STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

SOUTH DAKOTA CANVASSING GROUP, Appellant, v. MINNEHAHA COUNTY, DAVISON COUNTY, LINCOLN COUNTY, AND PENNINGTON COUNTY, SOUTH DAKOTA, Appellees.	49CIV23-003402 **BRIEF OF APPELLEES, MINNEHAHA COUNTY, DAVISON COUNTY, AND PENNINGTON COUNTY, SOUTH DAKOTA**

Appellant, South Dakota Canvassing Group ("SDCG"), asks this Court to abrogate South Dakota law and exercise its power to compel Appellees, Minnehaha, Davison, and Pennington County ("Appellees"), to create and disclose certain confidential voter information ("Voter Data") and election machine data ("Machine Data"). This Court must decline. First, *res judicata* bars SDCG from relitigating its request for Voter Data and Machine Data. Second, it is the Legislature's role is to enact statutes governing the disclosure of "public records." The Legislature has done so, and the existing statutes express the will of the people. This Court's role is to interpret and enforce such statutes, thereby giving effect to the will of the people. This Court may not usurp the role of the Legislature by rewriting statutes or declining to enforce statutes as written. Here, SDCL 1-27-1.1 and SDCL 1-27-1.5 unambiguously preclude the disclosure of the Voter Data and Machine Data. For these reasons, Appellees respectfully request this Court dismiss SDCG's appeal in full[1].

[1] Appellees respectfully incorporate by this reference those arguments and authorities referenced in Appellee Lincoln County's brief.

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JURISDICTIONAL STATEMENT[2]

On October 26, 2023, the Office of Hearing Examiners ("OHE") issued a written opinion denying SDCG's request for the Voter Data and Machine Data. (Administrative Record ("AR") 5–12). On November 22, 2023, SDCG filed a notice of appeal of the OHE's final decision with this Court. (AR1–2). This Court has jurisdiction over this appeal subject to SDCL 1-26-30.2.

LEGAL ISSUES

SDCG raises eight arguments on appeal. (Appellant's Brief 1–2). These issues may be condensed and restated as follows:

1. Whether *res judicata* bars the SDCG's request for the Voter Data and the Machine Data.

   The OHE concluded *res judicata* barred SDCG's request for the Voter Data and Machine Data. (AR5–12).

2. Whether the Voter Data and Machine Data are "public records" subject to disclosure.

   The OHE declined to reconsider whether the Voter Data and Machine Data were "public records" because it concluded SDCG's requests were barred by *res judicata*. (AR5–12). However, in a former opinion, the OHE found that the Voter Data and Machine Data were not "public records" subject to disclosure. (AR40–46).

STATEMENT OF CASE

In February 2022, Cindy Meyer ("Meyer") and Jessica Pollema ("Pollema") requested the Voter Data and Machine Data from Minnehaha, Pennington, and Lincoln Counties under SDCL 1-27-1 (the "***First Action***"), and, when those requests were denied, appealed to the OHE. On May 17, 2022, the OHE issued a written opinion concluding that the Voter Data and Machine Data were exempt from disclosure under SDCL 1-27-1.5(24) (the "internal agency records" exemption) and SDCL 1-27-1.5(27) (the "confidential" records exemptions) and affirmed denial of the First

[2] Appellant's brief does not submit a jurisdictional statement in compliance with SDCL 1-26-33.3. Therefore, Appellees have provided a jurisdictional statement here.

Action. Around this time, Meyer and Pollema caused SDCG to be incorporated as a South Dakota nonprofit corporation and submitted another request for the Voter Data and Machine Data (the "***Second Action")*** to Appellees. After Appellees denied the request to produce the records in the Second Action, SDCG again appealed to the OHE. For the second time, the OHE issued a written opinion ("the Decision") affirming denial of the records request, although, this time, the OHE concluded the request was barred by *res judicata*.

The Decision was correct for several reasons and should be affirmed. First, as the OHE correctly concluded, the Second Action is barred by *res judicata*. The First Action and Second Action concerned identical issues and claims—whether the Voter Data and Machine Data were public records under South Dakota law— and the factual predicate underlying each of these claims was identical. As such, *res judicata* bars the Second Action in full, and SDCG may not relitigate its requests for Voter Data and Machine Data over and over again until it obtains the outcome it desires.

Secondly, as the OHE also correctly concluded, the Voter Data and Machine Data are not "public records" under South Dakota law. First, Voter Data and Machine Data are not public records under SDCL 1-27-1.1 because they do not exist and must be created by Appellees before they could be disclosed. Even if the records existed, Voter Data and Machine Data would be "internal agency records" under SDCL 1-27-1.5(24) and/or "closed or confidential records" under SDCL 1-27-1.5(27) and thus exempt from disclosure. As such, Appellees do not have the statutory authority to produce the records requested, and this Court must enforce South Dakota law by prohibiting disclosure. Rather than attempt to persuade this Court to abrogate South Dakota law and compel Appellees to disclose protected information, SDCG's recourse is limited to the legislative change process.

FACTUAL BACKGROUND

A. First Action – February 2022 to June 2023.

In February 2022, Meyer sent Minnehaha, Pennington, and Lincoln Counties nearly identical letters requesting "CVR (Cast Vote Records) from the November 3rd, 2020 election (specifically) and the November 8, 2016 election (if still available)." (AR104, 110, 123). In the letter, Meyer stated that Cast Vote Records could also be referred to as a "ballot log[] or summary of ballots." (*Id.*). This Brief refers to requests for these "Cast Vote Records" or a "ballot logs" as requests for "Voter Data." (*Id.*). Meyer asked that the Voter Data be produced in a "text, comma, or tab delimited file, or a text-based report, listing, in the sequence processed by the county, ***every ballot, its sequential ID, its timestamp, its method of voting (early in person, absentee mail-in, in person), the batch id and tabulator id***." (*Id.* (emphasis added)). Meyer asserted that this Voter Data was a "public record" subject to disclosure under SDCL 1-27-1. (*Id*.).

Minnehaha, Pennington, and Lincoln Counties sent Meyer letters denying her request for the Voter Data on various but overlapping grounds. (AR106, 111, 124). Pennington County stated that the Voter Data was "not required by South Dakota code to create or store" and thus it could not produce it. (AR111). Likewise, Lincoln County advised Meyer that "no such record exists" to satisfy the Voter Data request and denied the request. (AR106). In denying Meyer's request, Minnehaha County stated that the Voter Data was made "confidential" by South Dakota statute and, therefore, was not a "public record" under subject to disclosure. (AR124).

Shortly thereafter, in March 2022, Pollema sent Lincoln County a letter requesting "machine event logs from ES&S DS850 (voting machines) from October 29, 2020, to November 5, 2020."[3] (AR41). In that letter, Pollema explained that this data would provide information on

[3] The State of South Dakota uses voting machines distributed by Election Systems & Software, LLC ("ES&S"), a Delaware corporation, for the operation of its elections. (*See* AR112–19).

"when the [ES&S voting] machine[s were] turned on or off, time stamps, who logged in, software updates, etc." (*Id*.). This Brief refers to requests for these ES&S event logs as requests for "Machine Data." Lincoln County found the Machine Data was exempt from disclosure under SDCL 1-27-1.5 and denied the request. (AR89).

In April 2022, Meyer and Pollema filed requests for review of Minnehaha, Pennington, and Lincoln Counties' denials of their respective requests for the Voter Data and Machine Data under SDCL 1-27-43 to the OHE. (AR86–88, 95–97, 101–03, 107–09, 120–22). The OHE consolidated Meyer's and Pollema's requests for review into a single action pursuant to SDCL 15-6-42(a) and allowed the parties to submit briefing on the matter. (AR83).

On May 17, 2022, the OHE issued a written opinion affirming Minnehaha, Pennington, and Lincoln Counties' denials of the requests. (AR40–46). The OHE began by noting that the South Dakota Constitution, Article Seven, Section 3, requires the Legislature to enact laws to "insure secrecy in voting" and that the Legislative has done so in chapter 12 of the statutory code. (AR6). The OHE then found that disclosure of the Voter Data would "violate[] the secrecy of the ballot box" and numerous South Dakota statutes preserving the secrecy of ballots. (AR43–46). Specifically, the OHE found disclosure of the Voter Data would violate SDCL 12-17B-15, which requires ballots as well as "[a]ny program board which may be used in the automatic tabulating equipment" to be sealed after an election; SDCL 12-20-20, requiring ballots to be sealed; SDCL 12-20-21, forbidding the breaking of sealed ballots; ARSD 5:02:16:42, forbidding breaking of returned sealed ballots and election materials; and SDCL 12-20-32, making the breaking of sealed ballots a felony. (*Id*.). The OHE further stated:

> There are no laws or rules that allow the general public to peruse the ballots, look at when a specific ballot came into the voting place, or be given a database of information about the counted ballots, besides the vote count. The information Petitioners seek includes, among other things, the sequence a voter appeared at the

> voting booth and/or voted for specific candidates or questions. Revealing that information violates the secrecy of the ballot box.

(AR8). As such, the OHE rightly found that the Voter Data was exempt from disclosure under SDCL 1-27-1(27), which states that "[a]ny other record made closed or confidential by state or federal statute or rule" is not a "public record" subject to disclosure. (*See* AR42–46).

Additionally, OHE found that the Machine Data was exempt from disclosure under SDCL 1-27-1.5(24), providing an exemption for "internal agency records." (AR43). The OHE correctly found that the Machine Data was an "internal agency record" because it "not required to be filed with the County or State Election Board . . . [, and was] not final tabulations or numbers or final audits" (*Id.*). Further, "[t]here [were] no provision in state law that open up to the general public, vote tabulating machine logs," although SDCL 12-17B-5 and SDCL 12-27-12 set forth testing procedures for voting machines and SDCL 12-17B-10 made "final ballot counting . . . open to the public view." (AR6). Therefore, the OHE found that the Machine Data was not a "public record" but an "internal agency record" not subject to disclosure. (*Id.*).

On June 15, 2022, Pollema filed an action in circuit court requesting review of the OHE's decision under SDCL 1-27-40.2. (AR131). However, Pollema failed to file briefing within 30 days of the submission of the administrative record to the circuit court in violation of SDCL 1-26-33.2. (AR142). In May 2023, Steven Haugaard—who is also SDCG's counsel in this appeal—filed a notice of appearance on behalf of Pollema in the matter. (AR144).

In June 2023, the Circuit Court dismissed the action on the merits. The Court specifically found that Pollema's failure to "fil[e] her briefing for over nine months after it was due [was] egregious [and] that [Pollema] ha[d] failed to meet her responsibility to move this appeal forward." (AR142–43). Therefore, the Court found that dismissal of the action on the merits was warranted under SDCL 15-6-41(b) and the "requested records at issue [were] not subject to disclosure and

shall not be disclosed." (*Id.*). The Circuit Court then entered a judgment of dismissal on the merits of the appeal with prejudice against Pollema. (AR148).

B. Second Action– May 2023 to present.

As above set forth, Meyer and Pollema legally incorporated SDCG on May 9, 2023. (AR150–53). Two weeks later, on May 23, 2023, SDCG sent Minnehaha, Davison, Pennington, and Minnehaha Counties nearly identical letters requesting the Voter Data. (AR218–21). In form and substance, these letters were identical to the letters Meyer sent Minnehaha, Pennington, and Lincoln Counties in the First Action. (AR104, 110, 123, 218–21). The letters in the First Action and Second Action described the Voter Data in identical terms and both requested that the Voter Data be produced in "text, comma, or tab delimited file, or a text-based report, listing, in the sequence processed by the county, every ballot, its sequential ID, its timestamp, its method of voting (early in person, absentee mail-in, in person), the batch id and tabulator id." (AR104, 110, 123, 218–21). The only notable difference between the two sets of letters were the dates for which the Voter Data was requested. (*Id*.). In the First Action, Meyer sought Voter Data for the November 3, 2020 election and the November 8, 2022 general election. (AR104, 110, 123). In the Second Action, SDCG sought Voter Data from the "November 3, 2022 general election, the June 7, 2022 primary, and the November 8, 2023 general election from the ES&S Tabulating Machines." (AR218–21).

That same day, SDCG sent Minnehaha, Davison, Pennington, and Lincoln Counties nearly identical letters requesting the Machine Data. (AR214–17). Again, these letters sought Machine Data, showing "when the [voting] machine[s were] turned on or off, time stamps, who logged in, software updates, etc." (AR41, 214–17). The only notable difference between Pollema's letter in the First Action and SDCG's letters in the Second Action was the dates for which the Machine

Data was requested. (*Id.*). While the First Action sought Machine Data from the "October 29, 2020 to November 5, 2020" election, the Second Action sought Machine Data for the November 3, 2020 general; June 7, 2022 primary; and November 8, 2022 general election. (*Id.*).

In June 2023, Minnehaha, Davison, Pennington, and Lincoln Counties issued letters denying the requests for Voter Data and Machine Data. (AR223–31). In denying the requests, Minnehaha, Davison, Pennington, and Lincoln Counties relied upon the reasons for denying the requests in the First Action, as well as the OHE's decision denying the same. (*Id.*). As to the Voter Data, these counties stated that (1) such data did not exist, or (2) that even if it did exist, that data would be a "confidential record" exempt from disclosure under SDCL 1-27-1.5(27) and various South Dakota statutes, and/or (3) that the data was an "internal agency record" exempt from disclosure under SDCL 1-27-1.5(24). (*Id.*). As to the Machine Data, Minnehaha, Davison, Pennington, and Lincoln Counties stated that the Machine Data was an internal agency record under SDCL 1-27-1.5(24) and thus not subject to disclosure. (*Id.*).

In July 2023, SDCG filed a Notice of Review with the OHE, requesting a review of Appellees' denials of its requests for the Machine Data and Voter Data. (AR202). On October 26, 2023, after the matter was fully briefed, the OHE issued the Decision affirming denial the Second Action on grounds of *res judicata*. (AR5–12). OHE concluded it "was precluded by law" from reconsidering the merits of SDCG's appeal and affirmed denial of SDCG's request for Voter Data and Machine Data. (AR12).

SDCG timely appealed the Decision to this Court. (AR1–2). For the reasons discussed below, the Decision should be affirmed.

STANDARD OF REVIEW

On reviewing an appeal of administrative agency ruling under SDCL chapter 1-26, Circuit Courts apply the same standard of review as the South Dakota Supreme Court. *Kuhle v. Lecy Chiropractic*, 2006 SD 16, ¶ 15, 711 N.W.2d 244, 247. Under this standard, "[t]he Department's factual findings and credibility determinations are reviewed under the clearly erroneous standard" and may be reversed "only if [the court is] definitely and firmly convinced a mistake has been made." (*Id.).* However, "[q]uestions of law are reviewed *de novo.*" *(Id*.). "The court may reverse or modify the decision [of the OHE] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in light of the entire evidence in the record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36.

ANALYSIS AND ARGUMENT

A. *Res Judicata* bars the Second Action in Full.

"Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Healy Ranch, Inc. v. Healy*, 2022 SD 43, ¶ 41, 978 N.W.2d 786, 798. Issue and claim preclusion are similar and share three out of four elements. *See id.* ("The difference between issue and claim preclusion is largely "one of degree and emphasis[.]"). "[I]ssue preclusion prevents relitigation *only of issues actually litigated* in a prior proceeding." (*Id.* (emphasis in original)); *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 153, 135 S. Ct. 1293, 1306 (2015) (stating that "[i]ssue preclusion applies when the issues in the two cases are indeed identical"). Claim preclusion is slightly broader in scope. *Healy*, 2022 SD 43, ¶ 41, 978 N.W.2d at 798. While issue

preclusion prevents the relitigation of identical issues, claim preclusion prevents parties from litigating claims and issues that "***could have*** been raised and decided in a prior action—even if they were not actually litigated." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020) (emphasis added); *see Healy*, 2022 SD 43, ¶ 45, 978 N.W.2d at 799.

The three shared elements of issue preclusion and claim preclusion are: [1] that there was "a final judgment on the merits in the previous case, [2] the parties in the two actions [are] the same or in privity, and [3] there [was a] full and fair opportunity to litigate the issues in the prior adjudication." *Healy*, 2022 SD 43, ¶¶ 42–44, 978 N.W.2d at 799. The fourth and distinguishing element of issue preclusion is that "the issue in the prior adjudication [was] identical to the present issue." (*Id.).* The fourth and distinguishing element of claim preclusion is that [4] that instant action arose out of the same "common nucleus of operative facts" or sought to address the "same wrong" as a previous action. *Lucky Brand Dungarees, Inc.*, 140 S. Ct. at 1594; *Healy*, 2022 SD 43, ¶ 45, 978 N.W.2d at 799. Here all of these elements are satisfied. Therefore, the Court should affirm the Decision in full on grounds of res judicata and need no revisit the merits of SDCG's claim, which have already been litigated.

1. There was a final judgment on the merits in the previous case.

SDCG does not dispute that this element is satisfied. (Appellant's Brief at 7–10). Nevertheless, it is clear this element is established.

The OHE issued a final judgment on the merits denying the requests in the First Action. (AR134–40). *See Johnson v. United Parcel Serv., Inc.*, 2020 SD 39, ¶ 35, 946 N.W.2d 1, 10 (stating that the law has "not distinguished between judicial orders and valid final administrative orders on issues of enforceability and preclusive effect" for purposes of claim preclusion and issue preclusion); *Small v. State*, 2003 SD 29, ¶ 16, 659 N.W.2d 15, 19 (stating that *res judicata* applies

to administrative decisions); *B & B Hardware*, 575 U.S. at 148, 135 S. Ct. at 1303 (same). Then, on appeal, the Circuit Court issued a final judgment on the merits denying the requests in the First Action. (AR146–47). *See LaPlante v. GGNSC Madison, S. Dakota, LLC*, 2020 SD 13, ¶ 17 n.6, 941 N.W.2d 223, 228 n.6 (stating that dismissal under SDCL 15-6-41(b) for failure to prosecute operates as a dismissal on the merits absent a court determination that a "dismissal without prejudice is appropriate"); *Tuitama v. Bank of Am., NA*, 552 F. App'x 881, 883 (11th Cir. 2014) (stating that, under federal law, "dismissal for failure to prosecute . . . is a judgment on the merits with claim-preclusive effect"); *Sowinski v. California Air Res. Bd.*, 971 F.3d 1371, 1375 (Fed. Cir. 2020) (holding the same); *Watlington v. Browne*, 791 F. App'x 720, 722 (10th Cir. 2019) (applying Colorado law—stating that "a dismissal for failure to prosecute . . . operates as an adjudication upon the merits"—to hold such a dismissal has claim preclusive effect).

2. The parties in the two actions are the same or in privity.

SDCG argues this element is not satisfied because SDCG brought the Second Action in a representative capacity, while Meyer and Pollema brought the First Action in their individual capacities. (Appellant's Brief at 8–9). SDCG does not cite any South Dakota authority in support of this argument but rather relies on *Armstrong v. Miller*, 200 N.W.2d 282 (N.D. 1972). (Appellant's Brief at 8–9). However, *Armstrong* is nonbinding and more importantly fails to support SDCG's claim. *Armstrong* concerned a fatal automobile crash. 200 N.W.2d at 283. In that case, the wife of the decedent brought a wrongful death claim *on behalf of her husband's estate* and obtained a final judgment arising from the fatal crash ("first claim"). *Id*. The wife then brought another wrongful death action *in her individual capacity* arising from the fatal crash ("second claim"). *Id*. The North Dakota Supreme Court held *res judicata* and did not bar the second claim because the wife brought the first claim "in a representative capacity" and with "an interest in the

judgment in that action as an heir at law for beneficiary," while the wife brought the second claim in an "individual" capacity for her "personal injuries." *Id*. at 285–86. *Armstrong*'s analysis turned on wife's status as a "beneficiary" of the first claim and did not address whether privity existed between claims brought by a corporation and identical claims brought by the incorporators and individual members of a corporation. (*Id*.). In brief, *Armstrong* is unhelpful.

More applicably, the South Dakota Supreme Court has stated, in determining whether parties were in privity, that "courts [are to] look beyond the nominal parties[] and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties." *Schell v. Walker*, 305 N.W.2d 920, 922 (S.D. 1981). Likewise, other courts hold parties are in privity if (1) a party in a subsequent action "controlled" the party in a prior action despite not being named in the suit, OR (2) a party in a former action "represented" the interest of a party in a subsequent action. *See, e.g., Ward v. El Rancho Manana, Inc.,* 945 N.W.2d 439, 447 (Minn. Ct. App. 2020) ("In general, courts will find persons in privity with another party when (1) they control an action despite not being a named party to it, [or] a party represents their interests in an action"); *Am. Freedom Ins. Co. v. Garcia*, 192 N.E.3d 649, 660 ("A nonparty may be bound pursuant to privity if his or her interests were so closely aligned to those of a party that the party was the nonparty's virtual representative. . . . Privity generally exists when parties adequately represent the same legal interests."); *Matter of Prop. Ventures, LLC*, 624 B.R. at 218 (stating that "[p]rivity requires . . . a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same"); *Shelter Mut. Ins. Co. v. Vaughn*, 300 P.3d 998, 1002 (stating that privity exists when there is a "substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation").

Here, there is no dispute that Meyer and Pollema "represented" and advanced the interests of SDCG in the First Action. Meyer and Pollema also controlled the actions of SDCG. When the First Action was denied, Meyer and Pollema personally incorporated SDCG to bring the Second Action—advancing identical interests as the First Action—on their behalf. (AR150–53). There is no question that Meyer and Pollema directed and controlled SDCG in bringing the Section Action because Pollema's and Meyer's letters requesting the Voter Data and Machine Data, and SDCG's letters requesting the same, were identical in form and substance. (AR41, 104, 110, 123, 214–21). In sum, because the interests of the Section Action were advanced by Meyer and Pollema in the First Action, and Meyer and Pollema controlled and directed SDCG in bringing the Section Action, this element is satisfied.

3. There was a full and fair opportunity to litigate the issues in the prior adjudication.

SDCG seemingly addresses whether this element is satisfied. (Appellant's Brief at 7–10). At most thought, and as will be discussed in detail below, SDCG states that "new facts" arising at the time of the Second Action defeat *res judicata*. (Appellant's Brief at 7–10). SDCG's argument is without merit.

In examining whether this element is satisfied, courts have examined whether the first action was procedurally deficient or whether the interests advanced in the first action were sufficiently similar to the current litigation. "The question of whether a party had a full and fair opportunity to litigate a matter generally focuses on [1] whether there were significant procedural limitations in the prior proceeding, [2] whether the party had the incentive to litigate fully the issue, or [3] whether effective litigation was limited by the nature or relationship of the parties." *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001); *see also Allen v. Martin*, 203 P.3d 546, 560–61 (Colo. App. 2008) ("Factors relevant in determining a full and fair opportunity to litigate are (1) whether

the procedures in the earlier action differ substantially from procedures in the action where preclusion is sought; (2) whether the party resisting preclusion had sufficient incentive to vigorously litigate the issue in the earlier action; and (3) whether the issues in the second action are similar to that issue."); *BP Auto. LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 200 (Tex. App. 2017) ("To determine whether the facts were fully and fairly litigated in the first suit, we consider (1) whether the parties were fully heard, (2) that the court supported its decision with a reasoned opinion, and (3) that the decision was subject to appeal or was in fact reviewed on appeal.").

Here, there were no procedural limitations or shortcomings in the First Action. The First Action was fully litigated through the Circuit Court. (AR148). Further, the First Action and Second Action were brought by the same parties in interest: Meyer and Pollema (First Action) and then SDCG on behalf of Meyer, Pollema, and its other members (Second Action). (AR41, 104, 110, 123, 214–21). Additionally, the issues advanced in the Second Action—whether the Voter Data and Machine Data were "public records" —were identical to the issues fully advanced and litigated in the First Action. (*Id*.). As such, this element is plainly satisfied.

4. The issue in the prior adjudication was identical to the present issue (issue preclusion), and the instant action arose out of the same "common nucleus of operative facts" as a previous action (claim preclusion).

SDCG treats claim preclusion and issue preclusion interchangeably. (Appellant's Brief at 7–10). It admits that the First Action and Second Action concerned a "similar legal question," *i.e*., whether the Voter Data and Machine Data are "public records." *(Id*. at 7). However, SDCG attempts to persuade this Court that issue preclusion and claim preclusion do not apply because the Section Action occurred later in time than the First Action. (*Id.* at 8–9). Further, SDCG argues that the First Action and Section Action do share a "common nucleus of operative facts" because

the Second Action presented an "an entirely different set of known facts" than the First Action. (*Id*. at 3–10). SDCG's "new facts" include:

> (1) a hearsay opinion from an unnamed ES&S officer that the Voter Data would not contain "personally identifiable information;"
> (2) purported evidence that some states consider Voter Data subject to disclosure;
> (3) purported evidence that some South Dakota auditors wanted to disclosure Voter Data and Machine Data;
> (4) reference to "over 500 pages of compelling factual information which describes why" the data requested "is possessed by the public and therefore should be disclosed upon request;"
> (5) purported statements from ES&S explaining that Appellees possess software that will allow them to obtain Voter Data and Machine Data if Appellees properly train staff;
> (6) purported evidence that ES&S user manuals, possessed by Appellees, would provide instructions on how to obtain Voter Data and Machine Data;
> (7) purported evidence that Appellees should have created Voter Data and Machine Data to identify voting irregularities;
> (8) purported hearsay statements of a potential expert witness, in which the purported witness opined that Appellees would have access to the Voter Data and Machine Data because they have access to ES&S voting machines;
> (9) reference to federal statutes and regulations on record preservation in state and national elections.

(*Id*.).

SDCG's arguments are unavailing. At issue in this appeal is a question of statutory construction: whether the Voter Data and Machine Data are "public records" under SDCL 1-27-1.1 or exempt under SDCL 1-27-1.5. As will be discussed below, none of the purported "facts" offered by SDCG change that legal issue or the analysis of that legal issue. Therefore, because the legal issues of the First Action and Second Action are identical, issue preclusion applies. *See B & B Hardware*, 575 U.S. at 153, 135 S. Ct. at 1306 (stating issues are NOT identical when "the second action involves application of a different legal standard [than the first action]").

Claim preclusion also applies. As claim preclusion is broader than issue preclusion, it will bar subsequent claims that arise from the same "nucleus of operative facts" or key "factual predicate" as a previous claim; even if the issues in the subsequent action are not identical to the

first action. *See generally Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) (stating that, in general, claim preclusion applies when the case at hand "arises out of the same nucleus of operative fact, or is based upon the same factual predicate" as the case already decided); *In re Ark-La-Tex Timber Co., Inc.,* 482 F.3d 319, 330 (5th Cir. 2007) (stating that "[m]aking a determination of whether the same nucleus of operative facts is present requires that the court analyze the factual predicate of the claims asserted"); *Healy*, 2022 SD 43, ¶¶ 44–45, 978 N.W.2d at 799 (stating claims preclusion will apply even when issues between two actions are not identical).

Here, not only do the First Action and Second Action concern identical issues, they also concern the same factual predicate. Although SDCG attempts to insert additional facts to the present appeal, it cannot dispute the underlying facts giving rise to the First Action and Second Action are the same. Both the First Action and Second Action sought identical data and described that data in identical terms. (AR41, 104, 110, 123, 214–21). The only notable difference between the First Action and Second Action was the dates for which the data was requested. (*Id*.). However, those dates are immaterial on the merits of SDCG's claims that the data requested fits the definition of "public records" under South Dakota law and thus do not change the factual predicate underlying the First Action and Second Action. *See New York Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000) (holding that two claims arise from the same "nucleus of operative facts" when "the same ***key facts*** are at issue in both of them" (emphasis added)). Because the factual predicate giving rise to the First Action and Second Action were the same, claim preclusion bars the Second Action.

Nonetheless, SDCG argues that claim preclusion cannot apply because the Second Action arose later than the First Action and relies on *Lucky Brand Dungarees, Inc.*, 140 S. Ct. 1589 (2020)

in support. (Appellant's Brief at 8–9). However, this reliance is misplaced. In *Lucky Brand Dungarees, Inc.*, the Supreme Court clarified that claim preclusion may apply either when the two claims "aris[e] from the same transaction," **OR** "involve a "common nucleus of operative facts." *Lucky Brand Dungarees, Inc.*, 140 S. Ct. at 1595 (citations omitted). The Supreme Court then clarified that claim preclusion will "bar claims that are predicated on events that postdate" the initial action [*i.e*., arise from a different "transaction"] ***if those new events*** "give rise to "['m]aterial operative facts' that 'in themselves, or taken in conjunction with the antecedent facts,' create a new claim to relief." *Id.* at 1596 (quoting Restatement (Second) § 24, Comment f, at 203).

Appellees do not dispute that the First Action and Second Action arose from different "transactions", but rather argue that claim preclusion applies because the two actions share a common "nucleus of operative fact." As already discussed, none of the new "facts" SDCG offers give rise to "create a new claim for relief" or materially change the analysis of the whether the data requested in the Section Action is a public record under SDCL 1-27-1.1 and/or exempt under SDCL 1-27-1.5. Therefore, as a matter of law, SDCG's argument that claim preclusion may not apply merely because the Second Action occurred after the First Action cannot succeed.

In sum, for all the reasons stated, this Court should decline to revisit the merits of SDCG's appeal and affirm the Decision on grounds of *res judicata*.

B. The Voter Data and Machine Data are not subject to disclosure under SDCL 1-27-1.1 and SDCL 1-27-1.5.

Because *res judicata* applies, the Court does not need to review the merits of SDCG's claims that the data sought are "public records." Nonetheless, Appellees will address SDCG's claims. First, SDCG's claims fail because the Voter Data and Machine Data are not "public records" under SDCL 1-27-1.1. Second, SDCG's claims fail because the Voter Data and Machine Data are exempt under 1-27-1.5(24) and/or (27). Moreover, to accept SDCG's claims to the

contrary and grant it relief would require the abrogation of South Dakota's public disclosure laws. As such, the Court must deny SDCG relief.

As a starting place, the Court must look at SDCL 1-27, which governs all "Public Records and Files" and sets forth standards for their disclosure. Tellingly, in support of its claim that the Voter Data and Machine Data should be disclosed, SDCG largely ignores SDCL 1-27 and, instead, refers this Court to a variety of statutes in different chapters of South Dakota's statutory code. For example, SDCG cites: SDCL 12-6-64, ***stating "primary" election laws*** "shall be liberally construed" to effectuate the will or the voter; SDCL 12-19-34, ***stating that "informalit[ies]" in absentee voting*** will not invalidate an election; SDCL 1-27-1.10, stating that "***public record officer[s]" may redacts portions of document precluded from public disclosure***; and SDCL 15-15A-1, stating the ***purposes of statutes governing public access court records***. (Appellant's Brief at 10–12). These statutes do not need to be considered because the merits of SDCG's appeal are clearly decided based on SDCL 1-27 and SDCL 1-27-1.1 and -1.5 specifically.

Nonetheless, SDCG makes a strained, if not disingenuous, argument that the hodgepodge of statutes cited above—despite being completely unrelated to standard for public record disclosure— when consider together, suggest there is "public policy" in favor of data disclosure and/or election transparency. (Appellant's Brief at 10–13). Based on this unfounded reading of unrelated statutes, SDCG demands this Court compel the disclosure of the Voter Data and Machine Data. (*Id*.). Additionally, SDCG offers draft legislation that, ***if enacted***, would change South Dakota law to make Voter Data a "public record." (*Id*. at 2). Along similar lines, SDCG argues this ***proposed legislation*** (that actually has already been rejected by the South Dakota Senate)[4]

[4] *See Senate Bill 48*, SOUTH DAKOTA LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, https://sdlegislature.gov/Session/Bill/24975 (last visited Jan. 30, 2024). Senate Bill 48 ("SB 48") was introduced to the South Dakota Legislature on January 9, 2024. (*Id*.) SB 48, if enacted, would have changed SDCL 12-17B-13 to

suggests the disclosure of the Voter Data and Machine Data is in line with public policy. (*Id*. at 2–3).

However, the public policy of this state is expressed by ***enacted*** statutes. *See State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 300 (SD 1979) (stating that "statute[s are] a legislative expression of the public policy of South Dakota"). And here, the Legislature has directly promulgated South Dakota's public policy on the disclosure of "public records" in SDCL 1-27-1.1 and SDCL 1-27-1.5. As such, SDCG's argument that a general public policy interest in data disclosure or election transparency requires the disclosure of Voter Data and Machine Data is unavailing. Further, the Legislature sets public policy in the state through statutes that are not contrary to the State's Constitution, and the Court's role is to give effect to that policy by interpreting and enforcing the plain language of South Dakota statutes.[5] *See Zoss v. Schaefers*, 1999 SD 105, ¶ 6, 598 N.W.2d 550, 552 (stating that, in interpreting a statute, a court "is to give words and phrases their plain meaning and effect"). Here, the plain language of SDCL 1-27-1.1 and SDCL 1-27-1.5 require that this Court to deny SDCG relief.

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define the Voter Data, or "cast vote record and ballot images" as it is referred to in SB 48, as a "public record." (*Id*.). The bill was heard on January 24, 2024, by State Senate Affairs and deferred to the 41st legislative day. (*Id*.)

[5] The South Dakota Supreme Court also has the power to declare public policy, although the South Dakota Supreme Court has noted that such power is shared with the Legislature and that it should only declare public policy when such public policy is clearly revealed:

> Although this Court has the power to declare public policy, . . . it shares that power with the Legislature, and such power is subject to the South Dakota Constitution. . . . Further, the Legislature is closest to and best represents the people. Accordingly, exertions of judicial rulemaking based on public policy must be mindful of the Legislature's public policy determinations and avoid overreach. We [the South Dakota Supreme Court] are not legislative overlords empowered to eliminate laws whenever we surmise they are no longer relevant or necessary. . . . Public policy safeguards that which the community wants and not that which an ideal community ought to want. Therefore, until firmly and solemnly convinced that an existent public policy is clearly revealed, a court is not warranted in applying the principle under consideration.

Richardson v. Richardson, 2017 S.D. 92, ¶ 16, 906 N.W.2d 369, 374 (internal citations omitted).

1. The Voter Data and Machine Data are not "public records" under SDCL 1-27-1.1 because they are not "possessed" by Appellees.

Only records defined as "public records" are possibly subject to production. *See* SDCL 1-27-1, -1.1. Here, the Voter Data and Machine Data are not within SDCL 1-27-1.1's definition of "public records" and thus are not subject to production.

First and foremost, SDCL 1-27-1.1 defines "public records" are only those records "***of or belonging to this state***, *any county, . . . or any agency, branch, department, board . . .*" of a state or municipal government. SDCL 1-27-1.1. Crucially, SDCL 1-27-1.1 does not define "public records" as records outside of County's possession. Neither SDCL 1-27-1.1, nor any other statute, requires a county to obtain or create information NOT in its possession to respond to public records request. When interpreting a statute, "the language expressed in the statute is the paramount consideration." *Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 SD 39, ¶ 18, 931 N.W.2d 714, 721. A court "will not enlarge a statute beyond its face where the statutory terms are clear and unambiguous in meaning and do not lead to an absurd or unreasonable conclusion." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 886 (SD 1984). As such, the Court here should not interpret SDCL 1-27-1.1 more broadly than the Legislature specified.

Moreover, if the Court holds SDCL 1-27-1.1 includes records that a county does not have in its possession, it would lead to absurd results. Under such a reading of SDCL 1-27-1.1, South Dakota municipalities and agencies would be compelled to exercise their powers to obtain and produce a virtually limitless pool of information in response to public record requests. The expense and burden of such an interpretation of SDCL 1-27-1.1 would likewise be limitless. As such, an interpretation of SDCL 1-27-1.1 that would require Appellees to create, store, and then disclosure the Voter Data and Machine Data must be rejected. *See Petition of Famous Brands, Inc.*, 347 N.W.2d at 886 (stating courts will decline to interpret statutes in ways that lead to absurd or

unreasonable conclusions); *People ex rel. J.L.*, 2011 SD 36, ¶ 9 n.2, 800 N.W.2d 720, 723 n.2 (collecting cases in which the South Dakota Supreme Court has declined to interpret statutes in ways that would lead to absurd results).

Here, the Voter Data and Machine Data do not "belong" to the Counties. The Appellees do not possess this data and would have to, as SDCG acknowledges, take steps to create and store that data by training staff to access that data with ES&S software. (*See* AR106, 111, 223–31; Appellant's Brief at 4–7). As such, an initial matter, the Voter Data and Machine Data are not public records subject to disclosure under SDCL 1-27-1.1.

2. Even if the Voter Data was a public record, it would be exempt from disclosure under SDCL 1-27-1.5(24) (internal records exemption) and (27) (confidential records exemption).

Even if the Voter Data was a "public record" subject to disclosure, which is it not, the Voter Data would be exempt from disclosure under SDCL 1-27-1.5 (24) and (27). Tellingly, SDCG does not appear to dispute whether the Voter Data and Machine Data are exempt under SDCL 1-27-1.5. (Appellant's Brief at 7–13). Notwithstanding, it is clear that Voter Data records fall within SDCL 1-27-1.5's exemptions.

SDCL 1-27-1.5(24) states that any "***information received by agencies that are not required to be to be filed with such agencies***" are "[i]nternal agency records" and not public records, so long as that information is not "final statistical or factual tabulations, final instructions to staff that affect the public, . . . final agency policy or determinations, or any completed state or federal audit." SDCL 1-27-1.5(24) (emphasis added). SDCL 1-27-1.5(27) states that "[a]ny other record made closed or confidential by state or federal statute" is also not a "public record." SDCL 1-27-1.5(27).

Appellees have extensively reviewed South Dakota statutes and administrative codes. Upon this review, there is no statute, administrative rule, or other binding legal authority requiring the ***filing*** of voting machine data or of voter information collected from voting machine, as described by SDCG's request for the Voter Data, with counties or any county agency. Further, the Voter Data is not a "final statistical or factual tabulations, final instructions to staff that affect the public, . . . final agency policy or determinations, or any completed state or federal audit." SDCL 1-27-1.5(24). As such, until such time as South Dakota statute, administrative code, or governing authority requiring the "filing" of Voter Data, that Voter Data would be exempt from disclosure under SDCL 1-27-1.5(24).

Additionally, the Voter Data is exempt from disclosure under SDCL 1-27.1.5(27), the "confidential" records exemption. SDCG describes the Voter Data as "every ballot, its sequential ID, its timestamp, its method of voting (early in person, absentee mail-in, in person), the batch id and tabulator id." (AR218–21). As the OHE correctly observed in its denial of the requests in the First Action, the South Dakota Constitution and numerous state statutes require the protection and unsealing of such voter and ballot information. First, under the South Dakota Constitution, "[t]he rights of individuals to vote by secret ballot is fundamental. . . . [T]he right of any individual to vote by secret ballot shall be guaranteed." S.D. CONST. art. VI, § 28. To protect the secrecy of the ballot, the South Dakota Constitution has directed the Legislature to enact statutes "insur[ing] secrecy in voting." S.D. CONST. art. VII, § 3. The Legislature has done so in SDCL chapter 12 by setting forth strict measures for the preservation of ballot secrecy. *See, e.g.,* SDCL 12-17B-15 (providing for the sealing of ballots and "automatic tabulating equipment"); SDCL 12-20-20 (requiring ballots to be sealed after counting); SDCL 12-20-21 (penalizing the destruction or unsealing of the ballot box and other election materials); SDCL 12-21-29 (allowing the opening

of sealed ballots only upon circuit court order for recount and requiring the resealing of those ballots). Because the South Dakota Constitution and numerous South Dakota statutes require the protection of individual ballots, the Voter Data is exempted from disclosure under SDCL 1-27.1.5(27).

3. The Machine Data is exempt from disclosure under SDCL 1-27-1.5(24) (internal agency records).

Finally, even assuming, arguendo, that the Machine Data was a "public record" under SDCL 1-27-1.1, it would also be exempt from disclosure under SDCL 1-27-1.5(24). There is no South Dakota statute, administrative rule, or other binding authority that requires filing of voting machine information, such as the described in SDCG's request or the Machine Data. Additionally, the Machine Data is not a "final statistical or factual tabulations, final instructions to staff that affect the public, . . . final agency policy or determinations, or any completed state or federal audit." SDCL 1-27-1.5(24). As such, the Machine Data, if existing, would be an internal agency record under SDCL 1-27-1.5(24) not subject to production.

C. SDCG's request for "in camera review" and sanctions should be dismissed.

If the Court were to hold the Voter Data and Machine Data may not be disclosed, SDCG asks this Court to review that data in camera. (Appellant's Brief at 12). But in camera review is inapplicable to these proceedings. *See Andrews v. Ridco, Inc.*, 2015 SD 24, ¶ 31, 863 N.W.2d 540, 551 (explaining that in camera review is "the preferred procedure for handling privileged" information sought to be disclosed in discovery); *Ferguson v. Thaemert*, 2020 SD 69, ¶ 33, 952 N.W.2d 277, 286 (explaining the same). The present matter is not a discovery dispute, so in camera review is inapplicable.

SDCG has also requested civil sanctions against Appellees under SDCL 1-27-40.2. (Appellant's Brief at 13). SDCL 1-27-40.2 allow civil sanctions when a "public entity acted

unreasonably and in bad faith" in denying public records request. However, there is simply no evidence that Appellees denied SDCG's request in "bad faith" or "unreasonably." Appellees carefully considered SDCG's requests and denied those requests in reliance on careful research of South Dakota law, as well as the OHE's well-reasoned analysis holding that the Voter Data and Machine Data were not public records. (AR223–31). For all the reasons stated, that reliance was well-founded. SDCG's request for sanctions is inappropriate and should be dismissed.

CONCLUSION

In sum, the Second Action is barred by *res judicata*. Further, the Voter Data and Machine Data are in no way "public records" under South Dakota law subject to disclosure. Appellees respectfully ask this Court to enforce South Dakota law by affirming the Decision and denying SDCG's requests.

Dated this 5th day of February, 2024.

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CERTIFICATE OF SERVICE

I, Lisa Hansen Marso, hereby certify that I am a member of the Boyce Law Firm, L.L.P., and that on the 5th day of February, 2024, the foregoing Brief of Appellees, Minnehaha County, Davison County, and Pennington County, South Dakota was served by and through the Odyssey File and Serve System and/or U.S. First Class Mail upon the Hearing Examiner, counsel of record and the agencies as listed below:

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