



June 3, 2019

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

RECEIVED
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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).

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context of the word's usage in the Constitution and the history of the Constitution's framing do not suggest that the term includes resolutions. Instead, the language has always been interpreted by the South Dakota Supreme Court only to include those measures that enact, amend, or repeal laws.²

Additionally, Article III, section 1 requires specific language to be used for the enacting clause of voter-initiated measures: "Be it enacted by the people of South Dakota." A resolution is an expression of "the sense, will, or action of a deliberative assembly."³ It is not an enactment of a law as suggested by the constitutionally required enacting clause.

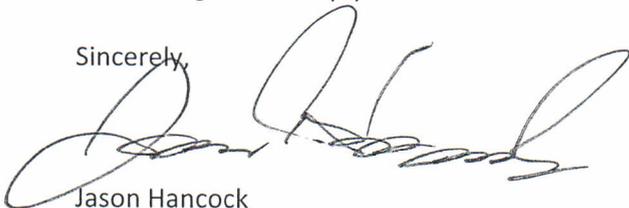
For all the reasons outlined above, the proposed resolution is likely subject to challenge as an unconstitutional voter-initiated measure.

Regarding the style and form of the proposed measure, the resolution lacks a title, which should be placed in the body of the measure before the first "whereas" clause. We suggest the title should read: "A RESOLUTION, applying to the United States Congress to call a convention for the exclusive purpose of proposing an amendment to the United States Constitution that will restore free and fair elections."

In several sections, the resolution purports to speak on behalf of the Legislature, however this resolution is not a product of the Legislature but of the people. This is likely to cause confusion among voters. Therefore, the language of the resolution should speak on behalf of "the people of South Dakota," not on behalf of the Legislature.

This letter constitutes neither an endorsement of your initiated measure nor a guarantee of its 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 measure, please take care to ensure that your statements or advertising do not imply that this office endorses or approves your proposal.

Sincerely,



Jason Hancock
Director

JH:DO:ct

Enclosure

CC: The Honorable Steve Barnett, Secretary of State
The Honorable Jason Ravensborg, Attorney General

² See *Brendro v. Nelson*, 720 N.W.2d 670 (S.D. 2006).

³ See BLACK'S LAW DICTIONARY (10th ed. 2014), resolution.

WHEREAS, the framers of the United States Constitution ~~of the United States of America~~ intended that the United States Congress ~~of the United States of America~~ should be "dependent on the people alone" (James Madison, Federalist 52); and

WHEREAS, that dependency has evolved from a dependency on the people alone to a dependency on powerful special interests, through campaigns or third-party groups, that has created a fundamental imbalance in our representative democracy; and

WHEREAS, Americans across the political spectrum agree that elections in the United States ~~of America~~ should be free from the disproportional influence of special interests and fair enough that any citizen can be elected into office; and

WHEREAS, the South Dakota Constitution ~~of the State of South Dakota~~ states that "governments are instituted among men, deriving their just powers from the consent of the governed," and our "elections shall be free and equal" (Article VI, ~~Sections~~ sections 1 & 19); and

WHEREAS, Article V of the United States Constitution requires Congress to call a convention for proposing amendments to the federal Constitution on the application of two-thirds of the legislatures of the several states; and

WHEREAS, the people of South Dakota ~~Legislature perceives~~ perceive the need for ~~an~~ amendments a convention in order to restore balance and integrity to our elections by proposing an amendment to the federal Constitution that will permanently protect free and fair elections in America by addressing, inter alia, issues raised by the decisions of the United States Supreme Court in Citizens United v. Federal Election Commission (~~2010~~), 130 S.Ct. 876 (2010) and related cases and events, and desires that the said convention should be so limited; and

WHEREAS, the State of South Dakota desires that the delegates to ~~said~~ the convention shall be comprised equally of individuals currently elected to state and local office, or be selected by election, in each ~~Congressional~~ congressional district for the purpose of serving as delegates, though all individuals elected or appointed to federal office, now or in the past, be prohibited from serving as delegates to the convention, and intends to retain the ability to restrict or expand the power of its delegates within the limits expressed ~~herein~~ in this resolution; and

WHEREAS, the State of South Dakota intends that this be a continuing application considered together with applications calling for a convention passed in the 2013-2014 Vermont legislature as R454, the 2013-2014 California legislature as Resolution Chapter 77, the 98th Illinois General Assembly as SJR 42, the 2014-2015 New Jersey legislature as SCR 132, the 2015-2016 Rhode Island legislature as HR 7670 and SR 2589, and all other passed, pending, and future applications until such time as two-thirds of the several states have applied for a convention for a similar purpose and said convention is convened by Congress;:

NOW, THEREFORE, BE IT RESOLVED, that the people of the State of South Dakota ~~speaking through its legislature, and pursuant to Article V of the United States Constitution,~~ hereby

apply to the United States Congress to call a convention for the exclusive purpose of proposing an amendment to the Unites States Constitution of the United States of Ameriea that will restore free and fair elections as described ~~herein~~ in this resolution, as soon as two-thirds of the several states have applied for a convention for a similar purpose; and

BE IT FURTHER RESOLVED, that the ~~Chief Clerk of the South Dakota [House of Representatives or Senate]~~ Secretary of State transmit copies of this resolution to the President of the United States; the Vice President of the United States in his capacity as presiding officer of the United States Senate, the Speaker of the United States House of Representatives, the Minority Leader of the United States House of Representatives, the President Pro Tempore of the United States Senate, to each Senator and Representative from South Dakota in the Congress of the United States with the respectful request that the full and complete text of this resolution be printed in the Congressional Record, to the presiding officers of each legislative body of each of the several states, requesting the cooperation of the states in issuing an application compelling Congress to call a convention for proposing amendments pursuant to Article V of the U.S. Constitution.