



April 19, 2022

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

Re: LRC Review of Proposed Constitutional Amendment Regarding Vaccine or Medication Mandates

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.

LRC encourages you to consider edits and suggestions to the proposed text. The edits are recommended for the 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 of clarification 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:

General:

- Proposed catchlines were struck, reflecting the fact that catchlines are not law, but are merely indexing that is set by the LRC's Code Counsel on authority delegated by law from the Code Commission.
- 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 proposed change to the constitution 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. It is my opinion that this proposed constitutional change is an amendment, not a revision. There may be a single subject concern with this proposal. Section 1 involves a prohibition on vaccine and medication mandates. Section 2 creates an escrow account specific to vaccines that is for the payment of medical claims associated with certain vaccines. This escrow account exists regardless of any mandate. 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.

Section 1:

- This section prohibits "mandates" that require persons receive a vaccine or medication. It includes private persons within the prohibition. Private persons, however, do not have the ability to impose what is commonly defined as a "mandate," as a private person is only able to assert the person's will in a lawful fashion by contract or persuasion. An additional term may need to be used in this section that is specifically applicable to private individuals.
- Although this section's mandate prohibition applies to vaccines and "other medications," subdivision 2's criteria appears to be almost exclusively relevant to vaccines. Other medications may therefore not be able to meet this second criteria, thereby making it so that no mandate for other medications may ever be mandated.
- Subdivision 3 may be problematic. First, it is a double negative. As noted above, this section prohibits a vaccine or medication mandate unless certain conditions are met. Subdivision 3, or the third condition, is a condition that negates the other two and may occur at any time. This makes it awkward to include as a third element. This office recommends pulling out this content and making it a final paragraph for the section, to better clarify that the Legislature could prohibit the mandate at any time.

Additional edits to the language of subdivision 3 are meant to address a clarity issue. If the intent is that the Legislature can prohibit a mandate without gubernatorial veto, then the joint resolution would appear to be the appropriate means to accomplish this. *See* Joint Rule 6A-1(3). Also, the language was clarified so that a "majority of the state legislature" was replaced by language akin to the South Dakota Constitution's provision describing the vote taken by each house for final passage of bills. *See* S.D. Const., Art. III, § 18.

Section 2:

- Section 1 relates to a "vaccine or other medication" but this section only describes a "vaccine." Is that difference in treatment intentional?
- The language does not specify when the escrow period starts. It might be assumed to begin on the effective date of the provision, but it is better to be clear on that material concern.
- The timeframe in which the "seventy-five percent of revenues" is measured is not specified. That likely needs to be clarified. Any requirement to deposit funds that is retrospective may constitute a taking or a violation of the Contracts Clause of the United States Constitution and South Dakota Constitution.
- If this commission of the Legislature is to direct payment of medical claims, does this mean that a separate administrative fact-finding structure must be created to determine whether the claim is valid? Or are the courts charged with that fact-finding determination? That should be specified.
- The term "account" is used in two sentences, with "fund" used in a third sentence, describing the same concept. This office recommends the nomenclature "fund" be used, as that is the predominant convention in the South Dakota Constitution and South Dakota Codified Laws.
- "Vaccine" is referenced in the singular and the plural. This office recommends consistent use of the singular, except where the intention is to be exclusively plural. *See* SDCL 2-14-6.

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- The remaining balance convention described in the subdivisions could be written with greater clarity.

Fiscal Impact

It has been determined during this review that this proposed initiated constitutional amendment 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 amendment 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 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/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 Vaccine Mandates
____ Attorney General Explanation:

Article XXXV

Object Clause:

To amend the State's Constitution so that it prevents mandates of vaccines or ingestion of other medications.

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:

See § 1, Medical Rights.

No vaccine or other medications medication may be mandated by any the state government, or any subdivision, or agency thereof, or other a private organization or party, unless:

(a) It (1) The vaccine or other medication has been in existence and successfully tested for at least 20 twenty years without significant modification;

(b) It (2) The vaccine or other medication has been developed primarily by use of inactivated toxins, or whole bacteria or virus, or parts of them, and is not an RNA a ribonucleic acid vaccine; and

(c) (3) The majority of the state legislature members-elect of each house of the Legislature has not at any time objected to such the mandate.

See § 2, Medical Claims.

The provider of any vaccine, which or other medication that does not comport with the requirements of See subdivisions 1(a) and (b), which are and is administered in this State, shall be is required for twenty years to escrow seventy-five percent of revenues for the purpose of paying medical claims. Such The revenues shall must be escrowed into an account established and controlled by the state legislature Legislature. Such account shall be directed by a health commission established by the state legislature to pay The Legislature shall establish a health commission to direct the payment of any health claims or compensation for injury or death

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]: You may have a single subject issue.

Commented [JG3]: This is vague language. What constitutes "significant" as opposed to "insignificant" modification?

Commented [JG4]: This line is unclear. How is the objection expressed? Could not the Legislature enact a law that prohibited mandates?

A majority of the Legislature may not be a majority of members-elect of each house needed to pass a measure under the South Dakota Constitution. S.D. Const., Art. III, § 18. To align with normal legislative procedure, at a minimum, the edit to the left is required.

Commented [JG5]: Seventy-five percent of revenues of what? That needs to be specified.

associated with the vaccine or other medication, according to a schedule established by the ~~state legislature~~ Legislature. The payment of claims shall must be ongoing during the twenty years. The balance remaining in ~~such~~ the fund at each year-end, if any, shall must be released to the provider of ~~such vaccines~~ the vaccine or other medication on the following schedule:

- ~~1.~~(1) One-tenth, after eleven years;
- ~~2.~~(2) One-ninth, after twelve years;
- ~~3.~~(3) One-eighth, after thirteen years, and so forth until;
- ~~4.~~(4) All remaining funds, after twenty years.

Commented [JG6]: Vaccine is referenced in the plural and singular. There needs to be consistency as to whether this fund is established for all vaccines and other medications, or a fund for each vaccine or other medication. The latter seems to be the more reasonable construction given your intent.

Commented [JG7]: I cannot understand what this schedule is intended to achieve.

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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.~~

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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