UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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



**Memorandum in Support of**
**Motion for Preliminary and Permanent Injunction**

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## I. Summary of case

The issue in this case is whether South Dakota can set the deadline for filing initiated measures more than six months before an election. This issue was decided in 2023 in *SD Voice v. Noem*, Civ. 1:19-CV-1017-CBK. The court ruled that under the First Amendment, "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, 945-48 (D.S.D. 2001).

The Eighth Circuit affirmed the district court's holding that South Dakota's one-year pre-election filing deadline for initiated laws violated the First Amendment. The court also held that the one-year pre-election filing deadline for proposed constitutional amendments violated the First Amendment, stating that "Neither the district court nor South Dakota offers any legal basis for distinguishing the deadlines to submit petitions to initiate state statutes from petitions to amend the state Constitution. Nor do we discern one." *SD Voice v. Noem*, 60 F.4th 1071, 1083 (8th Cir. 2023). The court reversed the district court's order imposing a filing deadline of the first Tuesday in May, ruling that it was up

to the South Dakota Legislature to set a new deadline. *Id.* The Legislature then set the deadline as the first Tuesday in May. SDCL §§ 2-1-1.1 and 2-1-1.2.

In 2024 plaintiffs and others brought four proposed initiated laws and constitutional amendments for public vote by the citizens of South Dakota. This led the 2025 Legislature to enact new restrictions on initiatives, and to pass a Joint Resolution that will place a proposed constitutional amendment on the 2026 ballot that would raise the vote required to enact an initiated constitutional amendment from 50% to 60%. As part of its anti-initiative actions, the Legislature changed its 2023 law setting the filing deadline as the first Tuesday in May, moving it back to the first Tuesday in February. Declaration of James D. Leach ¶ 2. Under *SD Voice v. Noem*, the nine-month pre-election filing deadline plainly violates the First Amendment.



## II. Statement of facts

In December 2024, Dakotans for Health, a South Dakota ballot question committee and advocacy organization, and Rick Weiland, its Chair ("DFH") began the legally-mandated process of filing with the State, and obtaining State approval, to circulate two citizen petitions for the 2026 ballot. Both proposals would amend Article III, § 1 of the Constitution. One would add: "Any law or measure passed by

the Legislature affecting the people's exercise of their right to initiative and referendum is effective only if approved by the electors of the state at the general election immediately following Legislative passage." The other would add: "The Legislature may not repeal or amend a measure proposed by the people and approved by the electors for seven years from the measure's effective date, except by a three-fourths vote of the members elected to each house, and only if the repeal or amendment is approved by the electors of the state at the general election immediately following Legislative passage."

SB 1184 injures DFH in the same way that the one-year pre-election petition filing deadline injured plaintiffs in *SD Voice v. Noem*: it "limits the number of voices who will convey" DFH's message by imposing a deadline for petition circulation and signature nine months before an election; it "effectively prohibits circulating petitions" during that time, because anyone who circulates or signs a petition during that period "engages in a futile act"; it limits DFH's opportunity to speak with voters and train circulators; it makes it less likely that DFH will obtain enough signatures to qualify the matter for the ballot, thereby limiting its ability to make the political change it seeks the "focus of statewide discussion"; and it limits DFH's ability to

obtain the political change it seeks. *SD Voice v. Noem*, 60 F.4th 1071, 1078 (8th Cir. 2023).

## III. Plaintiffs have standing

In general, standing requires that plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022), quoting *Young America's Found. v. Kaler*, 14 F.4th 879, 887 (8th Cir. 2021). "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*, *supra*, 14 F.4th at 386. And when "threatened enforcement effort implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *Dakotans for Health v. Noem*, *id.*, quoting *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (cleaned up).



Plaintiffs in *SD Voice v. Noem* had standing because they were "burdened by the filing deadline" for initiated measures. 60 F.4th at 1077. DFH has standing here for the same reason: because its work to place initiatives on the ballot will be harmed by the unconstitutional early filing deadline. Complaint ¶ 36, quoting Declaration

of Cory Heidelberger ¶ 11. HB 1184 causes DFH to suffer an injury in fact, because defendant must enforce it, an injury that will be redressed by a favorable decision in this case. So DFH has standing.

## IV. Collateral estoppel bars 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

Federal common law determines whether an earlier federal case precludes a later one. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Federal common law provides that "Under claim preclusion, 'a final judgment on the merits of a action precludes the parties . . . from relitigating issues that were or could have been raised in that action.'" *Magee v. Hamline Univ.*, 775 F.3d 1057, 1059 (8th Cir. 2015), quoting *Knutson v. City of Fargo*, 600 F.3d 992, 996 (8th Cir. 2010) (ellipsis by court). Here, the prior litigation determined that more than a six-month pre-election filing deadline violated the First Amendment. The State appealed and lost. On remand, it gave up and accepted the district court's determination. Now, two years later, it wants to try again, this time with a nine-month deadline. But claim preclusion bars the State from relitigating the final determination that "a filing deadline 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, 945, 948 (D.S.D. 2021).

Typically, the elements of claim preclusion are: "(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies." *W.A. Lang* Co. *v. Anderberg-Lund Printing Co.*, 109 F.3d 1343, 1346 (8th Cir. 1997), quoting *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983).

Applying these elements here, the first suit resulted in a final judgment on the merits, and was based on proper jurisdiction. Both suits involved the same claim: that the State's pre-election petition filing deadline violates the First Amendment. The State is the same real party in interest. Plaintiffs in the two cases are different—SD Voice and Cory Heidelberger in the first case, Dakotans for Health and Rick Weiland in this one—so the only question is whether this allows the State to avoid being collaterally estopped from relitigating the same issue it lost in *SD Voice v. Noem*.

The answer is that it does not, because the fourth element, "mutuality," has not been part of federal common law for more than half a century. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979) ("the mutuality requirement was criticized

almost from the inception. Recognizing the validity of this criticism, the Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation [402 U.S. 313 (1971)]* abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid.") Beyond patent law, the "'broader question' before the Court [in *Blonder-Tongue*] . . . was 'whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.' . . . The Court strongly suggested a negative answer to that question." *Parklane Hosiery Co. v. Shore*, *supra*, 439 U.S. at 327-28, quoting *Blonder-Tongue, supra*, 402 U.S. at 328.



Nonmutual offensive collateral estoppel—what DFH invokes against the State—is impermissible where it would be "unfair" to a defendant. *Parklane Hosiery Co.*, *supra*, 439 U.S. at 330. *See Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 757 (8th Cir. 2003) (*Parklane Hosiery's* "fairness" test applies with respect to nonmutual offensive collateral estoppel). *Parklane Hosiery* says that "the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." 439 U.S. at 331. Here, there is every reason

to apply it, and no reason not to do so. The State had a full and fair opportunity to litigate against similarly-situated plaintiffs. The State could not have thought that it could lose *SD v. Noem* and later relitigate the same issue. The State had every reason to litigate the issue fully, and did so.

*Trail v. 3M Co.*, 2020 U.S. Dist. Lexis 128366, 2020 WL 4193868 (D. Minn.), applied nonmutual offensive collateral estoppel against a defendant who had earlier litigated and lost its claim that the Federal Officers Removal Statute, 28 U.S.C. § 1442(a)(1), allowed it to remove product liability litigation to federal court. There was no unfairness in precluding defendant from mounting the same defense in subsequent cases. 2020 U.S. Dist. Lexis 128366 ** 7 - 11.

*Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74 (2d Cir. 2019), reversed a district court's refusal to apply nonmutual offensive collateral estoppel because the district court erroneously believed that the doctrine could not be applied unless the "scope" of the two cases and the "causes of action" were "identical." *SD Voice v. Noem* may well be "identical" to the present case in "scope" and "causes of action," but all that matters is that the issue in question, meaning the "single, certain and material point arising out of the allegations and contentions of the parties," is the same. *Bifolck, supra*, 936 F.3d at 81, quoting *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 48 (2d

Cir. 2014) (bracket in *Bifolck* omitted). Here, that "single, certain and material point" is that "a filing deadline 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*, *supra*, 557 F. Supp. 3d at 948 (D.S.D. 2021).

Because the State's claim is precluded, it is not entitled to another trial on the merits to attempt to justify a pre-election petition filing deadline of greater than six months. "Parties are bound . . . 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Yankton Sioux Tribe v. U.S. Dept. of Health & Human Servs.*, 533 F.3d 634, 640 (8th Cir. 2008), quoting *Comm'r v. Sunnen*, 333 U.S. 591 (1948), and *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876). The State had its day in court; it is not entitled to another one.



## V. If collateral estoppel does not apply, on the merits House Bill 1184's nine-month pre-election filing deadline for citizen initiatives violates the First Amendment

### A. Standard of review

Petition circulation "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *SD Voice v. Noem*, 60 F.4th at 1078, quoting *Meyer v. Grant*, 486 U.S. 414,

421-22 (1988). Likewise, "[a] citizen's signing of a petition is core political speech." *Miller v. Thurston*, 967 F.3d 727, 738 (8th Cir. 2020) (cleaned up), quoting *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011).

Because House Bill 1184 forbids core political speech beginning nine months before an election, it severely burdens political speech, and strict scrutiny applies. HB 1184 "trenches upon an area"—petition circulation—"in which the importance of First Amendment protections is 'at its zenith.'" So the burden on the State to justify the law is "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

HB 1184 survives strict scrutiny only if it furthers a "compelling state interest" and is the "least restrictive means" of doing so. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021). *SD Voice v. Noem* strongly suggests that the standard of review is strict scrutiny: "we harbor doubt that the burden on the ability to engage in political speech as a result of the [one-year pre-election filing] deadline is less than severe." 60 F.4th at 1080. But the court found it unnecessary to resolve this issue, because it concluded that the statute failed even if its burden on speech was less than severe. *Id.* That lower standard is that the burden be "reasonable,

nondiscriminatory, and furthers an important regulatory interest." *SD Voice v. Noem*, 60 F.4th 1071, 1080.

**B. Argument**

The State cannot meet its "well-nigh insurmountable" burden, so HB 1184 fails strict scrutiny. Prohibiting petition circulation between nine and six months before an election satisfies *no* legitimate state interest, let alone a "compelling" one. *SD Voice v. Noem*, 60 F.4th 1071, 1080-83 (8th Cir. 2023) (reviewing South Dakota's attempt to justify its one-year pre-election filing deadline, and concluding that it failed to do so).

Nor does the nine-month deadline satisfy the standard for restrictions on speech that are not "severe." The State enacted a nine-month pre-election filing deadline in the teeth of Judge Kornmann's rulings that "[s]ix months gives the Secretary of State's office more than adequate time to do the work that must be done"; that six months satisfies "the State's legitimate interest in free, fair, and organized elections"; and that "a filing deadline 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, 945, 948 (D.S.D. 2021).

Judge Kornmann's ruling binds the State. "[W]here the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009). And "when a judgment is clear and unambiguous, a court must adopt, and give effect to, its plain meaning." *McKenzie County, ND v. United States*, ___ F.4th ___, 2025 U.S. App. Lexis 6474, * 19, 2025 WL 866056 (8th Cir. March 20, 2025) (cleaned up). Judge Kornmann's ruling is plain, clear, and unambiguous, so it controls this case.



The Eighth Circuit affirmed Judge Kornmann's holding that the one-year filing deadline for an initiated law violates the First Amendment, and reversed his holding that the one-year filing deadline for an initiated constitutional amendment does not violate the First Amendment. *SD Voice v. Noem*, 60 F.4th 1071 (8th Cir. 2023). The State then enacted a deadline consistent with Judge Kornmann's ruling: the first Tuesday in May. *SD Voice v. Noem*, both in the district court and on appeal, establishes that the nine-month pre-election filing deadline violates plaintiffs' First Amendment right to engage in the core political speech of petition circulation to seek political change.

*SD Voice v. Noem* establishes as a matter of law multiple reasons supporting this conclusion:

- A filing deadline in early February instead of early May means it is "less likely that [plaintiff] will garner the number of signatures necessary to place a matter on the ballot, thus limiting its ability to make its political causes the focus of statewide discussion." *SD Voice v. Noem*, *supra*, 60 F. 4th at 1078, quoting *Meyer v. Grant*, 486 U.S. 414, 423 (1988) (cleaned up);
- "Common sense" is that restricting petition circulation by the earlier filing deadline will "dilute the effectiveness of the speech." *SD Voice v. Noem*, *supra*, 60 F. 4th at 1078; and
- "[D]eadlines far before election day are problematic because of the general disinterest of potential voters so far removed from elections." *SD Voice v. Noem*, 60 F.4th at 1080, quoting *Libertarian Party of Ark.*, 962 F.3d 390, 400 (8th Cir. 2020).



The bottom line is that "South Dakota, having adopted the petition process, must satisfy the First Amendment." *SD Voice v. Noem*, 60 F.4th at 1082, citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) ("The State, having chosen to tap the energy and the legitimizing power of the democratic process, must accord the

participants in that process the First Amendment rights that attach to their roles." (cleaned up)).

## VI. The nine-month deadline is unconstitutional on its face

A law is facially invalid "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Dakotans for Health v. Noem*, 52 F.4th 381, 388 (8th Cir. 2022), quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021). The nine-month pre-election filing deadline bans all petition circulation, which is "core political speech," during the three-month period from early February to early May of every election year. So it bans "a substantial amount of protected speech," has no plainly legitimate sweep, and is facially unconstitutional.



In *SD Voice v. Noem*, the district court held the deadline for initiated laws "unconstitutional and unenforceable." 557 F. Supp. 3d at 948. The court of appeals agreed, and held that the deadline for constitutional amendments was unconstitutional under the same analysis. 60 F.4th at 1082-83. Both the district court and court of appeals implicitly held the law unconstitutional on its face, not just as applied. So under *SD Voice v. Noem*, House Bill 1184's nine-month deadline is unconstitutional on its face.

## VII. A preliminary injunction should be granted

### A. Standards for a preliminary injunction

The standards for issuing a preliminary injunction are found in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 & n.5 (8th Cir. 1981) (en banc). The *Dataphase* factors are: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020). When, as here, the moving party seeks a preliminary injunction against implementing a state statute, it must show that it "is likely to prevail on the merits." *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 892 (D.S.D., W. Div. 2019), quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008) (*en banc*).



### B. All *Dataphase* factors favor a preliminary injunction

#### 1. Without a preliminary injunction, plaintiffs face irreparable harm

*Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 892 (D.S.D. 2019), ruled that the threat of irreparable harm to the plaintiffs was "clear and substantial," because "planning and seeking public support, must take place now, before and in

anticipation of the next construction season." Likewise, planning and seeking public support for signature collection on DFH's two proposed constitutional initiatives must take place now. Declaration of Cory Heidelberger ¶ 11.

The threat of irreparable harm to plaintiffs is "clear and substantial," because HB 1184 harms DFH's attempt to qualify its two proposed constitutional amendments for the ballot, by making the petition circulation process much harder. Declaration of Cory Heidelberger ¶¶ 11 a. to h. Making the process much harder makes it less likely that DFH will be able to raise the money needed to obtain the signatures to get its initiatives on the ballot, and less likely that it will motivate people to spend the time and do the work needed for success. Declaration of Cory Heidelberger ¶¶ 11 i. to j.



Generally, "[i]rreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 914-15 (8th Cir. 2015), quoting *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). DFH has no adequate remedy at law. DFH's injuries cannot be compensated with damages. And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Kirkeby v. Furness*, 52 F.3d

772, 775 (8th Cir. 1995), quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). So DFH is threatened with irreparable harm.

Courts have not hesitated to enjoin unconstitutional laws before they go into effect. *SD Voice v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019) (court enjoined unconstitutional election law before it can go into effect); *SD Voice v. Noem*, 432 F. Supp. 3d 991 (D.S.D. 2020) (same); *Dakotans for Health v. Noem*, 543 F. Supp. 3d 769 (D.S.D. 2021) (same).

**2. The threat of irreparable harm outweighs any potential injury to defendant**

Defendant faces no injury from being required to abide by the First Amendment. An election law case, *Nader 2000 Primary Comm., Inc. v. Hazeltine*, 110 F. Supp.2d 1201, 1204 (D.S.D., Central Div. 2000), found "there is no possible harm" to defendant Secretary of State if the injunction sought by plaintiffs was granted. The same is true here. So the threat of irreparable harm to DFH outweighs any possible potential injury to defendant from a preliminary injunction.



**3. Plaintiffs are likely to prevail on the merits**

For the reasons set forth above, DFH is likely to prevail on the merits.

**4. The public interest favors a preliminary injunction**

"The major purpose of the First Amendment 'was to protect the free discussion of governmental affairs.'" *SD Voice v. Noem*, 380 F. Supp. 3d 939, 946 (D.S.D. 2019), quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Indeed, "freedom of speech and association are constitutional rights that are central to all citizens of our country." *Dakota Rural Action v. Noem*, *supra*, 416 F. Supp. 3d at 893. In *Dakota Rural Action*, the court wrote that "[t]hose rights will be thwarted if the unconstitutional portions of the riot boosting legislation remain in effect," so public policy favored the plaintiffs. *Id.* In this case, DFH's First Amendment rights are thwarted by HB 1184, so the public interest favors DFH.



**5. Summary of *Dataphase* factors**

All *Dataphase* factors favor issuance of a preliminary injunction, so there are no factors to balance against each other. And "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012), quoting *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (per curiam). DFH has

shown a likely violation of its First Amendment rights, so a preliminary injunction is appropriate.

**C. A bond should not be required**

"The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." F.R.Civ.P. 65(c). But no bond should be required here. Defendant will sustain no costs or damages if this Court issues a preliminary injunction. Even if defendant could show that it could sustain costs or damages, this litigation seeks to vindicate the public interest in the First Amendment, so a bond should be waived. *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016) (district court did not err by not requiring moving party to post a bond, because the case was public interest environmental litigation).



Consistent with this authority, courts in this district have not required bonds in similar litigation. *Dakotans for Health v. Noem*, Civ. 21-4045, Doc. 31 (judgment imposed preliminary injunction against State enforcing Senate Bill 180 (2020), an election law, because it violated the First Amendment, bond not required); *Dakotans for Health v. Anderson*, Civ. 23-4075, Doc. 43 at 34 (opinion and order imposing

preliminary injunction against Minnehaha County to restrain First Amendment violation with respect to election activities, bond waived); *Dakotans for Health v. Ewing*, Civ. 23-5042, Doc. 12 at 16 (opinion and order imposing temporary restraining order against Lawrence County to restrain First Amendment violation with respect to election activities, bond waived).

**VIII. A permanent injunction should be granted**

"A permanent injunction requires the moving party to show actual success on the merits." *Miller v. Thurston*, 967 F.3d 727, 735 (8th Cir. 2020), quoting *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). "If actual success is found, courts must then consider three factors to determine whether a permanent injunction is warranted: '(1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest.'" *Id.*



If the Court rules that the nine-month pre-election filing deadline is unconstitutional, DFH will have succeeded on the merits. The other factors are met: the plaintiffs' First Amendment rights will be irreparably harmed without a permanent injunction; there are no harms to any other party from enforcement of

the First Amendment; and the public interest favors enforcing the First Amendment and thereby furthering free speech and free discussion of political affairs.

## IX. The balance of HB 1184 can stand if the first-Tuesday-in-February deadline is severed

Under federal law, "[b]efore severing a provision and leaving the remainder of a law intact, the Court must determine that the remainder of the statute is capable of functioning independently and thus would be fully operative as a law." *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 628 (2020) (cleaned up). The Supreme Court previously said that severability of an unconstitutional state law is "a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*). But *Barr*, *supra*, 591 U.S. at 631 n.11, casts doubt on this conclusion, suggesting that it may be inconsistent with *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).



If South Dakota law applies, it provides that if constitutional and unconstitutional provisions of a law "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are

thus dependent, conditional, or connected must fall with them." *State ex rel. Mills v. Wilder*, 42 N.W.2d 891, 897 (S.D. 1950), quoting *Warren v. Mayor and Aldermen of Charlestown*, 68 Mass. 84 (1854).

House Bill 1184 changed SDCL § 2-1-1.1, which deals with initiated constitutional amendments, and SDCL § 2-1-1.2, which deals with initiated laws, in only one respect: it moved the deadline for filing petitions from the first Tuesday in May to the first Tuesday in February. The unconstitutional provisions—the first-Tuesday-in-February deadlines—are severable. They can be severed and the rest of the law can remain in effect.

The sentences containing the two deadlines are found at page 2 line 4 to 7 and page 2 line 34 to page 3 line 3 of HB 1184. Declaration of James D. Leach in Support of Motion for Preliminary and Permanent Injunction, Exhibit 2. Without the deadlines, those sentences make no sense. So those sentences should be stricken. It would make sense—at least to DFH—that the result of this would be that the law would revert to the first-Tuesday-in-May deadlines. But as DFH understands *SD Voice v. Noem*, *supra*, 60 F.4th at 1083, this option is not open to the court. As DFH understands *SD Voice v. Noem*, only the Legislature may set new deadlines. Until it does so, South Dakota will not have deadlines. The Legislature may set deadlines

less than six months before the election; it may return to the first-Tuesday-in-May deadlines that were in effect from 2023 to 2025; or it may again set the deadlines earlier than the first Tuesday in May, and once again recycle this litigation.

## X. Conclusion

A majority of the Legislature dares the judiciary to enforce its previous holding: "The Court also holds that a filing deadline 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). There should be only one answer to the State's dare.

Dated: April 1, 2025

Respectfully submitted,

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Certificate of Service

I certify that on April 1, 2025, I served this document on defendant by emailing it to her attorney, Marty Jackley, Attorney General, at Marty.Jackley@state.sd.us.

/s/ James D. Leach
James D. Leach