

STATE OF COLORADO

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MEMORANDUM

February 16, 2004

TO: Tom Tancredo and Charles Heatherly

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #88, concerning Restrictions on State Services

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. Earlier versions of this initiative were the subject of a memorandum dated January 12, 2004. Proposal 2003-2004 #80 was discussed at a hearing on January 14, 2004. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

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 specify that the provision of non-emergency services of the state of Colorado or any city, county or other political subdivision of the state be restricted to citizens of and aliens lawfully present in the United States of America.
2. To specify that the provision of any and all services of the state of Colorado or any city, county or other political subdivision of the state may be provided to persons who are not legally present in the United States of America if the provision of such services is mandated by federal law.
3. To specify that any resident of the state of Colorado has standing to sue the state of Colorado or any county, city, or other political subdivision of the state, to enforce the provisions of the proposed measure.
4. To specify that courts of record of the state of Colorado have jurisdiction to hear cases brought to enforce the proposed measure.
5. To authorize the general assembly to provide reasonable and appropriate limits on the time and manner of suits brought under the proposed measure.
6. To specify that the general assembly shall have the power to enforce the proposed measure by definitions, guidelines and other appropriate legislation.

Comments and Questions

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

Technical questions:

1. If the proponents intend for the phrase "Amendment to Article V of the Colorado Constitution, as new section 51:" to be enacted with the remainder of the proposed measure, would the proponents consider placing the enacting clause ("Be it Enacted by the People of the State of Colorado:") to precede the proposed amending clause ("Amendment to Article V of the Colorado Constitution, as new section 51:")?
2. To be consistent with standard drafting practices in Colorado, would the proponents consider using the standard wording of an amending clause by deleting the phrase "Amendment to Article V of the Colorado Constitution, as new section 51:" and substituting the phrase "SECTION 1. Article V of the Colorado constitution is amended BY THE ADDITION OF A NEW SECTION to read:", with the words

"by the addition of a new section" in capital letters, as shown?

3. Would the proponents consider placing the phrase "**Section 51.**", in bold, prior to the beginning of the substantive provisions of the proposed measure to denote the new section 51 that the proponents are proposing to add to article V of the Colorado constitution to be consistent with standard drafting practice in Colorado? Also, would the proponents consider adding a section heading after the phrase "**Section 51.**" that describes the substantive provisions included in the proposed measure? For example, section 1 of article V has a section heading of "**General assembly - initiative and referendum.**".

4. Bills prepared for and considered by the general assembly indicate new statutory or constitutional language by showing it in small capital letters. To be consistent with standard drafting practices, would the proponents consider showing the text of the proposed measure, apart from any headings, in "SMALL CAPS" to indicate new language?

5. To be consistent with standard drafting practices in Colorado, would the proponents consider following the numbering convention used in the Colorado Revised Statutes as follows: Subsection (1), paragraph(a), subparagraph (I), and sub-subparagraph (A)? For example, the proposed measure appears to three separate provisions, would the proponents consider numbering these as subsections (1), (2), and (3)?

6. In reference to the proposed provision: "The General Assembly shall have the power to enforce this amendment by definitions, guidelines and other appropriate legislation."

The general assembly has the constitutional authority to pass laws necessary to further implement provisions of law, such as the proposed constitutional provision, unless constitutionally restricted from doing so, but does not have the power to enforce any provision of law since the power to enforce laws lies with the executive branch of government. Would the proponents consider changing the phrase "power to enforce" to "the authority to implement" if it is the intent of the proponents to authorize the general assembly to pass legislation necessary for the implementation of the proposed measure?

7. The proponents use the phrase "this amendment" in four different places of the proposed measure. To conform with standard drafting practice, would the proponents consider striking the word "amendment" and substituting the word "section" to refer to the proposed section 51?

Substantive questions:

1. What is the purpose sought by the proponents in placing the proposed measure in the legislative department's article of the Colorado constitution instead of, for example, the executive department's article of the Colorado constitution or another article of the constitution since the proposed measure is intended to apply not only to the state, but any political subdivision of the state as well?

2. What do the proponents intend by the phrase "non-emergency services"?

3. The proposed measure restricts the provision of non-emergency services by any political subdivision of the state to citizens of and aliens lawfully present in the United States. Special districts, like those created in title 32, Colorado Revised Statutes, are considered political subdivisions of the state of Colorado.

How do the proponents intend for water districts and sanitation districts, which provide water and sanitation services for domestic purposes, to determine which homes, or persons residing in those homes, in the districts should not receive the districts' services?

4. What determines whether someone is a "resident"? Is the term "resident" a term that the proponents intend for the general assembly to define in implementing legislation?

5. Do the proponents intend for a resident to be able to sue a city, county, or other political subdivision in which the person does not reside?

6. Do the proponents intend for there to be an applicable statute of limitations on a resident's right to sue under this proposed constitutional provision?

7. a. Is the resident suing the state because of the wrongful provision of services to an ineligible person?

i. If so, what damages do the proponents intend to be awarded to a resident plaintiff under a successful lawsuit brought pursuant to this proposed constitutional provision?

ii. What claim for relief would a resident plaintiff make under such lawsuit?

b. Do the proponents intend to authorize the award of punitive damages against a governmental entity under a successful lawsuit brought under this proposed constitutional provision?

c. Do the proponents intend for the general assembly to address the issue of damages in implementing legislation?

8. Do the proponents intend for a resident's attorney fees to be paid if the resident is successful in a lawsuit brought under this proposed constitutional provision?

9. Do the proponents intend to authorize a resident to sue only the governmental entity to enforce the provisions of the proposed section 51, or do the proponents also intend to authorize a resident to sue a government employee for providing a service that is restricted under the proposed measure?

10. a. The resulting effect of the first sentence of the second substantive paragraph of the proposed section 51, which establishes standing for a resident to sue to enforce the proposed measure, may be to waive the immunity under the "Colorado Governmental Immunity Act" for government employees as their actions relate to the implementation of the proposed measure. Is that the intent of the proponents?

b. The applicability of some portions of the "Colorado Governmental Immunity Act", which are found in article 10 of title 24, Colorado Revised Statutes, are not addressed in the language of the proposed section 51 and may need to be clarified. For instance, do the proponents intend for the notice provisions set forth in section 24-10-109, Colorado Revised Statutes, to apply when a party intends to sue under the proposed section 51? Under section 24-10-114, Colorado Revised Statutes, damages against a public entity or public employee are limited to \$150,000 per person and \$600,000 for multiple injuries, with no one person recovering more than \$150,000. If the proponents intend for a successful plaintiff to collect monetary damages, do the proponents intend for the limitations on judgments found in such section to apply to possible suits under the proposed section 51?

c. How do the proponents envision this measure interplaying with the "Colorado Governmental Immunity Act"? Would the proponents consider clarifying which provisions of the "Colorado Governmental Immunity Act" would still be applicable, if any? If it is the proponents' intent, would the proponents consider specifying that none of the provisions of the "Colorado Governmental Immunity Act" apply?

11. Since the general assembly may only pass additional laws to further define the law or grant the executive departments the authority to adopt rules to implement and enforce the laws, what do the proponents intend by the allowing the general assembly to "have power to enforce...by guideline"?

12. Pursuant to section 1 (4) of article V of the Colorado constitution, initiated measures take effect "from and after the date of the official declaration of the vote thereon by proclamation of the governor...".

Do the proponents intend for the right of a resident to sue under the proposed measure to apply to causes of action accruing on or after the effective date of the measure? If so, would the proponents consider adding another section to the proposed measure to clarify the applicability of the measure similar to the following:

"SECTION 2. Effective date - applicability. This act shall take effect upon proclamation of the vote by the Governor, and shall apply to causes of action accruing on or after said date."