In the Supreme Court
of the
State of South Dakota

Life Defense Fund and Leslee Unruh, Plaintiffs and Appellants, v. Dakotans for Health, Defendant and Appellee.	)))))))))))	Nos. 30759 & 30760

Appeal from the Circuit Court of Minnehaha County
Hon. John R. Pekas, Judge

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Jurisdictional Statement

Notice of entry of judgment was given on July 16, 2024. Life Defense Fund and Leslee Unruh filed a notice of appeal later the same day. Dakotans for Health filed a notice of review on July 17, but will not proceed with the issue raised because the circuit court did not decide it. Judgment was entered on July 19.

Statement of Issues

1. Is Secretary of State Monae L. Johnson an indispensable party in an action charging that she violated the law and must cancel five ballot measures?

The circuit court ruled that because Secretary Johnson is not a party, the case must be dismissed.

The most relevant authorities are:

S.D.C.L. § 21-24-7

S.D.C.L. § 15-6-19(a)(1)

S.D.C.L. § 2-1-18

Busselman v. Egge, 2015 S.D. 38, 864 N.W.2d 786

J. K. Dean, Inc. v. KSD, Inc., 2005 S.D. 127, 709 N.W.2d 22

In re Request of Governor Daugaard, 2016 S.D. 27, 884 N.W.2d 163

Sodak Distrib. Co. v. Wayne, 93 N.W.2d 791 (S.D. 1958)

2. Should this Court reach the issue of whether S.D.C.L. § 2-1-18 bars the Secretary of State from being represented by the Attorney General—and if it reaches the issue, should it reject LDF's argument?

LDF did not raise this issue in circuit court, so the circuit court had no opportunity to rule on it.

The most relevant authorities are:

South Dakota Constitution Art. IV, § 7

S.D.C.L. § 2-1-18

Haas v. Independent Sch. Dist., 9 N.W.2d 707 (S.D. 1943)

Mortweet v. Eliason, 335 N.W.2d 812 (S.D. 1983)

Gray v. Gienapp, 2007 S.D. 12, 727 N.W.2d 808

3. Did the circuit court properly hear and decide Dakotans for Health's dispositive motion to dismiss the complaint for failure to state a claim on which relief can be granted before allowing Life Defense Fund to begin discovery?

The circuit court heard and decided Dakotans for Health's dispositive motion to dismiss the complaint for failure to state a claim on which relief can be granted before allowing Life Defense Fund to engage in discovery.

The most relevant authorities are:

James v. Templeton, 2024 U.S. App. Lexis 5769, 2024 WL 1045229 (3d Cir. 2024) (unpublished)

Chambers-Johnson v. Applebee's Rest., 101 So.3d 473 (La. App. 2012)

4. Does LDF's unhappiness with Judge Pekas's ruling justify removing him from this case—and should LDF be rewarded for attacking him in its brief as "unwilling" to do his work, and for issuing a press release calling him "avoidant" and alleging that he made an "outlandish claim out of nowhere" that "plays into their motive to delay our case"?

The circuit court did not address this issue.

The most relevant authorities are:

Dunham v. Sabers, 2022 S.D. 65, 981 N.W.2d 620

In re Russell, 2011 S.D. 17, 797 N.W.2d 77

Statement of the Case

On May 9, 2024, two days after the deadline for ballot measure petitions to be submitted to Secretary of State Monae L. Johnson, Life Defense Fund (LDF) sent Johnson a 28-page memo. It asserted that S.D.C.L. § 2-1-1.4 (2018), a petition circulator law, is still in effect, even though it was repealed in 2019. LDF Appendix p. 24 to 51. LDF asserted that because it is still in effect, "All petitions from petition circulators out of compliance with HB 1196 [the source of S.D.C.L. § 2-1-1.4 (2018)] must not be considered." LDF Appendix p. 24.

S.D.C.L. § 2-1-1.4 (2018) required all petition circulators to submit detailed personal information to the Secretary of State before being allowed to circulate a petition. It required for each petition circulator:

> A sworn affidavit filed with the secretary of state pursuant to § 2-1-1.1 [initiated constitutional amendment], 2-1-1.2 [initiated law], or 2-1-3.1 [referred law] shall include information attesting to residency as defined in § 12-1-4 of each petition circulator. The following information shall be included in the affidavit:

(1) Current state in which the petition circulator is licensed to drive, driver license number, and expiration date;

(2) Current state of voter registration;

(3) Length of time at current physical street address and previous two addresses, and whether the prior addresses were located in South Dakota;

(4) A sworn statement by the petition circulator indicating the circulator's intention to stay in the state after the petition circulation deadline;

(5) Any other information relevant to indicate residency, including a library card or utility bill;

(6) Whether the petition circulator pays in-state tuition at any public postsecondary educational institution, if applicable; and

(7) Whether the petition circulator obtains any resident hunting or resident fishing license of any kind, if applicable.

The statute provided: "Failure to substantially comply with the provisions of this section shall disqualify the petitions from a petition circulator not in substantial compliance with this section from being considered." LDF Appendix p. 29.

Secretary Johnson did not respond to LDF's memo. LDF Appendix p. 4 ¶ 19. She certified five ballot measures for the November election, none of which complied with repealed S.D.C.L. § 2-1-1.4 (2018). Those ballot measures are to amend the constitution to add *Roe v. Wade* protections; to amend the constitution to create an open primaries system; to initiate a law to remove the state sales tax on groceries; to initiate a law to legalize recreational marijuana; and to refer the Legislature's pipeline bill to a vote of the people. https://sdsos.gov/elections-voting/upcoming-elections/general-information/2024/2024-ballot-questions.aspx (last visited July 24, 2024). This Court may take judicial notice of the Secretary of State'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).

LDF sued Dakotans for Health (DFH)—but not Secretary Johnson—for a declaratory judgment that the *Roe v. Wade* initiative "is disqualified and/or has not been validly submitted pursuant to South Dakota law," and that "the Secretary of State not place" it on the general election ballot. LDF Appendix p. 17. LDF's argument applies equally to the other four ballot petitions. LDF Appendix p. 24 ("All petitions from petition circulators out of compliance with HB 1196 [S.D.C.L. § 2-1-1.4 (2018)] must not be considered.")

LDF admits that S.D.C.L. § 2-1-1.4 (2018) was repealed by House Bill 1094 (2019). LDF Appendix p. 8 ¶ 34 ("House Bill 1094 also, in Section 2 of the bill, explicitly stated 'That § 2-1-1.4 be repealed.' Therefore, HB 1094 removed the requirements for the petition circulator residency affidavits.") LDF's legal theory is that S.D.C.L. § 2-1-1.4 (2018) lives on. LDF Appendix p. 5 to 12 and 24 to 51.

DFH moved pursuant to S.D.C.L. § 15-6-12(b)(5) to dismiss LDF's Complaint for failure to state a claim on which relief can be granted. DFH challenged LDF's theory that S.D.C.L. § 2-1-1.4 (2018) survived its repeal. DFH asserted that LDF's other grounds for keeping the *Roe v. Wade*

initiative off the ballot likewise fail to state a claim on which relief can be granted. The circuit court heard argument on July 15. At the conclusion of the hearing, the court orally granted the motion to dismiss. Its written Order, entered July 16, incorporates those reasons. LDF Appendix p. 52. It did not reach the grounds set forth in the motion to dismiss.

LDF issued a press release calling Judge Pekas an "avoidant judge" who made an "outlandish claim out of nowhere." LDF advised the press and public that "there are no legal grounds for this dismissal." LDF told the press and public that the dismissal "further plays into their motive to delay our case," without specifying who "their" is. DFH Appendix Tab 1 p. 1. LDF is co-chaired by its attorney Jon Hansen and plaintiff Leslee Unruh. https://lifedefensefund.com/#education-materials (last visited July 24, 2024).

Statement of Facts

On May 16, Secretary of State Johnson certified the *Roe v. Wade* initiative for the ballot. DFH Appendix Tab 2 p. 4. She also certified four other petitions for the ballot. None complied with S.D.C.L. § 2-1-1.4 (2018). All were submitted in accordance with A.R.S.D. §§ 5:02:08:07, 5:02:08:08,

and 5:02:08:09, which require that a petition circulator certify "I am a resident of South Dakota." A sample is DFH Appendix Tab 3 p. 7.

Dakotans for Health had collected 54,281 signatures on the *Roe v. Wade* petition and submitted them to Secretary Johnson. DFH Appendix Tab 2 p. 4. S.D.C.L. §§ 2-1-15 to 2-1-17 require the secretary of state to validate signatures by random sample in accordance with A.R.S.D. 5:02:08:00.05. Because Dakotans for Health submitted 54,281 signatures, the random sample was 723, which is 1.332% of the total. Secretary Johnson determined that of 723 signatures sampled, 614 were valid, a rate of 84.9239%. DFH Appendix Tab 2 p. 4.

Nationally, the average signature validity rate for initiatives certified to appear on a state ballot from 2017 to 2023 was 77.33%. https://ballotpedia.org/Initiative_petition_signature_validity_rates (last visited July 24, 2024). During the same time period, six initiatives qualified for the South Dakota ballot. Their signature validity rates were 73.41%, 74.63%, 79.22%, 81.00%, 81.37%, and 83.00%, an average of 78.77%. https://ballotpedia.org/Initiative_petition_signature_validity_rates (petitions for 2018, 2020, and 2022) (last visited July 24, 2024).

The *Roe v. Wade* petition validation rate of 84.9239% was significantly higher than the national average of 77.33% and significantly higher than the South Dakota average of 78.77%.

Applying the validation rate to the total number of signatures submitted, Secretary Johnson determined that the *Roe v. Wade* petition contained 46,098 valid signatures, substantially more than the 35,017 required to qualify for the ballot. DFH Appendix Tab 2 p. 4. So Secretary Johnson certified the petition to be placed on the ballot. DFH Appendix Tab 2 p. 4 ("Petition Status: CERTIFIED.") In certifying the petition and four other petitions, Secretary Johnson implicitly rejected LDF's argument that former S.D.C.L. § 2-1-1.4 (2018) is still in effect despite its 2019 repeal.

S.D.C.L. § 12-13-1 requires the secretary to "deliver to each county auditor a certified copy of each initiated measure, referred law, or proposed amendment to the Constitution to be voted on at the election," at least twelve weeks before the general election. This year that is August 13.

LDF's lawsuit was ready to file by May 9, as the legal memorandum and attachments LDF submitted to Secretary Johnson on that date show. LDF Appendix p. 24 to 51. When Secretary Johnson certified the *Roe v.*

Wade initiative for the ballot on May 16, LDF had 89 days to bring this action and see it to conclusion. Yet LDF squandered 46 of those 89 days. First, LDF waited 28 days, until June 13, to file this lawsuit. Then when DFH moved to dismiss on June 20, LDF waited 18 days to respond, instead of responding immediately so the motion could be heard as soon as possible. DFH Appendix Tab 4 p. 8 (first page showing date filed).

The inescapable backdrop to this litigation is LDF's prolonged campaign of falsehoods against DFH and the *Roe v. Wade* initiative. Those allegations continue in this litigation: LDF tells this Court that DFH "misrepresented the contents of the petition and even induced signatures by claiming the petition was for the grocery tax repeal," among other wrongdoing. Brief p. 3.

But it is LDF that has attempted to scam South Dakotans. On May 13, Secretary Johnson issued a Telephone Scam alert:

> Secretary of State Monae L. Johnson is warning South Dakotans to be aware of scammers after citizens have reported receiving calls, coming from random numbers with a 605-area code, where the caller is claiming they are with the Secretary

> of State's office. Scammers are pushing the voters to challenge the Abortion Rights ballot measure petitions.
>
> The Secretary of State's office has alerted law enforcement as to these groups impersonating themselves as SOS staff. The groups have stated they are the South Dakota Integrity Committee or the Petition Integrity Commission. It appears that the calls are trying to pressure voters into asking that their name be removed from the Abortion Rights petitions. 'Citizens in South Dakota, by law, have the right to petition and people like these scammers are eroding public trust in the election process,' stated Secretary Johnson."
>
> DFH Appendix Tab 5 p. 9.

The Petition Integrity Committee is a Political Action Committee whose Chair is LDF's attorney Jon Hansen. It lists LDF as an "Affiliated Organization" in the Statement of Organization that Mr. Hansen filed with Secretary Johnson. https://sdcfr.sdsos.gov/Search/Search Results.aspx?cid=1560&rid=3340 (last visited July 24, 2024).

A side-by-side comparison of *Roe v. Wade* with the South Dakota proposed constitutional amendment shows that the two are virtually identical:

Roe v. Wade	**Initiated Constitutional Amendment**
"For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."	"Before the end of the first trimester, the State may not regulate a pregnant woman's abortion decision and its effectuation, which must be left to the judgment of the pregnant woman."
"For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, *regulate the abortion procedure in ways that are reasonably related to maternal health*."	"After the end of the first trimester and until the end of the second trimester, the State may regulate the pregnant woman's abortion decision and its effectuation only in *ways that are reasonably related to the physical health of the pregnant woman*."
"For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is *necessary, in appropriate medical judgment, for the preservation of the life or health of the mother*."	"After the end of the second trimester, the State may regulate or prohibit abortion, except when abortion is *necessary, in the medical judgment of the woman's physician, to preserve the life or health of the pregnant woman*."

Sources: *Roe v. Wade*, 410 U.S. 113, 164-65 (1973), and Initiated Constitutional Amendment filed with the Secretary of State, DFH Appendix Tab 6 p. 11 (emphasis added)

LDF's falsehoods about the *Roe v. Wade* initiative include:

LDF Claim	**Why the LDF Claim is False**
The Initiative "overrid[es]" "protections for a mother from being forced to have an abortion against her will" Source: https://lifedefensefund.com/ (last visited July 24, 2024)	The Initiative contains no provisions on this subject, nor could it, as any law forcing anyone to have an abortion against her will would be obviously unconstitutional Source: Initiated Constitutional Amendment, DFH Appendix Tab 6 p. 11
The Initiative allows abortions "all the way to the point of birth" Source: https://lifedefensefund.com/ (last visited July 24, 2024)	South Dakota's existing trigger law allows third-trimester abortions to preserve the *life* of the pregnant woman. The Initiative also allows them when *necessary*, *in the doctor's judgment*, to preserve the *health* of the pregnant woman. Source: Initiated Constitutional Amendment, DFH Appendix Tab 6 p. 11

The Initiative "overrid[es]" "parents' rights to know when their minor daughter is pregnant and being pressured into an abortion" Source: https://lifedefensefund.com/ (last visited July 24, 2024)	Under *Roe*, which the Initiative copies, States *can* require parental involvement for minors seeking an abortion Source: *Bellotti v. Baird*, 443 U.S. 622 (1979)
The Initiative "overrid[es]" "conscience protections so that doctors and nurses cannot be forced to participate in performing abortions against their will" Source: https://lifedefensefund.com/ (last visited July 24, 2024)	The Initiative does not require anyone to do anything they don't want to do Source: Initiated Constitutional Amendment, DFH Appendix Tab 6 p. 11 In addition, federal law prohibits any person from being required "to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(b)(1).

"Even basic health and safety requirements for abortionists to follow, including requirements that abortions be done by a physician and an inspected and clean facility" are "overridden" Source: https://lifedefensefund.com/ (last visited July 24, 2024)	Under *Roe v. Wade*, states can require that an abortion is performed only by a licensed physician. *Connecticut v. Menillo*, 423 U.S. 9 (1975)

Argument

I. Secretary of State Monae L. Johnson is an indispensable party because this action charges that she violated the law and must cancel five ballot measures

A. LDF did not sue Secretary Johnson, so the circuit court properly dismissed the Complaint for failure to state a claim on which relief can be granted

Secretary Johnson made the decision that LDF complains about: she certified the *Roe v. Wade* initiative, and four other ballot petitions, that did not comply with S.D.C.L. § 2-1-1.4 (2018). Whether Secretary Johnson is an indispensable party is an issue of law, so it is reviewed de novo.

S.D.C.L. § 21-24-7 provides: "When declaratory relief is sought all persons shall be made parties who have or claim any interest which would

be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

LDF sought declaratory relief. It sought "a declaratory judgment that 'An initiated Amendment Establishing a Right to Abortion in the State Constitution' is disqualified and/or has not been validly submitted pursuant to South Dakota law," and "That the Secretary of State not place 'An Initiated Amendment Establishing a Right to Abortion in the State Constitution' on the general election ballot for the November 5, 2024, election[.]" LDF Appendix p. 17.

Secretary Johnson has an interest which would be affected by these declarations, because she concluded that the *Roe v. Wade* initiative and four other ballot questions qualify for the ballot. The declaratory judgment that LDF seeks would cancel her determination that those ballot questions qualify to be voted on by the people of South Dakota. So S.D.C.L. § 21-24-7 makes Secretary Johnson an indispensable party.

S.D.C.L. § 21-24-7 means what it says. *Dan Nelson Auto, Inc. v. Viken*, 2005 S.D. 109, ¶ 22, 706 N.W.2d 239, 247 ("we agree that the State was required to be joined as an indispensable party," citing S.D.C.L. § 21-24-7,

in a claim for declaratory relief against the Secretary of the Department of Revenue and Regulation.)

LDF claims that Secretary Johnson failed to understand and apply the law correctly, by failing to require DFH to satisfy S.D.C.L. § 2-1-1.4 (2018), even though it was repealed in 2019. LDF Appendix p. 5 to 12 and 24 to 51. This same theory applies equally to the other four ballot petitions, so if it is valid against the *Roe v. Wade* initiative, it is valid against them as well, and all are cancelled.

Even though its primary claim is against Secretary Johnson—and even though it would be impossible to grant judgment for LDF on this claim without reversing her decision—LDF chose not to sue her. LDF emailed the Complaint to the South Dakota Attorney General's Office, but not to Secretary Johnson. LDF Appendix p. 19. Secretary Johnson was not required to come forward and volunteer to be sued. The responsibility to present a legally adequate case rested with LDF.

S.D.C.L. § 15-6-19(a)(1) also makes Secretary Johnson an indispensable party. It provides: "A person who is subject to service of process shall be joined as a party in the action if: (1) In his absence

complete relief cannot be accorded among those already parties[.]" Secretary Johnson is subject to service of process. In her absence complete relief cannot be accorded among those already parties.

"An indispensable party is one 'whose interest is such that a final decree cannot be entered without affecting that interest or in whose absence the controversy cannot be terminated.'" *Busselman v. Egge*, 2015 S.D. 38, ¶ 6, 864 N.W.2d 786, 788, quoting *Thieman v. Bohman*, 2002 S.D. 52, ¶ 13, 645 N.W.2d 260, 262. Secretary Johnson's interest would be affected by a final decree, and without her the controversy cannot be terminated. So she is an indispensable party.

Government representatives such as Secretary Johnson whose interest would be affected by a final decree are indispensable parties. *Busselman v. Egge*, *supra* (governmental entity responsible for accepting a purported road dedication is an indispensable party); *Oyen v. Lawrence Cty. Comm'n*, 2017 S.D. 81, ¶ 10, 905 N.W.2d 304, 307 (governmental entity is indispensable where it has "an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may . . .

impair or impede [its] ability to protect that interest") (quoting S.D.C.L. § 15-6-19(a)(1), all alterations in original).

A government entity is an indispensable party even if relief is not sought against it, if the requested relief would affect the government. *J. K. Dean, Inc. v. KSD, Inc.*, 2005 S.D. 127, ¶ 20, 709 N.W.2d 22, 26 ("Despite the fact that Dean did not seek to have the shoulder area dedicated to the public, the effect of Dean's complaint and requested relief would have been such a dedication. The resulting dedication would have obligated the Town to maintain the shoulder area at taxpayer expense." So the Town was an indispensable party.) The requested relief would affect Secretary Johnson, so she is an indispensable party.

LDF does not mention S.D.C.L. § 21-24-7 or S.D.C.L. § 15-6-19(a)(1), but argues that the circuit court should rule Secretary Johnson's actions unlawful and enter judgment that she not place the *Roe v. Wade* initiative on the ballot. It asserts that if the circuit court so decides and Secretary Johnson does not abide by its decision, "any number of things [meaning remedies] could be pursued if needed." Brief p. 6. But LDF has it backwards. Indispensable parties must be joined before their interests are

adjudicated, not after. And a controversy is resolved in one lawsuit, not two.

LDF argues that "Litigants never have to prove entitlement to each and every item in their prayer for relief to be able to state a claim." LDF Brief p. 7. But that is not the issue. LDF seeks to require Secretary Johnson to remove the *Roe v. Wade* initiative from the ballot. This cannot be adjudicated unless Secretary Johnson is a party.

An Answer was not yet due when the case was dismissed, so DFH had not yet pled the indispensable party defense. Even if DFH never plead it, failure to join an indispensable party can be, and has been, raised for the first time on appeal, and even raised sua sponte by this Court. *Busselman v. Egge*, *supra*, 2015 S.D. 38, ¶ 7, 864 N.W.2d at 789.

B. S.D.C.L. § 2-1-18 must be read together with S.D.C.L. § 21-24-7 and S.D.C.L. § 15-6-19(a)(1)

LDF relies on S.D.C.L. § 2-1-18, which allows "any interested person who has researched the signatures contained on a validated petition" 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." The statute continues: "The summons and complaint for a challenge under this section shall be served on each petition sponsor as a party defending the validated petition being challenged."

LDF argues that S.D.C.L. § 2-1-18 justifies ignoring S.D.C.L. § 21-24-7 and S.D.C.L. § 15-6-19(a)(1). But all statutes are read together. *State v. I-90 Truck Haven Serv.*, 2003 S.D. 51, ¶ 8, 662 N.W.2d 288, 291 ("We read statutes as a whole along with the enactments relating to the same subject. We assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage. . . . the statutes at issue must be read as a whole, not in isolation.") So S.D.C.L. § 2-1-18 must be read together with S.D.C.L. § 21-24-7 and S.D.C.L. § 15-6-19(a)(1). Or to say it differently, S.D.C.L. § 2-1-18 does not justify disregarding S.D.C.L. § 21-24-7 and S.D.C.L. § 15-6-19(a)(1).

Reading these three statutes together so that Secretary Johnson must be joined as a party before she can be adjudicated to have acted illegally, and ordered to reverse her decision allowing South Dakotans to vote on the five ballot measures that she certified for the November ballot, is the

only reading consistent with fair play. People—including government officials—are entitled to be heard before they are ordered to do anything.

An interpretation of S.D.C.L. § 2-1-18 that would authorize a court to require Secretary Johnson, even though she is not a party, to reverse her decision that S.D.C.L. § 2-1-1.4 (2018) no longer is in effect would deny her due process of law. *In re Request of Governor Daugaard*, 2016 S.D. 27, ¶ 5, 884 N.W.2d 163, 166, quoting *In re Construction of Constitution*, 54 N.W. 650, 652 (S.D. 1893) ("There can be no due process of law unless the party to be affected has his day in court.") Because the "statute can be reasonably construed to avoid an unconstitutional interpretation," it should be so construed. *Steinkruger v. Miller*, 2000 S.D. 83, ¶ 8, 612 N.W.2d 591, 595.

In summary, LDF's argument contradicts S.D.C.L. § 21-24-7, S.D.C.L. § 15-6-19(a)(1), the rule that no one can be ordered to do anything unless that person is a party to the action, and the principle that statutes are construed to avoid unconstitutional results.

C. S.D.C.L. § 2-1-18 provides that a petition sponsor is "a" party, not "the only" party—so it is completely consistent with S.D.C.L. § 21-24-7 and S.D.C.L. § 15-6-19(a)(1)

LDF argues that S.D.C.L. § 2-1-18 makes the petition sponsor the only party to the proceeding. But the statute provides that a petition sponsor is *"a* party" defending the validated petition being challenged. DFH Appendix Tab 7 p. 13. "A definite article points to a definite object[.]" *The Chicago Guide to Grammar, Usage, and Punctuation*, Bryan A. Garner (2016) p. 61. But "An indefinite article points to a nonspecific object, thing, or person that is not distinguishable from the other members of a class." *Id.*

"A" and "the" have distinct legal meanings. *Brown v. Douglas Sch. Dist.*, 2002 S.D. 92, ¶ 23, 605 N.W.2d 264, 271 (a workers' compensation claimant need prove only that her work injury was "a" major contributing cause of her disability, not that it was "the" major contributing cause). The statute's reference to the petition sponsor as "*a* party" demolishes LDF's claim that "no party may defend the validated petition in a court challenge to the petition other than the petition sponsor." LDF Brief p. 9.

So the statute does not support LDF's claim that the petition sponsor must be the only party. The statute controls. *US W. Communications v.*

Public Utils. Comm'n, 505 N.W.2d 115, 123 (S.D. 1993) ("When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.")

In addition, LDF misreads S.D.C.L. § 2-1-18's requirement that "The summons and complaint for a challenge under this section shall be served on each petition sponsor as a party defending the validated petition being challenged," as if it read that the summons and complaint "*in all circumstances* need be served *only* on the petition sponsor." But the statute does not say "in all circumstances" or "only."

LDF's reading of the statute to mean that the summons and complaint in all circumstances need be served only on the petition sponsor is nonsensical, because it would mean that even though there may be other defendants, the summons and complain need not be served on them. Statutes are construed to avoid absurd or unreasonable results. *Dale v. Young*, 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74.

The words of S.D.C.L. § 2-1-18 show that a petition sponsor is not necessarily the only party. This is consistent with S.D.C.L. § 21-24-7 and

S.D.C.L. § 15-6-19(a)(1). The three statutes are consistent with each other. Statutes are construed to be consistent with each other. *In re Keystone XL Pipeline*, 2018 S.D. 44, § 16, 914 N.W.2d 550, 576 (court "proceeds upon the supposition that the several statutes are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions").

D. Secretary Johnson is not bound by the result of this litigation because she is not a party to it

Only parties and those in privity with them are bound by the result of a lawsuit. *In re Est. of Smeenk*, 2024 S.D. 23, ¶ 18, 6 N.W.3d 250, 254, quoting *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 42, 978 N.W.2d 786, 799. Secretary Johnson is not a party. And she is not in privity with Dakotans for Health. *Sodak Distrib. Co. v. Wayne*, 93 N.W.2d 791, 795 (S.D. 1958) ("Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property.")

More generally, "The concept of 'privity' refers to a cluster of relationships, see [Restatement 2d of Judgments] §§ 34 to 61, under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party, for example, the relationship of successor in interest." Restatement 2d of Judgments, § Scope. The relationship between Secretary Johnson and Dakotans for Health does not fall within a thousand miles of any of those relationships. Restatement 2d of Judgments §§ 34 to 61.

Because Secretary Johnson is not a party and not in privity with Dakotans for Health, she is not bound by a judgment in this lawsuit. LDF argues that "It is pure speculation, and very highly unlikely, that the Secretary of State would nonetheless place the issue on the ballot after the circuit court ruled it was disqualified, simply because the circuit court did not *order* the Secretary of State not to include it on the ballot," and that "If that very unlikely situation unfolded, any number of things [remedies] could be pursued if needed[.]" LDF Brief p. 6 (emphasis in original).

LDF's argument fundamentally misunderstands res judicata. LDF erroneously assumes that Secretary Johnson will be bound by the

judgment in this case even though she is not a party or in privity with a party. And LDF erroneously assumes that she would have a legal obligation to abide by a judgment to which she was neither a party nor in privity with a party. Secretary Johnson might well feel that a judgment saying that she misapplied the law is wrong and that she wants to be heard, and to be represented by the Attorney General or other counsel of her choice. She would be entitled to be heard and to be represented before she is adjudged to have acted contrary to law. She would have no obligation to cancel any ballot question until and unless ordered to do so after having received due process.

Secretary Johnson, like every other government official, is not bound by a judgment resulting from litigation between private parties who have chosen not to include the government official as a party. She will not be bound by the result in this case, because LDF chose not to include her as a party.

E. The circuit court's rationale and result were correct; its reference to an inapplicable legal principle does not change its correct result

If the circuit court states a wrong reason for its judgment, but reaches the right result, its judgment will be affirmed. *Communication Tech. Sys. v. Densmore*, 1998 S.D. 87, ¶ 16, 583 N.W.2d 125, 130, quoting *Owens v. City of Beresford*, 201 N.W.2d 890, 893 (S.D. 1972) ("This court has consistently held that where the trial court reaches the right result it will not be reversed even though based on erroneous conclusions or wrong reasons.") The circuit court reached the right conclusion, because S.D.C.L. § 21-24-7, S.D.C.L. § 15-6-19(a)(1), and due process of law all required LDF to sue Secretary Johnson to obtain relief against her.

Judge Pekas's oral ruling stated:

> Life Defense Fund and Ms. Unruh, are seeking, ah, to get Dakotans for Health somehow on the complaint, the authority to prohibit the Secretary of State from putting this on the ballot. I don't read that the Secretary of State is a party to this complaint. I don't know how Dakotans for Health can control the Secretary of State. They've submitted the information to the State of South

> Dakota. It has been accepted. The proper parties would be on a writ of quo warranto to challenge, I believe, the Secretary of State and their authority.

He continued:

> Dakotans for Health put this before the Secretary of State. The challenge, I believe, is now out of the hands of Dakotans for Health. It's within the confines of the Secretary of State's office, and they are the ones that should be hearing this particular matter on a challenge. . . . I don't believe that this is a complaint that relief can be granted. And so because of that, just considering what's in the complaint I have to grant the motion.

Transcript p. 41 to 42.

Judge Pekas recognized that the complaint did not seek relief that Dakotans for Health could grant. He stated: "Life Defense Fund and Ms. Unruh, are seeking, ah, to get Dakotans for Health somehow on the complaint, the authority to prohibit the Secretary of State from putting this on the ballot. I don't read that the Secretary of State is a party to this complaint. I don't know how Dakotans for Health can control the Secretary of State." Transcript p. 41. All that is true.

Judge Pekas noted that Dakotans for Health did what it needed to do by submitting the petitions to the Secretary of State. He stated: "They've submitted the information to the State of South Dakota. It has been accepted." Transcript p. 41. That is true.

Judge Pekas ruled that relief must sought from the Secretary of State. He stated: "The challenge, I believe, is now out of the hands of Dakotans for Health. It's within the confines of the Secretary of State's office, and they are the ones that should be hearing this particular matter on a challenge." Transcript p. 41. That is true.

Judge Pekas concluded that accordingly, the complaint must be dismissed for failure to state a claim on which relief can be granted. He stated: "I don't believe that this is a complaint that relief can be granted. And so because of that, just considering what's in the complaint I have to grant the motion." Transcript p. 42. Again that is true.

So the circuit court's reasoning and result were correct. One sentence of its ruling refers to an inapplicable legal principle: that "the proper parties would be on a writ of quo warranto to challenge, I believe, the Secretary of State and their authority." Quo warranto is not an

applicable remedy. But one legal misstatement never allows reversal of a correct result. Judge Pekas's reasoning and result were correct: relief was sought against Secretary Johnson that could not be granted because she is not a party. So the order appealed from should be affirmed.

F. LDF faults the circuit court for not "allow[ing]" it to add Secretary Johnson as a party, but LDF never asked to add her as a party

LDF asserts that "the circuit court should have allowed Life Defense Fund to add the Secretary of State as a party." LDF Brief p. 7. But it does not cite to the record showing that it made such a request. And for good reason: no such citation exists. LDF never made such a request.

The transcript of the hearing shows that the circuit court did not prevent LDF from adding Secretary Johnson as a party. When the circuit court announced its decision and reasoning, LDF did not attempt to discuss the issue with the circuit court. It did not ask the circuit court to allow it to add Secretary Johnson as a party. Transcript p. 39 to 42.

The circuit court did its duty, which was to rule on the case as the parties presented it. The circuit court would have stepped outside its role

if it had given LDF legal advice about how best to proceed. The circuit court cannot be faulted for not doing what LDF never asked it to do.

After the hearing, LDF forfeited two more opportunities to ask the circuit court to allow it to add Secretary Johnson as a party. After the court announced its decision at the conclusion of the hearing on the morning of July 15, and after the parties left the courtroom, but before the court entered its order on the afternoon of July 16, LDF could have asked the court to allow it to add Secretary Johnson as a party. It did not do so.

And after the circuit court entered its order, LDF could have filed a post-judgment motion under S.D.C.L. § 15-6-60(b), asking to add Secretary Johnson. It did not do so. Error occurs only if the circuit court fails to do something it should have done—not when it does not do what it was never asked to do.

Instead of taking any of these paths to add Secretary Johnson as a party, LDF immediately chose to appeal, stating in its press release "We will follow the judge's invitation to appeal this case." DFH Appendix Tab 1 p. 1. LDF cannot blame the circuit court for its own choice to appeal instead of moving to add Secretary Johnson as a party.

II. This Court should not reach the issue of whether S.D.C.L. § 2-1-18 bars the Secretary of State from being represented by the Attorney General—and if it reaches the issue, it should reject LDF's argument

LDF raises a new issue in this appeal that it did not raise in circuit court: it asserts that S.D.C.L. § 2-1-18 bars the Attorney General from representing the Secretary of State. Because this issue was not raised below, this Court should not reach it in this appeal. This Court "has said on countless occasions that an issue may not be raised for the first time on appeal." *Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983).

The remainder of this section addresses the merits of this issue. This is an issue of law, so if the Court reviews it, the standard of review is de novo.

The relevant sentence of S.D.C.L. § 2-1-18 provides: "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."

Laws are read to avoid constitutional questions, if possible. *Haas v. Independent Sch. Dist.*, 9 N.W.2d 707, 710 (S.D. 1943) ("One of the most firmly established doctrines of constitutional law is that a court will pass

on the constitutionality of a law only when necessary to the determination upon the merits of a cause under consideration." A court "will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.")

LDF argues that the statute precludes the Attorney General from appearing in this action. LDF says that he cannot appear because—LDF asserts—the signature verification process is not at issue. Brief p. 6 (LDF says Attorney General could appear "should the Secretary of State's signature-verification process become an issue (which it is not currently).")

But the "signature verification process" is exactly what LDF challenges. LDF asserts that Secretary Johnson improperly verified the signatures on the *Roe v. Wade* petition, because the petition circulators did not comply with S.D.C.L. § 2-1-1.4 (2018). So S.D.C.L. § 2-1-18 does not bar the Attorney General from appearing on behalf of Secretary Johnson in this action.

If S.D.C.L. § 2-1-18 were so interpreted, it would be unconstitutional, because the Legislature may not dictate to the Secretary of State whether she may be represented by the Attorney General. Nor may the Legislature

dictate to the Attorney General whether he may represent the Secretary of State. Article II of the South Dakota Constitution divides the powers of government of the state into "three distinct departments, the legislative, executive and judicial[.]" The Secretary of State and the Attorney General are constitutional executive officers. South Dakota Constitution Art. IV, § 7. The Attorney General is the executive branch's legal counsel. *In re Request of Governor Daugaard*, 2016 S.D. 27, ¶ 3, 884 N.W.2d 163, 165, citing *In re House Resolution No. 30*, 72 N.W. 892 (S.D. 1897).

Separation of powers among the legislative, executive, and judicial branches is "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. No branch is permitted to encroach on the powers of another branch. *State v. Moschell*, 2004 SD 35, ¶ 14, 677 N.W.2d 551, 558. "Each branch, so long as it acts within the limitations set by the constitution, may exercise those powers granted to it by the constitution without interference by the other branches of government." *State ex rel. Walter v. Gutzler*, 249 N.W.2d 271, 273 (S.D. 1977).

Applying these principles here, the Legislature may not dictate to the executive branch when and whether the Secretary of State may be represented by the Attorney General, nor may it dictate when and whether the Attorney General may represent the Secretary of State. As distinct departments of the executive, those matters are for the Secretary of State and Attorney General to decide without interference from the Legislature. And the Legislature may not dictate to the judicial branch when and whether it may allow the Secretary of State to be represented by the Attorney General, or when and whether it may allow the Attorney General to represent the Secretary of State.

III. The circuit court properly heard and decided Dakotans for Health's dispositive motion to dismiss the complaint for failure to state a claim on which relief can be granted before allowing LDF to begin discovery

In two paragraphs devoid of citation to the record, LDF criticizes the circuit court for allegedly "failing to consider the case on an expedited basis." LDF asks that upon remand, this Court "order the circuit court to immediately enter an expedited scheduling order which results in a final judgment date of August 13, 2024, so the ballot may be printed in a timely manner for the November 2024 election."

This is an issue of litigation management. DFH is not aware of a case from this Court establishing a standard of review for such matters. Other courts apply extremely deferential standards. *James v. Templeton*, 2024 U.S. App. Lexis 5769 * 5, 2024 WL 1045229 (3d Cir. 2024) (unpublished), quoting *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982) ("We will not interfere with a trial court's control of its docket except upon the clear showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant") (cleaned up); *Chambers-Johnson v. Applebee's Rest.*, 101 So.3d 473, 477 (La. App. 2012) ("An appellate court's interference with trial court matters, such as control of a docket and case management should be done so only with reluctance and in extreme cases.")

Both parties agreed that the case had to be decided by August 13. The only issue was how to accomplish this. LDF submitted a proposed schedule, and DFH responded. DFH Appendix Tab 8 p. 14 to 20. Later LDF submitted a new proposed schedule. The next day, DFH objected, explained why LDF's new proposed schedule was unworkable, and proposed a schedule that would be fair to DFH and allow the case to be

decided by August 13. DFH Appendix Tab 9 p. 21 to 32. DFH objected to LDF's request for completely unrealistic deadlines, such as three days to respond to written discovery, and two days to respond to the motion for summary judgment that LDF had weeks to prepare and was waiting to file. DFH Appendix Tab 9 p. 29 to 32, and Transcript p. 31 lines 13 to 14 and 24.

On May 9, LDF already had this lawsuit ready to file. LDF Appendix p. 24 to 51 (long memo with attachments to Secretary Johnson arguing that S.D.C.L. § 2-1-1.4 (2018) survived its 2019 repeal). From May 16, when Secretary Johnson certified the *Roe v. Wade* initiative for the ballot, until July 15, when the circuit court heard the motion to dismiss, was 63 days. LDF wasted 46 of them, first by not filing this lawsuit until June 13, and then by taking 18 days to respond to DFH's motion to dismiss, instead of responding immediately so that the motion could be heard sooner. LDF's lackadaisical pace is inconsistent with its demands that everyone else—DFH, the circuit court, and now this Court—move at warp speed.

After hearing argument on the motion to dismiss on July 15, the circuit court acted immediately, orally granting the motion. The parties

submitted proposed orders the next day, and the court entered an order that same day. The circuit court proceeded promptly and LDF was treated fairly. The circuit court appropriately heard and ruled on the motion to dismiss before allowing LDF discovery.

When the court heard argument on the motion to dismiss, it also heard argument on LDF's motion for an expedited scheduling order. Transcript p. 30 to 39. If the circuit court had denied the motion to dismiss, it would have addressed LDF's motion for an expedited scheduling order and DFH's objection. They became moot when the circuit court granted the motion to dismiss. Judge Pekas is not responsible for LDF's four-week delay in filing this case, for its 18-day delay in responding to the motion to dismiss, or for its choice not to name Secretary Johnson as a party, which required dismissal.

IV. LDF's unhappiness with Judge Pekas's ruling does not justify removing him from this case—and LDF should not be rewarded for attacking him in its brief as "unwilling" to do his work, and for issuing a press release calling him "avoidant" and alleging that he made an "outlandish claim out of nowhere" that "plays into their motive to delay our case"

LDF's disagreement with Judge Pekas's ruling is not grounds for removing him from the case. LDF attacks him personally, saying that his

ruling, and what he told LDF on the record about appealing, "is indication that Judge Pekas is not willing to review the relevant law regarding this case or work expeditiously." LDF Brief p. 10.

A claim that a judge is not "willing" to do something is a claim that the judge has made a conscious choice not to do it. LDF's claims that Judge Pekas is not "willing to review the relevant law" or "work expeditiously" are unsupported by anything in the record or outside of it. This Court has described similar claims of judicial bias as "unbefitting of the professionalism this Court expects of appellate counsel." *Dunham v. Sabers*, 2022 S.D. 65, ¶ 22 n.4, 981 N.W.2d 620, 632.

LDF's post-hearing press release criticizing Judge Pekas was even sharper and less befitting of professionalism. LDF's co-chairs are its attorney Jon Hansen and plaintiff Leslee Unruh. https://lifedefensefund.com/#education-materials (last visited July 24, 2024). The press release quotes Unruh, and at least one LDF attorney was involved in preparing it, because it attaches copies of statutes that must have come from an attorney.

The press release called Judge Pekas an "avoidant judge" who made an "outlandish claim out of nowhere." LDF alleged "there are no legal grounds for this dismissal," and that the "dismissal further plays into their motive to delay our case[.]" DFH Appendix Tab 1 p. 1. "Their" is unspecified and suggests that Judge Pekas may be working with Dakotans for Health to delay LDF's case.

Because a press release is designed, intended, and distributed for maximum public distribution, attacking a judge in a press release is substantially worse than criticizing a judge in a brief. A judge has no way to defend against such criticism. Such a press release lowers public regard for the judge, for the judiciary, and for the legal profession as a whole.

In re Russell, 2011 S.D. 17, 797 N.W.2d 77, was a disciplinary proceeding for a lawyer who, in addition to other misconduct, issued a press release that criticized a circuit court judge and "implied that [the judge] dragged [his] feet in setting a trial date." *Id.* ¶ 28, 797 N.W.2d at 84 [first bracket by counsel, second in original]. This Court affirmed the Referee's conclusion that this and other misconduct justified public censure.

LDF's press release is worse than the press release in *Russell*. The press release in *Russell* implied only that the circuit court judge acted too slowly. The press release here called Judge Pekas "avoidant," said he made an "outlandish claim out of nowhere," that "there are no legal grounds for this dismissal," and that the "dismissal further plays into their motive to delay our case."

Removing Judge Pekas would send a message to attorneys and litigants that the judicial system condones attacks on judges by press release. And it would show that by publicly raising the temperature of the debate, a litigant may get rid of a judge it has come to dislike, despite the absence of any legal grounds for doing so.

LDF relies on *Sarver v. Dathe*, 479 N.W.2d 913 (S.D. 1992) and *State v. Bult*, 1996 S.D. 20, 544 N.W.2d 214. In *Sarver v. Dathe*, this Court reassigned a case after a circuit court ignored this Court's directions, waited two years to enter an order it should have entered immediately, and granted an *ex parte* motion, all in favor of the same party. In *State v. Bult*, this Court reassigned a case thirteen years after a crime was committed, and after four appeals, three of which concerned sentencing. Neither remotely

resembles the present case, in which the circuit court promptly heard DFH's motion to dismiss and LDF's motion for scheduling order, carefully listened to both parties' arguments, and immediately at the conclusion of the hearing rendered a decision.

Conclusion

This Court should affirm, because Judge Pekas was correct that the case must be dismissed because Secretary Johnson is not a party.

If this Court were to reverse, it should remand the case to Judge Pekas to address the other grounds of DFH's motion to dismiss for failure to state a claim on which relief can be granted.

This Court may wish to address LDF's attacks on Judge Pekas in its brief and press release, as this Court did in *Dunham v. Sabers* and *In re Russell.*

Dated: July 29, 2024

Respectfully submitted,

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Statement Regarding Oral Argument

Dakotans for Health defers to the Court as to whether oral argument would be helpful.

Dated: July 29, 2024 Respectfully submitted,

/s/ James D. Leach
James D. Leach

Certificate of Service

I certify that on July 29, 2024, I served this document on appellants by filing it in Odyssey using the filing and service designation, which will automatically serve it on plaintiffs-appellants' attorneys of record.

/s/ James D. Leach
James D. Leach

Certificate of Compliance

This brief was prepared in Palatino Linotype 13 in Word Perfect. It contains 8,045 words.

/s/ James D. Leach
James D. Leach

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