

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

February 17, 2014

**TO:** Natalie Menten and Mike Spalding

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #71, concerning recall of state and local officers

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. Repealing and reenacting article XXI of the Colorado constitution concerning recalling elected officials from office;

2. Specifying who may file a recall request and the appropriate entity to conduct recall;
3. Outlining requirements for recall petitions and circulators, filing of petitions, the conduct of recall elections, and the filling of resulting vacancies; and
4. Specifying provisions for the enforcement of the article and complaint and appeal procedures concerning recall elections.

## 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. Article V, section 1 (8) 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, this phrase should be added to the beginning of the proposed initiative.
2. The amending clause should read "In the constitution of the state of Colorado, **repeal and reenact, with amendments**, article XXI as follows:".
3. 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.
4. It is standard drafting practice to use small capital letters to show the language being added to the Colorado constitution. In a repeal and reenacted section, the language should all be shown in small capital letters, with the exception of the section numbers and headnotes. For example, the first sentence would begin "ANY ELECTIVE OFFICER IN ANY STATE..."
5. Headnotes should be in bold-faced type and should be in lower case letters, and the text of the section should immediately follow the headnote. For example: "**Section 2. Procedures.** (1) FIVE REGISTERED ELECTORS..."
6. Numbers should be spelled out.

7. When referencing another section within the article, it is standard drafting practice to specify the article in which the section is located. For example, the reference in the first sentence in section 2 (1) should read: "section 1 of this article."
8. The following is the standard drafting language used for creating a definition: "As used in this article, unless the context otherwise requires, 'elective' means subject to regular or retention elections."

## **Substantive Comments and Questions**

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

### **General 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. Compared to the manner in which recall elections are currently conducted, what major changes do the proponents intend to effect or what problems do the proponents intend to redress through the proposed initiative?

### **Section 1 "Application"**

3. What is meant by "non-enterprise government entity?" Does this mean that, for example, the head of D.I.A. (Denver's Department of Aviation) is excluded? What about the president of a state university?
4. What is the rationale for recalling non-elective officers? Does the ability to recall non-elective officers impact due process? What if the person who holds one of these positions is in a civil service or other personnel system?
5. The stated intent of the proposed initiative is to "increase public accountability of public servants." How will the proposed initiative achieve that goal?

### **Section 2 "Procedures"**

6. Subsection (1) of section 2 describes the process for initiating and conducting a recall election.

- a. Would the proponents consider specifying with whom (i.e., the appropriate officer or entity) the signed request must be submitted?
  - b. Subsection (1) requires the secretary of state to conduct statewide recall elections and the election official of any county or city and county in the "recall area" to conduct local recall elections.
    - i. What constitutes a statewide recall election? Who conducts non-statewide elections when the recall area traverses county boundaries?
    - ii. How does this provision comport with subsection (1) of section 3 of the proposed initiative, which forbids an "officer in a recall [from conducting] that recall or [deciding] its entry validity"? In other words, who conducts the election when the secretary of state or the county clerk and recorder is the officer subject to the recall?
  - c. Although current law does not specify any causes for which a public officer may be recalled, every recall petition must contain a brief statement setting forth the recall proponents' grounds for seeking recall.
    - i. Is it the intent of the proponents to continue to allow officers subject to recall under the proposed initiative to be recalled for any reason (and, by that rationale, for no reason at all)?
    - ii. Should grounds be specified on the recall petition (e.g., to apprise voters of the reason that the recall was initiated)?
7. With regard to subsection (2), a "government" is prohibited from detaining, stopping, citing, or arresting peaceful petition circulators or signers. The next sentence in that subsection states that "such actions shall apply only to perjury, forgery, and other felonies".
- a. Does the phrase "such action" apply to arrest, detention, etc., of peaceful circulators or signers? Would the proponents consider clarifying this phrase?
  - b. Current law relating to elections offenses makes perjury a misdemeanor (section 1-13-104, Colorado Revised Statutes). Similarly, certain offenses relating to recall petitions are also misdemeanors (section 1-12-108, Colorado Revised Statutes). Do the proponents intend to increase penalties for extant offenses or to

create new felonies? Would the proponents consider clarifying this provision?

8. Subsection (2) also requires signed petitions to be filed within a certain number of days after "sample petition section delivery". What is meant by that phrase, and when must such document be delivered? What information does the document contain?
9. Subsection (2) further provides for a single 30-day period opportunity for recall proponents to cure insufficient petition entries, which period commences upon the issuance of invalidity from the election official or supreme court.
  - a. Is "invalidity" synonymous with "insufficiency"? If so, would the proponents consider employing a single term to prevent possible confusion? If not, would the proponents consider explaining the difference between the terms?
  - b. Who has standing to seek review by the supreme court? Can only a determination of insufficiency be appealed, or can a finding of sufficiency be protested? Should this portion of subsection (2) be absorbed within subsection (4) for chronological clarity?
10. Subsection (3) requires recall petitions to have valid signatures from "5% of *active* registered electors" [emphasis added] in the "recall area".
  - a. What constitutes an "active registered elector"?
  - b. The next sentence requires signers to merely be "registered electors". This seems to allow *inactive* registered electors to qualify to sign recall petitions, which conflicts with the first sentence. Would the proponents consider clarifying who is eligible to sign recall petitions, and, in particular, clarifying possible confusion regarding the requirement that the elector be "active"?
  - c. Why cap the number of valid petition entries at 100,000?
  - d. Is the "recall area" the political subdivision in which the officer sought to be recalled serves?
11. Subsection (3) requires that each recall petition "entry" be "reviewed individually, with no random or statistical sampling." Why is sampling prohibited? Other types of petitions are validated using sampling. Is it feasible to require that 100,000 signatures be individually assessed within

twenty days, or does this create a logistical hardship or financial burden for elections administrators?

12. Subsection (4) appears to vest the state supreme court with original jurisdiction to hear protests related to petitions.

- a. Does the twenty-day period for an election official to issue his or her "report" pertain to the original petition filing, or after a subsequent ("cured") filing?
- b. Why would these actions be filed directly with the supreme court, as opposed to the election official or the district court?
- c. Does the mandate that the supreme court issue a determination within thirty days of the protest filing run counter to the court's constitutional authority to "make and promulgate rules governing the administration of all courts and... practice and procedure in civil and criminal cases"? (See article VI, section 21 of the Colorado constitution.)

13. Subsection (5) requires recall elections to be held "on a Tuesday within 60 days of a final decision of sufficiency."

- a. Who declares the date of the election?
- b. Regarding timing, current law requires recall elections to be combined with general elections when the latter is scheduled to be held in close temporal proximity to the former. The proposed initiative makes no such provisions regarding timing (except to bar more than one recall effort per four-year period against any particular official). Have the proponents considered that efficiencies may be realized (and voter confusion possibly reduced) by combining elections?
- c. Similarly, current law prevents a recall from being initiated within certain times (e.g., within the first six months of a nonlegislative officer's tenure). Have the proponents considered allowing an official to serve a minimum length of time before becoming eligible for recall?

14. Subsection (5) also states that "[d]eath, resignation, or removal from office shall stop the recall petition but not the election to fill an elective officer vacancy." With regard to this provision:

- a. Because this does not apply to vacancies that arise without a recall effort, this appears to result in two separate processes for filling vacancies. Is that correct?
- b. When does this provision take effect? At any time after a final decision of sufficiency? In that case, if an officer subject to recall resigns prior to such decision, what results?
- c. Is the intention that the recall election goes forward even if the signature requirement for recall has not been met? If not (and signature gatherers have to meet the requirement), are signature gatherers allowed to continue gathering signatures after a resignation?

15. How is a mayoral vacancy filled under subsection (7)?

### **Section 3 "Enforcement"**

16. Subsection (1) of section 3 requires "perjury, forgery, and other felony charges" to be prosecuted.

- a. A "charge" is typically filed by a prosecutor after he or she makes the determination regarding whether and how to proceed in light of alleged criminal acts. Do the proponents instead intend to refer to "offenses" or "crimes" or "acts"? If so, to eliminate confusion, would you consider changing your terminology on this point?
- b. Is it the proponents' intent to eliminate prosecutorial discretion to file charges regarding such offenses? Relatedly, under what condition should prosecutors act? Only when probable cause exists?
- c. As under question 7 (b), above, do the proponents intend to make perjury a felony?

17. Is it the proponents' intent that recall petition circulators and recall donors be completely unregulated? Could the general assembly, for example, require all circulators to register or undergo training? Would Article 27 of the State Constitution or the "Fair Campaign Practices Act", article 45 of title 1, Colorado Revised Statutes, not apply to recall efforts?

18. Because this section pertains to enforcement, is subsection (2) the most appropriate location for a defined term that applies to the entire proposed initiative? Because the term "elective" is not utilized in subsection (2) or section 3, would it reduce voter confusion to locate the definition elsewhere?

19. Subsection (1) allows "[a]ny Colorado adult" to circulate a recall or successor nomination petition.
- a. What is meant by the term "Colorado adult?" Can paid or volunteer signature gatherers from out of state circulate such petitions?
  - b. If the term operates to categorically exclude nonresidents from circulating petitions, is it likely to withstand First Amendment analysis? That is, would excluding nonresidents from participating in petition activities, which activities comprise "core political speech", survive the strict scrutiny standard espoused in *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) and related jurisprudence?
20. Subsection (2) forbids recalled officers from holding elective office for four years from the date of the recall.
- a. Given the fact that a recall need not be premised on any cause, is this excessively punitive?
  - b. Why extend this four-year ban to officers who resigned during the recall effort but prior to the election? Does the totality of the proposed initiative disincentivize resignation in all instances?
21. Subsection (2) allows up to seven officers in the same recall area to be listed on a single recall petition. How would a signer indicate his or her support for recall of fewer than the seven listed officials?
22. What is the rationale for limiting officers eligible for recall to one quadrennial ballot listing under subsection (2)? Hypothetically, if any officer is sought to be recalled in the first year of his or her term, survives that recall effort, and subsequently commits misfeasance or malfeasance, he or she would be ineligible for recall for another 3 years. Does this idea make sense on policy grounds?
23. Subsection (2) further requires the secretary of state to "always" list on his or her office's website every officer eligible for recall. Must this list include all eligible non-elected officials as well? This is a potentially huge number of people and could be very difficult to keep current. Is the secretary of state the appropriate official to provide such information for those offices for which he or she is not the designated recall election official?
24. Subsection (3) allows any Colorado adult to file an action in district court to enforce reenacted article XXI. Do the proponents intend to omit all

traditional standing considerations from this provision? Under this construction, for example, could a person who resides in Moffat County file an action in the district court in Craig, Colorado, to enforce recall provisions against a member of the board of directors of the Alamosa Mosquito Control District?