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MEMORANDUM

April 19, 2011

TO: Jerry Dryer and Warren Dryer

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #28, concerning election funding

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.

An earlier version of this proposed initiative, proposed initiative 2011-2012 #24, was the subject of a memorandum dated April 4, 2011. Proposed initiative 2011-2012 #24 was discussed at a public meeting on April 6, 2011. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purpose of the proposed initiative appears to be that only money from a residence of the state of Colorado shall be used for any election concerning the state of Colorado, including general elections, federal office, or ballot initiatives.

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.

1. Pursuant to section 1 (2) of article V of the Colorado constitution, proposed initiatives must amend either the Colorado constitution or state law (i.e., the Colorado Revised Statutes). The proposed initiative should be revised to indicate whether it amends the Colorado constitution or the Colorado Revised Statutes and to show where in the constitution or statutes its provisions should be inserted. **Please be aware that the failure of the proposed initiative to identify whether it is amending the state constitution or the Colorado Revised Statutes is a potential jurisdictional defect that may prevent you from obtaining a title for the proposed initiative from the title board.** With respect to the placement of the proposed initiative:
 - a. Is your intention to add the proposed initiative to the Colorado constitution as a new article or as a new section within an existing article? Article XXVIII of the Colorado constitution addresses campaign and political finance. Accordingly, it may be logical to add the proposed initiative to this article as a new section or as another provision within a section.
 - b. Is your intention to add the proposed initiative to the Colorado Revised Statutes? Article 45 of title 1 of the Colorado Revised Statutes addresses fair campaign practices and campaign contributions. Accordingly, it may be logical to add the proposed initiative to this article as a new section or as another provision within a section.
2. The proposed initiative states that "only money from a residence of the state of Colorado shall be used . . .". Was the use of the word "residence" intentional? This suggests limitations on what may be contributed by a physical structure as opposed to the natural persons residing therein. Do you mean to say "resident", as in referring to a person that resides in the state of Colorado?
3. The proposed initiative states that "*only* money from a residence of the state of Colorado shall be used for any election concerning the state of Colorado". The use of the word "only" may suggest that no other kind of contribution may be made by a resident (e.g., volunteering or nonmonetary gifts). Was this your intention?
4. The proposed initiative includes the phrase "Be it Enacted by the People of the State of

Colorado", which is required by the Colorado constitution but is not placed correctly according to standard drafting practice. In order to conform to all standard drafting practices, please review the following technical comments:

- a. It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the Colorado Revised Statutes or Colorado constitution. For example, if your intention is to add a new article to title 39 of the Colorado Revised Statutes, include an amending clause that reads as follows: "Title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW ARTICLE to read:".
 - b. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution or Colorado Revised Statutes. For example, the first sentence would begin "ONLY MONEY FROM A RESIDENCE . . ."
 - c. Each section in the Colorado Revised Statutes or Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in lower case letters.
 - d. Commas need to be used in a series before the conjunction. For example, in the proposed initiative, there should be a comma after "federal office".
5. For guidance on standard drafting practices, consider the following example of how the proposed initiative might look if you were to amend the Colorado constitution:

Be it Enacted by the People of the State of Colorado:

SECTION 1. Article [Enter Number Here] of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section [Enter Number Here]. [Insert Headnote Here]. ONLY MONEY FROM A RESIDENCE OF THE STATE OF COLORADO SHALL BE USED FOR ANY ELECTION CONCERNING THE STATE OF COLORADO. THIS INCLUDES GENERAL ELECTIONS, FEDERAL OFFICE, OR BALLOT INITIATIVES.

Substantive Comments and Questions

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

1. As was perhaps not made sufficiently clear in either the review and comment memorandum for proposed initiative 2011-2012 #24 or in the accompanying hearing, the state of Colorado may not legally (either by means of the Colorado constitution or state statutory provisions)

regulate the manner by which candidates for federal offices raise money for their election to such offices. As clear as anything may be in this field, it is probable that a court would strike down this portion of the proposed initiative as either unconstitutional or contrary to federal law, or both. Are you aware of some legal argument why this is not a probable outcome? If not, why is this provision included in the second iteration of the proposed initiative?

2. Several questions in the review and comment memorandum for proposed initiative 2011-2012 #24 were directed to the meaning of almost every word used in the proposed initiative. For the most part, you elected not to provide further clarity and definition with respect to these terms (which is your right). However, have you considered the possibility that, in the absence of such further clarity and definition, affected persons will likely seek the intervention of the courts as they resolve the inevitable disputes likely to arise in trying to determine exactly what is or is not implicated by the proposed initiative, which means that judges will have the final say in discerning your intent?
3. In general, any citizen has the right to make a contribution to a political campaign, and the courts have acknowledged this level of activity as a form of free speech. The proposed initiative would eliminate this right in Colorado elections for those individuals who are nonresidents of the state, thereby discriminating against those individuals. In general, such discrimination in the case of First Amendment rights is subject to strict scrutiny, meaning that it will only be upheld if justified to further a compelling governmental interest where the restriction is narrowly tailored to achieve that interest. Assuming the applicability of the strict scrutiny analysis to the proposed initiative, are you able to articulate an argument for why the proposed initiative satisfies this test? If "yes", how would you address this argument? If "no", have you even considered this argument in drafting the proposed initiative?
4. Have you considered the application of the proposed initiative to the following groups of people:
 - a. College students who are not residents of the state?
 - b. Persons who live in the state part-time?

Assuming these groups of individuals are not permitted to make contributions under the proposed initiative, what is the rationale for such restrictions?

5. Under current law, a resident of Colorado is presumably free to contribute to the campaign of a candidate running for a state or local office in another state, for a candidate for a federal office not representing Colorado, or for a ballot measure in another state. Why should a person who is not a resident of this state be denied the exercise of these same rights with respect to Colorado elections?

6. Are you aware of the fact that the use of the word "residence" or "resident" is not necessarily restricted to natural persons, as the term also has some applicability with respect to corporations or other forms of business entities?