

Testimony relating to SCR 4008

North Dakota Senate State and Local Government Committee

To the Chairman and members of the committee,

My name is Eric Winters, I am an attorney specializing in election law and uses of the initiative process. Although my practice is in Oregon, a state with an active initiative system, I also have clients who seek advice about related questions in other initiative states. I am here today at the request of my client, US Term Limits Foundation who asked me share my analysis of the following questions:

**1. Can the North Dakota Legislative Assembly propose amendments to the North Dakota Constitution that, if enacted, would alter or repeal their term limits?**

No. but the question requires a little overview. North Dakota provides two methods for amending its constitution. Although those methods are contained in separate articles of the ND Constitution, they mirror each other in several respects. Art. III, sec. 1 provides the people with the initiative authority to directly propose and adopt amendments (sixteen states reserve this direct authority to electors, two state reserve indirectly with sub-steps that include the legislative assembly). Alternatively, Art. IV, sec. 16 provides the legislative assembly with the direct authority to propose amendments, while also leaving enactments to popular vote. Forty-nine states have some form of legislative referral for amendments (Delaware authorizes its legislature to amend its constitution without a popular vote).

Although the people of North Dakota hold the sole authority to enact amendments to the ND Constitution, both the legislature (in Art. IV, sec. 16) and the people (in Art. III, sec 1) each hold a separate authority to propose amendments. Both of North Dakota's amendment methods involves two basic steps: the first step is the proposal of an amendment, the second step is its submission voters. The second step cannot occur unless the first is completed successfully.

Proposing an amendment by initiative contains several sub-steps:

- A) sponsorship by twenty-five electors,
- B) a circulation of approved forms by sworn electors, and,
- C) submitting a sufficient number of signatures 120 days before the election.

If any of these sub-steps fails to occur, an initiative does successfully propose an amendment for enactment.

The amendment proposal process in Art. IV, sec. 16 (hereinafter called the “legislative referral” process) in North Dakota also includes a distinct proposal phase. To complete it, the legislative assembly must “agree” to the proposal “upon a roll call of a majority of the members elected to each house”. Although the proposal is not required to originate in a specific house, it must pass with a majority of each before submission “to the electors”. If one house fails to support the proposal with a majority of its members, it makes no difference whether two-thirds of the entire assembly supported it. Obtaining a separate majority among the members of each house is specific mandatory sub-step for proposing all legislative referrals.

This exercise in recognizing the separate sub-steps in the proposal processes does lead to a point. The subject matter limitation language in Art. XV, sec 4 refers to both amendment methods to avoid confusion. It specifically cites each them by article and section using language common to both. In doing so, it harmonizes the language common to the proposal phases within the separate sections. The integrated language bars specific subject matter for proposals by legislature referral while doubly reserving that same subject matter for proposals by initiative.

On its face, Art. XV, sec. 4 removes the authority of the legislative assembly “to propose an amendment to this constitution to alter or repeal the term limitations established in section 1 of this article” while further reserving that same authority “to the initiative petition of the people.” Prior to the enactment of term limits, the legislative assembly and the people held co-equal power to propose constitutional amendments. The purpose limiting legislative referral authority is not expressly declared in Art. XV, sec. 4, but it is not difficult to read between the lines.

The people of North Dakota collected and submitted many thousands of signatures over many months to propose term limits for legislative candidates and did not want to leave those limits subject to proposals to lengthen or repeal them by the very people subject to those limits. Instead, they entrusted this narrow slice of proposal authority to the method that requires a measure of popular support before going to the voters.

State legislators may still propose changes to their term limits by the initiative process like every other voter, but Art. XV, sec 4 makes it clear that they cannot use their special legislative referral authority to propose amendments to alter or repeal their own term limits.

**2. Does the introduction of SCR 4008 violate Art. XV, sec 4? What about approval from both houses?**

Maybe and Yes.

SCR 4008 proposes to send to the voters a measure to amend Art. XV, sec 1 to effect changes that would increase the term limitations for members of each house from eight years to twelve years. This question is not complicated, a term limitation is inarguably “altered” when increased from eight to twelve years, it should not matter whether the changes are characterized as a “resolution to amend and reenact” the relevant portions. The language of Art. XV, sec 4 relates to the actual changes proposed rather than the nomenclature used when describing such changes.

In a bit of an ironic twist, the second section of SCR 4008 attempts to repeal Art. XV, sec. 4 – the same section that otherwise bars any term limits amendments by the legislature (which is the purpose of the first section). It goes without saying that even if SCR 4008 were to be presented to voters without legal review, the enactment of second section would not retroactively save invalid proposals within the first section.

Although the current draft of SCR 4008 (as of 2/19/25) introduced by Senator Dwyer would (if enacted) alter the term limits in Art. XV, sec 1, it is unclear whether the step of introducing it or hearing testimony about it would be considered exercise of “the legislative assembly’s authority to propose amendments” as neither is an identifiable sub-step of the proposal stage for legislative referrals. On the other hand, in so much as individual legislative authority possessed by each member of legislature is derived from the collective authority of the legislative branch under Art. IV, the subject matter bar in Art. XV, sec 1 may also bar the advancement of restricted subject matter through legislative processes.

However, if both houses of the legislature were to individually pass SCR 4008, the completion of those sub-steps would propose an amendment to the voters by a clearly unauthorized method.

Thank you for your consideration of my comments today,

*Eric Winters*

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## Referenced Constitutional Provisions:

### ND Constitution Art. XV Term Limits

**Section 1.** An individual shall not serve as a member of the house of representatives for a cumulative period of time amounting to more than eight years. An individual shall not serve as a member of the senate for a cumulative period of time amounting to more than eight years. An individual shall not be eligible to serve a full or remaining term as member of the house of representatives or the senate if serving the full or remaining term would cause the individual to serve for a cumulative period of time amounting to more than eight years in that respective house.

....

**Section 4.** *Notwithstanding the legislative assembly's authority to propose amendments to this constitution under article IV, section 16 thereof, the legislative assembly shall not have authority to propose an amendment to this constitution to alter or repeal the term limitations established in section 1 of this article. The authority to propose an amendment to this constitution to alter or repeal the term limitations established in section 1 of this article is reserved to initiative petition of the people under article III of this constitution. (emphasis added).*

### Art. III Powers Reserved to the People

**Section 1.** While the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative Acts, or parts thereof, by the referendum; *to propose and adopt constitutional amendments by the initiative*; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers. (emphasis added).

**Section 2.** A petition to initiate or to refer a measure must be presented to the secretary of state for approval as to form. A request for approval must be presented over the names and signatures of twenty-five or more electors as sponsors, one of whom must be designated as chairman of the sponsoring committee. The secretary of state shall approve the petition for circulation if

it is in proper form and contains the names and addresses of the sponsors and the full text of the measure. The legislative assembly may provide by law for a procedure through which the legislative council may establish an appropriate method for determining the fiscal impact of an initiative measure and for making the information regarding the fiscal impact of the measure available to the public.

**Section 3.** The petition shall be circulated only by electors. They shall swear thereon that the electors who have signed the petition did so in their presence. Each elector signing a petition shall also write in the date of signing and his post-office address. No law shall be enacted limiting the number of copies of a petition. The copies shall become part of the original petition when filed.

**Section 4.** The petition may be submitted to the secretary of state if signed by electors equal in number to two percent of the resident population of the state at the last federal decennial census.

**Section 5.** An initiative petition shall be submitted not less than one hundred twenty days before the statewide election at which the measure is to be voted upon....

....

**Section 9.** A constitutional amendment may be *proposed by initiative petition*. If signed by electors equal in number to four percent of the resident population of the state at the last federal decennial census, the petition may be submitted to the secretary of state. All other provisions relating to initiative measures apply hereto. (emphasis added).

#### **Art. IV Legislative Branch**

**Section 16.** Any amendment to this constitution *may be proposed in either house of the legislative assembly, and if agreed to upon a roll call by a majority of the members elected to each house, must be submitted to the electors* and if a majority of the votes cast thereon are in the affirmative, the amendment is a part of this constitution. (emphasis added).