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July 26, 2021

Mr. Brendan Johnson
Robins Kaplan LLP
140 N. Phillips Ave., Ste. 307
Sioux Falls, SD 57104

Re: LRC Review of Proposed Initiated Measure Amending Title 34 (13 Sections)

Dear Mr. Johnson:

In accordance with SDCL 12-13-24 and 12-13-25, the Legislative Research Council (LRC) is required to review each initiated measure submitted to it by a sponsor for the purpose of determining whether the measure is "written in a clear and coherent manner in the style and form of other legislation" and for the purpose of ensuring that the "effect of the measure is not misleading or likely to cause confusion among voters." Based on this review, the LRC provides written comments to the proposal's sponsor for the purpose of assisting the sponsor in meeting these requirements. This includes providing "assistance . . . to minimize any conflict with existing law and to ensure the [proposal]'s . . . effective administration." While there is no obligation to accept any of the suggestions contained in this letter, including the edits below, you are asked to keep in mind the legal standards established in SDCL 12-13-24 and 12-13-25.

LRC encourages you to consider edits and suggestions to the proposed text. We recommend the edits for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. The latter is based upon the Guide to Legislative Drafting (<https://mylrc.sdlegislature.gov/api/Documents/127102.pdf>). Should you have any questions about the attached edits, or about the suggestions made in this letter, please feel free to contact this office. Please reference the enclosed, marked-up copy while reviewing the bulleted changes, organized by section:

Section 1

- Subdivision 2 uses a slightly different definition of "hemp" than the industrial hemp chapter, SDCL 38-35-1(2).
- Subdivision 5's "which" is revised to "that" to reflect the latter connotation of an essential, defining quality. "Which" should not be used in a definitions section or in law generally. Additionally, "specifically" is struck as superfluous.

Section 2

- Edits to the lead-in sentence strike redundant words. If the chapter expressly does not affect the laws listed, there is no need to declare the section as being "notwithstanding the provisions of this chapter." Indeed, the circular nature of the rationale would negate Section 2, since, as a "provision[] of this chapter," it would be notwithstanding itself.

- Subdivisions 1 and 2 are similar, yet the verb "transport" was left off subdivision 1. Was that intentional?

Section 3

- Again, on the lead-in sentence, edits address redundancy and circular concerns. Further, "notwithstanding" is redundant given the canon of statutory construction that a specific provision prevails over a more general principle.
- Added language to subdivision 1 specifies that it is employees to whom an employer is not required to permit or accommodate recreational marijuana use. This specification seems necessary given that it is specified in subdivision 2 but not subdivision 1.

Section 4

- The lead-in sentence required multiple edits for clarity concerns. "Notwithstanding" is again struck as redundant for the reason described in Section 3. A double negative ("not unlawful") was clarified. "Shall" is replaced by "may" because associating a negative with "shall" merely negates the duty, while associating it with "may" negates both the duty and permission to act.
- In subdivision 2, "provided" is changed to "if" to simplify language. Similarly, in paragraph (2)(b), the phrase "in or on the grounds of" was replaced by the simpler and accurate "at."

Section 5

- *Guide to Legislative Drafting*, pg. 25: "The federal drafting style, which is also used in a few states, assigns a subdivision designation to each paragraph of a multiparagraph section. This practice is **not** used in South Dakota[.]" (Emphasis in original.) Accordingly, LRC suggests a lead-in sentence that appears to capture the intent of the section. In doing so, it substantially shortens each of the subdivisions and makes them clearer.
- Throughout this paragraph, new civil penalties are laid out. References to civil penalties should indicate who is assessing the civil penalty and where the collected penalty will be deposited, as is the statutory practice. *Id.* at 13.
- Subdivision 5 uses the term "fine" when the term "civil penalty" is used in all other references to the concept. "Fine" is struck and replaced by "civil penalty" for sake of consistency.

Section 6

- Any additional licenses would need to be propounded by the department in administrative rule. Administrative rules are quasi-legislative delegations of authority. It is unconstitutional to delegate authority to an agency to propound rules on a particular subject without statutory guardrails. There do not appear to be guardrails on the authority of the department here to adopt "any other types of licenses the department deems necessary." This phrase is therefore struck.

Section 7

- Edits specify that the rulemaking process in question is the current statutory rulemaking process in SDCL chapter 1-26. This is keeping with nearly all other permanent rulemaking authority in statute. Stylistic edits also help to make the language more concise.
- Recommend that the rule list be revised to indicate that it is exhaustive, thereby providing more reasonable guidance to the department and prevent a potential challenge as an unconstitutionally broad delegation of rulemaking authority.
- Subdivision 13 authorizes civil penalties without indicating an amount. LRC encourages establishing an amount "not to exceed" for any fine or civil penalty to be provided for in rule.

Section 9

- The last sentence may conflict with SDCL 53-5-2 and 53-5-3. Moreover, the fact that a contract is prohibited by federal law is a consideration independent of and superior to what state law can authorize.

Section 10

- The content in the third sentence should be moved to Section 4, paragraph (2)(c), so that the limited authorization exists alongside the general prohibition, instead of relying on cross-references.

Section 11

- "Sold" is struck in the first sentence since the preceding phrase, "sales of marijuana," makes the word redundant. "To a consumer" is a shorter phrase and should therefore be paired with the other shorter phrase for ease of reading.
- Again, the rulemaking authority referenced is edited to specify the SDCL chapter 1-26 rulemaking process.
- The provision does not specify where the moneys are to be deposited, or whether a new fund should be created to receive these deposits. It is also unclear what "fifty percent of the remaining revenue must be appropriated" actually means, since it is unclear as to when the "remaining" amount would be determined. Additionally, it is unclear who has the responsibility of depositing these moneys from one fund to another.

Section 12

- The commas separating the listed items are replaced by semicolons, reflecting the fact that there is a list of items nested within the items list. The last item on the list is revised to specify the "revenues" referenced, to prevent any ambiguity.

Section 13

- The first sentence contains a stylistic edit from "shall" to "must," reflecting that the subject "section" is inanimate.
- In the third sentence, "shall" is struck and replaced by "may" because associating a negative with "shall" merely negates the duty, while associating it with "may" negates both the duty and permission to act.

In addition to the above changes, in general, the initiated measure should have deadlines that reflect the convention used for legislation (e.g., "**Section 1.** That title 34 be amended . . ."). There is also no need to indicate "chapter" in the first deadline, since Section 1 contains a reference to a chapter, providing Code Counsel with enough guidance on how it should be codified if approved by voters. Be sure to use consistent font.

Fiscal Impact

It has been determined during this review that this proposed initiated measure may have an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions. Please provide the Legislative Research Council a copy of the initiated measure as submitted in final form to the Attorney General, so we can develop any fiscal note required by SDCL 2-9-30.

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Finally, this letter constitutes neither an endorsement of the initiated measure nor a guarantee of its sufficiency. It is a recognition that your responsibility to submit the draft proposal to the LRC for review and comment, as required by SDCL 12-13-25, has been fulfilled. If you proceed with the proposal, please ensure neither your statements nor any advertising imply that this office has endorsed or approved the proposal.

Sincerely,



Reed Holwegner
Director

RH/jg/bh

Enclosure

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

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

Section 1. That title 34 be amended by adding a NEW CHAPTER-SECTION to read:

~~§ 1.~~ Terms used in this chapter mean:

- (1) "Department," the Department of Revenue or its successor agency;
- (2) "Hemp," the plant of the genus cannabis, and any part of that plant, including theseeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;
- (3) "Local government," means a county, municipality, town, or township;
- (4) "Marijuana," the plant of the genus cannabis, and any part of that plant, including, the seeds, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including hash and marijuana concentrate. The term includes an altered state of marijuana absorbed into the human body. The term does not include hemp, or fiber produced from the stalks, oil or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products;
- (5) "Marijuana accessory," any equipment, product, or material, which that is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marijuana into the human body.

Section 2. That title 34 be amended by adding a NEW SECTION to read:

~~§ 2. Notwithstanding the provisions of this chapter, this~~ This chapter does not ~~limit or~~ affect laws that ~~prohibit or~~ otherwise regulate:

- (1) Delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age;
- (2) Purchase, possession, use, or transport of marijuana or marijuana accessories by a person younger than twenty-one years of age;
- (3) Consumption of marijuana by a person younger than twenty-one years of age;
- (4) Operating or being in physical control of any motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana;
- (5) Consumption of marijuana while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport, while it is being operated;

- (6) Smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated;
- (7) Possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private preschool, elementary school, or high school, in a school bus, or on the grounds of any correctional facility;
- (8) Smoking marijuana in a location where smoking tobacco is prohibited;
- (9) Consumption of marijuana in a public place, other than in an area licensed by the department for consumption;
- (10) Consumption of marijuana as part of a criminal penalty or a diversion program;
- (11) Conduct that endangers others;
- (12) Undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; or
- (13) Performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless licensed for this activity by the department.

Section 3. That title 34 be amended by adding a NEW SECTION to read:

~~§3. Notwithstanding the provisions of this chapter, this~~ This chapter does not:

- (1) Require that an employer permit or accommodate an employee to engage in conduct allowed by this chapter;
- (2) Affect an employer's ability to restrict the use of marijuana by employees;
- (3) Limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this chapter on or in that property; or
- (4) Limit the ability of the state or a local government to prohibit or restrict any conduct otherwise permitted under this chapter within a building owned, leased, or occupied by the state or the local government.

Section 4. That title 34 be amended by adding a NEW SECTION to read:

~~§4. Subject to the limitations in this chapter, and notwithstanding any other law, the following acts, if done by a person at least twenty-one years of age, are not unlawful~~ lawful and ~~shall may~~ not be an offense ~~under state law or the laws of any local government within the state or~~; be subject to a civil fine, penalty, or sanction, ~~or~~; be a basis for detention, search, or arrest; ~~or to deny any right or privilege; or to seize or forfeit assets under state law or the laws of any local government, if the person is at least twenty-one years of age~~ be a basis for asset seizure or forfeiture:

- (1) Possessing, using, ingesting, inhaling, processing, transporting, delivering without consideration, or distributing without consideration one ounce or less of marijuana, except that not more than eight grams of marijuana may be in a concentrated form;
- (2) Possessing, planting, cultivating, harvesting, drying, processing, or manufacturing not more than three marijuana plants and possessing the marijuana produced by the plants, provided if:
 - (a) The plants and any marijuana produced by the plants in excess of one ounce are kept at one private residence, are in a locked space, and are not visible by normal, unaided vision from a public place;
 - (b) Not more than six plants are kept ~~in or on the grounds of~~ at a private residence at one time; and

- (c) The private residence is located within the jurisdiction of a local government where there is no licensed retail store where marijuana is available for purchase pursuant to this chapter;
- (3) Assisting another person who is at least twenty-one years of age, or allowing property to be used, in any of the acts permitted by this section; and
 - (4) Possessing, using, delivering, distributing, manufacturing, transferring, or selling to persons twenty-one years of age or older marijuana accessories.

Section 5. That title 34 be amended by adding a NEW SECTION to read:

§5. A person who commits the following acts is subject to a civil penalty not exceeding the amount specified:

- (1) ~~A person who, pursuant to §4 of this chapter, cultivates~~Cultivates marijuana plants that are visible by normal, unaided vision from a public place ~~is subject to a civil penalty not exceeding, two hundred and fifty dollars;~~
- (2) ~~A person who, pursuant to §4 of this chapter, cultivates~~Cultivates marijuana plants that are not kept in a locked space ~~is subject to a civil penalty not exceeding, two hundred and fifty dollars;~~
- (3) ~~A person who, pursuant to §4 of this chapter, cultivates~~Cultivates marijuana plants within the jurisdiction of a local government where marijuana is available for purchase at a licensed retail store or where the cultivation of plants is not allowed through local ordinance or regulation pursuant to ~~§10~~section 10 of this chapter ~~is subject to a civil penalty not exceeding, two hundred and fifty dollars;~~
- (4) ~~A person who smokes~~Smokes marijuana in a public place, other than in an area licensed for such activity by the department, ~~is subject to a civil penalty not exceeding one hundred dollars;~~ and
- (5) ~~A person who is~~Is under twenty-one years of age and possesses, uses, ingests, inhales, transports, delivers without consideration or distributes without consideration one ounce or less of marijuana or possesses, delivers without consideration, or distributes without consideration marijuana accessories ~~is subject to a civil penalty not to exceed, one hundred dollars. The person shall be provided the option of attending up to four hours of drug education or counseling in lieu of the fine~~civil penalty.

Section 6. That title 34 be amended by adding a NEW SECTION to read:

§6. The department shall have the power, except as otherwise provided in ~~§10~~section 10 of this chapter, to license and regulate the cultivation, manufacture, testing, transport, delivery, and sale of marijuana in the state and to administer and enforce this chapter. The department shall accept applications for and issue, ~~in addition to any other types of licenses the department deems necessary:~~

- (1) Licenses permitting commercial cultivators and manufacturers of marijuana to cultivate, process, manufacture, transport, and sell marijuana to marijuana wholesalers;
- (2) Licenses permitting independent marijuana testing facilities to analyze and certify the safety and potency of marijuana;
- (3) Licenses permitting marijuana wholesalers to package, process, and prepare marijuana for transport and sale to retail sales outlets; and
- (4) Licenses permitting retail sales outlets to sell and deliver marijuana to consumers.

Section 7. That title 34 be amended by adding a NEW SECTION to read:

~~§ 7.~~ Not later than July 1, 2023, the department shall promulgate rules ~~issue regulations pursuant to chapter 1-26 necessary for the implementation and enforcement of this chapter. The rules shall be reasonable and~~ shall include:

- (1) Procedures for the issuance, renewal, suspension, and revocation of licenses;
- (2) Application, licensing, and renewal fees, not to exceed the amount necessary to cover the costs to the department of implementing and enforcing this chapter;
- (3) Time periods, not to exceed ninety days, by which the department must issue or deny an application;
- (4) Qualifications for licensees;
- (5) Security requirements, including lighting and alarm requirements, to prevent diversion;
- (6) Testing, packaging, and labeling requirements, including maximum tetrahydrocannabinol levels, to ensure consumer safety and accurate information;
- (7) Restrictions on the manufacture and sale of edible products to ensure consumer and child safety;
- (8) Health and safety requirements to ensure safe preparation and to prohibit unsafe pesticides;
- (9) Inspection, tracking, and record-keeping requirements to ensure regulatory compliance and to prevent diversion;
- (10) Restrictions on advertising and marketing;
- (11) Requirements to ensure that all applicable statutory environmental, agricultural, and food and product safety requirements are followed;
- (12) Requirements to prevent the sale and diversion of marijuana to persons under twenty-one years of age; and
- (13) Civil penalties for the failure to comply with rules adopted pursuant to this chapter.

Section 8. That title 34 be amended by adding a NEW SECTION to read:

~~§ 8.~~ In determining the appropriate number of licenses to issue, as required under this chapter, the department shall:

- (1) Issue enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state; and
- (2) Limit the number of licenses issued, if necessary, to prevent an undue concentration of licenses in any one municipality.

Section 9. That title 34 be amended by adding a NEW SECTION to read:

~~§ 9.~~ Actions and conduct by a licensee, a licensee's employee, and a licensee's agent, as permitted pursuant to a license issued by the department, or by those who allow property to be used by a licensee, a licensee's employee, or a licensee's agent, as permitted pursuant to a license issued by the department, are not unlawful and ~~shall~~ may not be an offense under state law, or the laws of any local government within the state, or be subject to a civil fine, penalty, or sanction, or be a basis for detention, search, or arrest, or to deny any right or privilege, or to seize or forfeit assets under state law, or the laws of any local government within the state. No contract is unenforceable on the basis that marijuana is prohibited by federal law.

Section 10. That title 34 be amended by adding a NEW SECTION to read:

~~§10.~~—A local government may enact ordinances or regulations governing the time, place, manner, and number of licensees operating within its jurisdiction. A local government may ban the establishment of licensees or any category of licensee within its jurisdiction. A local government may allow for cultivation at private residences within its jurisdiction that would otherwise not be allowed under §4(2)(c) so long as the cultivation complies with §4(2)(a) and §4(2)(b) and the other requirements of this chapter. A local government may not prohibit the transportation of marijuana through its jurisdiction on public roads by any person licensed to do so by the department or as otherwise allowed by this chapter.

Section 11. That title 34 be amended by adding a NEW SECTION to read:

~~§11.~~—An excise tax of fifteen percent is imposed upon the gross receipts of all sales of marijuana ~~to a consumer sold~~ by a person licensed by the department pursuant to this chapter ~~to a consumer~~. The department shall ~~by promulgate~~ rules pursuant to chapter 1-26 to establish a procedure for the collection of this tax and shall collect the tax. The revenue collected under this section ~~shall~~ must be appropriated to the department to cover costs incurred by the department in carrying out its duties under this chapter. Fifty percent of the remaining revenue ~~shall~~ must be appropriated for the support of South Dakota public schools and the remainder ~~shall~~ must be deposited into the state general fund.

Section 12. That title 34 be amended by adding a NEW SECTION to read:

~~§12.~~—The department shall publish an annual report that includes the number and type of licenses issued; demographic information on licensees; a description of any enforcement or disciplinary action taken against licensees; a statement of revenues and expenses of the department related to the implementation, administration, and enforcement of this chapter; ~~and~~ a statement of taxes collected in accordance with this chapter; and an accounting for how ~~those~~ the tax revenues were disbursed.

Section 13. That title 34 be amended by adding a NEW SECTION to read:

~~§13.~~—This chapter ~~shall~~ must be broadly construed to accomplish its purposes and intents. Nothing in this chapter purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this chapter or the application thereof to any person or circumstance is held invalid or unconstitutional, such invalidity or unconstitutionality ~~shall~~ may not affect other provisions or applications of the chapter that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this chapter are severable.