

Mike Mauer, Director  
Legislative Council Staff

**Colorado Legislative Council**  
200 East Colfax Avenue Suite 029  
Denver, Colorado 80203-1716  
Telephone 303-866-3521  
Facsimile 303-866-3855  
TDD 303-866-3472



Dan L. Cartin, Director  
Office of Legislative Legal Services

**Office of Legislative Legal Services**  
200 East Colfax Avenue Suite 091  
Denver, Colorado 80203-1716  
Telephone 303-866-2045  
Facsimile 303-866-4157  
Email: olls.ga@state.co.us

## MEMORANDUM

**TO:** John Hereford and Tyler Thompson  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** April 6, 2016  
**SUBJECT:** Proposed initiative measure 2015-2016 #141, concerning primary elections

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.

### Purposes

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to allow voters unaffiliated with a major political party to participate in state and local primary elections in order to increase participation and voter turnout in primary elections.

## 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 statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Are you aware of this possibility?
3. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state and local governments? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, have the proponents considered incorporating a tax, fee, or some other mechanism that would allow some of the costs of the proposed initiative to be recovered?
4. Are the proponents aware of any legal impediments to allowing an elector to cast a ballot in the primary election of a political party with which they are not affiliated? Do the proponents know how many other states limit participation in their primary elections to only those affiliated with a political party?
5. How do the proponents address the philosophical arguments that the political parties should be able to restrict their primary election electorate to voters who have affiliated with that political party?
6. The declaration of the proposed initiative makes the argument that all eligible voters should be able to voter in primary elections since primary elections are paid for by taxpayers. However, many public goods that are provided by government (e.g., public schools, educational institutions, various forms of economic subsidies, public infrastructure) are not enjoyed by all taxpayers who pay for such services. What is the rationale for treating primary elections any differently than many of these other public goods?
7. With respect to the changes the proposed initiative would make to section 1-2-218.5, C.R.S. (**section 2**, “Declaration of affiliation”):
  - a. What is the connection between the proposed initiative and allowing electors to declare their political party or political organization status online? If an elector is not required to declare an affiliation prior to voting in a primary election, how would he or she even make use of the online system to declare an affiliation?

- b. Currently, an unaffiliated elector may declare his or her affiliation via a letter or form furnished by the county clerk and recorder, which letter or form is submitted by mail or in person. Under the proposed initiative, it appears that an elector may declare his or her affiliation by mail or in person, but that such methods do not involve documentation provided by clerk and recorder. Is this the proponents' intent?
- 8. Under the changes the proposed initiated measure makes to section 1-4-101 (2),C.R.S. (**section 3**, introductory portion):
  - a. Are these changes intended to apply to major and minor political parties? If they are intended to apply only to “major political parties”, would the proponents consider clarifying the language of the proposed initiative on this point?
  - b. What determines whether the political party is “entitled to participate in the primary election”?
  - c. By what manner would an elector select and cast the ballot of any one political party?
  - d. Why is it necessary to create and use a separate ballot for unaffiliated voters? Since an unaffiliated elector is able to cast a ballot in only one primary election, if an unaffiliated voter expresses a preference to participate in the primary election of a particular political party, what are the legal or technical difficulties involved in giving the elector the same ballot as is given to an elector who is affiliated with that same political party?
  - e. To what extent does the mail ballot system in place for all elections in Colorado present any obstacle to implementation of the requirements of section 1-4-101 as amended by the proposed initiative?
- 9. With respect to the proposed new section 1-4-101 (2) (a), C.R.S., do you know how practicable or costly it will be for a county to use (and send to all eligible electors) a single combined ballot that contains the names of the candidates of each of the political parties? Is this requirement only applicable to major political parties? What if an elector wishes to cast a single combined ballot of a minor political party? Are there any implementation difficulties that would arise from the fact that the introductory portion of this amended section appears to refer to all political parties whereas the requirements in this paragraph (a) appear to involve only major political parties? Additionally, current law requires mail ballots to be sent to all active registered electors. Proposed section 1-4-101 (2) (a), however, would require single combined ballots to be sent to all “active electors”.

10. With respect to the proposed new section 1-4-101 (2) (b), C.R.S., would you consider amending this paragraph to require that any rules be adopted in conformity with the “State Administrative Procedure Act”, article 4 of title 24, C.R.S.?
11. With respect to section 1-4-1304, C.R.S., as amended by the proposed initiative (**section 4**), why is the authority given minor political parties to prohibit unaffiliated voters from voting in their party’s primary election (if, in accordance with their constitution, bylaws, or other applicable rules) not extended to major political parties?
12. With respect to the changes made to section 1-5-402 (2), C.R.S., (**section 5**) is the “combined primary election ballot to be used by unaffiliated electors” referenced in subsection (2) (introductory portion) the same combined ballot referenced in section 1-4-101 (2)? If so, would the proponents consider adding a cross-reference or using a consistent term to make the connection more clear?
13. With respect to the changes made to section 1-7-201, C.R.S. (**section 6**):
  - a. What is the consequence of changing the “shall” to “may” in the second sentence of section 1-7-201 (2), C.R.S.?
  - b. Is it a correct reading of section 1-7-201 (2), C.R.S., as amended by the proposed initiative, that an eligible elector who declines to state an affiliation with a political party that is participating in the primary will not be able to cast a ballot in the primary election if the political party has chosen to exclude unaffiliated electors pursuant to proposed new section 1-7-201.5?
  - c. With respect to proposed section 1-7-201 (2.3), C.R.S., is the “combined ballot” as used in this subsection (2.3) the same as the “single combined ballot” as used in amended section 1-4-101 (2)? If so, would the proponents consider adding a cross-reference or using a consistent term to make the connection more clear? If the default consequence is that the unaffiliated elector is simply given “the appropriate party ballot”, wouldn’t it be simpler and perhaps more cost-effective for the unaffiliated elector to receive the appropriate party ballot in the first place?
14. With respect to the changes made to section 1-7.5-107 (2.5) (a) (II), C.R.S., (**section 7**), why is it necessary to send a notice clearly and conspicuously advising electors of the name of the political party and the fact that it has chosen to exclude unaffiliated electors from its primary elections? This sounds like a punitive measure

designed to make the political party look bad for excluding unaffiliated voters. Have the proponents considered limiting such notice to informing unaffiliated voters of any political party that has chosen to allow unaffiliated electors to vote in its primary elections (in connection with advising electors as to how they may vote in that party's primaries)?

15. With respect to the changes made to section 1-8.5-101 (5), C.R.S. (**section 9**), this section uses the term "regular party ballot". Is this the same as "appropriate party ballot" as used in section 1-7-201 (2.3)? Would the proponents consider using a uniform term throughout the text of the proposed initiative for this type of ballot?
16. With respect to proposed section 1-7-201.5, C.R.S. (**section 10**):
  - a. How does this section relate to the single-subject of the proposed initiative?
  - b. What is the purpose of requiring an election to decide the question of whether a major political party may exclude unaffiliated voters from participating in its primary elections?
  - c. Is it a correct reading of proposed new section 1-7-201.5 (1), C.R.S., that a major political party may choose to exclude unaffiliated voters from participating in its primary elections if at least 66% of the electors voting on the ballot question vote to prohibit such unaffiliated electors from voting in that party's primary elections?
  - d. Are you aware of any legal issues involved in having a private association, i.e., a major political party, place a ballot question on the primary election ballot that relates to the association's internal voting procedures and not directly to the selection of candidates?
  - e. How did the proponents arrive at the supermajority threshold of 66% as the required percentage of voters that would determine whether participation by unaffiliated voters in that primary is excluded? What is the rationale in having such a high supermajority requirement?
  - f. Is there any authority or precedent in Colorado law for this type of plebiscitary election? Is this election a one-time occurrence that must be conducted in 2018?
  - g. Is it your intent that a signed writing from the executive director requesting such an election is all that it takes to have this ballot question put on the primary election ballot?

- h. How clear do you think it would be to most voters that a vote to allow unaffiliated voters to vote in primary elections in 2016 is subject to the possibility of an additional vote in 2018 that would potentially negate approval rendered in 2016?
  - i. Would unaffiliated voters be able to vote on the ballot question to be decided in 2018?
  - j. Why does the proposed section 1-7-201.5 (1) (d), C.R.S., state that all future elections of that political party “shall be closed to unaffiliated electors” when proposed section 1-7-201.5 (d), C.R.S., allows such participation by unaffiliated voters? What is the point of holding the election in the first place if a disallowance vote can be undone for all time by the executive director of the major political party as soon as the next calendar year following the election?
17. Many political observers across the spectrum have come to appreciate the role of political parties as mediating institutions capable of creating broad coalitions of voters that potentially transcend special interests and our tendency to break up into ever smaller and hostile political units. Perhaps the last major role played by political parties is placing their brand name behind candidates for the general election. If enacted, would the proposed initiated measure deprive political parties of even this function? How will the role played by political parties be changed if the proposed initiative were enacted?

## **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. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names.

2. The separate sections of the legislative declaration should be numbered or lettered, as appropriate.
3. Following standard drafting practice, proposed subsection 1-4-101 (2), C.R.S., should be expressed as an introductory portion (meaning the language ends in a colon and sets up the subsequent paragraphs as a list) or the entire section can be renumbered as (2) (a), (2) (b), (2) (c), and (2) (d).
4. When repealing language from the Colorado Revised Statutes, the amending clause should include the command “repeal”. For example, Section 7 of the proposed initiative should read “In Colorado Revised Statutes, 1-7.5-107, **amend** (2.5) (a) (II); and **repeal** (2.3) as follows:”.
5. In the amending clause of section 5, please write the C.R.S. number as “1-5-402” instead of “1.5.402”.