

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

April 4, 2012

TO: Elena Nunez and Danny Katz

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #81, concerning the Colorado congressional delegation to support campaign finance limits

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 and the Colorado Revised Statutes appear to be:

1. To specify that the United States constitution, the bill of rights, and the Colorado constitution are intended to protect the rights of "real people" and specify that money is property;
2. To state that the interests of the public are best served by campaign spending limits and contribution limits;

3. To state the need for an amendment to the United States constitution that allows for campaign spending limits at the federal, state, and local level that also states that a corporation has only the privileges granted to it by their charters, state and federal laws, and the corporation's shareholders or members.
4. To instruct Colorado's congressional delegation to propose and support, using all procedural methods available, a joint resolution to amend the United States constitution, as follows:
  - a. Overturn all portions of the United States Supreme Court ruling in *Buckley v. Valeo* and *Citizens United v. Federal Election Commission* that conflict with specified provisions;
  - b. Establish that corporations are not people with constitutional rights;
  - c. Establish the right of a political body at any level of government to impose prohibitions on campaign contributions or expenditures by corporations in specified situations;
  - d. Authorize any level of government to enact campaign contribution and spending limits.

### **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. The proposed initiative amends article XXVIII of the Colorado constitution, not article XVIII.
2. 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. It is also standard practice to bold the section number and headnote.
3. Standard format for amending clauses is as follows:

Amending the constitution: "In the constitution of the state of Colorado, **amend** section 1 of article XXVIII as follows:"  
Amending statute: "In Colorado Revised Statutes, **amend** 1-45-102 as follows:" and "In Colorado Revised Statutes, 1-45-103.7, **add** (9) as follows:"
4. Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate:
  - a. The first letter of the first word of each sentence;

- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names. For example: January, United States.
5. Each section in the Colorado Revised Statutes and Colorado constitution has a headnote. A headnote should be added to the section 1-45-103.7 in the proposed initiative.
  6. The names of court cases should be initial-capped and appear in *italics*.

### **Substantive Comments and Questions**

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

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative? Does addressing campaign finance and the privileges of corporations in the same proposed initiative result in multiple subjects?
2. The portion of the proposed initiative that is a change to the Colorado constitution may only be amended by a subsequent amendment to the constitution. Is this your intention? The portion of the proposed initiative that is a statutory change may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
3. The term "real people" used in the proposed additions to section 1 of article XXVIII of the Colorado constitution, section 1-45-102, and section 1-45-103.7 (9) (a), C.R.S., is ambiguous in that it may mean different things to different people. If you intend the term to cover natural persons and not business entities, would you consider substituting the term "natural persons"?
4. What is the basis for the statement as used in the proposed changes to section 1 of article XXVIII of the Colorado constitution and section 1-45-102, C.R.S., that "[money] is property, it is not speech"?
5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court concluded that spending money is a form of expression, since money buys time or space in public fora to communicate ideas. It appears the proponents disagree with this conclusion. If so, what is the basis for your position on the issue of money as representing a form of expression?
6. What are the particular holdings of the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), that would conflict with the objectives of the proposed initiative?
7. If the United States constitution were amended in the form advocated by the proposed initiative, to what extent would free speech protections advocated by the proposed initiative

be restricted to individuals on soapboxes and the lonely pamphleteer?

8. What does "mandatory spending limits" mean as used in the proposed changes to section 1 of article XXVIII of the Colorado constitution and in sections 1-45-102 and 1-45-107-103.7 (9), C.R.S.?
9. What would be the effect of establishing that corporations may only enjoy the privileges bestowed upon them by their charters, by state and federal statutes, and by the "inalienable rights of the real people who are their shareholders or members"? What form would this "establishment" take? What "privileges" currently enjoyed by corporations in general would corporations no longer be permitted to exercise after this "establishment"? How have corporations exercised any of these privileges being objected to if not by their charters, by state and federal statutes, and by the "inalienable rights of the real people who are their shareholders or members"? What if such privileges are derived from judicial opinions construing corporate charters or state and federal statutes?
10. Presumably the word "corporation" for purposes of the changes to section 1 of article XXVIII of the Colorado constitution, section 1-45-102, and section 1-45-103.7 (9) (a), C.R.S., does not include "labor organizations", yet political contributions from labor organizations are not always an indication of support among the organization's members for the organization's political ideas, and these moneys may also unfairly influence the outcome of Colorado elections. Is there any reason why the restrictions of the proposed initiative are not extended to labor organizations? Would you consider making this change?
11. If mandatory campaign spending limits have the effect of limiting the diversity and amount of speech available to the public in the marketplace of ideas, how is the public "best served" by such limits?
12. Would passage of the proposed initiative *require* a member of Colorado's congressional delegation or the general assembly to do anything? What effects do you hope the proposed initiative will have on members of congress or of the general assembly, as applicable? What penalties or enforcement mechanisms, if any, do the proponents envision being levied or used if Colorado's congressional delegation or state legislators fail or refuse to abide by the instructions of the proposed initiative? Is there a deadline by which the congressional delegation must propose and support the joint resolution referenced in section 1-45-103.7 of the proposed initiative?
13. How is a vote of the people instructing a member of Colorado's congressional delegation or the general assembly to propose, support, or ratify, as applicable, a constitutional amendment on a very controversial issue with complex legal implications consistent with the traditional view of representative democracy in which, according to the statesman, political philosopher, and long-time member of the English Parliament Edmund Burke, a holder of public office fundamentally owes his or her constituents his or her judgment which he or she betrays if that is sacrificed to public opinion? What if the state overall were to pass the proposed initiative, but the voters in a particular member's district do not vote to pass the initiative?

14. Have the proponents considered the potential spillover effect on many areas of law, most particularly including corporate law, of establishing that "corporations are not people with constitutional rights"?
15. In light of the provisions of proposed section 1-45-103.7 (9) (a) (IV), C.R.S., are you hoping a constitutional amendment overturning the *Buckley* decision would empower governmental bodies to restrict the ability of a candidate to spend his or her own moneys in support of his or her election to office? Is there any other way to create a "level playing field " in which the wealth of a candidate would not matter?
16. With respect to proposed section 1-45-103.7 (9) (a) (III), C.R.S., at the federal level and in many states direct contributions from corporations to political campaigns have been prohibited for many years. Is this subparagraph (III) designed to make clear that corporations are also prohibited from making independent expenditures under the anticipated federal constitutional amendment or is some other meaning intended?
17. In order to fulfill the mandate of the proposed initiative, what is a member of congress or of the general assembly supposed to do in the event that he or she may be faced with multiple--and possibly conflicting--joint resolutions that amend the United States constitution to promote the objectives specified in the proposed initiative?
18. Proposed section 1-45-103.7 (9) (c), C.R.S., references "the purpose and findings expressed in this subsection (9)", but it does not appear there are any "purposes and findings" expressed in said subsection (9). Should the sentence be modified to cross-reference another section, perhaps section 1-45-102?
19. In the case of *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), the United States Supreme Court struck down term limit requirements imposed by state law on members of congress under a determination that state may not impose qualification for offices beyond those specified in the United States constitution. Insofar as the proposed initiative imposes an additional qualification on members of congress elected from Colorado, (i.e., that they propose and support the objectives of the proposed initiative), is there any concern that the proposed initiative raises legal concerns under *Thornton*? Have you considered this issue?
20. There is a general severability provision applicable to all statutory enactments in Colorado found in section 2-4-204, C.R.S. Accordingly, have you considered or would you consider whether the provisions of proposed section 1-45-103.7 (9) (d), C.R.S., are necessary in the proposed initiative?
21. What form would the mandatory campaign contribution or spending limits take in order to fulfill the objectives of the proposed initiative? How is the determination to be made whether the proposed federal constitutional amendment at issue fulfills said objectives? Who makes this determination?
22. The contribution limits and voluntary spending limits specified in the Colorado constitution are specifically addressed in two very detailed and complex provisions of article XXVIII of

the Colorado constitution (sections 3 and 4 of said article). Do you anticipate that the anticipated federal constitutional amendment imposing these limits will contain the same level of detail and specificity?

23. The proposed initiative is not connected to any particular or specific proposal to amend the United States constitution. As any veteran of the legislative process knows well, the "devil is frequently in the details." As such, is it reasonable to instruct a member of congress or a member of the general assembly to approve, support, or ratify, as applicable, a joint resolution affecting our most cherished political rights when the precise provisions of the resolution are very much inchoate?
24. Section 1-45-103.7 (9) (a) (III) uses the term "political body" in the context of prohibitions on campaign expenditures by corporations. Would you consider providing a definition of "political body"?
25. What avenues of political expression do you envision being available to corporations if an amendment to the United States constitution was passed that satisfies the objectives expressed in section 1-45-103.7 (9) (a) of the proposed initiative? Would corporations organized specifically for advocacy purposes be treated differently under such an amendment?