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MEMORANDUM

January 5, 2004

TO: Pete Maysmith and Lorie Young

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #75, concerning the Colorado Fair Redistricting Act

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. This memorandum contains our comments to you regarding the appended proposed initiative.

The purpose of this statutory review and comment requirement is to assist proponents in determining the language of their proposal and to make the public aware of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To amend the provisions of the state constitution on the division of the state into congressional districts in order to transfer the power to divide the state into congressional districts from the general assembly to a fair redistricting commission (commission);
2. To make a statement of the purposes of the proposed measure;
3. To require that congressional districts be as equal in population as possible and that the deviation in population among the districts be as low as practicable;

4. To prohibit consideration of the location of the residence of any candidate for or incumbent member of congress or the general assembly in the drawing of congressional and state legislative districts;
5. To state that the plan for dividing the state into congressional and state legislative districts shall comply with all federal laws governing redistricting;
6. To apply to congressional redistricting the same criteria of compactness, contiguity, preservation of local government boundaries, and communities of interest that currently apply to state legislative districts; to add as a new criterion for both congressional and state legislative redistricting the requirement that districts be competitive to the extent practicable; and to state that the criteria shall be applied to the maximum extent practicable and in the order in which they are listed;
7. To state that congressional and state legislative districts shall be drawn once every ten years, after each federal census;
8. To transform the existing Colorado reapportionment commission into the Colorado fair redistricting commission; and to specify that the commission shall have seven members: Four appointed by the legislative department, two selected by lot, and one selected by the members of the commission;
9. To state that members of the commission shall be qualified electors of the state of Colorado who voted in at least one of the last two general elections in which they were eligible to vote;
10. To specify the following regarding the two members of the commission to be selected by lot:
 - a. The secretary of state shall conduct an open application process.
 - b. The secretary of state shall forward the names and biographical information of all qualified applicants to the chief justice of the state supreme court.
 - c. The chief justice shall select from all qualified applicants a pool of at least six applicants who can, in the chief justice's judgment, bring fairness and balance to the commission.
 - d. No later than February 15 of the year after the year in which a federal census is taken, the secretary of state shall select two members of the commission by lot from the pool of applicants determined by the chief justice.
 - e. Each of the two members selected by lot shall be a registered Colorado voter who has been unaffiliated with any political party for at least three years before appointment to the commission.
11. To specify the following regarding the members of the commission appointed by the legislative department:

- a. The speaker of the house of representatives, the house minority leader, the senate majority leader, and the senate minority leader shall each appoint one member no later than February 20 of the year after the year in which a federal census is taken.
 - b. Each of the four members appointed by the legislative department shall be a registered Colorado voter who has been continuously registered with the same political party for at least two years before appointment to the commission.
- 12. To specify the following regarding the seventh member of the commission:
 - a. The seventh member shall be appointed by a vote of at least five of the six previously appointed members by March 31 of the year following the federal census.
 - b. The seventh member shall be a registered Colorado voter who has not been affiliated with any political party already represented on the commission for at least two years before appointment to the commission.
- 13. To specify that no person shall be appointed to the commission who has within the previous three years been appointed to, elected to, or a candidate for any other public office, not including school board member or officer, served as an officer or employee of a political party, or served as a registered paid lobbyist;
- 14. To specify that no more than two commission members shall be affiliated with the same political party;
- 15. To specify that no more than one member shall be appointed from any congressional district;
- 16. To state that if the commission fails to submit an agreed upon plan, the state supreme court shall adopt a plan in accordance with all the constitutional criteria for drawing districts;
- 17. To state that if an agreed upon plan is challenged in court, the state supreme court shall have original jurisdiction and discretion to establish a procedure to dispose of the matter promptly, consistent with the rights of the parties, either affirming the commission's action or reversing it, in which case the court shall remand the plan to the commission with instructions indicating the commission's errors in preparing the plan;
- 18. To state that all existing provisions regarding the timeline and supreme court approval for the reapportionment of the members of the general assembly shall also apply to the redrawing of congressional districts;
- 19. To require the commission to convene, appoint the seventh member, and elect its officers no later than March 31 of the year of the appointment of its members;

20. To state that during the term of office and for three years thereafter, a commissioner shall be ineligible for Colorado public office or for registration as a paid lobbyist;
21. To specify that five commissioners, including the chair or vice-chair, constitute a quorum and that five or more votes are required for any official action;
22. To state that where a quorum is present, the commission shall conduct business in meetings open to the public with at least seventy-two hours notice;
23. To require the commission to hold no fewer than twelve public hearings throughout the state on its proposed plan, allowing for comments and questions from the public; and to specify that at least one public hearing shall be held in each congressional district and that each public hearing shall be publicized at least two weeks in advance;
24. To require the commission to make redistricting data and mapmaking tools available to the public in at least one location in each congressional district and to allow the public to submit redistricting maps, recommendations, and inquiries;
25. To require the general assembly to appropriate sufficient funds for fees and expenses incurred by the commission in the event of a legal challenge to its plan;
26. To state that the commission shall have access to computer software necessary for its reapportionment duties;
27. To declare that any statutory provisions that are in conflict or inconsistent with article V of the state constitution are inapplicable to the matters covered and provided for in article V;
28. To state that article V of the state constitution shall take effect on December 2, 2004; and to authorize legislation to facilitate its operations so long as the legislation does not limit or restrict the provisions of article V or the powers granted therein;
29. To state that if any provision of article V of the state constitution is held invalid, the remaining provisions of the article that can be given effect without the invalid provision shall remain in effect.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. The following comments relate to the placement of the proposed measure in article V of the state constitution:

- a. The enactment clause of the proposed measure reads: "Article V of the constitution is amended as follows." However, the measure proposes amendments not to the entire article V but only certain of its sections.
- b. In standard drafting style, if an entire section is repealed, such as section 44 in the proposed measure, the same section number is not used for a new provision. However, because the sections amended by the proposed measure are in the middle of article V, it is not possible to give a new section number to the section entitled "Statement of Purpose" in the proposed measure.
- c. The proposed measure adds two new sections to article V (sections 49 and 50) using section numbers that already exist in article V.
- d. The proposed measure has an effective date clause stating that "THE PROVISIONS OF THIS ARTICLE SHALL TAKE EFFECT ON DECEMBER 2, 2004. . .". However, most of article V is already in effect and the proponents presumably intend to make only the new provisions of the proposed measure effective in December.
- e. Since the proposed measure repeals the power of the general assembly to draw congressional districts, article V, which relates to the legislative department, may not be the most appropriate place for the provisions of the proposed measure.

In light of the above comments, do the proponents believe it would be preferable to move all of the existing and amended provisions on congressional and legislative redistricting to a new article of the constitution? Have the proponents considered drafting the proposed measure so that it would create a new article, perhaps "Article XXIX: Congressional and Legislative Districts", with an enactment clause reading:

Be it Enacted by the People of the State of Colorado:

The constitution of the state of Colorado is amended BY THE
ADDITION OF A NEW ARTICLE to read:

If the proponents choose to create a new article in the constitution, it would be necessary to repeal the existing provisions on congressional and legislative apportionments (sections 44 to 48 of article V). It would also be necessary to change the internal references throughout the text.

2. If the proponents choose to leave the redistricting provisions in article V of the state constitution, it is not necessary to include in the text of the proposed measure the existing constitutional provisions that are not amended by the proposal, such as section 45. In this case, would the proponents consider using a standard enactment clause that would read:

Be it Enacted by the People of the State of Colorado:

Sections 44, 46, 47, and 48 of article V of the constitution of the state of Colorado are amended, and the said article V is further amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS, to read:

3. The proposed measure indicates new constitutional language in CAPITAL LETTERS. To be consistent with standard drafting style, would the proponents consider showing new language is SMALL CAPITALS?
4. Section 44 of the proposed measure reads in part: "... A REASONABLE CHANCE OF BEING ELECTED TO PUBLIC OFFICE ; AND, THAT THE INTERESTS . . .". Would the proponents consider deleting the space before the semicolon and the comma after "AND"?
5. In standard drafting style, language to be deleted is shown in strike type before new language shown in small capitals. Would the proponents consider revising the proposed measure to conform to this drafting convention throughout the text of the proposed measure, including: The first sentence of section 46; the sentence in section 48 (1) (b) that begins "EACH OF THE FOUR DESIGNEES MUST BE . . ."; the second sentence of section 48 (1) (d); and the third sentence of section 48 (1) (i)?
6. In standard drafting style, imperatives are generally indicated with "shall" rather than "must". Would the proponents consider changing "must" to "shall" in the portion of section 46 that reads "... Each district in each ~~house~~ LEGISLATIVE BODY MUST HAVE . . ." and in the portion of section 48 (1) (b) that reads "EACH OF THE FOUR DESIGNEES MUST BE REGISTERED COLORADO VOTERS . . ."?
7. Sections 46 and 47 of the proposed measure refer to the fair redistricting commission, yet this commission is not created until section 48. Have the proponents considered changing the order of these provisions so that the provision creating the commission comes before the provisions governing the work of the commission?
8. In standard drafting style, provisions are drafted in the singular when possible. As a matter of statutory interpretation, the singular includes the plural. To be consistent with this practice, would the proponents consider making the final sentence in section 46 singular: "... THE FAIR REDISTRICTING COMMISSION SHALL NOT CONSIDER THE LOCATION OF THE PRIMARY LEGAL RESIDENCE OF ANY CANDIDATE FOR OFFICE, INCUMBENT LEGISLATOR, OR INCUMBENT MEMBER OF CONGRESS."?
9. In the proposed measure, the introductory portion to section 47 is all new language, but only some of it is shown in capital letters. To be consistent with standard practice, would the proponents consider showing all of this language in small capitals? Also, would they consider ending the introductory portion with a colon as follows: "THE FOLLOWING CRITERIA SHALL BE APPLIED AND

GIVEN PRIORITY IN THE ORDER IN WHICH THEY ARE LISTED :'"?

10. In section 47 of the proposed measure, the new subsection (4) reads in part: "TO THE EXTENT PRACTICABLE, THE FAIR REDISTRICTING COMMISSION SHALL CREATE COMPETITIVE DISTRICTS. THE COMMISSION'S PLAN SHALL NOT BE DRAWN PURPOSELY TO FAVOR OR DISCRIMINATE AGAINST ANY POLITICAL PARTY OR GROUP." However, the provisions listing the existing three criteria in section 47 make "the district" the subject of the sentence. Do the proponents believe the language creating the new subsection (4) should be consistent with this form, especially in light of the fact that, under section 48 (1) (f), it is possible that the supreme court, rather than the commission, will be drawing districts using the criteria in section 47? If so, would they consider rewording section 47 (4) to read: "TO THE EXTENT PRACTICABLE, EACH DISTRICT SHALL BE COMPETITIVE. NO DISTRICT SHALL BE DRAWN PURPOSELY TO FAVOR OR DISCRIMINATE AGAINST ANY POLITICAL PARTY OR GROUP."?
11. In standard drafting style, an internal reference to another subsection of the same section need only refer to the other subsection and not to the entire section. Would the proponents consider following this practice in section 47 (4) ("NOTWITHSTANDING SUBSECTION (2) OF THIS SECTION, COUNTIES MAY ALSO BE DIVIDED IN ORDER TO CREATE COMPETITIVE DISTRICTS AS LONG AS SUCH DIVISION IS CONSISTENT WITH SUBSECTION (3) OF THIS SECTION.") and section 48 (1) (g) (" . . . MEMBERS OF THE GENERAL ASSEMBLY AS SET FORTH IN PARAGRAPH (e) OF THIS SUBSECTION (1) . . .")?
12. In section 48 (1) (a), the word "After" is still capitalized even though it is no longer the first word of the sentence. Would the proponents consider correcting this error?
13. In section 48 (1) (a), the word "congress" is inserted but it is not shown in small capitals. Would the proponents consider revising this language to read: ". . . and the members of THE CONGRESS, the STATE senate, and the STATE house of representatives apportioned among them . . . "?
14. In section 48 (1) (b), would the proponents consider correcting this typographical error: "tHE cOLORADO SECRETARY OF STATE . . . "?
15. In standard drafting style, numbers in the constitution and statutes are expressed in words rather than numerals. Would the proponents consider spelling out the number "6" in section 48 (1) (b) and the number "72" in section 48 (1) (k)? Also, it is not necessary to use both words and numerals in section 48 (1) (l) ("TWELVE (12)").
16. In section 48 (1) (b), the sentence beginning "~~The ff~~ Four legislative members shall be the designees of the speaker of the house . . ." contains two technical errors. Would the proponents consider revising this language to read: "The Four legislative members shall be THE DESIGNEEES OF the speaker of the house . . . " ? Alternately, since under the proposed measure each legislative leader would no longer have the right to serve on the commission or designate someone to serve in his or her stead, but rather would merely have the right to appoint a member of the commission, do the

proponents believe it would be more appropriate to use the word "appoint" rather than "designate" here? An example of such language would be: "~~The four legislative members shall be the~~ speaker of the house of representatives, the minority leader of the house of representatives, and the majority and minority leaders of the senate ~~or the designee of any such officer to serve in his or her stead, which acceptance of service or designation shall be made~~ SHALL EACH APPOINT ONE MEMBER OF THE COMMISSION no later than April 15 FEBRUARY 20 of the year following that in which the federal census is taken."

17. The next few sentences of section 48 (1) (b) combine the singular and the plural, place new language before deleted old language, and contain some garbled text. Would the proponents consider revising this portion of the section to read: "~~The three executive members shall be appointed by the governor between April 15 and April 25 of such year, and the four judicial members shall be appointed by the chief justice of the Colorado supreme court between April 25 and May 5 of such year~~ EACH OF THE FOUR LEGISLATIVE DESIGNEES [or APPOINTEES if the above suggestion is taken] SHALL BE A REGISTERED COLORADO VOTER WHO HAS BEEN CONTINUOUSLY REGISTERED WITH THE SAME POLITICAL PARTY FOR THE TWO YEARS PRIOR TO APPOINTMENT TO THE COMMISSION. THE SEVENTH MEMBER OF THE COMMISSION SHALL BE APPOINTED BY THE AFFIRMATIVE VOTE OF AT LEAST FIVE OF THE SIX PREVIOUSLY APPOINTED MEMBERS OF THE COMMISSION BY MARCH 31 OF SUCH YEAR."?
18. The next sentence seems redundant and uses the imperative "shall" where the descriptive "is" might be more appropriate. Would the proponents consider revising this sentence to read: "THE SEVENTH MEMBER OF THE COMMISSION SHALL BE A REGISTERED COLORADO VOTER WHO HAS NOT BEEN AFFILIATED WITH ANY POLITICAL PARTY ALREADY REPRESENTED ON THE COMMISSION IN THE TWO YEARS PRIOR TO APPOINTMENT TO THE COMMISSION."?
19. To improve clarity, would the proponents consider revising the beginning of section 48 (1) (c) to read: "NO PERSON SHALL BE APPOINTED TO THE COMMISSION WHO HAS WITHIN THE PREVIOUS THREE YEARS BEEN APPOINTED TO, ELECTED TO . . . "?
20. The language in section 48 (1) (f) appears to be entirely new, yet only a portion of the paragraph is shown in capital letters. Would the proponents consider showing all the new language in small capitals?
21. In standard drafting style, a paragraph letter is not capitalized. Would the proponents consider leaving the paragraph letters for paragraphs (f) to (n) in section 48 (1) in lower case?
22. The proposed measure moves the requirement that one commission member reside west of the continental divide to a separate paragraph in section 48 (1). Why did the proponents separate this provision from the other provision on the geographical composition of the commission (section 48 (1) (d), under which no more than one member may be from any congressional district) and place it after the provisions on how the commission operates?

23. To correct technical errors in section 48 (1) (i), would the proponents consider revising the final sentence of that paragraph as follows: "No later than ~~May 15~~ MARCH 31 of the year of their appointment, the ~~governor~~ COMMISSION shall convene, ~~the commission and appoint a temporary chairman who shall preside until the commission elects~~ APPOINT THE SEVENTH MEMBER OF THE COMMISSION, AND ELECT its ~~own~~ officers."?
24. Section 48 generally refers to members of the commission as "members", but paragraphs (j) and (k) of subsection (1) of that section call them "commissioners". Would the proponents consider using the term "members" in these paragraphs for consistency? Also, since membership on the commission is presumably a public office, would the proponents consider revising the language in paragraph (j) to specify that members are ineligible for any *other* public office. For example, paragraph (j) could be drafted as follows:

(j) DURING HIS OR HER TERM OF OFFICE AND FOR THREE YEARS THEREAFTER, A MEMBER OF THE COMMISSION SHALL BE INELIGIBLE FOR ANY OTHER PUBLIC OFFICE IN COLORADO OR FOR REGISTRATION AS A PAID LOBBYIST.
25. In accordance with the general drafting rule, the "fair redistricting commission" could be referred to by its full name the first time it is mentioned in each section. Subsequent references could be to "the commission" if there is no ambiguity. The proposed measure sometimes follows this rule and sometimes uses the full name of the commission. Would the proponents consider revising the proposed measure to conform to this drafting style?
26. In standard drafting style, section headings are not shown in small capitals. Would the proponents consider setting forth the heading of section 50 in lower case?
27. In section 50, the phrase "AND BE APPLICABLE THEREAFTER" is redundant, because once the provisions take effect, they are by definition applicable. Would the proponents consider deleting the redundant phrase?

Substantive questions:

1. Under section 1 (5.5) of article V of the state constitution, "No measure shall be proposed by petition containing more than one subject. . .". What is the single subject of the proposed measure? Since the proposed measure primarily affects congressional redistricting but also makes changes to the process of state legislative redistricting (for example, by adding competitiveness as a criterion for drawing districts), do the proponents believe the proposed measure may contain more than one subject?
2. Section 46 of the proposed measure prohibits the commission from considering the location of the residence of any candidate or incumbent when creating congressional and legislative districts. How

would a court be able to determine whether the commission or any of its members considered this factor? Is it the proponents' intent that a finding that the commission considered a candidate's or incumbent's address would require specific evidence, or could the court infer that this was a factor based on the plan proposed by the commission? Or would this issue be left to the supreme court's rules for considering the commission's proposed plan?

3. Section 47 (4) of the proposed measure requires the commission to create competitive districts to the extent practicable. What is the definition of a "competitive district"? How would a court determine whether a district is competitive and the extent to which it was practicable for a district to be competitive?
4. Section 48 (1) (b) requires the secretary of state to forward to the chief justice of the state supreme court the names and biographical information of the qualified applicants who apply to be one of the members of the commission to be selected by lot. What is a "qualified applicant"? The proposed measure appears to specify that a commission member selected by lot have the following qualifications:
 - a. The member shall be a qualified elector of the state of Colorado who voted in at least one of the last two general elections [section 48 (1) (b)].
 - b. The member shall be a registered Colorado voter unaffiliated with any political party for the past three years [section 48 (1) (b)].
 - c. The member, in the previous three years, shall not have been appointed to, elected to, or a candidate for any other public office except school board member or officer, shall not have served as an officer or employee of a political party, and shall not have served as a registered paid lobbyist [section 48 (1) (c)].

Is this a complete list of the qualifications that the secretary of state is required to verify? Are there other circumstances in which an applicant to be selected by lot would not be considered "qualified"? For example, the members selected by lot must be appointed no later than February 15 and the members designated by the legislative leaders must be appointed no later than February 20, but it is possible that the legislative leaders would appoint their designees before the members are selected by lot. If the legislative leaders had already appointed four members, each from a different congressional district, at the time the secretary of state was determining which applicants were qualified, would the secretary of state be required to reject all applicants from those four congressional districts? Or if the legislative leaders had appointed two members from each major political party, would the secretary of state have to eliminate all applicants belonging to those two parties to comply with section (48) (1) (d)?

5. If two legislative leaders each wanted to appoint a member from the same congressional district, how would the requirement that no more than one member may reside in any congressional district be applied?

6. Under section 48 (1) (b) of the proposed measure, the members of the commission selected by lot must have been unaffiliated with any political party for three years before their appointment; the legislative members must have been affiliated with the same party for the previous two years; and the seventh member must have been unaffiliated for the previous two years with any political party already represented on the commission. What is the purpose of these differing lengths of time?
7. Section 48 (1) (b) of the proposed measure states that the members of the commission designated by the legislative leaders must have been continuously registered with the same political party for at least two years before their appointment. Does this mean that a legislative leader could not appoint an unaffiliated member?
8. Under section 48 (1) (c) of the proposed measure, people who have held any public office other than school board member or officer in the prior three years are excluded from serving on the commission. What is the definition of "public office"? Does it include only elective office, or would it include people who hold appointed positions such as judges? What is the purpose of excluding people who have held public office from serving on the commission? What is the reason for exempting members and officers of school boards from this prohibition?
9. According to section 48 (1) (d) of the proposed measure, no more than one member of the commission may be appointed from any congressional district. The commission has seven members, so this provision has the effect of ensuring that each congressional district is represented on the commission. If Colorado's population grows at a slower rate than some other states over the next few years and the state loses a seat in the U.S. House of Representatives after the census of 2010, it would be impossible to appoint a seven-member commission without having more than one member from a congressional district. How would this conflict be resolved?
10. Section 48 (1) (g) of the proposed measure states: "ALL PROVISIONS REGARDING THE TIMELINE AND SUPREME COURT APPROVAL FOR THE REAPPORTIONMENT OF THE MEMBERS OF THE GENERAL ASSEMBLY AS SET FORTH IN SECTION 48 (E) OF THIS ARTICLE SHALL ALSO APPLY TO THE REDISTRICTING OF CONGRESSIONAL DISTRICTS IN THE STATE OF COLORADO." Why did the proponents include this provision in a separate paragraph rather than simply adding a reference to congressional redistricting in paragraph (e)? Is it the proponents' intent that there are some provisions in paragraph (e) that are unrelated to the timeline and supreme court approval and therefore would not apply to congressional redistricting?
11. What is the purpose of section 48 (1) (j) of the proposed measure, which prohibits members of the commission from holding other public office or registering as paid lobbyists during and for three years after their service on the commission? Is it the proponents' intent that a person who was a member of a school board in the prior three years could be appointed to the board, so long as the person is no longer a member of the school board when the person's term on the commission begins, and that this person would be precluded from holding any public office, including school board member, for three years after leaving the commission?

12. Section 48 (1) (l) of the proposed measure requires the commission to hold at least twelve public hearings throughout the state on the proposed plan. Does "the proposed plan" refer to the congressional and state legislative redistricting plans individually or to a single plan encompassing both congressional and state legislative redistricting? Is the "proposed plan" referred to in paragraph (l) the same as the "preliminary plan" referred to in section 48 (1) (e)?
13. Do the public hearings on the proposed plan constitute "official action" or "business" of the commission? If so, the quorum requirements in section 48 (1) (k) would apply to the public hearings. Is this the proponents' intent?
14. Section 49 of the proposed measure states: "ANY PROVISIONS IN THE STATUTES OF THIS STATE IN CONFLICT OR INCONSISTENT WITH THIS ARTICLE ARE HEREBY DECLARED TO BE INAPPLICABLE TO THE MATTERS COVERED AND PROVIDED FOR IN THIS ARTICLE." Are the references to "this article" intended to mean all of article V of the state constitution or only the provisions amended or added by the proposed measure? Since a constitutional provision always prevails over a conflicting statutory provision as a matter of statutory interpretation, do the proponents believe this section is necessary? Does it serve a purpose beyond this general rule of interpretation?
15. Sections 50 and 51 of the proposed measure also refer to "this article". Are these references intended to mean all of article V of the state constitution or only the provisions amended or added by the proposed measure? If they apply to the entire article, do the proponents believe they encompass more than a single subject?
16. Section 50 of the proposed measure specifies an effective date for the proposed measure. If the proposed measure did not specify an effective date, it would take effect "from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed" (article V, section 1 (4) of the state constitution). Why did the proponents choose December 2, 2004, as the effective date?