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S.D. SEC. OF STATE

June 17, 2022

Mr. James D. Leach  
Attorney at Law  
1617 Sheridan Lake Road  
Rapid City, SD 57702-3483

Dear Mr. Leach:

SDCL 12-13-24 and 12-13-25 requires the South Dakota Legislative Research Council (LRC) 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." Comments and suggestions in compliance with the cited sections are included below.

LRC encourages you to consider the edits and suggestions to the proposed text. The edits are suggested 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, which may be found as one of the online references via the [website](#) of the South Dakota Legislature.

#### Measure as Submitted with Suggested Changes and Explanations

##### BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

*That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION ~~to read:~~*

It is not necessary to utilize an italicized font.

~~Before the end of the first trimester, the abortion decision and its effectuation must be left to the judgment of the pregnant woman.~~

As proposed, this sentence does not require any action on the part of the state. If the intent is to prohibit action on the part of the state, that prohibition should be clearly articulated. In its current form, the sentence appears to be merely explanatory and is therefore an unnecessary addition to the South Dakota Constitution. It is suggested that either the sentence: (1) be stricken, or (2) rewritten to establish a pregnant woman's right to abortion before the end of the first trimester, if that is the intent of the sentence.

After the end of the first trimester, the State, ~~in promoting its interest in the health of the pregnant woman,~~ may regulate by law the abortion decision and its effectuation only in ways that are reasonably related to ~~her~~ the health of the pregnant woman.

Because the state's interest in the health of the pregnant woman is not specifically articulated, there is no basis upon which to reference a "promotion" of that interest. In the absence of such an articulation, it is suggested that the phrase be stricken.

Authorizing the regulation of the abortion decision and its effectuation on the condition that the manner of regulation be "reasonably related" to the "health" of the pregnant woman raises several questions:

- What constitutes a "reasonable" relationship to the woman's health?
- Is the term "health" to be broadly construed as referencing mental and physical wellbeing?
- Does the reference to a pregnant "woman" preclude the regulation of abortion in the case of a pregnant minor?

This proposed language references the regulation of an abortion "[a]fter the end of the first trimester." In fact, the regulation applies to a time frame that begins at the end of the first trimester and extends only to the end of the second trimester. It would be preferable to articulate that duration or even to use a phrase such as "except as otherwise provided in this section . . . ."

After the end of the second trimester, the State, ~~in promoting its interest in the potentiality of human life,~~ may regulate or prohibit abortion, ~~except where~~ when it is necessary, in the medical judgment of the woman's physician, to preserve the life or physical or emotional health of the pregnant woman.

Because the state's interest in promoting the potentiality of human life is not specifically articulated, there is no basis upon which to reference a promotion of that interest. Secondly, because the above sentence deals specifically with the regulation or prohibition of an abortion during the third trimester of a pregnancy, the reference to the state's interest in promoting the potentiality of human life could be interpreted as applying only to that latter period of a pregnancy and not to an earlier stage. The intent of the proposed language is not entirely apparent. In the absence of a clearer articulation, it is suggested that the phrase be stricken.

As noted above, the above sentence also references the phrase "pregnant woman," thereby raising an issue with respect to its application in the case of a pregnant minor.

While the reference to preserving the "life" of the pregnant woman is a reasonably identifiable threshold, preserving the "physical" health of the pregnant woman is more nebulous. Is this intended to mean only great bodily harm or the impairment of major bodily functions, or is it intended to have a broader application? Again, the intent of the language is not readily apparent.

The sentence also contains a reference to "preserving" the emotional health of the pregnant woman. Is this intended to merely maintain her current emotional state? Does it preclude any action or intervention to restore her emotional health? The intent is likewise not clear, and neither is the manner in which a woman's baseline emotional health might be established for purposes of equitably applying this concept.

While the above sentence pertains to the preservation of the pregnant woman's physical and emotional health, it does not appear to provide any flexibility in addressing medical situations involving the life or health of a fetus in the case of a pregnancy involving multiple fetuses.

Lastly, the proposed constitutional amendment language would be added to S.D. Const., Art. VI, which is the state of South Dakota's Bill of Rights. The last two sentence of the proposed language authorizes the state to regulate or prohibit abortions during the second and third trimesters of a woman's pregnancy, meaning the language gives the state the authority to pass laws regulating abortion. The language does not establish the right of an individual in relation to state government, as do other sections in the Bill of Rights article. Perhaps the last two sentences could be moved into their own article or into a different existing article.

Although you are not statutorily required to make changes based upon the suggestions and comments provided above, you are encouraged to be cognizant of the standards established in SDCL 12-13-24 and 12-13-25 and ensure that your language is in conformity.

SDCL 12-13-25 also requires the issuance of a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether it is in fact an "amendment under S.D. Const., Art. XXIII, § 1," or a "revision under S.D. Const., Art. XXIII, § 2." The proposed constitutional change appears to embrace only one subject, the availability of an abortion. Given that the subject does not result in a far-reaching, complete, comprehensive, and substantial rewrite of the state constitution, it appears to be an amendment and not a revision of the constitution.

This letter is issued in compliance with statutory requirements placed upon this office. It is neither an endorsement of the measure nor a guarantee of its sufficiency. If you proceed with the measure, please ensure that neither your statements nor any advertising contain any suggestion of endorsement or approval by the Legislative Research Council.

Enclosed with this letter you will find the suggested edits without comments.

Sincerely,



Reed Holwegner  
Director

RH/jm/at

Enclosure

CC:  The Honorable Steve Barnett, Secretary of State  
The Honorable Charles McGuigan, Acting Attorney General

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That Article VI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION ~~to read:~~

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After the end of the first trimester, the State, ~~in promoting its interest in the health of the pregnant woman,~~ may regulate by law the abortion decision and its effectuation only in ways that are reasonably related to ~~her~~ the health of the pregnant woman.

After the end of the second trimester, the State, ~~in promoting its interest in the potentiality of human life,~~ may regulate or prohibit abortion, ~~except where~~ when it is necessary, in the medical judgment of the woman's physician, to preserve the life or physical or emotional health of the pregnant woman.