



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

<http://atg.sd.gov>

RECEIVED

NOV 09 2022

SD Secretary of State

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 9, 2022

Honorable Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501

RE: Attorney General's Statement (Initiated Constitutional Amendment:
Sales Tax on Eating and Drinking)

Dear Secretary Barnett,

Enclosed is a copy of a proposed initiated Constitutional amendment, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed Attorney General's Statement for this initiated measure.

By copy of this letter, I am providing a copy of the Statement to the sponsors.

Very truly yours,

Mark A. Vargo
ATTORNEY GENERAL

MAV/dd
Enc.

Filed this 9th day of

November, 2022

STEVE BARNETT
SECRETARY OF STATE

cc/encl: Richard P. Weiland
Reed Holwegner - Legislative Research Council

RECEIVED

NOV 09 2022

SD Secretary of State

CONSTITUTIONAL AMENDMENT
ATTORNEY GENERAL'S STATEMENT

Title: An Initiated Amendment Prohibiting Taxes on Anything Sold for Eating or Drinking.

Explanation:

Currently, the state collects tax on the sale or use of certain foods or drinks. Many municipalities also collect tax on the sale or use of foods or drinks.

This initiated amendment overrides existing laws and prohibits the state, or municipalities, from collecting sales or use tax on anything sold for eating or drinking by humans. The amendment eliminates these sources of revenue.

The amendment does not prohibit the collection of sales or use tax on alcoholic beverages or prepared food. Prepared food is defined by law to include food that is sold heated or with utensils.

Judicial clarification of the amendment may be necessary. The Legislature cannot alter the provisions of a constitutional amendment.

Filed this 9th day of

November, 2022

Steve Barnett

SECRETARY OF STATE

RECEIVED RECEIVED

NOV 09 2022

OCT 24 2022

August 26, 2022

SD Secretary of State

SD Secretary of State

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy. 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner
Legislative Research Council
500 E. Capitol Ave.
Pierre, SD 57501

Steve.Barnett@state.sd.us
Secretary of State Steve Barnett
Capitol Building
500 E. Capitol Ave. Ste 204
Pierre, SD 57501

Gentlemen:

In accordance with SDCL 12-13-25.1, I submit the following proposed initiated amendment to the Constitution in final form:

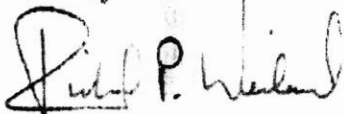
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food.

I ask that the Attorney General prepare the necessary title and explanation for this initiated amendment. Per SDCL 2-9-30, I ask that the Director of the Legislative Research Council prepare the necessary fiscal note for this initiated amendment.

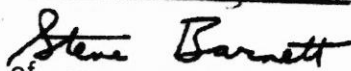
Thank you.



Richard P. Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD 57101

Filed this 24th day of

October 2022


SECRETARY OF STATE

Filed this 9th day of

November 2022


SECRETARY OF STATE

Dougherty, Debbie

From: Kooistra, Stacy <stacy.kooistra@siouxfalls.org>

Sent: Tuesday, November 8, 2022 9:21 AM

Subject: [EXT] Initiated Amendment - Food and Drinks - City of Sioux Falls comments

Attorney General Vargo,

On behalf of the City of Sioux Falls, thank you for this opportunity to submit comments regarding your proposed explanation for the food tax initiated amendment. For your convenience, I have attached proposed revisions in both tracked changes and clean versions.

The intent of the City's proposed changes is to provide information to the voters regarding the municipal uses of the existing tax because the City knows that removal of the tax will significantly impact both our general fund and capital fund, which will likely result in the reduction of services and capital investments. The City believes that the impact will be even greater on South Dakota's smaller communities, due to their sales tax bases being far less diversified.

We presume that there will be a fiscal note that will go along with the AG's explanation that will provide information to the voter regarding the total impact to the state and municipalities.

Thank you to you and your team for your consideration!

Respectfully,

Stacy

Stacy F. Kooistra
City Attorney

224 West Ninth Street
P.O. Box 7402
Sioux Falls, SD 57117-7402



605-367-8880

stacy.kooistra@siouxfalls.org

www.siouxfalls.org

WARNING: This e-mail message and any attachments may be privileged, confidential, and protected from disclosure since the message and any attachments are based on attorney work product and/or attorney-client privileged information. Therefore, you are hereby notified that any use, disclosure, copying or distribution of this e-mail message and/or attachments may be prohibited. If you have received this e-mail in error, please immediately notify this office by returning it to the sender, contacting this office at 605-367-8880 and deleting the information from your computer system. Thank you.

Title: An Initiated Amendment Prohibiting Taxes on Anything Sold for Eating or Drinking.

Explanation:

Currently, the state collects tax on the sale or use of certain foods or drinks. ~~Many~~ municipalities also collect tax on the sale or use of foods or drinks, which is a primary revenue source used to fund government services such as the construction and maintenance of roads, funding public safety personnel and equipment, and other essential municipal services.

This initiated amendment overrides existing laws and prohibits the state, or municipalities, from collecting sales or use tax on anything sold for eating or drinking by humans. The amendment eliminates these sources of revenue.

The amendment does not prohibit the collection of sales or use tax on alcoholic beverages or prepared food. Prepared food is defined by law to include food that is sold heated or with utensils.

Judicial clarification of the amendment may be necessary. The Legislature cannot alter the provisions of a constitutional amendment.

Title: An Initiated Amendment Prohibiting Taxes on Anything Sold for Eating or Drinking.

Explanation:

Currently, the state collects tax on the sale or use of certain foods or drinks. Municipalities also collect tax on the sale or use of foods or drinks, which is a primary revenue source used to fund government services such as the construction and maintenance of roads, funding public safety personnel and equipment, and other essential municipal services.

This initiated amendment overrides existing laws and prohibits the state, or municipalities, from collecting sales or use tax on anything sold for eating or drinking by humans. The amendment eliminates these sources of revenue.

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Judicial clarification of the amendment may be necessary. The Legislature cannot alter the provisions of a constitutional amendment.

NOV - 4 2022

Ballot Comment:

I don't get involved in politics, usually. Things are getting so stupid, I must do my part to try and save the state. I have given up on Washington DC. I hate to see my state lose it's common sense way.

South Dakota ranks well in so many conservative ways. We can be proud, in comparison to so many other states.

The revenue taken in from the tax on food has to be a very large amount. Keep that tax. It works. Look around, you will see that most people are eating a little better than they should.

I can look ahead and see the future here. Without a tax on food, there will come a budget shortfall. Our political governor will be one of many republicans getting blamed for it. Democrats will get elected. They will propose an income tax and get it. South Dakota will lose it's main selling point for it's future.

I will be moving to a no income tax state.

Maybe the so called "republicans" in this state aren't much different than DC. I think our republican DC-3 ^{Thune} ^{Johnson} ^{Rounds} are all big business establishment people. Not conservatives.

One more thing. We people in South Dakota should be able to know from campaign signs and literature if a candidate is republican, democrat or other. The party title of the candidate tells me more than catchy rhetoric which I don't know if it is true or not.

Lanna Lutterman

I'm a realist. I probably wasted my time writing this letter. The political fix is in. At least I get to express, not my feelings, but my anger.

I had thought Kristy was different. I think I was wrong.

I'm sorry I'm not sophisticated enough to

EMAIL.

primitive person

From: Lana Greenfield < >
Sent: Tuesday, October 25, 2022 2:28 PM
To: ATG Ballot Comments
Subject: [EXT] Possible elimination of sales tax on food.

I think the elimination of sales tax should only apply to foods with nutritional value. The WIC program set up good parameters, and so should this idea should it come to fruition. It is senseless to exempt soda, chips, and candy from sales tax.

Sincerely,
Lana Greenfield

From: Jim Leach
Sent: Tuesday, October 25, 2022 3:50 PM
To: ATG Ballot Comments
Subject: [EXT] Comment re Draft Attorney General's Statement re Sales Tax on Food and Drink
Attachments: 21025.Ltr.A.G.Vargo.pdf

JAMES D. LEACH

Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
Tel: (605) 341-4400
Fax: (605) 341-0716

Legal Assistant
Raquel L. Vokenroth, CLA

Legal Secretary
Verma J. Stehly

jim@southdakotajustice.com

October 25, 2022

By email and U.S. Mail

Attorney General Mark Vargo
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre SD 57501-8501

Re: Draft Attorney General's Statement re Sales Tax on Food and Drink

Dear Attorney General Vargo:

I am the attorney for Richard P. Weiland and Dakotans for Health, who submitted the proposed initiated constitutional measure and law concerning sales tax on food and drink.

On October 19, the Legislature Research Council submitted a fiscal note that accurately states that if these measures are passed, "Municipalities could still tax anything sold for eating or drinking by humans." But the draft Attorney General's Statement says that these measures prohibit "the state, *or municipalities*" (emphasis added) from collecting such taxes.

With respect, the LRC is correct. Neither proposal affects municipalities' ability to tax food and drink. Both measures say that "the *state* may not tax" (emphasis added) food and drink. The State's power to tax food and drink comes from SDCL 10-45 and 10-46. Municipalities' power to tax food and drink has a separate source: SDCL 10-52-2.

JAMES D. LEACH

Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
Tel: (605) 341-4400
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October 25, 2022

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Office of the Attorney General
1302 E Hwy 14, Suite 1
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October 25, 2022

Attorney General Mark Vargo

Page 2

The word "State" and the word "municipalities" have plain, common, ordinary meanings. Prohibiting the State from taxing food and drink does not limit municipalities' ability to do so.

When we submitted these measures to the LRC for its comments, the LRC did not suggest that either measure would somehow be construed to apply to municipal taxes on food and drink.

Accordingly, I request that you revise the Draft Attorney General's Statement re Sales Tax on Food and Drink so that it does not say that either measure would prohibit municipalities from taxing food and drink.

In light of the natural confusion that may result from events so far, and to eliminate any public uncertainty, I request that your final Attorney General's Statement explicitly say that neither proposal will affect municipalities' taxes on food and drink.

Respectfully submitted,

/s/ James D. Leach

James D. Leach

JDL/hs

cc: Richard P. Weiland

1911

1. The first thing I noticed when I stepped out of the plane was the cold air. It was a sharp contrast to the warm air of the plane.

2. The second thing I noticed was the sound of the engine. It was a low, steady hum that seemed to fill the air.

3. The third thing I noticed was the view. The landscape below was a mix of green fields and brown hills.

4. The fourth thing I noticed was the smell. It was a mix of the fresh air of the plane and the earthy smell of the ground.

5. The fifth thing I noticed was the feeling of freedom.

6. The sixth thing I noticed was the sound of the engine.

7. The seventh thing I noticed was the view.

8. The eighth thing I noticed was the smell.

Attorney General

OCT 27 2022

JAMES D. LEACH

Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
Tel: (605) 341-4400
Fax: (605) 341-0716

Legal Assistant
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Legal Secretary
Verma J. Stehly

jim@southdakotajustice.com

October 25, 2022

By email and U.S. Mail

Attorney General Mark Vargo
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre SD 57501-8501

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October 25, 2022

Attorney General Mark Vargo

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In light of the natural confusion that may result from events so far, and to eliminate any public uncertainty, I request that your final Attorney General's Statement explicitly say that neither proposal will affect municipalities' taxes on food and drink.

Respectfully submitted,

/s/ James D. Leach

James D. Leach

JDL/hs

cc: Richard P. Weiland

From: Richard Schriever <rschriever@hotmail.com>
Sent: Wednesday, October 26, 2022 11:47 AM
To: ATG Ballot Comments
Subject: [EXT] Language in ballot questions regarding taxing food

Neither the proposed initiated measure, nor the proposed constitutional amendment have language that prohibit governmental subdivisions of the state (counties, municipalities, etc.) from collecting tax on food and drink.

When legislators (and the people are acting as legislators when they vote on these issues at the polls) write laws they include language that specifies which governmental divisions or subdivisions of the state that law affects. Examples: SDCL 1-25-1, SDCL 1-27-1.1 and SDCL 1-27-20.

Further – LRC's fiscal note on these measures clearly states they are of the opinion that the language of these measures does not impact the ability of subdivisions of the state (counties, municipalities, etc.) from collecting taxes on food and drink.

Sincerely,

Richard F. Schriever, PhD (ABD)
Lennox, SD

Sent from Mail for Windows

From: Dale Christensen <et1partnr@yahoo.com>
Sent: Wednesday, October 26, 2022 7:57 PM
To: ATG Ballot Comments
Subject: [EXT] Clarify AG Ballot statements

The AG has erred in his ballot statements, should say state of SD only, municipalitys can still tax food! Thanks Dale Christensen, 1412 Grant Dr Watertown SD

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

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<http://atg.sd.gov>

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OCT 24 2022

SD Secretary of State

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

October 24, 2022

Honorable Steve Barnett
Secretary of State
500 E. Capitol
Pierre, SD 57501


RE: Attorney General's Statement (Initiated Constitutional Amendment:
Sales Tax on Eating and Drinking)

Dear Secretary Barnett,

Enclosed is a copy of a proposed constitutional amendment, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed *draft* Attorney General's Statement for the purposes of receiving public comment on the same.

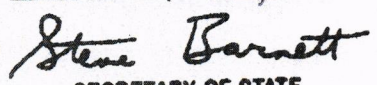
By copy of this letter, I am providing a copy of the *draft* Statement to the sponsor.

Very truly yours,


Mark A. Vargo
ATTORNEY GENERAL

MAV/dd
Enc.

Cc/encl: Richard P. Weiland
Reed Holwegner - Legislative Research Council

Filed this 24th day of
October, 2022

STEVE BARNETT
SECRETARY OF STATE

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U.S. DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

WASHINGTON, D.C.

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OCT 24 2022

SD Secretary of State

August 26, 2022

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy. 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner
Legislative Research Council
500 E. Capitol Ave.
Pierre, SD 57501

Steve.Barnett@state.sd.us
Secretary of State Steve Barnett
Capitol Building
500 E. Capitol Ave. Ste 204
Pierre, SD 57501

Gentlemen:

In accordance with SDCL 12-13-25.1, I submit the following proposed initiated amendment to the Constitution in final form:

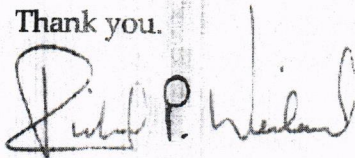
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food.

I ask that the Attorney General prepare the necessary title and explanation for this initiated amendment. Per SDCL 2-9-30, I ask that the Director of the Legislative Research Council prepare the necessary fiscal note for this initiated amendment.

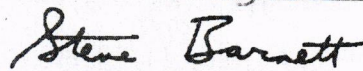
Thank you.



Richard P. Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD 57101

Filed this 24th day of

October, 2022


SECRETARY OF STATE

RECEIVED

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TO: DIRECTOR, FBI
FROM: SAC, NEW YORK
SUBJECT: [illegible]
[illegible]

RE: [illegible]
[illegible]

On [illegible] [illegible]
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STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

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<http://atg.sd.gov>

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

September 1, 2022

Richard P. Weiland
Dakotans for Health
PO Box 2063
Sioux Falls, SD 57101

Re: **Proposed Initiated Amendment to the Constitution Concerning Sales
Tax on Food and Beverages**

Dear Mr. Weiland:

This letter acknowledges our receipt of the proposed initiated constitutional amendment that you submitted to this Office. Your proposed amendment was received on August 26, 2022. As required by SDCL 12-13-25.1, the Attorney General will prepare a draft title and explanation for the measure and file it with the Secretary of State on or before October 25, 2022. You will be provided a copy of the title and explanation at the time it is filed.

Sincerely,

A handwritten signature in black ink, appearing to read "SRB", followed by a horizontal line.

Steven R. Blair
Assistant Attorney General

SRB/dd

cc: Reed Holwegner, Director – Legislative Research Council
Hon. Steve Barnett, Secretary of State

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OCT 24 2022

CONSTITUTIONAL AMENDMENT
DRAFT ATTORNEY GENERAL'S STATEMENT

SD Secretary of State

Title: An Initiated Amendment Prohibiting Taxes on Anything Sold for Eating or Drinking.

Explanation:

Currently, the state collects tax on the sale or use of certain foods or drinks. Many municipalities also collect tax on the sale or use of foods or drinks.

This initiated amendment overrides existing laws and prohibits the state, or municipalities, from collecting sales or use tax on anything sold for eating or drinking by humans. The amendment eliminates these sources of revenue.

The amendment does not prohibit the collection of sales or use tax on alcoholic beverages or prepared food. Prepared food is defined by law to include food that is sold heated or with utensils.

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October, 2022
Steve Barnett
SECRETARY OF STATE

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Attorney General

AUG 29 2022

August 26, 2022

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy. 14, #1
Pierre, SD 57501
Steve Blair 605-394-2258

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner
Legislative Research Council
500 E. Capitol Ave.
Pierre, SD 57501

Steve.Barnett@state.sd.us
Secretary of State Steve Barnett
Capitol Building
500 E. Capitol Ave. Ste 204
Pierre, SD 57501

Gentlemen:

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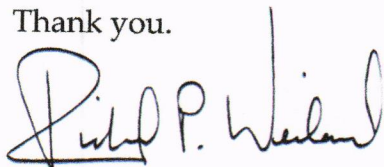
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food.

I ask that the Attorney General prepare the necessary title and explanation for this initiated amendment. Per SDCL 2-9-30, I ask that the Director of the Legislative Research Council prepare the necessary fiscal note for this initiated amendment.

Thank you.



Richard P. Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD 57101

Attorney General

AUG 29 2022

August 29, 2022

Reed H. Hovestadt
Director Reed Hovestadt
Legislative Research Council
500 E. Capitol Ave.
Pierre, SD 57501

Mark Vargoxstad
Attorney General Mark Vargo
1302 E. Hwy 14 N
Pierre, SD 57501
Phone: 605-224-2228

Steve Hovestadt
Secretary of State Steve Barnett
Capitol Building

1302 E. Hwy 14 N
Pierre, SD 57501

Gentlemen:

In accordance with SDCL 12-12-3.1, I submit the following proposed initiated amendment to the Constitution in final form:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article X of the Constitution of the State of South Dakota be amended to read:

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food.

I ask that the Attorney General prepare the necessary title and explanation for this

amendment.

Thank you.



Reed H. Hovestadt
Director Reed Hovestadt
P.O. Box 2064
Pierre, SD 57501

PRESIDENT PRO TEMPORE LEE SCHOENBECK, CHAIR | SPEAKER SPENCER GOSCH, VICE CHAIR
REED HOLWEGNER, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | JOHN MCCULLOUGH, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV



August 12, 2022

AUG 15 2022

Mr. Rick Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD 57101
rick@rickweiland.com

Dear Mr. Weiland:

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."

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](#).

Proposed initiated amendment to the Constitution as submitted with comments following:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages, tobacco, or prepared food.

1. The proposed language begins with "[t]he state may not tax the sale of anything for eating or drinking..." The proposed language assumes the "state" has the authority to impose a tax on the purchase of food and beverages. The state, on its own and by its very nature, does not have, separate from the law, the authority to impose a tax. The "state" (in most instances an executive branch agency) has the authority, as provided by law, to collect certain taxes. But the *law* provides the authority to impose a tax. For example, SDCL 10-45-2 provides the following:

There is hereby imposed a tax upon the privilege of engaging in business as a retailer, a tax of four and one-half percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as otherwise provided in this chapter, sold at retail in the State of South Dakota to consumers or users.

In the SDCL 10-45-2 example, the law imposes a tax "upon the privilege of engaging in business as a retailer." Retailers collect the tax and remit it to the state in compliance with the law. The state does not impose the tax.

The perceived intent of the proposed constitutional language is to exempt the sale of certain food and beverages from tax. By beginning the proposed constitution text with "[t]he state may not tax," it is unclear if the intent is actually achieved. The proposed language simply states an existing legal reality, namely, that the state does not have the authority to impose a tax on the purchase of food and beverages. If this language were to become effective, the intended effect may not be achieved.

2. By using the term "state" in the proposed constitutional language, municipalities would not be prohibited from enacting a local ordinance requiring a tax on the purchase of food and beverages. Is this the intent of the proposal? If not, a rewrite of the language may be necessary.
3. The use of the phrase "the sale of anything sold for eating or drinking by humans" may be overly vague, inviting various interpretations in determining its meaning.

Under current law, the terms "food" and "food ingredients" are defined as follows:

"Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. See SDCL 10-45-1.

The statutory definition uses the terms "ingestion," "chewing," and "consumed." These terms seem to be more precise than "eating or drinking," as they may better capture the various elements of food and beverage consumption. Certain food and food ingredients are not purchased specifically for eating or drinking but may be used in the process of making specific foods or beverages. For example, coffee beans are neither eaten nor drunk. To take a narrow reading of the proposed language, coffee beans are not sold specifically "for eating or drinking." They cannot be drunk and are not eaten, generally. Given that the statutory definition of "food and food ingredient" is drafted more broadly, it includes "food" such as coffee beans, as they are "sold for ingestion...by humans" and are "consumed for [their] taste." Other examples that may create interpretive questions with the proposed language are gum, seasonings, spices, cooking oils, dietary supplements, etc. None of these examples are sold specifically for eating or drinking, but they are sold for ingestion or chewing and consumption. "Ingestion," "chewing," and "consumed" are terms with broader application that may better capture the intent of the proposed constitutional language. A rewrite of the language using terms consistent with the statutory definition of "food and food ingredients" may better clarify the intent of the proposed language. If the language is left in its current form, the question remains as to what food and beverages would be subject to tax.

The proposed language specifically provides that tobacco is an exception from "eating or drinking." Without adding defined terms to the proposed language, the tobacco exception may add to the interpretive confusion since tobacco is neither a food nor a beverage. If something that is not eaten or drunk is exempted from "eating or drinking," the language possibly could create an absurd legal reality, exempting items that generally do not apply in the ordinary sense of how "eating or drinking" are commonly understood.

Certain states that exempt the purchase of food and beverages from tax exclude candy, soft drinks, and dietary supplements from the tax exemption. Considering that the proposal is to amend the constitution,

which is more difficult to amend than state law, perhaps the sponsors should consider a broader list of exclusions.

4. The proposed constitutional language provides three exceptions to the tax prohibition: "alcoholic beverages, tobacco, or prepared food." The proposed language does not define these terms. Without definitions or a directive that definitions must be established by law, there may be questions as to what substances would qualify for the exceptions.

The sponsors should also consider changing the "or" to "and" in the clause, "except alcoholic beverages, tobacco, or prepared food." The use of "and" makes it clearer that all three of the substances are excepted. Typically, the use of "or" means that one is to be chosen from the list.

5. The sponsors may want to consider the utility of amending the constitution to create a tax exemption for the purchase of certain food and beverages. Since the constitution is more difficult to amend than state law, it may be problematic to address future considerations. For example, if consumable cannabis products are made legal in this state, would the purchase of these items automatically be exempt from tax? Often a stated goal of legalizing cannabis is the increased state revenue. The proposed language may limit future revenues if consumable cannabis products were to be legalized in South Dakota.

6. Based on the above comments, a possible rewrite of the proposed constitutional language is suggested as follows:

"The retail sale of any food or food ingredient for any purpose is exempt from any tax imposed by law or ordinance.

For purposes of this section, "food" and "food ingredients" mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

Food and food ingredients exempt under this section do not include alcoholic beverages, tobacco, and prepared foods. Alcoholic beverages, tobacco, and prepared foods must be defined by law."

The ordinary meaning of "retail sale" is when a business sells a product to an individual consumer for the consumer's own use. The definitions of "food" and "food ingredients" are taken from current law (See SDCL 10-45-1). And the last sentence of the suggested language directs the Legislature to enact laws defining the excepted items.

It may be worth considering whether additional exclusions to the definition of "food" and "food ingredients" should be added, such as candy, soft drinks, and dietary supplements. And additional consideration should be given for future products, such as consumable cannabis products.

7. 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.
8. 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, taxing the purchase of food and beverages. Given the limited nature of the proposed language, it appears to be an amendment and not a revision of the constitution.

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.

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 a guarantee of its 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 Steve Barnett, Secretary of State
✓ The Honorable Mark Vargo, Attorney General
Cory Heidelberger
Jim Leach