and last through Friday, February 7. Doc. 33 Ex. 32. So had the case begun three months earlier, the last day of the trial would have been November 7, 2024—two days after Election Day.

And November 7 would not have been the end of the circuit court case. LDF listed more than fifty exhibits, some including multiple documents such as "photos,"

"videos," and "screenshots," and "documents." Doc. 33 Ex. 33. And it listed hundreds of potential witnesses. Doc. 33 Ex. 34. After the trial was concluded, the circuit court would have had to reach a decision, write a (presumably long) opinion, receive proposed findings and conclusions, receive objections to proposed findings and conclusions, then enter its own findings and conclusions. Then the appeal would have begun. So three more months would not have allowed anything to be concluded before the election—even in circuit court.

Fourth, the State argues that initiated measures made the ballot in 2016, 2018, and 2020, so the one-year deadline for petitions that existed before *SD Voice v. Noem* should not be a problem. But *SD Voice v. Noem*, *supra*, 60 F.4th at 1079, rejected this argument ("The only other argument South Dakota raises regarding whether the deadline implicates the First Amendment is evidence of successful petitions despite the filing deadline." The court ruled: "we agree with the district court that South Dakota's filing deadline under South Dakota Codified Laws § 2-1-1.2 implicates the First Amendment.")

Fifth and finally, the State asserts that "finding in favor of Plaintiffs' rights to gather their petition signatures simultaneously suppresses the rights of anyone who feels compelled to challenge those signatures." Doc. 25 at 28. But not so. Anyone

who wants to challenge petition signatures can do so, regardless of how this case is decided.

VI. Conclusion

Judge Kornmann held that "a filing deadline [for initiated laws] of six months before the election at which the initiative would receive a vote is the constitutional limit for how remote a deadline may be set from the election." *SD Voice v. Noem*, 557 F. Supp. 3d 937, 948 (D.S.D. 2021). Collateral estoppel bars re-review of this holding. Even if collateral estoppel does not apply, HB 1194 survives neither strict scrutiny nor *Anderson/Burdick* review.

The State's only alleged interest is disconcertingly newly-discovered, and is contrary to its practice in 2016 and 2020 of litigating challenges to initiated measures after the election. S.D.C.L. § 2-1-18 eliminates any State interest in a petition challenge by prohibiting the State from being involved in one (except to address signature verification by the Secretary of State). Three additional months of litigation will not result in a final determination before an election, because even if the circuit court completes its work in that time, the losing party is likely to appeal to the Supreme Court. The Supreme Court has approved, and sometimes required,

post-election litigation of petition challenges. So HB 1184 prohibits three months of core political speech for no justifiable purpose, so it violates the First Amendment.

Dated: May 27, 2025[1]

Respectfully submitted,

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Certificate of Service

I certify that on May 27, 2025, I filed this document using CM/ECF, thereby causing automatic electronic service to be made on defendant.

/s/ James D. Leach
James D. Leach

[1]This brief was due May 26; because May 26 was Memorial Day, F.R.Civ.P. 6(a)(1)(C) extended the due date to May 27.