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MEMORANDUM

TO: Frank McNulty and Kathleen Curry

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 5, 2016

SUBJECT: Proposed initiative measure 2015-2016 #132, concerning the Colorado Redistricting Commission

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 directors of 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.

This initiative was submitted with proposed initiative 2015-2016 #133. The comments and questions raised in this memorandum that relate to both initiatives will not be repeated in the memoranda for proposed initiative 2015-2016 #133, except as necessary to fully understand the issues raised by the proposed initiatives. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Earlier versions of this proposed initiative, proposed initiatives 2015-2016 #55, #107, and #128 were the subject of memoranda dated December 1, 2015, March 2, 2016,

and April 4, 2016, which were discussed at public meetings on December 1, 2015, March 4, 2016, and April 4, 2016. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, 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 purposes of the proposed amendment to the Colorado constitution appear to be:

1. To prohibit political gerrymandering when drawing congressional and state legislative districts.
2. To authorize the renamed independent Colorado Redistricting Commission ("Commission") to review and approve congressional redistricting plans as well as state legislative plans.
3. To change the number, appointment process, and qualifications of members of the Commission.
4. To establish procedures and timelines for the Commission to follow in adopting plans for congressional, state senate, and state house of representatives districts ("plans"), including:
 - a. Providing that only nonpartisan staff from the legislative research and legal services offices of the general assembly ("staff") may submit plans;
 - b. Specifying criteria to be used in drawing congressional districts;
 - c. Adding maximizing the number of competitive districts as the last criteria for state legislative districts; and
 - d. Requiring that approval of any plan needs a vote of at least eight commissioners.
5. To prohibit certain communications concerning plans and require disclosure and notice of certain other communication concerning plans.

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. What will be the effective date of the proposed initiative?
3. Section 44 (1) provides that "THE COMMISSION OR ITS STAFF SHALL NOT DRAW OR ADOPT ANY PLAN FOR THE PURPOSE OF FAVORING A POLITICAL PARTY, INCUMBENT LEGISLATOR, MEMBER OF CONGRESS OR OTHER PERSON."
 - a. Some may argue that drawing a competitive district favors a political party. Is it the proponents' intent that staff and the Commission may draw or adopt one or more competitive districts so long as the plan as a whole does not favor a political party?
 - b. Who do the proponents intend with the phrase "INCUMBENT LEGISLATOR"?
4. Under section 44 (2) (a), must a person have been registered with a minor political party for a period of two calendar years?
5. Under section 44 (2) (b):
 - a. Should the four members be two from each of the state's two largest political parties?
 - b. Should such members be registered with their political parties for any length of time?
6. Under section 44 (2) (c):
 - a. Must the members be registered with one of the two largest political parties? If not, should an unaffiliated person be eligible?
 - b. Should such members be registered with their political parties for any length of time?
7. Under section 44 (4):
 - a. Current projections have Colorado receiving an eighth congressional seat following the 2020 census, meaning eight of the commissioners must be from different congressional districts. Do proponents still believe

that it would be appropriate for one congressional district to have four commission members?

- b. What is the proponents' intent with the phrase "AT LEAST ONE OTHER MEMBER"?
8. Under section 44 (6) (a), is there a distinction between a "MAP" and a "PLAN"?
9. Under section 44 (6) (b), may the commission adopt rules for what constitutes "CAUSE" for which a member may be removed?
10. Under part 2 of article 6 of title 24, C.R.S., members of commissions are not public officers subject to its disclosure requirements. Is it the proponents' intent by referencing "DISCLOSURE BY PUBLIC OFFICIALS" in section 44 (7) (a) that members of the Commission are subject to those requirements?
11. Under section 44 (7) (b):
 - a. Should the disclosures be limited to the time period since the last disclosure?
 - b. How do the proponents envision the disclosures being made? A list maintained by staff? A list posted on the website? By rule of the Commission?
12. Under section 44 (7) (c), commissioners may communicate with staff concerning "AMENDMENTS DEVELOPED BY A COMMISSIONER". May a commissioner communicate to staff a proposed amendment that was prepared by someone other than staff?
13. Under section 44 (7) (d), staff is prohibited from having ex parte communications about the content or development of any plan. Previous commissions have retained experts to conduct an analysis of voting behavior to determine if there is any need to draw districts to comply with the Voting Rights Act. Would staff be permitted to communicate with such experts?
14. Under section 44 (7) (e):
 - a. Do proponents intend that a commissioner be removed within seven days after a prohibited communication or that a removed commissioner be replaced within seven days?
 - b. Who determines whether a commissioner has engaged in a prohibited communication, and who is responsible for ensuring that such a commissioner is removed from the commission?

15. In section 44 (7) (f):

- a. It appears that a word between "STAFF" and "THE ADOPTION" is missing. Should it be "FOR" or "CONCERNING"?
- b. To what "RULE" are the proponents referring? Rules of the secretary of state? The Commission?

16. In section 44 (7) (g):

- a. What do the proponents intend by the phrase "UNDUE INFLUENCE"?
- b. What is the commission supposed to do about reported undue influence?

17. Under the process for appointing members in section 44 (8) (a) (III):

- a. The supreme court nominating commission is to submit ten names two days after the senate leaders make their appointments. How can the supreme court nominating commission ensure that, from the ten names it submits, the Commission will be able to select a member from each congressional district and from west of the continental divide and south of the southern border of El Paso County, and also give the Commission discretion in whom it appoints?
- b. If the eight legislative-appointed commissioners fail to appoint the four remaining commissioners, how does a random selection process ensure the required geographic diversity of the Commission?

18. Section 44 (9) authorizes the Commission and staff to consider "GENERAL ELECTION PERFORMANCE DATA". May the Commission and staff also consider other factors such as party registration data?

19. In section 48 (1) (a) (II):

- a. Must staff keep all plans confidential until all plans have been presented to the Commission, or should each plan become public once it has been so presented?
- b. The Commission has 45 days after the publication of the preliminary congressional plan to conduct hearings throughout the state. However, the preliminary state legislative plan is not due to be published until 14 days after the publication of the congressional plan. Do the proponents believe that 31 days is enough time for the Commission to conduct at least 21 public hearings throughout the state?

- c. What is the intent with the word "SEPARATELY"? That the two hearings south of El Paso County's southern border are not to be west of the continental divide? Or that neither of those two hearings can count as one of the two hearings west of the continental divide?
20. In section 48 (1) (a) (III), staff is to submit a plan "ON THE LAST BUSINESS DAY PRIOR TO OCTOBER 7 OF THE YEAR IN WHICH THE FEDERAL CENSUS IS TAKEN." Did the proponents intend this to be the year following the year in which the census is taken?
21. In section 48 (1) (b) (I) through (III):
- a. May the Commission adopt amendments to the plans submitted by staff?
 - b. The proponents refer to the Commission rejecting a plan. Must the Commission vote to reject a plan, or does it reject it by failing to approve a plan by the required majority?
22. In section 48 (1) (b) (II) and (III), what happens when the reasons the Commission rejected a plan are self-contradictory? For example, that a plan was both "too competitive" and "not competitive enough"?
23. What happens if the Commission does not approve a congressional plan under section 48 (1) (b) (III)?
24. Under section 48 (2) (c) (I), if the supreme court returns the plan:
- a. Does staff prepare the "CONFORMING PLAN"?
 - b. May individual commissioners request adjustments to the conforming plan or only the Commission itself?

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. When adding an "AND" to separate, for instance, the last two paragraphs of a subsection, the "AND" should come after the semi-colon. For example, section 44 (6) (d) should end: "IS IMPLEMENTED, OR OTHERWISE REMOVED; AND".

2. There are several errors concerning internal references. The Colorado constitution is divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

- (a) Paragraph
- (I) Subparagraph
- (A) Sub-subparagraph
- (B) Sub-subparagraph
- (II) Subparagraph
- (b) Paragraph

In section 46 (1) (c), the references to "THIS SUBSECTION (a) AND CONSIDERING THE PROVISIONS OF THIS SUBSECTION (b)" are incorrect. The references could be changed to read "PARAGRAPH (a) OF THIS SUBSECTION (2) AND CONSIDERING THE PROVISIONS OF PARAGRAPH (b) OF THIS SUBSECTION (2)".

In section 48 (1) (b) (II), the reference to "THIS PARAGRAPH (I)" should either read "THIS PARAGRAPH (b)" or "THIS SUBPARAGRAPH (II)".

In section 48 (1) (b) (III), the reference to "PARAGRAPH (II) OF THIS SUBSECTION (b)" should read "SUBPARAGRAPH (II) OF THIS PARAGRAPH (b)".

3. It is unnecessary to capitalize "GENERAL ASSEMBLY" in the proposed initiative. Additionally, it is unnecessary to capitalize "COMMISSION", "SPEAKER", "PRESIDENT", or "NOMINATING COMMISSION". It is, however, acceptable to capitalize "VOTING RIGHTS ACT OF 1965" in section 46 (1) (a) (II).
4. In section 44 (9), staff has already been identified for sections 43.5 through 48. It is unnecessary to further identify them in section 48 (1) (a) (I).