



June 3, 2019

Mr. Paul Thronson and Mr. Nick Zachariasen
South Dakota Community Action
7301 S. Valencia Drive
Sioux Falls, SD 57108

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S.D. SEC. OF STATE

Dear Mr. Thronson and Mr. Zachariasen:

This office is required to review each initiated measure to determine whether it is written in a clear and coherent manner in the style and form of other legislation and worded so that the effect of the measure is not misleading or likely to cause confusion among voters in accordance with SDCL 12-13-24. Further, in accordance with SDCL 12-13-25, this office is required to provide written comments to assist the measure's sponsor in complying with SDCL 12-13-24, including assistance regarding the substantive content of the measure in order to minimize any conflict with existing law and ensure the measure's effective administration. 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 and 12-13-25.

This initiative proposes a resolution that purports to "apply to the United States Congress to call a convention for the exclusive purpose of proposing an amendment to the Constitution of the United States of America that will restore free and fair elections as described [within the language of the resolution]." This proposed resolution raises questions that would make the measure subject to scrutiny under both the U.S. Constitution and the South Dakota Constitution.

The process for amending the U.S. Constitution is controlled by federal law. Under Article V of the U.S. Constitution, the Congress "shall call a Convention for proposing Amendments" to the Constitution "on the Application of the Legislatures of two thirds of the several States." The term "Legislatures" for purposes of Article V does not include voters acting through an initiated measure. In 1922, the Supreme Court of the United States addressed the definition of the term directly:

What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people . . . There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.¹

Even if Article V of the U.S. Constitution were to be interpreted to allow for voter-initiated resolutions that call for a constitutional convention, the South Dakota Constitution does not provide a process by which voters may propose resolutions to be placed on the ballot. Article III, section 1 of the South Dakota Constitution states that "the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state." Although the term "measure" is undefined under both the state constitution and state statute, the

¹ Hawke v. Smith, 253 U.S. 221, 227-8 (1922).