



How an Anti-Pot Governor Blocked Voter-Approved Legalization in South Dakota

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Kristi Noem is determined to defy the will of her constituents. The South Dakota Supreme Court will decide whether she can.

Last fall South Dakota became the first state to simultaneously approve legalization of medical and recreational marijuana. The success of the broader ballot initiative, which passed with support from 54 percent of voters, was especially surprising because the state is mostly Republican and largely conservative. But while voters were ready to legalize marijuana, Gov. Kristi Noem was not. Thanks to a legal challenge backed by Noem, the initiative has been blocked, and it may never take effect.

Seventeen days after the election, Pennington County Sheriff Kevin Thom and Col. Rick Miller, superintendent of the South Dakota Highway Patrol, filed a lawsuit arguing that the marijuana legalization initiative, known as Amendment A, violated the state constitution's restrictions on voter-approved amendments. Noem later said Miller was acting at her direction. In February, Sixth Judicial Circuit Judge Christina Klinger agreed with Thom, Miller, and Noem, ruling that the initiative violated the "single subject rule" and amounted to a "revision" of the state constitution, which requires a constitutional convention, rather than an amendment.

On the first point, Klinger concluded that Amendment A improperly "embrace[d] more than one subject" because it dealt with industrial hemp as well as marijuana, allocated the proceeds of a marijuana excise tax, created civil penalties for certain marijuana offenses, and barred disciplinary action against licensed professionals for advising the cannabis industry. In her view, these provisions "are not reasonably germane to the legalization of marijuana."

On the second point, Klinger noted that "the South Dakota Supreme Court has never directly ascertained the difference between an amendment and a revision." But based on decisions from other states, she concluded that the distinction depends on "the quantitative and qualitative aspects of the enactment." Although Amendment A "is not a drastic rewrite of the South Dakota Constitution," she said, it makes "far-reaching changes to the nature of South Dakota's governmental plan" by restricting the powers of the governor and the legislature with respect to marijuana. It "is therefore a revision."

Because of those defects, Klinger said, the initiative is "void and has no effect." South Dakotans for Better Marijuana Laws, the organization that backed Amendment A, has appealed Klinger's decision to the South Dakota Supreme Court, where oral arguments are scheduled for April 28. An amicus brief filed in support of the appeal by the Cato Institute (and joined by Reason Foundation, which publishes *Reason*) argues that blocking Amendment A defies the will of voters and undermines federalism.

"This case arises from the efforts of state officials who, having vehemently disagreed with the substance of Amendment A but having failed to persuade the state's electorate to adopt their views, now seek to set aside the will of the voters and to overturn the constitutional provisions endorsed and enacted by South Dakotans," the Cato brief says. "This case implicates matters of central concern to *amici*, not least the interests of all citizens to advance laws that indisputably increase their individual liberties and freedoms even when doing so diverges from the policies, preferences and practices of the federal government."

Noem praised Klinger's decision. "Amendment A is a revision, as it has far-reaching effects on the basic nature of South Dakota's governmental system," she said. "Today's decision protects and safeguards our constitution. I'm confident that South Dakota Supreme Court, if asked to weigh in as well, will come to the same conclusion."

Noem's determination to block Amendment A seems to be driven more by her anti-pot prejudices than by her commitment to upholding the abstruse rules governing amendments to the state constitution. "I was personally opposed to these measures and firmly believe they're the wrong choice for South Dakota's communities," she said after voters approved the medical and recreational marijuana initiatives. "We need to be finding ways to strengthen our families, and I think we're taking a step backward in that effort. I'm also very disappointed that we will be growing state government by millions of dollars in costs to public safety and to set up this new regulatory system."

State legislators proved more willing to set aside their personal views on marijuana in deference to the policy preferred by voters. "In my mind, [legalization is] inevitable because we've already seen the support from the public," Senate Majority Leader Gary Cammack said after Klinger's decision. "I didn't vote for recreational marijuana, but my constituents did," added Greg Jamison, another Republican senator. "Rarely do we get a chance to enact a law and not for sure know what our constituents think of that. Here we know."

In response to such comments from members of her own party, Noem threatened to veto any legalization bill the legislature might decide to pass. She also has tried, unsuccessfully so far, to stop the medical marijuana initiative from taking effect.

More recently, Noem suggested she might be open to decriminalizing low-level marijuana possession. A proposed bill that she was mulling last month would make possession of an ounce or less, currently a misdemeanor punishable by a maximum fine of \$2,000 and up to a year in jail, a petty offense, punishable only by a civil fine, for adults 21 or older. Repeat offenses would remain misdemeanors, although the maximum penalties would be less severe: a \$200 fine and 30 days in jail. The Sioux Falls *Argus Leader* reports that Noem's chief of staff "said the governor isn't necessarily in support of the draft proposal."

Amendment A, by contrast, would eliminate all penalties for adult possession or sharing of an ounce or less while authorizing the licensing and regulation of commercial suppliers. Adults also would be allowed to grow their own pot if they happened to live in a jurisdiction with no licensed retailers. Kristi Noem is not ready for that world, although she *might* be willing to support a decriminalization policy that was at the cutting edge of marijuana reform in the 1970s.