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MEMORANDUM

February 14, 2012

TO: Laura Kriho and Dr. Robert Melamede

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #58, concerning Legalization of Cannabis

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. Create a fundamental right to personal cannabis use in Colorado.
2. Allow personal cannabis use by adults without punishment or discrimination.
3. Allow commercial cannabis use without restrictions that are onerous or burdensome.
4. Repeal all criminal statutes and rules that punish or discriminate against the personal and commercial use of cannabis, while leaving other parts of those statutes in effect.

5. Replace the words "marijuana" and "marihuana" with the scientifically accurate word "cannabis".
6. Create the Colorado Cannabis Commission to implement this article.
7. Prohibit the personal and commercial use of cannabis by persons under the age of 18.
8. Allow existing medical marijuana providers to stay in business.
9. Require the commercial cannabis industry to self-regulate.
10. Prohibit the federal government from enforcing federal marijuana laws on Colorado citizens by:
 - a. Making cannabis a fundamental and absolute right in our Constitution;
 - b. Requiring the attorney general to file lawsuits against the federal government;
 - c. Prohibiting state resources from being spent to assist federal marijuana investigations;
 - d. Providing funding to the commission to, at their discretion, assist Colorado citizens in their legal defense if the federal government threatens to punish them for violating the provisions of this article;
 - e. Requiring the attorney general to notify the federal government that cannabis needs to be removed from the federal schedule of controlled substances; and
 - f. Protecting a citizen's right against self-incrimination in federal marijuana crimes as guaranteed by section 18 of article II of the Colorado constitution and the Fifth Amendment to the U.S. Constitution.
11. Require a 2% sales tax on cannabis to fund the commission, require any other tax to be approved by voters, and limit total taxes on cannabis to a maximum of 10%.
12. Require and authorize the governor, attorney general, general assembly, and state agencies to implement this article.
13. Investigate, impeach, or remove from office any state official that does not uphold and enforce this article.
14. Allow only the use of evidence-based performance tests to be used to determine impairment by cannabis.
15. Create an affirmative defense to cannabis prosecutions.

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. Constitutional provisions are usually divided into component parts using the following structure: Subsections (e.g., "(1)"), followed by paragraphs (e.g., "(a)"), followed by subparagraphs (e.g., "(I)"), and ending with sub-subparagraphs (e.g., "(A)").
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.
3. A new amending clause format has been adopted in standard drafting practice. The new format looks like this: "In the constitution of the state of Colorado, **add** Article XXX as follows:".
4. When adding a section to the Colorado constitution small capital letters are used to show new language. 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. "General Assembly" is not capitalized.
5. The definitions should be in alphabetical order.
6. In Section 9, paragraph (b) of subsection (1), the proposed initiative states "he/she". Standard drafting practice uses "he or she".
7. When paragraphs follow an introductory clause (as occurs in Section 4; Section 8, subsection (7); and Section 9), each paragraph should end with a semicolon. The second-to-last paragraph of a series should end with a semicolon and the applicable conjunction, either "and" or "or".

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?
2. 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?
3. Section 1, subsection (3) of the proposed initiative states that one of the goals of the initiative is to "Allow commercial cannabis use without restrictions that are onerous or burdensome." and Section 8, subsection (3), limits restrictions to not being "onerous and burdensome". How would the proponents define "onerous" or "burdensome" restrictions? Will the Colorado Cannabis Commission define guidelines for interpreting this language?

4. What is meant by "discriminate" in the language in Section 1, subsection (4), in reference to "criminal statutes and rules that ... discriminate against the personal and commercial use of cannabis"?
5. The definition of "cannabis" put forth in Section 2, subsection (2) does not include synthetic cannabinoids. Is this the proponents' intent?
6. What is meant by the definition of "personal cannabis use" in Section 2, subsection (4)? Does "use" in this context include manufacturing, distributing, cultivating, and selling cannabis?
7. What is meant by the definition of "commercial cannabis use" in Section 2, subsection (5)? Does "use" in this context include manufacturing, distributing, cultivating, and selling cannabis? Would commercial cannabis use that does not make a profit, but that does entail remuneration, be exempt from this definition?
8. The proposed initiative defines "adult" as a person over 18 years of age. That definition would exclude a person who is exactly 18 years old. Is that the proponents intent? If not, would the proponents consider defining "adult" as "a person 18 years of age or older"?
9. Could the proponents specify what is meant by language in Section 3, subsection (4), referring to "performance-based tests that have been scientifically proven beyond a reasonable doubt to show impairment by cannabis"? How will the court or law enforcement know which tests have been scientifically proven beyond a reasonable doubt?
10. In Section 3, subsection (5), subparagraph (g), the proposed initiative requires that Colorado laws "be based on science and research and have evidence to support them". Does this requirement apply to all Colorado laws, or just to Colorado laws pertaining to cannabis? Could the proponents explain what will occur if scientific studies offer conflicting evidence?
11. Section 4 of the proposed initiative proposes to repeal all criminal statutes and regulations related to marijuana. The provision identifies some of the sections of the law that would be repealed as a result and includes a catch-all for any other statutes that punish the use of marijuana and also states that all other parts of those laws would remain in effect.
 - a. Is it the proponents' intent that the General Assembly repeal each of the provisions during the legislative session after the proposed initiative becomes law, or is it the proponents' intent that the provisions would be automatically repealed? If the intent is to have provisions automatically repeal, the initiative should specifically direct the Revisor of Statutes to do so.
 - b. In order to ensure that the proponents' intent is clear, the proposed initiative should specifically list each statute that is to be repealed and specify any portion that would remain in law.
12. Section 5 of the proposed initiative states that "any action that conforms to the provisions of this article shall be an exception to the state's criminal statutes". What do the proponents intend by the phrase "an exception to the state's criminal statutes"?

13. In section 6, subsection (2), the proposed initiative allows the General Assembly to "define prohibition of cannabis use by persons under 18 years of age" and states that "Confinement shall not be use as punishment." and "Counseling may be required if approved by a parent."
 - a. What do the proponents mean by "confinement"? Would the prohibition apply to both pretrial situations and sentencing options?
 - b. What do the proponents mean by "counseling"?
14. Section 7, subsection (1) imposes a duty on all persons engaged in commercial cannabis use to enforce all provisions of this article. What does this duty entail? Is there a penalty for failing to satisfy this duty?
15. In Section 7, subsection (2), the proposed initiative states that "No state or local officer ... shall ever assist agents of the federal government in any way ... if the intent of the government is to punish that citizen for acts considered legal under this article." How will state or local officers, or others, be able to determine whether the intent of the federal government is to punish a citizen for acts considered legal under this article?
16. In Section 8, subsection (2), the Colorado Cannabis Commission is given the power and duty to promulgate regulations concerning commercial cannabis use.
 - a. Section 7, subsection (1) states that the commercial cannabis industry will be self-regulating. Do the proponents see any conflict in these provisions?
 - b. Do the proponents intend that the rulemaking be done in accordance with the "Administrative Procedures Act" in article 4 of title 24, Colorado Revised Statutes?
17. Section 8, subsection (3) states that a citizen's absolute right to privacy has been established by the proposed initiative. What language in the proposed initiative confers this right? Does this right to privacy only involve the use of cannabis? If the proposed initiative creates a right to privacy applicable to situations other than cannabis use, would this create a violation of the single-subject requirement of the Colorado constitution?
18. Section 8, subsection (3) states that all regulations must be "evidence-based", and Section 8, subsection (8) states that all policies must be "evidence-based". What does the term "evidence-based" mean? What is the consequence if a regulation is not evidence-based? If a regulation is not evidence-based, could a court strike it down? Is there any other recourse?
19. Section 8, subsection (10) permits the commission to investigate "state executive officers". Would the proponents define "state executive officers"?
20. In Section 8, subsection (10), the proposed initiative gives the commission the power to refer cases to the Colorado Supreme Court for prosecution for malfeasance in office. Prosecution is an executive branch function. Would the proponents consider making the referrals to the attorney general or local district attorneys?
21. In Section 9 of the proposed initiative, commissioners must have been "publicly advocating for the re-legalization of cannabis without onerous or burdensome restrictions for all adults 18 years of age and older in Colorado for at least the past 10 years." Do the proponents

anticipate that there will be an adequate pool of potential applicants to the Colorado Cannabis Commission? Who will determine whether applicants qualify? How would the proponents define "publicly" and "onerous or burdensome restrictions" in that context?

22. Section 9, subsection (3) requires the Senate to vote on the confirmations of the commissioners by May 15, 2013. What happens if the result of the vote is to not confirm the commissioners or certain commissioners?
23. In Section 10, subsection (1), a medical marijuana distributor or manufacturer that possesses a local license or is in good standing with their local community is allowed to continue to operate until the new cannabis regulations are enacted. Under current law, there are no medical marijuana distributors or manufacturers, only medical marijuana centers and medical marijuana-infused product manufacturers. Under current law, a medical marijuana center or a medical marijuana-infused product manufacturer must obtain a local and state license to operate.
 - a. Is it your intent that medical marijuana centers and medical marijuana-infused product manufacturers be covered by this provision?
 - b. What does the phrase "in good standing with their local community" mean?
24. Section 10, subsection (2) provides that any state agencies involved in the regulation of cannabis will be disbanded within 6 months of the proposed initiative's passage. Is it the intent of the proponents that the General Assembly repeal the related provisions? Is it the proponents' intent that the funding sources for such agencies will be reappropriated to the Colorado Cannabis Commission? If not, will they revert to the general fund?
25. How do the responsibilities of the Attorney General pursuant to Section 12, subsection (2) relate to the work of the Colorado Cannabis Commission, as described in Section 8, subsection (5)? Have the proponents anticipated what will occur if the Attorney General and the Colorado Cannabis Commission suggest conflicting recommendations?
26. In Section (12), subsection (5), the Attorney General is required to bring a lawsuit against the federal government if the federal government tries or threatens to enforce federal marijuana laws in Colorado. What happens if the lawsuits are unsuccessful?
27. It appears that Section 13, subsection (4) requires the governor to grant a reprieve or pardon to persons recommended by the commission for a reprieve or pardon. Is that your intent? If so, do you believe that violates the governor's authority to grant reprieves and pardons?
28. It appears that Section 14, subsection (2) requires the General Assembly to act at the request of the commission. Is that your intent?
29. It appears that Section 15, subsection (2) requires the as local government agency to act at the request of the commission. Is that your intent? Would it apply to home rule cities and counties?
30. Could the proponents give an example of what types of funding would be prohibited by

language in Section 14, subsection (4) prohibiting state funding or resources to be used to assist the federal government in the punishment of Colorado citizens for acts considered legal under the proposed initiative?

31. Could the proponents provide an example of how the Attorney General will "take any and all legal action necessary to force the federal government to remove marijuana from the federal schedule of controlled substances"?
32. In Section 22, do the proponents intend to refer to Section 14 of Article XVIII of the Colorado constitution, rather than to Section 16?
33. Do the supremacy provisions of Section 22 apply equally to initiatives that would amend the state statutes?
34. Generally, there are a number of provisions in the proposed initiative that reference the federal law regarding marijuana and its enforcement. Possession of cannabis is a criminal offense under federal law, and will remain so even if the proposed initiative is adopted. In adjudicating individual cases, courts are constitutionally bound to uphold the law. The "supremacy clause" of Article VI of the United States Constitution clearly requires courts -- *all* courts, including federal, state, and municipal courts -- to apply the law in a manner consistent with the United States Constitution and the United States Code:

This Constitution, and *the laws of the United States* which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby*, anything in the Constitution or laws of any State to the contrary notwithstanding. [Emphasis added.]

How do the proponents intend for the proposed initiative to work considering the application of federal law and supremacy clause?