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December 20, 2022

Joe Kirby
350 S. Main Avenue, #701
Sioux Falls, SD 57104

Attorney General

DEC 21 2022

Dear Joe Kirby:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated constitutional amendment submitted to it by a sponsor, for the purpose of assisting the sponsor in writing the amendment "in a clear and coherent manner in the style and form of other legislation" that "is not misleading or likely to cause confusion among voters."

The initiated constitutional amendment proposes to establish open primaries for certain elected offices, to establish certain ballot requirements, to provide election procedures, and to prohibit certain political party endorsements. 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. LRC comments are based upon the Guide to Legislative Drafting, which may be found on the South Dakota legislative [website](#).

Although a sponsor is 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—elections. Given the limited nature of the proposed language, it appears to be an amendment and not a revision of the constitution.

The sponsors may want to consider the utility of amending the constitution to provide elections administration requirements. Since the constitution is more difficult to amend than state law, it may be problematic to address future considerations and the ongoing administration of elections in this state.

Fiscal Impact

It has been determined during this review that this proposed initiated amendment to the Constitution 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 this initiated amendment to the Constitution as submitted in final form to the Attorney General so the LRC can develop any fiscal note required by SDCL 2-9-30.

Kirby – ICA related to Open Primaries

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Compliance

This letter is issued in compliance with statutory requirements placed upon this office. It is neither an endorsement of the proposed initiated amendment to the Constitution nor of any of the edits suggested by the LRC. This letter is not a guarantee of the proposal's sufficiency. If you proceed with the initiated constitutional amendment, please ensure that neither your statements nor any advertising contain any suggestion of endorsement or approval by the Legislative Research Council.

Sincerely,



Reed Holwegner
Director

Enclosure

CC: The Honorable Monae L. Johnson, Secretary of State
The Honorable Mark Vargo, Attorney General
De Knudson
Alfred Samuelson

Proposed Amendment to the South Dakota Constitution

Be it enacted by the people of South Dakota:

That Article VII of the Constitution of South Dakota be amended by adding ~~thereto~~ a NEW SECTION to read ~~as follows~~:

§ 4. ~~The purpose of this section is to establish open primary elections for the offices of governor, the legislature, all county elective offices, and the United States Senate and House of Representatives.~~¹ Primary elections covered by this section shall be² open to all candidates³ and all voters⁴ without regard for candidates' or voters' A primary election held for the office of the governor, a legislative office, a county office, the United States Senate, or the United State House of Representatives must not require a candidate to have a political party affiliation to be listed on the primary ballot. Any qualified⁵ voter may participate in a primary election covered by this section without regard to the voter's political party registration or affiliation, or lack thereof.

In a primary election covered by this section, ~~all candidates shall~~ each candidate must be listed on a single primary ballot regardless of ~~the candidate's~~ political party; and any A voter may vote for any primary candidate regardless of ~~the voter's~~ political party affiliation or lack thereof. The two candidates receiving the ~~greatest~~highest⁶ numbers~~number~~ of votes cast shall in a primary election advance to a the general election. If more than one candidate is to be elected to an office at the general election, the number of candidates advancing to the general from the primary election shall be⁷ twice the number to be elected in the general election.

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~~Only~~The⁷ general election ballot may only include those candidates properly⁸ advancing from the primary election ~~shall appear on the general election ballot;~~ however, the The legislature may, by law, establish procedures for replacing candidatesa candidate who have advanced from the primary election but will not participate in the general election due to death, withdrawal from the race, or disqualification.

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CandidatesA candidate may select the name of a political party preference to be listed alongside their namesnext to the candidate's name on the primary ballot; the The

¹ Purpose statements do not add legal value to the text of a law. Purpose statements are not found in the constitution. If the words of a law are clearly written, the law's purpose should also be clear. Declarations of purpose are not binding on courts. Please see page 19 of the LRC Drafting Manual.

² The use of "shall be" invites ambiguity. Does it mean "is" or "must"?

³ Is it the intent to have a primary election open to any candidate with no other qualifications to be included on the ballot? The constitution provides qualifications for certain offices.

⁴ Doesn't it need to be clarified that a voter still needs meet the requirements of voter registration.

⁵ Added for clarity. See Art. VII, sec. 2 of the S.D. Const.

⁶ "Highest" seems to be a better word choice.

⁷ Restructured sentence for readability.

⁸ This word doesn't seem necessary.

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same political party designation ~~shall~~must appear ~~alongside candidates next to the candidate's name on the general election ballot if the candidate advances who advance~~ to the general election.

~~The ballot shall~~Both the primary and general election ballots must state that a candidate's indicated political party affiliation~~designation~~ does not constitute or imply an endorsement of the candidate by the political party designated, ~~and no~~.

~~candidate for that office shall be deemed the official candidate of any party by virtue of his or her advancement to the general election from the primary election.⁹ A political party may not advertise, or deem in any way, that a candidate advancing from a primary election to a general election is the official or endorsed candidate of the political party by virtue of the candidate having listed the name of the political party next to the candidate's name on a primary ballot. Endorsement, nomination, or selection by any means by a political party shall be neither necessary nor sufficient for a candidate's name to appear on any ballot in a primary election covered by this section.¹⁰~~

The legislature may pass laws by law, and the secretary of state and board of elections may adopt rules and regulations,¹¹ as establish any necessary¹² procedures to implement this section. If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity will not affect any other provision or application of the section that can be given effect without the invalid provisions or applications, and to this end the provisions of this section are severable.¹³

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⁹ This sentence should be written in the active voice. See LRC Drafting Manual, page 31. The purpose of the sentence is to prohibit political parties from advertising a candidate as an official party candidate. A rewrite is suggested.

¹⁰ This sentence is not necessary. The purpose of the proposed language makes clear that any candidate may be on the ballot. The sentence does not have any operative legal significance.

¹¹ Authorizing rule-making through the constitution does not seem appropriate. If rule-making is necessary the Legislature should enact a law providing rule-making authority.

¹² Does this need to be further flushed out? It seems somewhat general.

¹³ Severability clauses are unnecessary. Please see page 20 of the LRC Drafting Manual.

