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MEMORANDUM

April 4, 2012

TO: Andrew Schmidt and Vija Handley

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #86, concerning voting in state and local elections

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 to the Colorado constitution appear to be:

1. To guarantee the right to vote in state and local elections to any person who is a United States citizen, is 18 years of age, has resided in the state and in the precinct in which he or she intends to register to vote for the legally required amount of time, and has registered to vote in accordance with state and local laws;
2. To allow the general assembly, cities and counties, and state and local election officials to adopt statutes, ordinances and resolutions, and regulations and administrative policies, respectively, to facilitate a registered elector's exercise of the right to vote;

3. To prohibit the state or a local government from adopting a measure that prevents any registered elector from exercising his or her right to vote if the elector has legally registered to vote since the last general election or:
 - a. Has legally voted at a regularly scheduled federal, state, or local election in the last ten years; and
 - b. The person's voter registration has not been invalidated because he or she failed to comply with the requirements of the proposed initiative; and
4. To prohibit the state or a local government from adopting a measure that burdens the exercise of the right to vote by violating provisions relating to, or limiting the forms of, voter identification as specifically authorized by federal election laws.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Section 1 (8) of article V of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, please add the words "the state of".
2. The constitutional provision being amended in the proposed initiative is located in article II of the Colorado constitution, not in article VII.
3. The proper format for constitutional amending clauses is: "In the constitution of the state of Colorado, **amend** section ___ of article ___ as follows:". Please rewrite the amending clause for the proposed initiative as follows in order to conform to this standard practice:

In the constitution of the state of Colorado, **amend** section 5 of article II as follows:

4. Since it is now a subdivision within section 5 of article II, the existing text of section 5 should be designated as subsection (1) and the new subsections being added should be renumbered accordingly. Additionally, it is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. The first word of each new subdivision should also be capitalized. By incorporating these changes, the proposed initiative would appear as follows:

Section 5. Freedom of elections. (1) All elections shall be free and open . . .

(2) VOTING IN STATE AND LOCAL ELECTIONS IS A FUNDAMENTAL RIGHT AND CANNOT BE DENIED . . .

(a) IS A CITIZEN OF THE UNITED STATES;

(b) HAS ATTAINED THE AGE OF EIGHTEEN ON THE DATE OF THE ELECTION . . .

(c) HAS RESIDED IN THE STATE OF COLORADO AND IN THE PRECINCT IN WHICH HE OR SHE . . .

(d) HAS REGISTERED TO VOTE IN COMPLIANCE WITH APPLICABLE STATE AND LOCAL LAWS.

(3) THE GENERAL ASSEMBLY MAY ADOPT SUCH STATUTES, CITIES AND COUNTIES MAY ADOPT SUCH ORDINANCES AND RESOLUTIONS . . .

(4) NO STATE OR LOCAL GOVERNMENT SHALL ADOPT ANY STATUTE, ORDINANCE, RESOLUTION . . .

(a) HAS LEGALLY VOTED AT A REGULARLY SCHEDULED . . .

(b) HIS VOTER REGISTRATION HAS NOT BEEN INVALIDATED BECAUSE HE OR SHE . . .

(5) NO STATE OR LOCAL GOVERNMENT SHALL ADOPT ANY STATUTE, ORDINANCE, RESOLUTION . . .

If the proposed initiative is renumbered in this fashion, any internal references contained in the measure will need to be updated.

5. Standard drafting practice is to use the term "rules", rather than "regulations", when referring to rules promulgated by a state agency or department. With this in mind, please consider changing any references to "regulations".
6. In subsections (3) and (4) of the proposed initiative, consider rewriting the phrase "NO STATE OR LOCAL GOVERNMENT SHALL ADOPT" as "NEITHER THE STATE NOR A LOCAL GOVERNMENT SHALL ADOPT".
7. It is standard drafting practice to use gender neutral language. In subsection (3) (b) of the proposed initiative, "HIS VOTER REGISTRATION" should be changed to "HIS OR HER VOTER REGISTRATION".

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?

4. Suffrage is well-established to be a fundamental (but not unrestricted) right. In that case, are certain portions of the proposed initiative (such as the list of voter qualifications, the authorization for governmental entities to enact laws relating to voting, the admonition against violating federal voting provisions, etc.) necessary? What problem is the proposed initiative intended to rectify or prevent?
5. How are the elector qualifications listed in proposed subsection (1) of section (5) intended to relate to the qualifications set forth in current article VII, section 1, of the state constitution? The proposed initiative is highly duplicative of the existing constitutional provisions but is not phrased verbatim. Is there a substantive distinction? If so, what change is the new section meant to effect? If not, would you consider making conforming amendments to cite to, modify, or supplant current law, as appropriate?
6. Does the proposed initiative limit the ability of governments to take actions intended to regulate voter registration and ensure fair elections? Specifically, proposed subsection (2) of article II, section 5, asserts that governmental entities may enact laws to "facilitate" voting. A narrow reading of this provision, in conjunction with the restrictive character of subsection (3), implies that such entities may act to ease or promote voting, but may not enact laws that could conceivably encumber voting, whether such encumbrance is deliberate or incidental. Is it your intent? Or, do you intend a more expansive interpretation of the term "facilitate", under which laws can be adopted so long as they directly or indirectly enable voting by qualified electors in some manner, though the laws may also operate to restrict certain actions?
 - a. For example, would the proposed initiative curtail the ability of officials to maintain voter rolls, including cancelling registrations of voters registered in multiple precincts or purging the names of deceased electors from registration books?
 - b. As another example, under certain circumstances, a voter in Colorado can be deemed "inactive" for not voting. Would this subsection (3) operate to prevent voters from being deemed inactive on the basis of failing to vote, or, so long as procedures exist that allow such electors to participate in an election, would such laws not run afoul of this provision?
7. Subsection (3) of the proposed initiative prohibits governmental entities from acting to prevent a person from voting if the person "has legally registered to vote since the last general election" or "has legally voted at a regularly scheduled federal, state, or local election within the last ten years and [has not had his or her voter registration] invalidated" for "[failure] to comply" with the elector qualification criteria of proposed subsection (1).
 - a. How would subsection (3) be implemented and monitored? For example, how would election officials in Colorado know if someone voted in another state in a federal election, or in a local election in another state or in a different county?
 - b. What is meant by the term "regularly scheduled"? Would this phrase exclude an elector who legally voted in a special election?

- c. What is the intended scope of the word "prevents"? For example, if an elector meets either of the two qualifying clauses but, say, neglects to bring his or her identification to the polls on election day, must he or she be allowed to vote, regardless?
 - d. How broadly is the provision concerning voting in a "federal, state, or local election within the last ten years" intended to apply, and does it supersede any current laws? Consider clarifying whether, and to what extent, this provision affects other voting laws. For example, would this provision allow an incarcerated person to vote, so long as he or she legally registered to vote in the prior decade? (If so, does this subsection (3) render article VII, section 10 of the Colorado constitution null to the extent it applies to such persons?)
- 8. Regarding subsection (4), which pertains to identification for voting in state and local elections:
 - a. Does this subsection affect identification for voter registration purposes?
 - b. While state and local governmental entities are prohibited from "violating provisions relating to, or limiting the forms of, voter identification as specifically authorized by federal election laws", it is unclear whether supplementing such identification is allowable. Can the permissible forms of identification be expanded (i.e., beyond those contained in federal law)?
 - c. Federal law, under the Help America Vote Act, requires persons registering by mail to vote for the first time in a federal election to provide a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. In light of the proposed initiative, would such federally sanctioned forms of identification apply to other situations in state elections law (identification at the polling place, identification for casting mail ballots, re-registering or changing voter registration) that are not specifically covered in federal law?