



**OFFICE OF ATTORNEY GENERAL**

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<http://atg.sd.gov>

**MARTY J. JACKLEY**  
ATTORNEY GENERAL

**RECEIVED**

MAR 16 2023

**SD Secretary of State**

**MARK W. BARNETT**  
CHIEF DEPUTY ATTORNEY GENERAL

March 16, 2023

Honorable Monae L. Johnson  
Secretary of State  
500 E. Capitol  
Pierre, SD 57501

RE: Attorney General's Statement (Initiated Constitutional Amendment  
Concerning Open Primaries)

Dear Secretary Johnson,

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 Attorney General's Statement for this constitutional amendment.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Marty J. Jackley".

Marty J. Jackley  
ATTORNEY GENERAL

MJJ/dd  
Enc.

Cc/encl: Joe Kirby  
Reed Holwegner – Legislative Research Council

Filed this 16<sup>th</sup> day of  
March 2023

A handwritten signature in black ink, appearing to read "Monae L. Johnson".

SECRETARY OF STATE

CONSTITUTIONAL AMENDMENT  
ATTORNEY GENERAL'S STATEMENT

**RECEIVED**  
MAR 16 2023  
SD Secretary of State

**Title:** An Amendment to the South Dakota Constitution Establishing Top-Two Primary Elections

**Explanation:**

Currently, to appear on the general election ballot, major party candidates for the following offices must participate in a partisan primary election: Governor, State Legislature, U.S. Senate and House of Representatives, and elected county offices. Only members of the candidate's party may vote for that candidate unless that party has opened the primary to voters not affiliated with the party.

Minor party candidates may be chosen by primary or party convention.

Unaffiliated candidates (independents) are only required to file nominating petitions to appear on the general election ballot.

For the listed offices, this amendment requires one primary election wherein all candidates run against each other in their respective races, including major and minor party and unaffiliated candidates. A candidate may list any party next to their name on the ballot regardless of party affiliation or registration. All voters may vote for any candidate. The two candidates receiving the most votes advance to the general election. If there is more than one candidate to be elected to an office, the number of candidates advancing to the general election is twice the number to be elected.

Primary elections may be held for other offices.

The amendment may be challenged on constitutional grounds.

Filed this 16<sup>th</sup> day of

March 2023

*Monae L. Johnson*

SECRETARY OF STATE

RECEIVED

MAR 16 2023

SD Secretary of State

## Open Primaries

Be it enacted by the People of South Dakota:

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

§ 4. A primary election held for the office of governor, a legislative office, a county office, the United States Senate, or the United States House of Representatives shall be open to all candidates and all qualified voters without regard to the candidates' or voters' party registration or affiliation, or lack thereof.

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

The general election ballot may only include those candidates advancing from the primary election. The legislature may, by law, establish procedures for replacing a candidate who advanced from the primary election but will not participate in the general election due to death, withdrawal from the race, or disqualification.

A candidate may select the name of a political party to be listed next to the candidate's name on the primary ballot. The same political party designation shall appear next to the candidate's name on the general election ballot if the candidate advances to the general election.

Both the primary and general election ballots must state that a candidate's indicated political party designation does not constitute or imply an endorsement of the candidate by the political party designated.

The legislature may establish any necessary 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.

Filed this 16<sup>th</sup> day of March 2023

*Monae L. Johnson*

SECRETARY OF STATE

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**From:** Nichole Braithwait <nkbraithwait@gmail.com>  
**Sent:** Wednesday, March 8, 2023 12:50 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] NO to the Proposed "Top Two Primary" Constitutional Amendment

Greetings,

I kindly submit for consideration: NO to the Proposed "Top Two Primary" Constitutional Amendment

This amendment would leave the party nominations vulnerable to manipulation and dilution.

One party could organize its voters to vote in the other party's primary and choose the candidate that they most agree with or that they think their party could most easily defeat.

Thank you for your time.

Nichole Braithwait  
605-569-2854  
3135 American Eagle Rd  
Spearfish SD 57783

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**From:** Heather <hz1jz@yahoo.com>  
**Sent:** Wednesday, March 8, 2023 6:47 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] SD Elections

Dear Mr. Jackley,

Please publicly oppose the amendment for Top Two Primary Constitution Amendment.

Thank you,  
Heather Baxter

Sent from my iPhone

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**From:** Linda M <mansanbic2@gmail.com>  
**Sent:** Wednesday, March 8, 2023 11:01 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Amendment to the Constitution

I am totally against Attorney General Marty J. Jackley's proposed Constitutional amendment. This goes against what South Dakota stands for. I do not want a change to our constitution, I believe this is a slippery slope that should not be entertained. Stop this amendment from going forward.

Linda Montgomery  
Fairview, SD  
District 16  
605-366-7172

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**From:** SD\_Coalition\_of\_Counties <SD\_Coalition\_of\_Counties@proton.me>  
**Sent:** Wednesday, March 8, 2023 6:53 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Joint Resolution Opposing the Proposed Open Primaries Amendment

Attorney General Jackley,

Greetings! The following joint resolution from the South Dakota Coalition of Counties is hereby submitted as a public comment in response to your letter dated February 27, 2023, RE: Attorney General's Statement (Initiated Constitutional Amendment Concerning Open Primaries). The undersigned are in complete opposition to the proposed amendment for the below stated reasons.

**South Dakota County Coalition**

**8 March 2023**

**A Joint Resolution Opposing a Proposed Constitutional Amendment Concerning Open Primaries**

**WHEREAS:** A proposed constitutional amendment originated by the advocacy group South Dakota Open Primaries was forwarded to the Attorney General of the State of South Dakota.

**WHEREAS:** Whereas Attorney General Marty Jackley subsequently submitted the required draft statement including the proposed amendment to Secretary of State Monae Johnson for the purposes of receiving public comment on the document, with the public comment period ending 9 March.

**WHEREAS:** The proposed amendment would allow for open primaries for governor, state legislature, US senator, US representative, and elected county offices, which means that all candidates for a given office would be on the June primary ballot regardless of party affiliation, with the top two vote-getters, regardless of party, appearing on the November general election ballot.

**WHEREAS:** Implementation of an open party primary per the proposed amendment will dilute the existing primary system by minimizing the importance of political parties and their party platforms in the candidate selection process.

**WHEREAS:** The First Amendment of the US Constitution guarantees the right to free association – a right exercised by all who choose to belong to a political party – and that the First Amendment also guarantees the right not to associate.

**WHEREAS:** The most important decision a political party can make is the selection of its candidates, and a party's most important decisions should be made by members of that organization.

**WHEREAS:** An open primary system enables "party crashing," which is a form of political sabotage that occurs when members of one political party take part in the primary of the opposing party for the express purpose of supporting the candidate they feel will be easier to defeat in the general election.

**THEREFORE, BE IT RESOLVED:** That we the undersigned oppose the proposed constitutional amendment concerning open primaries and strongly encourage opposition to it by elected and rank-and-file Republicans alike in South Dakota, as well as other South Dakotans who support a strong system of political parties.

**Signed:**

Chairman, Aurora County Republican Party  
Executive Board, Bennett County Republican Party  
Executive Board, Bon Homme County Republican Party  
Rich Hilgemann, Vice Chairman, Brown County Republican Party  
Drew Dennert, State Committeeman, Brown County Republican Party  
Executive Board, Butte County Republican Party  
Executive Board, Charles Mix County Republican Party  
Sarah Taggart, Vice Chair, Clay County Republican Party  
Gary Sokolow, Secretary, Clay County Republican Party  
Linda Alvey, State Committeewoman, Clay County Republican Party  
Glenn Pulse, State Committeeman, Clay County Republican Party  
Executive Board, Davison County Republican Party  
Chair, Fall River County Republican Party  
Prospective Executive Board, Hand County Republican Party  
Executive Board, Harding County Republican Party  
Executive Board, McPherson County Republican Party  
Executive Board, Minnehaha County Republican Party  
Executive Board, Pennington County Republican Party  
Executive Board, Todd County Republican Party  
Executive Board, Yankton County Republican Party  
Executive Board, Ziebach County Republican Party

Note: The South Dakota Coalition of Counties is a group of like-minded county Republican Party officials across the state whose objective is to positively impact policies and elected officials in the State of South Dakota at the federal, state, and local levels consistent with the US Constitution, South Dakota Constitution, and South Dakota Republican Party Platform.

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**From:** Amy Wagner <amywagner1@mac.com>  
**Sent:** Thursday, March 9, 2023 8:51 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Constitutional Amendment

A constitutional amendment concerning open primaries in South Dakota:  
Open primaries is a system to enable "party crashing" which is a form of political sabotage. We are very much opposed to this amendment. We have watched as other conservative states have fallen into the hands of saboteurs. It is yet another slimy trick to take the peoples voice away. Another Marxist move on freedom.

Eric Wagner and  
Amy Wagner  
South Dakota State Coordinator, National Day of Prayer  
605-415-0753

Sent from my iPhone

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**From:** Steve Hayes <steveh700@gmail.com>  
**Sent:** Thursday, March 9, 2023 10:06 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Constitutional Amendment Concerning Open Primaries

Attorney General Jackley and Secretary of State Jackson

I am opposed to the proposed amendment to make South Dakota primaries open. It sounds like a good thing. Elections should be open to all legal citizens right? But this amendment is nefarious, inappropriate, and possibly injurious to the constitutional rights of all South Dakotans.

1) It violates the constitutional rights of all South Dakotans regardless of party (The First Amendment Right to free association). For example switching parties at the primary election takes away my right to associate with (i.e.; vote for the most capable candidates deemed by a majority of a political party... which is the appropriate interpretation of freedom to associate). People who are registered in a party have made their choice about who they want to associate with. They have exercised their constitutional right of free association. Allowing a Republican to vote for a Democrat in a primary (and vice-versa) should not be construed as exercising their right of free association. Especially because it infringes on another's right of free association.

2) People who are satisfied with their party's candidate can change lanes and vote for a candidate they think will lose to their candidate. We've seen enough election shenanigans!

3) This constitutional amendment could have the affect of discouraging involvement in elections. Our nation and state benefits most when every legal citizen makes their voice heard at the ballot box, where one vote per legal citizen is ensured by upholding the law and using every legal means to verify the qualification of each person to vote. If a person is denied the ability to vote for the candidate they prefer it could erode citizen involvement in elections.

Thank you for considering my concerns and public comment.

Respectfully,

Stephen Hayes

1216 11th Ave, Belle Fourche, SD 57717

503-602-1518

[steveh700@gmail.com](mailto:steveh700@gmail.com)

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**From:** Kathy s <kjsteach@hotmail.com>  
**Sent:** Thursday, March 9, 2023 10:23 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Open primary constitutional ammendment

I am writing to express my opposition to the proposed open primary constitutional amendment. I am contacting you as a private citizen and resident of Corson County in South Dakota. I oppose this amendment on the basis it will put all power in determining federal and state offices of senators, representatives and governor in Minnehaha County, thus eliminating the voice from rural and western citizens of South Dakota. Our voice is already stifled and this proposal would completely silence it.

Kathy Schmeichel  
McLaughlin, SD

Sent from my Verizon, Samsung Galaxy smartphone  
Get [Outlook for Android](#)

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**From:** Julie Frye-Mueller <Julie.FryeMueller@sdlegislature.gov>  
**Sent:** Thursday, March 9, 2023 10:31 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Constitutional Amendment

AG Jackley,

I am very much opposed to this and encourage you to not continue with this action. What we have now is not broken and it doesn't need changed. Party's should pick their own candidates and maintain the process we have now.

Respectfully,  
Sen. Julie Frye-Mueller

Sent from my iPad

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**From:** Jodi Waltman <jlwaltman92@gmail.com>  
**Sent:** Thursday, March 9, 2023 10:51 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Comment to Constitutional Amendment Concerning Open Primaries

I am opposed to this Constitutional Amendment. I believe this will dilute the existing primary system by minimizing the importance of political parties and their party platforms in the candidate selection process.

I also believe this is unconstitutional as the 1st Amendment of the U.S. Constitution guarantees the right to free association - a right exercised by all who choose to belong to a political party - and that the First Amendment also guarantees the right not to associate.

I believe this would destroy our elections here in South Dakota. This is a rank-choice voting system which is a disaster on so many fronts. We do not need this in South Dakota elections.

Sincerely,  
Jodi Waltman  
36924 115th St.  
Wetonka, S.D. 57481

McPherson County  
District 23

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**From:** Scott Stolte <scottstolte@outlook.com>  
**Sent:** Thursday, March 9, 2023 10:53 AM  
**Subject:** [EXT] OPPOSED to Top Two Primary" Constitutional Amendment!

Attorney General,

As a citizen, I do not support this initiative for the following reasons.

- a. It opens the door to opposition parties "flooding the zone" with candidates to water down votes for strong candidates they do not support.
- b. You may get a scenario where the top two candidates have a very small percentage of the populace supporting them.

What if the legislature had to consider a spectrum of tax cut proposals? Some proposed from within house/senate. Some from the citizens. Then act on only the top two as determined by the voters. And one of them had to ultimately be enacted? Regardless of viability or potential fiscal impact. Don't think that would fly.

Do not arm those with less than good intent for the people.

Scott

Sent from [Mail](#) for Windows

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**From:** Scot Montgomery <n0jpe@hotmail.com>  
**Sent:** Thursday, March 9, 2023 10:56 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Open Primary Elections

I find it extremely difficult to understand why anyone in either party would want members of the other party to be able to decide who is the candidate for that said party!

I strongly ask that this ammendment be denied!

The SDGOP is showing their true colors, Republicans in name only.

Sincerely,  
Scot Montgomery  
Fairview, SD 57027

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**From:** Retha Engle <retha.engle@gmail.com>  
**Sent:** Thursday, March 9, 2023 10:56 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Strongly Oppose the "Top Two Primary " Constitutional Amendment

I ask that this proposed amendment be strongly opposed by you and other elected Republican leaders , and strongly encourage a system of political parties.

--  
Mark and Retha Engle  
422 W 12th Ave  
Mitchell SD 57301

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**From:** Darold Hehn <dhehn1@rap.midco.net>  
**Sent:** Thursday, March 9, 2023 12:04 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Proposed "Top Two Primary" Constitutional Amendment

Attorney General Jackley

**Proposed "Top Two Primary" Constitutional Amendment**

The proposed amendment would allow top-two primary elections, regardless of political party, for Governor, legislative office, county office, United States Senator, and United States Representative. The two top vote getters in each primary would advance to the general election.

THIS APPEARS TO BE A FORM OF RANK-CHOICE-VOTING, WHICH HAS NO PLACE IN SOUTH DAKOTA POLITICS.

I am and South Dakota should be, opposed to this Constitutional Amendment effort.

Sincerely

Darold Hehn  
1432 PANORAMA CIRCLE  
RAPID CITY SD 57701

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**From:** nchristo@juno.com  
**Sent:** Thursday, March 9, 2023 12:06 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Amendment for Open Primaries

I am opposed to Open Primaries. Among other things, that is like allowing non-citizens to vote. If we recognize political parties, they should be allowed to pick the candidates who represent their party values.

Nadine Christopherson, 57703

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**From:** Carolyn Mazzeo <fromnewyork@icloud.com>  
**Sent:** Thursday, March 9, 2023 12:09 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Top two primary

I urge you to STOP the proposed "Top Two Primary" Constitutional Amendment which would allow for open primaries. I lived thorough this hell in California and moved to So Dakota in the hope of never having to experience this again. Thank you. Carolyn Mazzeo, homeowner/resident/registered voter, Rapid City, SD

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**From:** Josh M. <zhalox@hotmail.com>  
**Sent:** Thursday, March 9, 2023 12:43 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] | Oppose the "Top Two Primary" Constitutional Amendment

Honorable Attorney General Marty Jackley:

I am a registered voter in Box Elder, South Dakota and am writing to voice my opposition to the "Top Two Primary" Constitutional Amendment.

This amendment would allow for open primaries from any political affiliation and the top two vote-getters, regardless of party, would be on the November general election ballot.

It would destroy South Dakota's political party system, and would enable "party" crashing - a form of political sabotage that occurs when members of a party take part in the primary of the opposing party for the express purpose of supporting the candidate whom they feel will be easier to defeat in the general election.

The right to freely associate - and not to associate - with members of political parties and to elect candidates within one's political party is a long-standing part of our American tradition, and therefore, I oppose this proposed constitutional amendment.

Best regards,

Joshua Muller  
514 Americas Way #15628  
Box Elder, SD 57719-7600

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**From:** DWIGHT STADLER <stadlerd@sbcglobal.net>  
**Sent:** Thursday, March 9, 2023 12:43 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Constitutional Amendment regarding top-two open primary elections

Attorney General Jackley,

I and my wife, Barbara, are writing to express our opposition to the Constitutional Amendment regarding top-two primaries. We firmly believe this Amendment is detrimental to the election process and enables fraudulent manipulation and misrepresentation by one political party seeking to undermine another political party. Each party should retain their right to choose their candidates for election within their respective party vs. outsider opponent parties voting for candidates they determine will be easier to defeat in a general election. In short, the proposed Amendment enables "party crashing" by members of one party voting in another party's primary for the express purpose of selecting candidates they deem will be easier to defeat in the general election. This undermines the long established party line and party platform election process.

We adamantly oppose the proposed Constitutional Amendment concerning open primaries and urge all elected officials and legislators to oppose it as well.

Very Respectfully,

Dwight D. Stadler, Republican District 20 Precinct 9 Committeeman  
Barbara M. Stadler, Republican District 20 Precinct 9 Committeewoman

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**From:** Tammie McKenzie <tj\_mcz@yahoo.com>  
**Sent:** Thursday, March 9, 2023 12:47 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] No Open Primaries

Dear Sir,

I strongly oppose open primaries. This allows political hits by the opposition party to take out strong candidates. Other than diluting the republican party what is the purpose of this proposed Constitutional Amendment?

Tammie McKenzie  
Hot Springs, SD

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**From:** jmsmith@gwtc.net  
**Sent:** Thursday, March 9, 2023 1:02 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Top Two Primary Constitutional Amendment

Dear Sir,

This letter is in regard to the proposed "Top Two Primary Constitutional Amendment". We are very much opposed to this. If a person wants to decide a political party's candidate for a particular office, then join that party. This is just another attempt to destroy the integrity of the election process.

Jim and Myrna Smith

Owanka, SD 57767

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**From:** cw@rap.midco.net  
**Sent:** Thursday, March 9, 2023 2:14 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] "Top Two Primary" Constitutional Amendment!

"Top Two Primary" Constitutional Amendment! No, no new amendments to the primary system.

Absolutely not. Our system is already somewhat compromised and this amendment would destroy it.

I've seen what happens in other states and it absolutely dilutes my vote.

NO

NO

Chuck Wendt  
3411 Kerry Drive  
in Beautiful Rapid city, SD 57702

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**From:** Barb Stolz <barbstolz@gmail.com>  
**Sent:** Thursday, March 9, 2023 2:43 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Open Primaries for South Dakota

Attorney General Jackley,

I write to reject the proposed amendment for Open Primaries for South Dakota.

I'm a registered Independent; if I were so concerned that my voice is not being heard, I'd proceed to register as a Republican.

All the South Dakota Open Primaries group wants to do is dilute our Constitutional rights. Don't they understand that our country is NOT a democracy? That's simply mob rule. Should we just ask all the illegals in our state to vote also?

We're a Constitutional Republic. We have two political parties. The present system is NOT broken. This unnecessary proposal needs to be rejected!

Sincerely,

Barb Stolz  
1020 West Cedar, Mitchell, SD

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**From:** Johnson, Brendan V. <BJohnson@RobinsKaplan.com>  
**Sent:** Thursday, March 9, 2023 2:48 PM  
**To:** ATG Ballot Comments  
**Cc:** Blair, Steven; Billion, Timothy W.; Titze, Thad A.  
**Subject:** [EXT] Comments Re: Initiated Constitutional Amendment Concerning Open Primaries

Attorney General Jackley  
1302 East Highway 14  
Pierre, SD 57501

Re: Comments to the Attorney General's Draft Statement (Initiated Constitutional Amendment Concerning Open Primaries)

Dear Attorney General Jackley:

I represent South Dakota Open Primaries and Joe Kirby, De Knudson, and Alfred Samuelson, the sponsors of the above-referenced initiated constitutional amendment. We have reviewed your draft statement of February 27, 2023, and offer the following comments and suggested changes.

We would request that title of the amendment be changed to "An amendment to the South Dakota Constitution allowing all registered voters to vote for any candidate in primary elections." This "concise statement of the subject of the proposed amendment," SDCL § 12-13-9, better reflects the breadth of the amendment's subject and its effect: primary elections would be open to all candidates and all voters, regardless of party affiliation or lack thereof. This proposed title is taken from the second sentence of the second paragraph of the proposed amendment itself, which reads "A voter may vote for any primary candidate regardless of the voter's party affiliation or lack thereof." Alternatively, the title of the amendment could be changed to "An amendment to the South Dakota Constitution establishing open primary elections." That title also better reflects the subject of the proposed amendment. The Attorney General's draft proposed title—"An amendment to the South Dakota Constitution establishing top-two primary elections"—is problematic for two reasons. First, it misstates the number of candidates who advance to the general election in a multi-member election. Second, the draft proposed title focuses solely on candidates, but the proposed amendment would affect all candidates *and all registered voters* at the primary election stage.

We would also request that the statement "[t]he amendment may be challenged on constitutional grounds" be removed. This statement could apply to any amendment and does not help or meaningfully explain the amendment, or its potential legal consequences, to voters. The statement is vague and confusing and we request that it be removed.

Thank you for your consideration of these comments. Please let me know if you have questions or would like to discuss any of our concerns.

Best Regards,

Brendan V. Johnson

**Brendan V. Johnson**

**ROBINS**  **KAPLAN** LLP  
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<http://www.robinskaplan.com/lawyers/brendan-johnson>

\*South Dakota office located on Oceti Sakowin lands, home to the Dakota, Nakota, & Lakota people

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Thank you in advance for your cooperation.

Robins Kaplan LLP

<http://www.robinskaplan.com>

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**From:** joanne geraets <jkgkag7@gmail.com>  
**Sent:** Thursday, March 9, 2023 3:54 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] "Top Two Primary" Constitutional Amendment

We would encourage you to oppose the proposed constitutional amendment. It seems that it would minimize the importance of political parties and their party platforms.

Thank you.

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**From:** Jim Borgstadt <Jim.borgstadt@outlook.com>  
**Sent:** Thursday, March 9, 2023 3:59 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] TOP TWO PRIMARY

To ATG Jackley,

This must be stopped. This is not at all appropriate for SD and our state must not go down this path. No to the TOP TWO PRIMARY!!

Sincerely,

Jim Borgstadt  
1520 East Hanson Avenue  
Mitchell, SD 57301

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**From:** Seth & Jessica Severtson <sjsevertson@gmail.com>  
**Sent:** Thursday, March 9, 2023 5:12 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Top Two Primary Constitutional Amendments

Attorney General Jackley,

I am opposing the proposed constitutional amendment concerning open primaries. If these pass, they will dilute the existing primary system by minimizing the importance of political parties and their party platforms in the candidate selection process. Secondly, the First Amendment of the US Constitution guarantees the right to free association and also guarantees the right not to associate. The most important decision a political party can make is the selection of its candidates and a party's most important decisions should be made by members of that organization. Unfortunately, an open primary system enables "party crashing," which is a form of political sabotage that occurs when members of one political party takes part in the primary of the opposing party for the express purpose of supporting the candidate they feel will be easier to defeat in the general election. For the reasons stated above, I am against allowing this type of constitutional change to happen in our state.

Thank you for your time,  
Jessica Severtson  
605-996-4020

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**From:** Marguerite McPhillips <trooper\_1949@q.com>  
**Sent:** Thursday, March 9, 2023 5:36 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Ballot

I do not want this on the ballot. Open elections are not good for South Dakota. Please do not go ahead with this ballot measure.

Marguerite McPhillips

Sent from my iPhone

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**From:** Edward Manzano <ejmanzanojr@gmail.com>  
**Sent:** Thursday, March 9, 2023 5:53 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] I say NO to top two primary amendment

I am a retired military veteran and would like to express my firm opposition to any TOP TWO PRIMARY Constitutional Amendment. What in the world is happening in South Dakota? I cannot express firmly enough my opposition to this travesty!

Sincerely  
Ed Manzano  
Rapid City SD

---

**From:** donald hinson <claymore2001@yahoo.com>  
**Sent:** Thursday, March 9, 2023 9:12 PM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Penn. Cty. citizen re. "Top-Two Pri. Con. Amend.

Greetings Attorney General Jackley,

As a citizen of Pennington County, SD, I strongly urge you to NOT put forth the "Top-Two" Primary Constitutional Amendment. This change is NOT necessary. Our voting procedures and primaries are sufficient as they are. PLEASE resist the temptation to institute something new and different. The process is fine the way it is.

Respectfully,

MSgt Donald Hinson, USAF Retired



Virus-free.[www.avast.com](http://www.avast.com)

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**From:** Wayne Larsen <treefarmr@aol.com>  
**Sent:** Friday, March 10, 2023 6:55 AM  
**To:** ATG Ballot Comments  
**Subject:** [EXT] Open primary initiative

I am opposed to an open primary as it can result in weaker candidates being selected by the opposition party. If you want to vote in a particular primary, change your registration to that party. Simple.

[Sent from the all new AOL app for Android](#)

STATE OF SOUTH DAKOTA



**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>

**MARTY J. JACKLEY**  
ATTORNEY GENERAL

**RECEIVED**

FEB 27 2023

**SD Secretary of State**

**MARK W. BARNETT**  
CHIEF DEPUTY ATTORNEY GENERAL

February 27, 2023

Honorable Monae Johnson  
Secretary of State  
500 E. Capitol  
Pierre, SD 57501

RE: Attorney General's Statement (Initiated Constitutional Amendment  
Concerning Open Primaries)

Dear Secretary Johnson,

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,

A handwritten signature in black ink, appearing to read "M. Jackley".

Marty J. Jackley  
ATTORNEY GENERAL

MJJ/dd  
Enc.

Cc/encl: Joe Kirby  
Reed Holwegner – Legislative Research Council

Filed this 27<sup>th</sup> day of

February 2023

A handwritten signature in black ink, appearing to read "Monae L. Johnson".

**SECRETARY OF STATE**

**RECEIVED**

FEB 27 2023

SD Secretary of State

**CONSTITUTIONAL AMENDMENT  
DRAFT ATTORNEY GENERAL'S STATEMENT**

**Title:** An amendment to the South Dakota Constitution establishing top-two primary elections

**Explanation:**

Currently, to appear on the general election ballot, major party candidates for the following offices must participate in a partisan primary election: Governor, State Legislature, U.S. Senate and House of Representatives, and elected county offices. Only members of the candidate's party may vote for that candidate unless that party has opened the primary to voters not affiliated with the party.

Minor party candidates may be chosen by primary or party convention.

Unaffiliated candidates (independents) are only required to file nominating petitions to appear on the general election ballot.

For the listed offices, this amendment requires one primary election wherein all candidates run against each other in their respective races, including major and minor party and unaffiliated candidates. A candidate may list a party next to their name on the ballot regardless of party affiliation or registration. All voters may vote for any candidate. The two candidates receiving the most votes advance to the general election. If there is more than one candidate to be elected to an office, the number of candidates advancing to the general election is twice the number to be elected.

Primary elections may be held for other offices.

The amendment may be challenged on constitutional grounds.

Filed this 27<sup>th</sup> day of

February 2023

*Monae L. Johnson*

SECRETARY OF STATE

**RECEIVED**

FEB 27 2023

**Open Primaries**

**SD Secretary of State**

Be it enacted by the People of South Dakota:

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

§ 4. A primary election held for the office of governor, a legislative office, a county office, the United States Senate, or the United States House of Representatives shall be open to all candidates and all qualified voters without regard to the candidates' or voters' party registration or affiliation, or lack thereof.

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

The general election ballot may only include those candidates advancing from the primary election. The legislature may, by law, establish procedures for replacing a candidate who advanced from the primary election but will not participate in the general election due to death, withdrawal from the race, or disqualification.

A candidate may select the name of a political party to be listed next to the candidate's name on the primary ballot. The same political party designation shall appear next to the candidate's name on the general election ballot if the candidate advances to the general election.

Both the primary and general election ballots must state that a candidate's indicated political party designation does not constitute or imply an endorsement of the candidate by the political party designated.

The legislature may establish any necessary 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.

Filed this

27th

day of

February 2023

*Monae L. Johnson*

**SECRETARY OF STATE**



**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>

**MARTY J. JACKLEY**  
ATTORNEY GENERAL

**MARK BARNETT**  
CHIEF DEPUTY ATTORNEY GENERAL

January 9, 2023

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

Re: **Proposed Initiated Constitutional Amendment Concerning Open Primaries**

Dear Mr. Kirby;

This letter acknowledges our receipt of the submission of the proposed initiated constitutional measure that you submitted to this Office. Your proposed measure was received on December 29, 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 February 27, 2023. 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. Monae L. Johnson, Secretary of State

DEC 29 2022

From: knudson1@sio.midco.net  
Subject: Fwd: Open Primaries Amendment to the SD Constitution  
Date: Dec 29, 2022 at 10:12:42 AM  
To: Dave Knudson dave.knudson@hotmail.com

Sent from my iPhone

Begin forwarded message:

**From:** Joe Kirby <[joekirby31@gmail.com](mailto:joekirby31@gmail.com)>  
**Date:** December 29, 2022 at 9:58:54 AM CST  
**To:** Reed Holwegner <[reed.holwegner@sdlegislature.gov](mailto:reed.holwegner@sdlegislature.gov)>, [Charles.McGuigan@state.sd.us](mailto:Charles.McGuigan@state.sd.us), [elections@state.sd.us](mailto:elections@state.sd.us)  
**Cc:** De Knudson <[knudson1@sio.midco.net](mailto:knudson1@sio.midco.net)>, Drey Samuelson <[dreysamuelson3@gmail.com](mailto:dreysamuelson3@gmail.com)>  
**Subject:** Re: Open Primaries Amendment to the SD Constitution

The three sponsors are:

Joe Kirby, Deanna Knudson and Alfred Samuelson

On Thu, Dec 29, 2022 at 7:34 AM Joe Kirby <[joekirby31@gmail.com](mailto:joekirby31@gmail.com)> wrote:  
We are hereby submitting an initiated amendment to the South Dakota constitution in accordance with SDCL 12-13-25.1 to the attorney general, the secretary of state, and the director of the Legislative Research Council. If enacted, it would create a system of open primaries in the state.

Joe Kirby  
**605.321.4646**  
350 S. Main Ave, #701  
Sioux Falls, SD 57104

## Open Primaries

Be it enacted by the People of South Dakota:

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

§ 4. A primary election held for the office of governor, a legislative office, a county office, the United States Senate, or the United States House of Representatives shall be open to all candidates and all qualified voters without regard to the candidates' or voters' party registration or affiliation, or lack thereof.

In a primary election covered by this section, each candidate must be listed on a single primary ballot regardless of the candidate's political party. A voter may vote for any primary candidate regardless of the voter's party affiliation or lack thereof.

The two candidates receiving the highest number of votes cast in a primary election advance to the general election. If more than one candidate is to be elected to an office at the general election, the number of candidates advancing from the primary election is twice the number to be elected in the general election.

The general election ballot may only include those candidates advancing from the primary election. The legislature may, by law, establish procedures for replacing a candidate who advanced from the primary election but will not participate in the general election due to death, withdrawal from the race, or disqualification.

A candidate may select the name of a political party to be listed next to the candidate's name on the primary ballot. The same political party designation shall appear next to the candidate's name on the general election ballot if the candidate advances to the general election.

Both the primary and general election ballots must state that a candidate's indicated political party designation does not constitute or imply an endorsement of the candidate by the political party designated.

The legislature may establish any necessary 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.



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  
December 20, 2022  
Page 2

**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.~~<sup>1</sup> Primary elections covered by this section shall be<sup>2</sup> open to all candidates<sup>3</sup> and all voters<sup>4</sup> 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 qualified<sup>5</sup> 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~~highest<sup>6</sup> 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 be~~is~~ twice the number to be elected in the general election.

~~Only~~The<sup>7</sup> general election ballot may only include those candidates properly<sup>8</sup> advancing from the primary election shall appear on the general election ballot; however, the The legislature may, by law, establish procedures for replacing candidates a 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.

~~Candidates~~A candidate may select the name of a political party preference to be listed alongside their names next to the candidate's name on the primary ballot; the The

<sup>1</sup> 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.

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

<sup>3</sup> 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.

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

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

<sup>6</sup> "Highest" seems to be a better word choice.

<sup>7</sup> Restructured sentence for readability.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>~~

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**The legislature may, pass laws by law, and the secretary of state and board of elections may adopt rules and regulations,<sup>11</sup> as establish any necessary<sup>12</sup> 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.<sup>13</sup>**

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> Does this need to be further flushed out? It seems somewhat general.

<sup>13</sup> Severability clauses are unnecessary. Please see page 20 of the LRC Drafting Manual.