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MEMORANDUM

March 5, 2004

TO: Parry Burnap and Mark Morland

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #99, concerning popular proportional selection of presidential electors.

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado 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. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents 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 add a new section 13 to article VII of the Colorado constitution that would take effect after November 3, 2004, and would:
 - a. Declare that:
 - i. The United States constitution delegates to each state the method of choosing presidential electors who are charged with casting votes in the electoral college for the offices of president and vice president of the United States;

- ii. The Colorado constitution reserves to the people of this state the right to act in the place of the state legislature in any legislative matter, and through enactment of this section, the people do hereby act as the legislature of Colorado for the purpose of changing the manner of electing presidential electors in accordance with the provisions of article II, section 1 of the United States constitution;
 - iii. The right to vote for president of the United States is a fundamental right and each person's vote is entitled to equal dignity and should count equally;
 - iv. The present "winner-take-all" method of awarding presidential electors in Colorado permits a presidential ticket to receive all of this state's electoral votes even though it wins less than a majority of the ballots cast in this state and acts as a disincentive for presidential candidates to focus their attention and policy concerns on our state and region;
 - v. The will of the Colorado electorate is best reflected by the popular proportional allocation of electoral college representatives, based on the number of ballots cast for the respective presidential tickets in this state; and
 - vi. In the strongest possible terms, the voters of Colorado declare that, by approving this initiative, they understand, desire, and expect that the popular proportional selection of presidential electors is intended to apply retroactively and thus determine the manner in which our state's presidential electors are chosen and our state's electoral votes are cast for the general election of 2004.
2. To require that the total number of electoral votes to which Colorado is entitled to be divided among the presidential tickets on the general election ballot, based upon the popular proportional share of the total statewide ballots cast for each presidential ticket, subject to subsections (3) and (4) of the proposed new section 13. Requires each presidential elector to vote for the presidential candidate and, by separate ballot, vice-presidential candidate on the presidential ticket of the political party or political organization that nominated said presidential elector.
3. To require the allocation of a presidential ticket's popular proportion of this state's electoral votes must be in whole numbers and made in the following manner:
- a. Specifies the total number of ballots cast in this state for each presidential ticket to be divided by the total number of ballots cast for all presidential tickets that receive votes at a general election; and
 - b. Specifies the proportion of a presidential ticket's popular vote, as determined by the new section, to be multiplied by the number of electoral votes to which Colorado is entitled.

4. To require the number of electoral votes that is attributable to the ballots cast for any presidential ticket, as determined by subsection (3) of the proposed section 13, to be rounded to the nearest whole number, subject to the following limitations:
 - a. Specifies that no presidential ticket shall receive any electoral votes from this state if its proportion of the total ballots cast for all presidential tickets would reflect less than a full electoral vote after rounding to the nearest whole number.
 - b. Specifies that if the sum of electoral votes allocated pursuant to paragraph (a) of subsection (4) of the proposed section 13 would be greater than the number of electoral votes to which Colorado is entitled:
 - i. The allocation of electoral votes to the presidential ticket receiving at least one electoral vote and the fewest number of ballots cast shall be reduced by whole electoral votes until only that number of electoral votes to which Colorado is entitled have been allocated; and
 - ii. The process set forth in subparagraph (I) of paragraph (b) of subsection (4) of the proposed section 13 shall be repeated if, after the reduction of electoral votes as set forth in the said subparagraph, the total number of electoral votes allocated to all presidential tickets remains greater than the total number of electoral votes to which this state is entitled, and such process shall be applied to the presidential ticket receiving at least one electoral vote and the next fewest number of ballots cast until the total number of electoral votes allocated to all presidential tickets is equal to the total number of electoral votes to which this state is entitled.
 - c. Specifies that if the sum of all electoral votes allocated would be less than the number of electoral votes to which Colorado is entitled, the presidential ticket receiving the greatest number of ballots cast shall receive any unallocated electoral votes until all of the electoral votes to which Colorado is entitled have been allocated.
 - d. Specifies that if two or more presidential tickets receive the identical total number of ballots cast for all presidential tickets and the allocation of electoral votes to which Colorado is entitled cannot be proportionally allocated in whole electoral votes to these presidential tickets, the secretary of state shall determine by lot which of these presidential tickets will have their number of electoral votes increased or decreased by a whole electoral vote until all of the electoral votes to which Colorado is entitled have been allocated.
5.
 - a. To require a recount of ballots cast for and against this initiative to be ordered by the secretary of state if the difference between the number of ballots cast for and against this initiative is less than or equal to one-half of one percent of the highest number of ballots cast in the election on this initiative. Where the difference between the number of ballots cast for and against this initiative is greater than one-half of one percent of the highest

number of ballots cast in the election on this initiative, a recount in connection with this initiative may be requested by a petition representative identified with this initiative or the registered agent of an issue committee opposing this initiative; provided, however, that any such person or the committee with which he is associated shall pay the cost of such recount before the secretary may begin the recount, but if the prevailing side in the election is changed thereby, such amount shall be refunded.

- b. To require a recount to be ordered by the secretary of state if:
 - i. The difference between the number of ballots cast for any two presidential tickets is less than or equal to one-half of one percent of the ballots cast for the ticket that received the most votes of the two presidential tickets in question; and
 - ii. At least one of the two presidential tickets, as a result of such recount, could qualify for one or more additional electoral votes.
 - c. To require when the difference between the number of ballots cast for the two presidential tickets in question is greater than one-half of one percent of the ballots cast for the ticket that received the most votes as between those two tickets, a recount for presidential electors may be requested by a presidential ticket or the political party or political organization associated with such ticket; provided that any such ticket or political party or organization with which it is associated shall pay the cost of such recount before the secretary may begin the recount, but if the election result is changed thereby and an additional electoral vote or votes is awarded to that presidential ticket, such amount shall be refunded.
 - d. To require any recount authorized pursuant to subsection (5) of the proposed section 13 shall be ordered or requested not later than close of business on the twenty-third day after the general election at which such ballots are cast and shall be completed and the result shall be certified by the secretary of state not later than close of business on the thirtieth day after the general election at which such ballots are cast.
6. To require for the purposes of the proposed section 13 the following:
- a. Specifies the results of the election on the proposed amendment be officially declared by proclamation of the governor which shall be issued after the votes thereon have been canvassed but before noon on:
 - i. The twenty-fourth day following the general election, if no recount is ordered or requested; or
 - ii. The thirty-first day following the general election, if a recount is ordered or requested.

- b. Specifies the secretary of state shall certify the election of presidential electors, as determined pursuant the proposed section 13, but in no event shall such certification be issued later than 2:00 p.m. on:
 - i. The twenty-fourth day following the general election, if no recount is ordered or requested as to such election; or
 - ii. The thirty-first day following the general election, if a recount is ordered or requested as to such election.
 - c. Specifies the election certification process referred to in paragraph (b) of subsection 6 of the proposed section 13 shall apply to general elections held after 2004 at which presidential tickets are on the statewide ballot.
7. To require the secretary of state to determine by lot which presidential electors, nominated in conjunction with a presidential ticket that qualifies for at least one electoral vote pursuant to this section, shall be entitled to cast electoral votes. Requires, for each presidential ticket, the secretary of state to then determine by lot the order of nominated presidential electors for that presidential ticket to serve as alternates if any vacancies occur in the office of presidential elector for that presidential ticket because of death, refusal to act, absence or other cause. Such determinations by lot performed by the secretary of state shall be made before 3:00 p.m. of the twenty-fourth day following the election if no recount is ordered or requested and before 3:00 p.m. of the thirty-first day following such election if a recount is ordered or requested. If the number of nominated presidential electors for a presidential ticket is insufficient to allow the secretary of state to fill a vacancy in the office of presidential elector by lot, the political party or political organization of the presidential ticket for which the vacancy remains shall nominate the number of additional presidential electors necessary to fill the vacancy. Requires the secretary of state to prepare a certificate of election for each presidential elector entitled to cast an electoral vote. Requires the governor to sign and affix the seal of the state to the certificates and deliver one certificate to each elector on the first Monday after the second Wednesday of December following a general election.
8. To give the supreme court original jurisdiction for the adjudication of all contests concerning presidential electors and to require the supreme court to prescribe rules for practice and proceedings for such contests. Requires contests concerning the election of presidential electors be given the highest priority on the court's calendar and shall be expedited in all respects, including hearing and decision. Requires the court to render its final decision in any contest concerning presidential electors not later than the first Friday after the second Wednesday of December following a general election. Specifies that no justice of the court who is a contestor in the election contest be permitted to hear and determine the matter.
9. To require the proposed section 13 be liberally construed to achieve popular proportional allocation of presidential electors at the 2004 general election.

10. To specify that the general assembly may enact legislation to change the manner of selecting presidential electors or any of the procedures related to that selection process.
11. To define the terms presidential ticket, rounded to the nearest whole number, this initiative, and whole number.
12. To specify the provisions of the proposed section 13 are severable.

Comments and Questions

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

Technical questions:

1. To conform to standard drafting practice in Colorado, would the proponents of the proposed initiative consider placing the section heading of the (proposed) new section 13 to article VII of the Colorado constitution in lower case letters?
2. To conform to standard drafting practice in Colorado, would the proponents of the proposed initiative consider removing the quotation marks around the words "winner-take-all"?
3. In a number of places in the text of the proposed initiative, the word "Colorado" is broken off at the right-hand margin, with the "C" on the margin and the rest of that word appearing on the next line. See, e.g., subsections (1) (d) and (4) (b) of the text of the proposed initiative. Would the proponents consider fixing this problem as it appears in the text of the proposed initiative?
4. Would the proponents of the proposed initiative consider eliminating the underscore that appears in subsection (1) (e) of the text of the proposed initiative?
5. In an effort to promote clarity of expression and to avoid reliance on overly legalistic expressions, it has become accepted practice in Colorado to avoid the word "said" when making a subsequent reference to a particular term. Would the proponents of the proposed initiative consider modifying its text to minimize the use of the word "said"?
6. Under the nomenclature system for describing units within a statutory provision in use in Colorado, the unit referenced in Colorado is "paragraph (a)," not "subparagraph (a)". Would the proponents consider making this change to subsection (3) (b) of the text of the proposed initiative?
7. In an effort to promote clarity of expression and minimize voter confusion, in subsection (4) (b) of the text of the proposed initiative, would the proponents consider changing the verb form "would be" to "is"?

8. In subsection (3) of the text of the proposed initiative, would the proponents consider changing the "must" to a "shall" to conform to Colorado drafting practice for expressing mandatory language?
9. To conform to standard drafting practice in Colorado, would the proponents consider adding a colon at the end of the introductory portion of subsection (3) of the text of the proposed initiative?
10. At various places in the text of the proposed initiative, the proponents refer to "this initiative." See, e.g., subsections (5) (a) and (6) (a). To conform to standard drafting practice in Colorado, would the proponents consider referring to "the initiative" within the text itself as "this section, " i.e., new section 13 to article VII of the Colorado constitution?
11. To minimize voter confusion and keep like-subjects together, would the proponents consider keeping all provisions relating to the selection of the individual presidential electors together so that subsections (2) and (7) would be part of one consolidated subsection or follow as successive subsections?
12. Subsection (9) of the proposed initiative state that the same shall be effective "from and after November 3, 2004." To conform to standard drafting practice in Colorado, would the proponents consider changing this phrase so that it reads "on and after [the effective date], or, here, November 3, 2004?"
13. To conform to standard drafting practice in Colorado, would the proponents consider capitalizing the first word in each new unit, whether subsection, paragraph, subparagraph, etc.?

Substantive questions:

1. What is the proponents' rationale for the proposed initiative?
2. The proposed initiative, among other subjects, addresses the division of electoral votes, the allocation of a presidential ticket's popular proportion of the state's electoral votes, election recounts, election certification, and the original jurisdiction of the Colorado Supreme Court. Section 1 (5.5) of article V of the Colorado constitution mandates that no measure proposed by petition shall contain more than one subject that shall be clearly expressed in its title. What is the single subject contained within the text of the proposed initiative?
3. Have the proponents researched the question of whether the proposed initiative is compatible with the provisions of the United States constitution as they relate to presidential electors, and particularly, section 1 of article II of, and the 12th amendment to, the United States constitution? More specifically, is there any conflict between the proposed initiative and the command of section 1 of article II of the United States constitution that presidential electors shall be appointed "in such manner as the [state] legislature may direct"?

4. Historically, a rationale of the present electoral college system is that its winner-take-all nature serves to magnify the results of an election, thereby conferring greater legitimacy on the president elected or reelected. A system based upon the proportional allocation of electoral votes would arguably weaken this legitimizing function of the electoral college. Have the proponents considered this historic rationale supporting the current system in drafting the proposed initiative?
5. If every state adopted the proposed initiative, the United States would essentially have arrived at a system based upon the direct popular election of the president. Do the proponents favor such a system? In such circumstances, would the electoral college have any continuing relevance?
6. Long ballot measures arguably produce voter fatigue, voter confusion and, as a result of the combination of these factors, possibly an easy reason for an elector to vote against the measure. In addition, because the text will be placed in the Colorado constitution, any changes would have to be made by a subsequent popular initiative or concurrent resolution from the General Assembly, which means that such changes are very difficult to accomplish. To avoid these potentially adverse consequences, have the proponents considered submitting a text containing fewer words that generally mandates the proportional selection of presidential electors, with the idea that follow-up legislation would supplement the constitutional directive with the necessary details of implementation?
7. The change proposed by proponents could presumably be accomplished by a statutory change instead of constitutional amendment. Have the proponents considered making the initiative an amendment to the Colorado Revised Statutes, the statutory law of Colorado, instead of the Colorado constitution? Have the proponents considered the general details of making changes to constitutional provisions in deciding whether to proceed by constitutional change or by statute?
8. What is the source of the authority for the statement in subsection (1) (b) that the "Colorado constitution reserves to the people of this state the right to act in the place of the state legislature in any legislative matter"? What conclusions do the proponents draw from this assertion?
9. Do the proponents mean to allege, as could be drawn from a reading of subsection (1) (b) of the text of the proposed initiative, that adoption of the proposed initiative is "in accordance with" section 1 of article II of the United States constitution? If so, how?
10. From what authority do the proponents draw the conclusion that "the right to vote for president of the United States is a fundamental right", as is stated in subsection (1) (c) of the proposed initiative? What does it mean to proponents that "each person's vote...should count equally"?
11. How does the present winner-take-all system act as a disincentive for presidential candidates to focus their attention on our state and region, as is stated in subsection 1 (e) of the text of the proposed initiative? Have the proponents considered the possibility that proportional selection of presidential electors will make presidential candidates even more likely to focus their time and resources on larger states where the proportional return (even where the candidate loses a big state

by a large margin) would arguably represent a bigger pick-up of electoral votes that even winning the popular vote in a small state like Colorado by a huge margin? Have the proponents considered the possibility that, in the event a system of proportional selection of presidential electors were adopted by many other states, the proposed initiative may serve to actually diminish Colorado's influence in presidential elections?

12. With respect to subsection (2) of the text of the proposed initiative:
 - a. Do the proponents anticipate any change in the method currently specified by law for the election of presidential electors? If yes, what are these changes and how does the proposed initiative address any such changes identified?
 - b. What do the proponents mean by the phrase "popular proportional share," i.e., is that simply a direct straight mathematical calculation of the proportion of the popular vote received by a particular presidential ticket?
 - c. It appears the text of the proposed initiative contemplates that various political parties or political organizations will be nominating electors. Is this conclusion correct? What do the proponents mean by "political organization" for purposes of the proposed initiative? How will such parties or organizations nominate their particular slate of electors? Would a political party or political organization be able to select a slate of electors if a particular presidential ticket was not representing the party or organization?
 - d. With respect to the last sentence of subsection (2) of the proposed initiative, please specify the time, place, and manner in which the electors will be voting for their slate of presidential electors? If you know, please explain whether and to what extent this requirement represents a change from existing law?
13. With respect to subsection (3) (a) of the proposed initiative, in the interests of clarifying the proponents' intent, would the proponents consider clarifying that the number of ballots cast for each presidential ticket at *any particular general election* shall be divided by the total number of ballots cast for all presidential tickets that receive votes *at that same general election*. In its current form, the text of the proposed initiative does not tie the vote total to any particular election, which may create unnecessary confusion as to the proponents' intent and the operation of the proposed initiative.
14. To make the process specified in subsections (3) and (4) more understandable, would the proponents consider specifying the end result of the calculations required by paragraphs (a) and (b) of that subsection? For example, the text could state that the calculations result in a "provisional (or preliminary) electoral vote calculation", which is then subject to the requirements of subsection (4) of the proposed initiative.
15. With respect to subsection (4) (a) of the text of the proposed initiative, if the text mandates that the

- preliminary or provisional calculations are to be rounded to the nearest whole number, wouldn't a presidential ticket always receive at least one electoral vote? If not, why not?
16. With respect to subsection 4 (b) of the text of the proposed initiative, how is it possible that the sum of electoral votes allocated would be greater than the number of electoral votes to which Colorado is entitled?
 17. As an alternative to the complicated structure set up in subsection (4) of the proposed initiative, if the ultimate intent is to eliminate an electoral vote distribution to a ticket that has received a *de minimus* share of the popular vote, have the proponents considered an alternate and arguably simpler mechanism whereby a presidential ticket would not receive any electoral votes if it did not obtain at least a specified percentage of the popular vote within the state?
 18. With respect to subsection (4) (b) (I) of the text of the proposed initiative, should the language of that subsection be read to mean that all of the overage vote would be taken away from the votes of this one ticket until the required number is achieved?
 19. With respect to subsection (4) (b) (II) of the text of the proposed initiative, how would the requirements of this subparagraph (II) ever come into operation if subparagraph (I) of this paragraph (b) requires the overage to be reduced until "only that number", i.e., the correct number of the state's electoral votes, have been allocated?
 20. With respect to subsection (4) (c) of the text of the proposed initiative, how is it possible that the sum arrived at would be less than the allocated votes to which Colorado is entitled? In addition, in a system based on proportional allocation of electoral votes, have the proponents considered the possible unfairness of giving the ticket that has received the greatest number of ballots cast all of the unallocated votes until all of the electoral votes to which Colorado is entitled have been allocated?
 21. With respect to subsection (4) (d) of the text of the proposed initiative, how do the proponents envision the lots determination required by that subsection to be made? Please explain how the procedures described in that subsection would work?
 22. In light of existing recount procedures provided under state law, see, e.g., article 10.5 of title 1, Colorado Revised Statutes, why have the proponents included procedures relating to recounts in the text of the proposed initiative? Do the proponents intend that the recount provisions contained in the text of the proposed initiative be supplemented by compatible statutory provisions concerning recounts or be the exclusive source of authority for recounts under the proposed initiative? How can substantive provisions of the measure govern the process by which the measure itself becomes law? If, for example, the measure is defeated by a margin of one eighth of one percent, how could the recount provisions be enforced?
 23. Under subsection (5) (a) of the text of the proposed initiative, why do the proponents authorize

only the a petition representative associated with the initiative or the registered agent of an issue committee opposing the initiative to request the recount authorized under that subsection? With respect to subsection (5) (b) of the text of the proposed initiative, would the recount that is the subject of that subsection affect all presidential elections at any time in the future or only the 2004 presidential election?

24. With respect to subsection (5) (c) of the text of the proposed initiative:
- a. How did the proponents arrive at the deadlines specified for requesting and completing recount? Do the proponents know whether these dates are compatible with the dates currently specified in state law for requesting and completing a recount?
 - b. The subsection references the phrase "close of business." Given uncertainty about what that phrase means, would the proponents consider specifying a time of day for which the action described is to be completed, as was done in subsection (7) of the proposed initiative?
25. With respect to subsection (6) of the text of the proposed initiative:
- a. Is officially declaring the results of the election equivalent to issuance by the governor of the governor's proclamation?
 - b. How did the proponents arrive at the deadlines specified for issuing the governor's proclamation and certifying the election results?
 - c. With respect to certification of the election of presidential electors, are the proponents aware of whether these dates are comparable with existing statutory deadlines for certifying election results? What is the basis for including within the text of the proposed initiative requirements pertaining to the certification of presidential electors? How can this provision have any effect if the measure itself is not effective until the governor issues the proclamation?
 - d. Why is it necessary that the proposed initiative have its own internal deadline for the date by which the governor shall have issued his or her proclamation?
 - e. Focusing only on subsection (6) (c), is it the proponents' intent that the election certification process contained in subsection (6) (b) apply to all candidate contests in all general elections after 2004 at which presidential tickets are on the state ballot? If yes, what is the proponents' intent in making all such contests conform to the procedures contained in the text of the proposed initiative? What is the connection between such certification and the proportional selection of presidential electors? If not, would the proponents consider clarifying the text of the proposed initiative to remove this possible ambiguity?

26. With respect to subsection (7) of the proposed initiative:
- a. Why is it necessary to determine by lots which presidential electors shall be entitled to cast electoral votes? Are the proponents contemplating competitive contests for the position of presidential elector among representatives of a political party or political organization?
 - b. How is the "lots" determination to be made?
 - c. Under current statutory requirements, codified at section 1-11-107, Colorado Revised Statutes, it appears the governor is required to deliver a certificate to each presidential elector on or before the thirty-fifth day after the general election. Under the text of the proposed initiative, as stated in subsection (7), the certification is to be issued on the first Monday after the second Wednesday of December following a general election, which is also the date on which the electors are to convene to cast their ballots under state law (section 1-4-304 (1), Colorado Revised Statutes). Assuming this is a correct reading of the proposed initiative, why does the proposed initiative make this change from current law?
27. How are the presidential electors to be selected under the proposed initiative?
28. Pursuant to the requirements of subsection (9) of the proposed initiative, its effective date is November 3, 2004. Do the proponents intend that, if passed by the voters at the general election in November 2004, the proposed initiative will govern the manner of selecting Colorado's electoral votes for the 2004 general election? If the answer to this question is yes, is it feasible that the procedures required by the proposed initiative can be implemented between November 3 and the first Monday after the second Wednesday of December 2004, particularly including any new procedures governing the selection of presidential electors?
29. Pursuant to the requirements of subsection (9) of the proposed initiative, how much discretion does the General Assembly have in changing the manner of selecting presidential electors or any of the procedures related thereto?
30. Are the proponents aware of any other states that have adopted a proportional selection system for allocating their state's electoral votes?
31. Are the proponents aware that some of the provisions of subsection (8) of the proposed initiative are also contained in section 1-11-204, Colorado Revised Statutes?