UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS GOODTOOTH, INDIGENOUS ENVIRONMENTAL NETWORK, NDN COLLECTIVE, SIERRA CLUB, AND NICHOLAS TILSEN, Plaintiffs, vs. KRISTI NOEM, in her official capacity as Governor of the State of South Dakota, JASON RAVNSBORG, in his official capacity as Attorney General, and KEVIN THOM, in his official capacity as Sheriff of Pennington County, Defendants.	)	Civ. 5:19-cv-5026-LLP DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION TO THE SOUTH DAKOTA SUPREME COURT

COME NOW, Defendants Kristi Noem in her official capacity as Governor of the State of South Dakota and Jason Ravnsborg in his official capacity as Attorney General (collectively, State Defendants), and as an alternative to granting the State Defendants a judgment on the pleadings, respectfully request this Court certify the question of law as to the breadth of SDCL 22-10-6, 22-10-6.1 and Senate Bill 189 (challenged laws) to the South Dakota Supreme Court pursuant to SDCL 15-24A-1 *et seq*.

Pending before the Court is a challenge asserting that Senate Bill 189, 94th Session, South Dakota Legislature, 2019, "An act to establish a fund to

receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefor, and to declare an emergency" (Senate Bill 189 or The Act), and SDCL §§ 22-10-6 and 22-10-6.1 are unconstitutional, both facially and as-applied. Plaintiffs allege that these laws infringe upon their First Amendment rights to gather, speak, and protest. Plaintiffs further allege that the laws violate their rights to due process by failing to provide notice of what conduct constitutes a violation of these laws.

State Defendants assert the challenged laws are neither unconstitutional outright nor are they unconstitutionally vague or overbroad. The reasons for these assertions are more fully set out in the State Defendants' Memorandum in Support of Judgment on the Pleadings and in Response to Defendants' Motion for Preliminary Injunction (State Defendants' Memorandum in Support of Judgment on the Pleadings). Nonetheless, should this Court be reluctant to grant the State's motion based on questions regarding the breadth or interpretation of the challenged laws, State Defendants request this Court certify the question to South Dakota Supreme Court.

FACTUAL BACKGROUND

South Dakota's riot statutes have been part of the penal code since 1877. SDCL ch. 22-10; *State v. Bad Heart Bull*, 257 N.W.2d 715, 720-21 (S.D. 1977). Relying on these statutes, the Act was passed during the 2019 legislative session. After witnessing the staggering costs incurred by the state of North Dakota after protests to the Dakota Access Pipeline turned violent in 2016 and the millions in expenses incurred in the aftermath cleanup of the

environmental devastation left behind by these protesters, a package of legislation was enacted to mitigate similar potential costs to South Dakota counties and the State should a controversial pipeline be constructed through our State. *See* SB 189 and SB 190.[1] As part of this legislative package, the pipeline engagement activity coordination expenses (PEACE) fund was created for the coordination of exceptional public safety services referred to as extraordinary expenses, as defined, that would not have been incurred but for the pipeline construction. *See* SB 190. The legislative package also created a second fund, referred to as the riot boosting recovery fund, and further provides a civil remedy to the counties and State to pay the costs incurred because of rioters. *See* SB 189.

ARGUMENT

In *Brandenburg v. Ohio*, the United State Supreme Court held that "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447, 1827 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969). The question then is whether the Act and SDCL §§ 22-10-6 and 22-10-6.1 proscribe

[1] Senate Bill 189 is available at https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SB189P.htm&Session=2019&Version=Printed&Bill=189. Senate Bill 190 can be found at http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SB190ENR.htm&Session=2019&Version=Enrolled&Bill=190.

protected speech or "is directed to incit[ing] or produc[ing]" riots. *Id.* "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether the statute reaches too far without first knowing what the statute covers." *U.S. v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008). The answer to these questions turns on the interpretation of state laws and statutory schemes.

The United State Supreme Court has held that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75, 117 S.Ct. 105, 1073, 137 L.Ed.2d 170 (1997) (citations omitted). Likewise, the Eighth Circuit has held that a federal court should determine those issues presented to it, "'[a]bsent a close question of state law or a lack of state guidance[.]'" *County of Ramsey v. MERSCORP Holdings, Inc.*, 776 F.3d 947, 951 (8th Cir. 2014) (quoting *Anderson v. Hess Corp.*, 649 F.3d 891, 895 (8th Cir. 2011).

Pursuant to SDCL 15-24A-1:

> The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, or a United States district court, if there are questions of law of this state involved in any proceeding before the certifying court which may be determinative of the cause pending in the certifying court and it appears to the certifying court and to the Supreme Court that there is no controlling precedent in the decisions of the Supreme Court of this state.

While the South Dakota Supreme Court has issued opinions regarding several of the riot statutes (SDCL §§ 22-10-1, 22-10-4, and 22-10-5), there are no cases issued by the South Dakota Supreme Court discussing SB 189. *See*

State v. Kane, 266 N.W.2d 552, 552-56 (S.D. 1978). "'[U]nsettled questions of state law are best left to the states." *SDIF Ltd. P'ship 2 v. Tentexkota, LLC,* 2018 WL 6493160, at *2 (D.S.D. Dec. 10, 2018) (quoting *Poage v. City of Rapid City*, 431 F.Supp. 240, 246 (D.S.D. 1977)). In fact, the United States Supreme Court has held that when determining whether to certify a question to the appropriate state court, "it is sufficient that the statute is susceptible of the interpretation offered by [the State (that the Act and SDCL §§ 12-10-6 and 12-10-6.1 can be interpreted in a manner so as to be found constitutional], . . . and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would." *Bellotti v. Baird*, 428 U.S. 132, 148, 96 S. Ct. 2857, 2866, 49 L. Ed.2d 844 (1976). Likewise, SDCL 15-24A-1 permits this procedure when a question of law "may be determinative of the cause pending in the [district] court."

The Certification process in use today provides a more cost effective and quicker resolution to novel state law questions than was previously available as a matter of abstention under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *Arizonans for Official English*, 520 U.S. at 75-76, 117 S. Ct. at 1073. Under the Pullman abstention doctrine, "'federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.'" *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 700 (8th Cir. 2019) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). Here, Plaintiffs challenge newly-

enacted legislation and two statutes which have not been reviewed by the State's highest court. The State asserts that these statutes, when read in conjunction with each other, present constitutional regulation. If the Court has questions, however, Certification would allow this Court to "save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Arizonans for Official English*, 520 U.S. at 76, 117 S.Ct. at 1073 (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 214 (1974)).

A review of the factors considered by some sister courts in the Eighth Circuit indicate that certification is appropriate. Those factors include:

> (1) the extent to which the legal issue under consideration has been left unsettled by the state courts; (2) the availability of legal resources which would aid the court in coming to a conclusion on the legal issue; (3) the court's familiarity with the pertinent state law; (4) the time demands on the court's docket and the docket of the state supreme court; (5) the frequency that the legal issue in question is likely to recur; and (6) the age of the current litigation and the possible prejudice to the litigants which may result from certification.

Hagen v. Siouxland Obstetrics & Gynecology, P.C., 964 F.Supp.2d 951, 961 (N.D. Iowa 2013) (quoting *Leiberkneckt v. Bridgestone/Firestone, Inc.*, 980 F.Supp. 300, 310 (N.D. Iowa 1997)). The majority of these factors weigh in favor of certifying the question to the South Dakota Supreme Court.

The State has in place a procedure for certifying these very questions. As this case has just commenced, there is no prejudice or harm that will result to the parties due to certification. While this Court may be familiar with pertinent state law, there is no guidance on the Act from South Dakota's highest court.

Certification – a now well-established procedure –offers a fair opportunity for the State's highest court to adjudicate these questions should this Court find them subject to interpretation. *Harrison v. N.A.A.C.P*, 360 U.S. 167, 176-78, 79 S.Ct. 1025, 1030-31, 3 L.Ed. 1152 (1959)(state court should be given a reasonable opportunity to interpret and limit state enactments).

Resolution of this issue by the South Dakota Supreme Court will, at the very least, narrow the issues. A determination by the South Dakota Supreme Court that the challenged statutes fall within the permissible regulation as provided in *Brandenburg* and *Williams* may, in fact, resolve the matter entirely. Accordingly, the State moves this Court to certify the following question to the South Dakota Supreme Court:

> Are Senate Bill 189, SDCL §§ 22-10-6 and 22-10-6.1 limited to proscribing advocacy of the use of force or violence where such advocacy is directed to inciting or producing imminent lawless action that is likely to incite or produce such action?

CONCLUSION

The State asserts that the Act, SDCL §§ 22-10-6 and 22-10-6.1 are constitutional, both facially and as applied and under *Brandenburg*. The State further asserts that it has constitutionally regulated those activities which incite force or violence as defined by SDCL § 22-10-1. Moreover, the State contends that these enactments are not vague or overbroad. Should the Court determine that there is a question of law as to the breadth of activities covered by the Act, SDCL §§ 22-10-6 and 22-10-6.1, the State requests this Court

certify the question to the South Dakota Supreme Court to allow the State's highest court to interpret these state statutes.

Dated this 30th day of April, 2019

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CERTIFICATE OF COMPLIANCE

1. I certify that the foregoing document is within the limitation provided for in D.S.D. Civ. LR 7.1(B)(1) using Bookman Old Style typeface in 12 point type. Said Brief contains 2,072 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 30th day of April, 2019

/s/ *Richard M. Williams*
Richard M. Williams
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Richard M. Williams*
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