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June 9, 2017

Mr. Drey Samuelson  
1711 S. Phillips Avenue  
Sioux Falls, SD 57105

RECEIVED  
JUN 13 2017  
S.D. SEC. OF STATE

Dear Mr. Samuelson:

Pursuant to SDCL 12-13-25, this office is required to review each initiated amendment to the South Dakota Constitution. Further, this office is required by SDCL 12-13-24 to determine if each initiated amendment is "written in a clear and coherent manner in the style and form of other legislation" and that it is "worded so that the effect of the measure is not misleading or likely to cause confusion among voters." You are under no obligation to accept any of the suggestions contained in this letter, but please keep in mind the legal standards established in SDCL 12-13-24.

The proposed constitutional amendment includes elements from two previous constitutional amendment proposals considered in the 2016 general election. The combination of the subjects from the two proposed amendments may not comply with the related subject matter as required in S.D. Const. Art. XXIII, § 1.

The draft of the initiated constitutional amendment submitted to this office is not written in a clear and concise manner and does not conform to the form and style of other sections of the constitution. Parts of the proposed amendment are better suited for statute. Rarely do we find any definitions in the constitution and under that limited circumstance it usually defines one term within that section. It is inappropriate to have two sets of subdivisions within one section. This may cause confusion when making any reference to subdivision (1) within this section as to which subdivision (1) is being referenced. As an alternative you may define the term, "state public office", which is a unique definition for the purposes of this proposed amendment.

Furthermore, section 7 conflicts with section 8 of the proposed constitutional amendment as submitted to our office. Section 7 proposes to amend S.D. Const. Art. III, § 5 and section 8 proposes to repeal the same section.

When drafting legislation, we use "may not" instead of "shall not." A negative used with "may" negates the obligation and permission to act and is the stronger prohibition. A negative used with "shall" negates the obligation, but not the permission to act and therefore is avoided.

The proposed constitutional amendment should outline the requirements of the proposal and the details should be set in law. The more details placed in the constitution, the more likely there may be a need for another constitutional amendment. If the wording is unclear, has ambiguous phrases, or unintended consequences, it is a complex process to propose and pass constitutional amendments to address the matter. Therefore, it is critical that the proposed constitutional amendments be carefully constructed.

Section 6 of the draft as it was submitted to our office – if the constitutional amendment is passed by the people in the 2018 general election, existing laws and regulations must be amended to comply with the provisions. It is unnecessary to have a section added to the Constitution requiring the state to comply with the previous constitutional sections. If you wished to delay the effective date of the proposed amendment and first apply those



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provisions to the 2022 election this section would serve a purpose. Furthermore, it may lead to unintended consequences with the addition of unnecessary phrases and comments.

Section 37 appears to require redistricting in 2019 and 2020 and does not provide for redistricting in 2021. Redistricting is a time consuming and costly use of resources. The redistricting requirements for 2019 and 2020 would be based on 2010 census data and would only apply to one election. This requirement appears to be an unnecessary use of state resources. Since there would not be an appropriation to fund the commission in FY 2019, the commission may have to wait FY 2020 to begin the redistricting process. The commission must purchase redistricting software and comply with the Voting Rights Act requirements. You should consider eliminating the 2019 redistricting requirement. The requirement to redistrict again in 2020 is nonsensical. Redistricting should be required for 2021.

It is unclear who would nominate the ten individuals for the commission for the three categories, especially the ten applicants that do not belong to either of two largest political parties. The current language implies the Board of Elections must accept any qualified applicant. Legislation could be enacted to provide the details for the application process. The time frame for reviewing the applications and verifying the applicant eligibility is limited, especially since this time frame occurs during the middle of legislative session. It may provide more flexibility by requiring the board to establish the commission by a certain date and omit the application deadline.


There is a reference to chapter 25 of the South Dakota Codified Laws in § 37. Perhaps you are referring to SDCL chapter 1-25. It is inappropriate to make cross references to codified laws in the Constitution for several reasons. If the chapter is recodified or repealed, the code counsel does not have authority to correct any cross references in the Constitution. If the goal is to require the independent redistricting commission to comply with the open meeting laws found in SDCL chapter 1-25, that chapter already applies to all public bodies and agencies, including the proposed commission.

The proposed amendment specifies that the Legislative Research Council must provide staff and services to the commission. This agency was created by law and it is inappropriate to specify an agency that may or may not continue to exist under this title or general purpose. Alternative language is provided in the form and style notes.

Attached is a copy of your proposed constitutional amendment with all our suggested style and form changes.

This letter constitutes neither an endorsement of your initiated amendment nor a guarantee of its statutory sufficiency. It does constitute fulfillment of your responsibility pursuant to SDCL 12-13-25 to submit your draft to this office for review and comment. If you proceed with your initiated amendment, please take care to ensure that your statements or advertising do not imply that this office endorses or approves your proposals.

Sincerely,



Jason Hancock  
Director

JH:FB:ct

Enclosure

CC: The Honorable Shantel Krebs, Secretary of State  
The Honorable Marty Jackley, Attorney General

An Amendment to the Constitution to provide for non~~partisan~~ <sup>redistricting</sup> elections ~~and a non-partisan apportionment of the legislature~~ <sup>by a commission.</sup>

Section 1. That ~~at the next general election held in the state, the following amendments~~ <sup>section 5</sup> to Article III, of the Constitution of the State of South Dakota ~~shall be submitted to the~~ electors of the state for approval.

(a) <sup>be amended to read as follows.</sup>

(b) <sup>be repealed.</sup>

<sup>• move either section 7 or 8 to this section</sup>

Section 2. That Article III of the Constitution of the State of South Dakota be amended by adding ~~a new section~~ <sup>new sections</sup> to read as follows:

§ 33 An open nonpartisan primary election shall be conducted to select the legislative candidates who shall compete in the general election. <sup>A</sup> ~~All~~ registered voters <sup>/</sup> may vote in the open nonpartisan primary election for any qualified legislative candidate, <sup>if</sup> ~~provided that~~ the voter is otherwise qualified to vote for the candidate ~~for the office in question~~. The two legislative candidates who receive the most votes in the primary election shall compete in the general election. However, for any office to which more than one legislative candidate is elected, the number of candidates who compete in the general election shall be the number of legislative candidates to be elected times two.

~~Section 3. That Article III of the Constitution of the State of South Dakota be amended by adding a new section to read as follows:~~



§ 34 Each qualified voter <sup>may</sup> ~~is guaranteed the unrestricted right to~~ vote for the qualified legislative candidate of the voter's choice in <sup>each</sup> ~~all~~ elections. No voter may be denied the right to vote for the qualified legislative candidate of the voter's choice in a primary or general election based upon the voter's party affiliation or lack of party affiliation.

~~Section 4. That Article III of the Constitution of the State of South Dakota be amended by adding a new section to read as follows:~~

§ 35 Each legislative candidate running for the Legislature shall file, ~~with the appropriate elections officer,~~ <sup>a nominating</sup> petitions <sup>in the office of the Secretary of State</sup> containing the signatures of registered voters in an amount to be established by law. The signature requirements established shall be based on the total votes cast for that office in the previous general election and shall be the same for <sup>each</sup> ~~all~~ candidates for that office, regardless of party affiliation or lack of party affiliation.

~~Section 5. That Article III of the Constitution of the State of South Dakota be amended by adding a new section to read as follows:~~

§ 36 Nothing in this article restricts the right of any person to join or organize into a political party or in any way restrict the right of private association of political party. Nothing in this article restricts a party's right to contribute to, endorse, or otherwise support or oppose <sup>a</sup> ~~any~~ candidates for elective office. Each political party may establish ~~such~~ procedures as the party determines to elect party officers, endorse or support candidates, or otherwise participate in <sup>any</sup> ~~all~~ elections. However, no ~~such~~ procedures may be paid for or subsidized using public funds. <sup>Each</sup> ~~All~~ qualified voters and candidates

shall be treated equally by law and regulations governing elections<sup>an</sup> regardless of party affiliation or lack of party affiliation. To the extent that any privileges<sup>/</sup> or procedures<sup>/ is</sup> are made available to any candidate or political party, <sup>the</sup> such privileges<sup>/</sup> <sup>on</sup> and procedures<sup>/</sup> shall be made equally available to <sup>each</sup> all candidates<sup>/</sup> or political parties<sup>/ party</sup>, regardless of party affiliation or lack of party affiliation.

~~Section 6. That Article III of the Constitution of the State of South Dakota be amended by adding a new section to read as follows:~~

~~§ 37~~ <sup>33 to 37</sup> The provisions of §§2 through 7, inclusive, of this article apply to <sup>(2021?)</sup> each<sup>/</sup> all legislative elections<sup>/</sup> occurring after January 1, 2020, and shall supersede any existing law, regulation, and elections<sup>/</sup> procedure to the extent that such are <sup>the law, regulation, or election procedure is</sup> inconsistent with this article. The Legislature, Secretary of State and local officials shall make such changes in and additions to laws, regulations, and elections procedures as are necessary to fully implement the provisions of this article in time for the open primary election for the Legislature in 2020 and for each open primary and general election for the Legislature thereafter. <sup>Any</sup> Laws, <sup>on</sup> regulations and elections procedures implementing this article shall permit and encourage <sup>each</sup> all qualified voters in South Dakota to vote in primary and general elections for <sup>the</sup> the legislative candidates of the voter's choice. <sup>Adds a goal which is unnecessary</sup>

This essentially repeats the content of the first sentence

Not Needed.

<sup>(section 7 or 8 should be moved to section 1 of this Amendment)</sup>  
Section 7. That Article III, Section 5 of the Constitution of the State of South Dakota be amended to read as follows:

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be



? ~~established wholly within senatorial districts and shall be either single member or dual member districts as the Legislature shall determine.~~ Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

Section 8. That Article III, Section 5 of the Constitution of the State of South Dakota, be repealed:

↑  
Move  
5. ~~The Legislature shall apportion its membership by dividing the state into as many single member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single member or dual member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census. An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same~~

as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.

~~Section 9. That Article III, of the Constitution of the State of South Dakota, be amended by adding a new section to read as follows:~~

**Definition of Terms.** Terms used in this section mean:

*Delete these definitions*  
(1) "Commission" or "commission" means the independent redistricting commission established pursuant to this section;

(2) "Political party" means a party whose candidate for Governor at the <sup>first</sup> preceding general election at which a Governor was elected received at least two and one-half percent of the total votes cast for Governor;

*These terms are defined in Title 12*  
(3) "Political party office" means an office of a political party organization as distinct from a public office;

*This definition could be inserted on the next page*  
(4) "State public office" means

*an*  
(a) An elective office in the executive or legislative branch of the government of this state, or

*an*  
(b) An office in the executive or legislative branch of the government of this state which is filled by the gubernatorial appointment, or

*an*  
(c) An office of a county, city or other political subdivision of this state <sup>that</sup> which is filled by an election process involving nomination and election of candidates on a partisan basis.

That Article III of the South Dakota Constitution be amended by adding a new section to read as follows:

*Note: Use this term the first time in each section and use commission thereafter in that section.*

§ 37

The independent redistricting commission is hereby created and shall be

composed of nine registered voters in South Dakota, ~~none of whom shall hold a~~ *No commission member may hold a*  
state public office or a political party office. The commission shall prepare the *The term, state public office, means an . . .*  
*plan*

plan for redistricting the state into legislative districts. This redistricting shall be

*completed* *2021*  
~~made~~ by the commission in ~~2019 and 2020~~, and every ten years after 2021. ~~Such~~

*R*edistricting shall be accomplished by December first of the year in which the redistricting is required.

*thirty-first*  
By January ~~31~~ of each year in which the redistricting is required, the board overseeing state elections and procedures shall accept applications *any* from persons *is* who ~~are~~ willing to serve on and are qualified for appointment to the commission.

The pool of candidates shall consist of no more than thirty individuals, ten from each of the two largest political parties in South Dakota based on party registration, and ten not registered with either of the two largest political parties in South Dakota.

*the last day of*  
By February ~~28~~ of each year in which the redistricting is required, the board shall establish a commission to provide for the redistricting of state legislative districts.

No more than three members of the commission ~~shall~~ *may* be members of the same political party. The commission shall select by majority vote one ~~of its members~~ to serve as chair and one ~~of its members~~ to serve as vice chair.



Each commission member <sup>must</sup> ~~shall~~ have been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, ~~and who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process.~~

Unnecessary. Who makes this determination

Within the three years immediately preceding appointment, <sup>no</sup> ~~a~~ commission member <sup>may</sup> ~~shall not~~ have been appointed to, or elected to, <sup>no</sup> ~~any~~ <sup>state public office</sup> ~~poli~~ or political party office. Within the three years immediately after appointment, <sup>no</sup> ~~a~~ commissioner member <sup>may</sup> ~~shall not~~ be appointed to, or elected to, <sup>no</sup> ~~any~~ state public office or political party office.

If a vacancy occurs on the commission, the board shall select a successor who has the same qualifications as the commissioner whose position is being vacated.

<sup>Legislature</sup>  
The ~~Legislative Research Council~~, ~~under the direction of the commission~~, shall provide the technical staff and clerical services that the commission needs to prepare its <sup>redistricting plan</sup> ~~districting plans~~. Each commission member shall receive per diem and expenses in the same manner and amount as paid to members of the Legislature.

Five commissioners, including the chair or vice chair, constitute a quorum. Five or more affirmative voters are required for any official action. ~~If a quorum is present,~~

~~the commission shall conduct its business in meetings in accordance with~~

~~Chapter 25 of the South Dakota Codified Laws.~~

*independent redistricting*

§ 38 The commission shall establish legislative districts by dividing the state into as many single-member, legislative districts <sup>as</sup> there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the commission ~~shall~~ determine <sup>s</sup> in compliance with federal and state law.

The commission shall commence the mapping process for the legislative districts by creating districts of equal population in a grid-like pattern across the state. Adjustments to the districts shall be made ~~as necessary to accommodate the~~ following: *to:*

- (1) Districts shall ~~comply~~ <sup>Comply</sup> with the United States Constitution, the South Dakota Constitution, and federal ~~statutes~~ <sup>law</sup>, as interpreted by the United State Supreme Court and other courts ~~with~~ of competent jurisdiction;
- (2) Districts shall ~~have~~ <sup>Have</sup> equal population to the extent practicable;
- (3) Districts shall ~~be~~ <sup>Be</sup> geographically compact and contiguous to the extent practicable;
- (4) District boundaries shall ~~respect~~ <sup>Respect</sup> communities of interest to the extent practicable; and
- (5) District lines shall ~~use~~ <sup>Use</sup> visible geographic features, municipal and county boundaries, and undivided census tracts to the extent practicable.

Note:

*If you keep both sets of subdivisions please use the same form & style.*



Party registration and voting history shall be excluded from the redistricting process. The places of residence of incumbents or candidates shall not be identified or considered.

*independent redistricting*  
§ 39 The Commission shall notify the public that a draft map of legislative districts is available for inspection and written comments. The Commission shall accept written comments for thirty calendar days following notification to the public. The *Legislature* Senate and House of Representatives may act within this period to submit written comments to the Commission. After the comment period has ended, the Commission shall establish final district boundaries. The Commission shall certify to the *Office of the* Secretary of State the establishment of *each* legislative districts.

*independent redistricting*  
§ 40 The Commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the Commission. The Commission shall have the authority to determine whether the South Dakota Attorney General or counsel hired or selected by the commission *may* shall represent the people of South Dakota in the legal defense of a redistricting plan.

*The duties of each member of the independent redistricting commission*  
§ 41 Each commissioner's duties established by this section expire upon the appointment of the next Commission. The Commission shall not meet or incur *any* expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending or to revise districts if required by *the legislative* a court decisions, or if the number of legislative districts is changed.