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July 26, 2021

RECEIVED
AUG 31 2021
S.D. SEC. OF STATE

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

Re: LRC Review of Proposed S.D. Const. Art. XXI, § 10 (Six Paragraphs)

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 constitutional proposal submitted to it by a sponsor for the purpose of determining whether the proposal 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 [proposal] 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, you are asked to keep in mind the legal standards established in SDCL 12-13-24 and 12-13-25.

The purpose of a constitution is to provide a basic structure within which a government can function. The Constitution, in general terms, prescribes and limits the powers to be exercised by that government and sets forth the rights of the governed. As submitted via e-mail on July 6, 2021, this proposal to establish a new § 10 to Article XXI of the South Dakota Constitution would specify amounts and types of marijuana that are lawful to consume and the multiple conditions that must be met before one has a right to consume marijuana. These are not general terms. Moreover, the civil penalties prescribed here would be the first in the Constitution. The Constitution is not a compilation of policy statutes and as such, should not be amended to incorporate what ought to be statutory material. Therefore, this office recommends that the proposed constitutional provision be re-written so that it would amend the South Dakota Codified Laws, rather than impact the South Dakota Constitution.

In addition, there are a number of changes that this office encourages you to consider to the proposed text. Please reference the enclosed, marked-up copy of edits while reviewing the bulleted explanations and suggestions below. Each is listed based upon the paragraph in which they are found:

Paragraph 1

- The first sentence is a run-on sentence that may be better organized for clarity. Specifically, the clauses that scope the acts that are lawful should be moved to the first portion of the sentence, while the conduct that is lawful should be listed thereafter. Otherwise, it is less clear which clauses apply to various aspects of the long sentence. "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. Additionally, the phrase "under state or local law, regulation, or ordinance" is redundant because making the acts lawful in the Constitution means those types of laws cannot prohibit or sanction the acts. The phrase "in or on" is replaced by "at" as a simpler, less-confusing way to capture the intent.

- It is not clear whether the private residence must be the residence of the cultivator, possessor, or neither; or whether there is a distinction between the cultivator or possessor. Must the cultivator of the plant also be the possessor of the plant for the plant to be lawful, and by extension, the actions of the cultivator or possessor?
- Is the phrase "to persons twenty-one years of age or older" applicable only to "selling for consideration," or to all of the preceding verbs? If so, only the verbs "delivering, distributing, or selling" grammatically align with the preposition "to." If the phrase only applies to "selling for consideration," a comma should be inserted after "older" and before "marijuana."

Paragraph 2

- The edits to the first sentence eliminate redundancies and improve clarity. The additions of "the" throughout the paragraph provide parallel construction. They are stylistic only.

Paragraph 3

- The edits to the first sentence make it more concise and clarify that permissiveness and accommodation is not required in relation to employees.
- We recommend striking the third sentence. The fact that this constitutional provision does not affect medical marijuana or industrial hemp use can be listed, if at all, in the second paragraph where other laws are listed that are not limited or affected by this provision. That edit has also been made. The provisions in this proposal that might conflict with existing law are the civil penalties that apply to cultivation or underage consumption, and the impact this would have on currently legalized medical cannabis.

Paragraph 4

- Throughout this paragraph, new civil penalties are laid out. However, 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.
- In the second sentence, there is a civil penalty for not cultivating marijuana plants in a locked space. Paragraph 1, however, requires both that the plants be cultivated in a locked space and at a private residence in order to be lawful. What role, if any, does the fact that the marijuana may not have been cultivated at a private residence have on a civil penalty, if any?
- We revised the third sentence to account for the fact that Paragraph 2 indicates this constitutional provision does not affect laws regarding the consumption of marijuana, unless permitted by statute. That language in Paragraph 2 suggests that this constitutional provision makes recreational marijuana use legal in public areas permitted by statute, suggesting that an exception should be made to the civil penalty where the conduct is permitted.
- The final sentence is problematic. For example, if an individual is engaged in unauthorized cultivation of thousands of marijuana plants in a field, does the fact that they are not kept in a locked space mean that the cultivator is only facing a modest civil penalty under this proposal? Moreover, it seems contradictory to allow civil penalties to be changed but then describe these penalties as "exclusive."

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Paragraph 5

- The first sentence contains a stylistic edit from "shall" to "must," reflecting that the subject "section" is inanimate.

Paragraph 6

- "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.

Many of the above stylistic edits are based upon the Guide to Legislative Drafting (<https://mylrc.sdlegislature.gov/api/Documents/127102.pdf>). Should you have any questions about these changes, or about the suggestions made in this letter, please feel free to contact this office.

Single Subject

Additionally, pursuant to SDCL 12-13-25, I am to provide a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether the proposal is indeed an "amendment under S.D. Const., Art. XXIII, § 1," or if it is rather a "revision under S.D. Const., Art. XXIII, § 2." The plain language of SDCL 12-13-25 indicates that this opinion has no legal effect. Moreover, the South Dakota Supreme Court has yet to construe the single subject requirement specific to Article XXIII, Section 1, or the distinction between an amendment or revision pursuant to Article XXIII, Sections 1 and 2. With this background, it is my opinion that this proposed constitutional provision is an amendment that embraces one subject.

Fiscal Impact

It has been determined during this review that this constitutional proposal 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 constitutional proposal as submitted in final form to the Attorney General, so we can develop any fiscal note required by SDCL 2-9-30.

Finally, this letter constitutes neither an endorsement of the proposed constitutional provision 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 Article XXI of the Constitution of the State of South Dakota, be amended by adding a NEW SECTION to read:

§ 10. Marijuana

The following acts, if done by a person at least twenty-one years of age, are lawful and ~~shall~~ may not be an offense; ~~or~~ be subject to a civil fine, penalty, or sanction; ~~or~~ is a basis for detention, search, or arrest; ~~or to~~ is deny any right or privilege; ~~or to seize or forfeit assets, under state or local law, regulation, or ordinance, if the person is at least twenty-one years of age~~ be a basis for asset seizure or forfeiture: possessing, using, ingesting, transporting, processing, 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; cultivating not more than three marijuana plants and possessing the marijuana produced by the plants, provided 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, are not visible by normal, unaided vision from a public place, and not more than six plants are kept ~~in or on~~ at the grounds of a private residence at one time; possessing, cultivating, manufacturing, testing, delivering, distributing, or selling for consideration to persons twenty-one years of age or older marijuana or marijuana accessories, by licensed commercial cultivators, wholesalers, testing facilities, or retail sales outlets; and 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.

This section does not limit or affect laws that ~~prohibit or~~ otherwise regulate ~~the following~~: the use, ingestion, purchase, possession, transport, delivery, or distribution of marijuana or marijuana accessories by a person younger than twenty-one years of age; delivery or distribution of marijuana or marijuana accessories, with or without consideration, to a person younger than twenty-one years of age; the 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; smoking marijuana within a motor vehicle, aircraft, motorboat, or other motorized form of transport, while it is being operated; the possession or consumption of marijuana or possession of marijuana accessories on the grounds of a public or private school, in a school bus, or on the grounds of any correctional facility; smoking marijuana in a location where smoking tobacco is prohibited; the consumption of marijuana in a public place, unless permitted by statute; the consumption of marijuana as part of a criminal penalty or a diversion program; undertaking any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice; performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food grade ethanol, unless permitted by statute; ~~or~~ conduct that endangers others; or medical marijuana and industrial hemp.

This section does not require that an employer permit or accommodate an employee to engage in conduct allowed by this section ~~or affect an employer's ability to restrict the use of marijuana by~~

~~employees.~~ This section does not limit the right of a person who occupies, owns, or controls private property from prohibiting or otherwise regulating conduct permitted by this section on or in that property, or limit the ability of the state or a local government to ~~prohibit or restrict~~otherwise regulate any conduct otherwise permitted under this section within a building owned, leased, or occupied by the state or the local government. ~~This section does not limit or expand the rights or restrictions otherwise applicable to medical marijuana or industrial hemp.~~

A person who 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. A person who cultivates marijuana plants that are not kept in a locked space is subject to a civil penalty not exceeding two hundred and fifty dollars. A person who smokes marijuana in a public place where smoking marijuana is not lawfully permitted is subject to a civil penalty not exceeding one hundred dollars. A person who is under twenty-one years of age and possesses, uses, ingests, transports, processes, delivers without consideration or distributes without consideration one ounce or less of marijuana or marijuana accessories is subject to a civil penalty not to exceed one hundred dollars, and may be provided the option of attending up to four hours of drug education or counseling in lieu of the civil penalty. The legislature may periodically adjust the amounts of the civil penalties provided herein, not to exceed the rate of inflation. The civil penalties enumerated in this paragraph are the exclusive penalties for the conduct described.

This section ~~shall~~must be construed broadly to accomplish its purposes and intents.

The legislature shall enact laws regulating the commercial cultivation, manufacturing, processing, testing, transport, delivery, and sale of marijuana, and may enact other laws as necessary to implement this section, but the legislature may not hinder or frustrate the purposes or intent of this section. The legislature may impose a tax on the commercial sale of marijuana and marijuana accessories, not to exceed fifteen percent.

Nothing in this section purports to supersede any applicable federal law, except where allowed by federal law. If any provision in this section 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 section that can be given effect without the invalid or unconstitutional provision or application, and to this end, the provisions of this section are severable.