

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

July 20, 2011

TO: Michelle LaMay and Terry Arnett

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #40 concerning the possession 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. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

#### Purpose

The major purpose of the proposed initiative appears to be:

To create within article XVIII of the state constitution a new section prohibiting and relieving any court in the state of Colorado from imposing any fine or sentence upon a person convicted of the criminal offense of possession of cannabis.

#### 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.

### **Organization and Punctuation of Provisions**

In Colorado, constitutional and statutory provisions are organized and punctuated using the following structure:

- a. Subsection, for example, "(1)";
- b. followed by paragraphs, for example, "(a)";
- c. followed by subparagraphs, for example, "(I)";
- d. ending with sub-subparagraphs, for example, "(A)".

Accordingly, please reorganize and re-punctuate the provisions of the proposed initiative. Subsection "1. Purpose and Findings." should be subsection "(1) Purpose and findings.", and the other subsections should be amended likewise. Paragraphs "(A)", "(B)", "(C)", and "(D)" should be paragraphs "(a)", "(b)", "(c)", and "(d)".

NOTE: For the sake of simplicity in this letter, when we refer to provisions of the proponents' initiative proposal, we will use the numbering format found in the proposal.

### **Amending Clauses**

It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the state constitution or Colorado Revised Statutes. For example, if your intention is to add a new article to title 39 of the Colorado Revised Statutes, you would include an amending clause that reads as follows: "Title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW ARTICLE to read:".

The proposed initiative includes an amending clause that reads as follows: "Article XVIII of the Constitution of Colorado is amended by the addition of a new Section to read:". Please consider restating this amending clause to reflect standard drafting practice (i.e., "Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:").

### **Capitalization**

1. To reflect standard drafting practice, please do not capitalize any word other than the first word in the headnote of the proposed new section. I.e., the headnote should read "**Section 16. Relief for the possession of cannabis.**".

2. To reflect standard drafting practice, please do not capitalize any word other than the first word in the headnotes of the proposed new subsections. I.e., the headnote to subsection 1 should read "**(1) Purpose and findings.**".

### **Substantive Comments and Questions**

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

1. Subsection (5.5) of section 1 of article V of the state constitution requires each proposed initiative to have a single subject. What is the single subject of the proponents' initiative proposal?

2. The proposed initiative identifies the new constitutional provision as "Section 17" of article XVIII of the state constitution. Currently, article XVIII contains only 15 sections, so the proposed new section should actually be identified as "Section 16".

3. Paragraph 17 (1) (A) of the proposed measure states that the purpose of the new section is "to prohibit and relieve any court in the state of Colorado from imposing any fine or sentence for the possession of cannabis." This language may be problematic because:

(a) Possession of cannabis (marijuana) is a criminal offense under both state and federal law, and will remain so even if the proposed initiative is adopted;

(b) Such state and federal laws prescribe certain punitive sentences, including fines, for the offense of possession of cannabis; and

(c) 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.]

Possession of cannabis is prohibited under federal law, and the statutory penalties for this offense may include both monetary fines and sentences of incarceration. It is not clear how the proponents' initiative, which attempts to prohibit and relieve "any court" in Colorado from imposing "any punitive fine or sentence" for cannabis possession, can be reconciled with the illegality of cannabis and the clear directive in Article VI that courts are bound to observe the law.

4. Paragraphs 17 (1) (B) and (C) include the word "we", but it is not clear whom is meant by this word. The proponents may wish to clarify. (If by "we", the proponents mean "the people", substitute "the people" for "we".)

5. In paragraph 17 (1) (D), the proponents should consider substituting the word "ensure" for "assure".

6. In the definitions (subsection 2 of the proposal), the proponents should add standard introductory language and use paragraphs (i.e., (a), (b), (c), (d)) to identify the individual defined terms, as follows:

(2) **Definitions.** AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "CANNABIS" MEANS . . .

(b) "COURTS" MEANS . . .

(c) "POSSESSION OF CANNABIS" MEANS . . .

(d) "RELIEVE" MEANS . . .

7. The proponents may consider using sub-paragraphs to clarify the language in the definition of "Possession of cannabis". For example:

(c) "POSSESSION OF CANNABIS" MEANS HAVING CANNABIS:

(I) IN OR ON ONE'S BODY OR CLOTHING; OR

(II) WITHIN ONE'S DOMICILE.

8. The definition of "Possession of cannabis" appears to exclude cannabis that is located within personal or real property that is under a person's ownership or control. For example, "possession of cannabis" does not appear to apply to cannabis found within a person's motor vehicle or within a building that a person owns. Is this the proponents' intent?

9. The language of the initiative doesn't include any reference to specific amounts of cannabis. Do the proponents intend to prohibit fines and sentences for possession of *any amount* of cannabis? The proponents should consider clarifying this matter by amending the definition of "cannabis". For example, if the proponents' intention is to prohibit fines and sentences for possession of *any amount* of cannabis, then clarify that by "cannabis" you mean "any amount of cannabis".

10. The proponents may wish to restate subsection 3 of the proposed initiative. For example:

NOTHING IN THIS ACT *SHALL* BE CONSTRUED TO MODIFY *ANY PROVISION OF THIS ARTICLE OR ANY OTHER CONSTITUTIONAL OR STATUTORY PROVISION* CONCERNING CANNABIS.

(Note that it is unclear how this statement can be reconciled with the language of section 18-18-406, C.R.S., which clearly prohibits possession of cannabis and imposes penalties for the offense.)

11. The proponents may wish to restate subsection 4 of the proposed initiative. For example:

THIS SECTION ADDS NO FISCAL COSTS *TO THE STATE* AND IMPOSES NO TAX *UPON* THE PEOPLE OF *THE STATE*.

12. The proponents may wish to restate subsection 5 of the proposed initiative. For example:

THIS SECTION IS SELF-EXECUTING AND SHALL SUPERCEDE *ANY CONFLICTING STATE, LOCAL, OR MUNICIPAL STATUTES, CODES, ORDINANCES, OR PROVISIONS*.

13. The proponents may wish to restate subsection 6 of the proposed initiative. For example:

THIS SECTION SHALL BECOME EFFECTIVE UPON OFFICIAL DECLARATION *OF* THE VOTE HEREON BY PROCLAMATION OF THE GOVERNOR, PURSUANT TO SECTION 1(4) OF ARTICLE *V OF THIS CONSTITUTION*.

14. Can the proponents clarify the effective date of the measure with respect to possession-of-cannabis cases that are in progress? For example, is it the proponents' intent that the language relieving or prohibiting courts from imposing any fine or sentence for the possession of cannabis will apply to anyone *charged* with cannabis possession on or after the effective date, or to anyone who has a *sentencing hearing* on or after such date?

15. Do the proponents anticipate that the General Assembly will need to amend state law in order to enact the proposed measure? If so, how?

16. Do the proponents intend the proposed measure to have any effect upon state law concerning the processing, manufacture, distribution, sale, or transfer of marijuana?