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APR 19 2022

S.D. SEC. OF STATE

April 19, 2022

Arthur Taylor, President  
Families for America, Inc.  
familiesforamerica@gmail.com

**Re: LRC Review of Proposed Constitutional Amendment Regarding Elections**

Dear Mr. Taylor:

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.

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 December 15, 2021, this proposal to establish a chapter of the South Dakota Constitution would specify several measures that must be taken in state elections. These are not general terms. For example, the five crimes prescribed in the draft would be the first crimes specified 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. Doing so only increases the risk of a successful challenge of this proposal, if approved, for failure to adhere to the single subject rule. (Please review the case of *Thom & Miller v. Barnett et al*, 2021 S.D. 65, 967 N.W.2d 261, for more information on this concern.) Therefore, this office recommends that the proposed constitutional provision be re-written so that it would amend the South Dakota Codified Laws as an initiated measure, rather than impact the South Dakota Constitution.

In addition, there are several edits to the proposed text that this office encourages you to consider. 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:

Generally:

- Proposed catchlines were struck, reflecting the fact that catchlines are not law, but are indexing that is set by the LRC's Code Counsel on authority delegated by law from the Code Commission.

- The LRC drafting manual reflects longstanding state practice by rejecting the federal drafting convention whereby sections may be long and each paragraph of a section may be made a subdivision. This is done for ease of understanding of discrete provisions. Accordingly, some of the long sections provided have been reduced in size and organized to reflect individual topics.
- The phrase "state-issued photo identification or a state-issued driver's license" was shortened to "state-issued photo identification," as a South Dakota-issued driver's license is photographic identification.
- Unless specified below, the remaining edits are stylistic and intended to make the language more concise and readily understood.

Section 4:

- There are a number of practical concerns with this section. This section requires "all internet connectivity" to "be discontinued at any polling place during the entire time votes are cast and counted." With internet connectivity provided by smart phones, how will this be practically enforced? If votes must be by paper ballots and there is no machine counting, does this remain a concern? Additionally, if poll workers can obtain information on vote totals by word-of-mouth, does the fact that "electronic sources of information" cannot provide the same information impede potential bias?

Section 9:

- This section establishes blanket liability protection for any photographing outside of a polling station. There are several criminal offenses associated with photography that, per the plain language of this provision, would receive a constitutional defense. This might not only include harassment or stalking, but also invasions of privacy, child pornography, as well as more esoteric crimes like misuse of identification cards.

Section 12:

- This section requires that all votes, to be counted, must be reported within six hours of the time voting has closed. This would appear to prevent the ability to count provisional ballots or to have canvassing boards correct issues, as provided in South Dakota law currently.

Section 14:

- The plain language of this section allows the Legislature to "adjust or void any vote totals it determines appropriate" as well as to "ignore any vote totals and exercise its right to appoint" presidential electors. This would likely be a violation of the Equal Protection Clause of the Fourteenth Amendment.

Sections 18-21:

- These sections specify a Class III felony. A Class III felony is not recognized in South Dakota law. This further underscores the problem of putting criminal acts in the Constitution. These provisions require concepts cross-referenced from statute to operate. Constitutional provisions should not rely upon subordinate aspects of law to function.
- With regard to Section 21, it is unclear what the phrase "causes ballots to be adjudicated" means. It is equally unclear how one can intentionally do so in good faith.

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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,

A handwritten signature in blue ink that reads "Reed Holwegner". The signature is written in a cursive style.

Reed Holwegner  
Director

RH/JM/ct

Enclosure

CC: Chris Curzon, ccurzon9@gmail.com  
The Honorable Charles McGuigan, Acting Attorney General  
✓ The Honorable Steve Barnett, Secretary of State

**INITIATED CONSTITUTIONAL AMENDMENT PETITION  
OR  
INITIATED PETITION FOR REPEAL OF CONSTITUTIONAL  
PROVISION**

~~WE, THE UNDERSIGNED~~ qualified voters of the state of South Dakota, petition that the following section or sections and article or articles of the South Dakota Constitution be added and that this proposal be submitted to the voters of the state of South Dakota at the general election on November \_\_\_\_, \_\_\_\_ for their approval or rejection:

\_\_\_\_\_  
Title: South Dakota Election Integrity  
\_\_\_\_\_  
Attorney General Explanation:

Article XXXIII

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That the Constitution of the State of South Dakota be amended to add a new article to read as follows:

~~Sec. § 1 - Prohibited Election Conduct.~~

~~(a) No voting machine may be utilized in any election to count or calculate votes. All ballots~~

~~shall must~~ be paper ballots.

§ 2. All votes ~~shall must~~ be counted by hand by ~~the judgment of~~ the human eye. All counting

~~shall must~~ occur by two persons, one appointed by each of the two largest vote-getting parties in

the previous state gubernatorial election.

~~(b) Any differences or uncertainties in counting by the two shall may~~ only be resolved by an

individual approved and appointed in advance of the election by the ~~state legislature~~ Legislature.

**Commented [JG1]:** Catchlines, which are not law but are mere indexing, are set by the Code Counsel on authority delegated by the Code Commission.

**Commented [JG2]:** [Drafting Manual](#), pg. 29, rejects the federal drafting style, whereby sections begin with subdivisions. This section is recommended to be reorganized to account for this better drafting method.

**Commented [JG3]:** This is unnecessary language.

~~(e)~~§ 3. Mail in ballots ~~shall be~~ are prohibited, except when requested by a voter in advance and after showing state-issued photo identification ~~or a state-issued driver's license.~~

Commented [JG4]: "State-issued photo identification" captures all state-issued driver's licenses, making the latter reference redundant.

~~(e)~~§ 4. All internet connectivity ~~shall must~~ be discontinued at any polling place during the entire time votes are cast and counted. ~~In addition, all~~All persons serving in any capacity at a polling location, except observers, ~~shall must~~, from the time of poll closing until the vote has been finally and publicly reported, check ~~--in~~ their cell phones so the counting occurs without the potential bias of any electronic sources of information of vote totals from other locations.

Commented [JG5]: From a practical standpoint, this seems impossible to enforce. This would appear to require cellphone blocking equipment, as that provides internet connectivity.

~~(e)~~§ 5. Local law enforcement officials shall prohibit the delivery of boxes or containers. No person may deliver any box or container of any kind ~~at to~~ a polling place from the time the polls are first open for voting until after all votes have been counted and reported.

Commented [JG6]: What of televisions and other electronic telecommunications devices? If this is the intent, then all forms of telecommunications will need to be restricted. Even then, nothing prohibits this information from being communicated verbally to the poll workers, without the aid of electronic devices.

Commented [JM7]: Why not just prohibit the action by law as opposed to making law enforcement prohibit it?

Sec. 2. Registration Requirements § 6.

~~(a)~~ All registration to vote shall occur on or before 14 days prior to an election. The time period for voter registration must end on or before the 14<sup>th</sup> day before election day. ~~Such registration shall~~ require Registration requires the registering individual to show valid state-issued photo identification ~~or a valid state-issued driver's license.~~ No identification ~~or driver's license which~~ that has expired ~~shall be~~ is valid.

Commented [JM8]: Suggested rewrite.

Sec. 3. Election Observer and Reporting Requirements § 7.

~~(a)~~ No early voting ~~shall may~~ be permitted more than two weeks before election day. All mail-  
in ballots must be received two days before election day. ~~Otherwise, they shall not to be~~  
counted. Mail-in balloting cannot be permitted to delay the announcement of full election totals  
within six hours after the poll's closing.

~~(b)~~ § 8. All voters in all elections ~~shall be are~~ A voter in an election is required to show valid  
state-issued photo identification ~~or a valid state issued driver's license~~ before receiving a  
ballot. No identification ~~or driver's license which that has expired shall be~~ is valid.

~~(c)~~ § 9. All observers in a polling station ~~shall may~~ be located ~~within at least five feet of from any~~  
station they desire to observe. Observers inside a polling station ~~shall are also be~~ permitted to  
photograph any ~~or all~~ activities they desire. Private citizens outside a polling station ~~shall be are~~  
permitted to photograph any ~~and all activity~~ activities they desire and shall be free from any  
liability of any kind for such photographing. ~~All Permitted photographing shall be understood to~~  
~~include and allow includes~~ video-taping and the recording of sound and voice.

**Commented [JG9]:** This language does not make sense. You are requiring, constitutionally, that observers have a duty to be within five feet of any station, which presumably means they can be anywhere in the polling station, including in the polling booth itself.

**Commented [JG10]:** Redundant given "any."

**Commented [JG11]:** Are you intending to limit this ability to citizens, or to all permanent residents, or to anyone?

**Commented [JG12]:** Will this prevent liability for what would otherwise constitute criminal harassment or stalking?

~~(d)~~ § 10. All ballots ~~shall may only~~ be counted ~~only~~ at and reported ~~only~~ from the place where  
the votes are cast.

~~(e)~~§ 11. Under no condition ~~shall may~~ the counting of votes be stopped between the time that a poll has closed and six hours thereafter, unless completed.

~~(f)~~§ 12. All votes ~~shall must~~ be counted and reported within six hours of the time voting has closed. No votes ~~being~~ reported thereafter ~~shall be~~ are valid.

Commented [JG13]: This would appear to eliminate the ability to count provisional ballots, or to have the canvassing board correct issues.

~~(g)~~§ 13. All vote totals ~~shall must~~ be reported from all locations on the following basis: (1) by 11:59 p.m. of the night before the election (relating to early voting and mail-in ballots); ~~and~~ (2) at one hour and each hour thereafter following the scheduled polling closing time; ~~and~~ (3) a final count at six hours after the scheduled polling closing time.

~~Sec. 4. Legislative Election Authority~~§ 14.

~~(a) The legislature of the state~~The Legislature shall have authority in elections for ~~president~~ President and ~~vice president~~ Vice President of the United States to adjust or void any vote totals it determines appropriate. It may also ignore any vote totals and exercise its right to appoint electors as specified under the United States Constitution.

Commented [JG14]: This section permits violations of the Equal Protection Clause of the Fourteenth Amendment.

~~(b)~~§ 15. Any alleged violation of state election law may be remedied by a complaint filed with the ~~state legislature~~ Legislature, who shall promptly, according to its own procedures, review, receive evidence, and make a final ruling on the same.

Sec. 5. Inspection Rights § 16.

(a) All registration material, election-related computer files and data-bases, and actual ballots

cast shall must remain available for inspection by representatives of any state party, the

legislature Legislature, the courts, and any group of 1,000 or more requesting registered voters in

the state, for 120 days after the election.

Sec. 6. Election Crimes

(a) § 17. Any person voting:

(1) voting twice Twice or more times in a single election. of:

(2) voting on On behalf of a deceased person. of:

(3) voting using Using another person's name.; or

(4) voting who Who is not a United States citizen.

shall be is guilty of treason against the state.

(b) § 18. Election officials An election official denying any right to observers to an election shall

be is guilty of a Class III felony.

**Commented [JG15]:** Criminal violations are not generally placed in the constitution, but are instead inserted in code. This is more properly included in an initiated measure.

**Commented [JG16]:** A Class III felony is not recognized in South Dakota law. This further underscores the problem of putting criminal acts in the constitution. These provisions require concepts provided in statute. Constitutional provisions should not rely upon subordinate aspects of law to function.

~~(e)~~§ 19. Any person who resets or erases any election files or data bases, or destroys or misplaces any ballots prior to the end of the 120-day inspection period ~~shall be is~~ guilty of a Class III felony.

~~(d)~~§ 20. Any polling supervisor who fails to report partial and final results on the schedule ~~shall be is~~ guilty of a Class III felony.

~~(e)~~§ 21. Any ballot counter who intentionally, with a lack of good faith, causes ballots to be adjudicated ~~shall be is~~ guilty of a Class III felony.

Commented [JG17]: It is unclear what this means-- "causes ballots to be adjudicated"--and how one can intentionally do so in good faith.

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#### INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.

—2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.

—3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.

—4. Abbreviations of common usage may be used. Ditto marks may not be used.

—5. Failure to provide all information requested may invalidate the signature.

NAME	RESIDENCE	DATE/COUNTY
-SIGN _____ - -PRINT	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER _____ - CITY OR TOWN	DATE OF SIGNING _____ - COUNTY OF REGISTRATION
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**VERIFICATION BY PERSON CIRCULATING PETITION INSTRUCTIONS TO CIRCULATOR:** This section **must** be completed following circulation and before filing.

\_\_\_\_\_  
 \_\_\_\_\_  
 Print name of the circulator      Residence Address      City      State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, that I am not attesting to any signature obtained by any other person,

that I am a resident of South Dakota, that I made reasonable inquiry and to the best of my knowledge each person signing the petition is a qualified voter in the county indicated on the signature line, that no state statute regarding petition circulation was knowingly violated, and that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration.

\_\_\_\_\_  
Circulator ID Number (paid circulator only) \_\_\_\_\_ Signature of Circulator

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(Seal) \_\_\_\_\_

\_\_\_\_\_  
Signature of Officer Administering Oath

My Commission Expires \_\_\_\_\_

\_\_\_\_\_ Form Revised 2020

~~5-02-08-09~~ \_\_\_\_\_ Title of Officer Administering Oath