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MEMORANDUM

TO: Frank McNulty and Bernie Buescher

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: December 1, 2015

SUBJECT: Proposed initiative measure 2015-2016 #55, 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.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To prohibit political gerrymandering of Colorado congressional, state senate, and state house districts.

2. To authorize the renamed Colorado redistricting commission (“Commission”) to review and approve congressional redistricting plans.
3. To direct the nonpartisan staff of the Commission to divide the state into congressional districts.
4. To change the number, appointment process, and qualifications of members of the Commission.
5. To require, and allow, only nonpartisan staff of the Commission to submit proposed plans for redistricting to the Commission and to establish a schedule for when plans are submitted to the Commission.
6. To establish limits on contact with members of the Commission and its nonpartisan staff and confidentiality requirements for the nonpartisan staff, including a prohibition on a commissioner communicating with anyone outside of a properly-noticed hearing, except a communication with up to two other commissioners.
7. To establish priorities and limitations on the nonpartisan staff when drawing congressional and state legislative districts.
8. To require affirmative votes of eight commissioners to approve any plan.
9. If, after the submission of three plans, the Commission fails to approve any plan, to direct the Commission to submit to the Colorado Supreme Court for its approval of the initial plan submitted to the Commission.
10. To provide that, if, after return of a final plan by the Colorado Supreme Court, the Commission does not approve a new plan, the nonpartisan staff is to submit a plan to the court to conform to the court’s requirements.

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. The four unaffiliated members of the Commission are to be appointed “by consensus”. Do the proponents intend that each of the four members must be approved unanimously by the eight members appointed by legislative leaders?

3. The legislative leaders' appointments are to be made by March 25. The unaffiliated members are to be appointed by April 1. Do the proponents believe that the legislative appointees can reach consensus on the unaffiliated members in six days?
4. What happens if the eight members appointed by the legislative leaders are not able to agree on appointment of the other four members?
5. The four members "may not be, or have been, affiliated with any political party for a period of one calendar year". Do the proponents intend that a member may not be or have been affiliated with a minor political party?
6. The measure provides that initial plans are to be published within thirty days after the Commission is convened or the necessary census data is available. If the Commission is convened on April 8, the initial congressional plans would be due May 8, near the end of the regular legislative session, and the state legislative district plans would be due two weeks later. Do the proponents believe that nonpartisan staff from legislative service agencies would be able to prepare initial plans within this time frame?
7. Throughout the measure, proponents refer to a "meeting or hearing of the commission". Is there a difference between a meeting and a hearing, and, if so, what is the difference?
8. Section 48 (2) (a) (I) of the measure provides:
 - (I) If, for any reason, nonpartisan staff is unable to present initial plans to the commission, the nonpartisan staff shall submit the initial plans directly to the supreme court for the court's consideration related to whether the plans adhere to the criteria outlined in this section.
 - a. Can the proponents give an example of when or why the nonpartisan staff would be unable to submit plans to the Commission?
 - b. When would the plans be submitted to the court? Would any public hearings be held prior to submission to the court?
9. The measure provides that the Commission is subject to the Colorado sunshine and open meetings law.
 - a. Article 6 of title 24, C.R.S., is the "Colorado Sunshine Act of 1972". Is that the law to which the proponents want the Commission to be subject?

- b. Part 2 of that article is the "Public Official Disclosure Law". Is it the proponents' intent that members of the Commission be subject to that part 2?
10. In Section 48 (2) (a) (II), the last phrase, "the time, place and agenda for such meeting or hearing", appears out of place. Would the proponents consider changing the wording to "proper notice for a meeting or hearing of the commission, including the time, place, and agenda, shall be posted on a web site dedicated by nonpartisan staff for the purpose of mapping districts at least seven days prior to such meeting or hearing;".
11. Is the notice in section 48 (2) (a) (II) in addition to, or in place of, the public posting required in section 24-6-402 (2) (c), C.R.S.?
12. Section 48 (2) (a) (II) (A) provides:
- (A) A commissioner shall not initiate, permit or consider ex parte communications, or consider communications to the commissioner if such communication is made outside of a properly noticed public hearing of the commission;

The proposed language seems to prohibit any communication while a person serves on the Commission. Would the proponents consider limiting the prohibition of communication to only that which concerns any plan or part of a plan to redistrict a congressional or state legislative district?

13. Section 48 (2) (a) (II) (B) provides:
- (B) Commissioners may communicate with one another provided that communication between more than three commissioners may only be conducted during a properly noticed public meeting or hearing of the commission. All communication with staff outside of a properly noticed meeting or hearing of the commission is prohibited;
- a. Similar to Question 11, would the proponents consider limiting the communication among commissioners and between commissioners to communication concerning any proposed plans?
 - b. Is it the proponents' intent that two or three commissioners could communicate with one another about a redistricting plan, but that they could not include a fourth member of the Commission in their communications?

- c. Generally, staff must communicate with Commission members concerning a broad range of topics not specifically related to any redistricting plan, including scheduling of meetings, reimbursement of expenses, and retaining outside counsel. Is it the proponents' intent that staff not be permitted to communicate with Commission members about this type of information?
- d. Sections 48 (3) (a) through (c) require the Commission to "provide the nonpartisan staff written reasons why the plan was not approved." Would the proponents consider making these written reasons an exception to the prohibition against commissioners communicating with nonpartisan staff?

14. Section 48 (2) (a) (II) (C) provides:

(C) Nonpartisan staff only may communicate with other nonpartisan staff who have been identified for such purpose. Workproduct and communications between nonpartisan staff shall not be considered public documents until presented to the commission during a properly noticed meeting or hearing of the commission;

- a. For previous commissions, nonpartisan staff has relied on and communicated with other nonpartisan legislative service agency staff not directly related to the Commission on issues including computer support and payroll and reimbursement processing. Is it the proponents' intent that nonpartisan staff working for the Commission not be allowed to speak to other nonpartisan staff for purposes other than a redistricting plan?
- b. Previous commissions retained outside counsel and experts. Would nonpartisan staff be permitted to communicate with outside counsel and experts on proposed plans?
- c. Is it the proponents' intent that any work product or communications not presented to the Commission would not become public documents?

15. Section 48 (2) (a) (II) (D) of the measure provides in part:

(D) Any commissioner being found to have participated in communications prohibited under this section shall be removed from the commission and replaced by a new commissioner appointed by the same authority having

appointed the commissioner removed from the commission.

- a. Under this provision, who determines whether a commissioner has participated in prohibited communications?
 - b. Under this provision, who has the authority to remove a commissioner?
16. Under section 48 (2) (b), nonpartisan staff is prohibited from drawing any district for the purpose of favoring a political party. Previous commissions have drawn competitive state senate and state house districts in El Paso and Boulder counties. A competitive district in El Paso county might be viewed as favoring the Democratic party, while a competitive district in Boulder county might be viewed as favoring the Republican party. Is it the proponents' intent that the nonpartisan staff be prohibited from drawing such districts?
17. Under section 48 (2) (b), nonpartisan staff is prohibited from drawing any district for the purpose of favoring any "other person or group". Does this conflict with section 48 (c) (V), which directs that the districts preserve "recognizable communities of interest"?
18. Also under section 48 (2) (b), nonpartisan staff is prohibited from drawing a district "for the purpose of augmenting or diluting the voting strength of a language or racial minority group." In section 48 (2) (c) (II), nonpartisan staff is to comply with the "Voting Rights Act of 1965". In 1996, the Tenth Circuit Court of Appeals held that under the Voting Rights Act, there should be a majority-minority state house district drawn for the San Luis Valley. Subsequent commissions have drawn such a district.
- a. Is it the proponents' intent that nonpartisan staff be prohibited from drawing such a district? If so, how can the nonpartisan staff comply with the Voting Rights Act?
 - b. If there are other areas of the state that might be subject to a claim under the Voting Rights Act, how do the proponents intend that the nonpartisan staff draw the district or determine how to draw the district?
19. In section 48 (2) (c) (V), what do the proponents mean by the requirement that the "districts established shall be as fair and competitive as practicable"?

20. In section 48 (2) (c) (V), what do the proponents believe constitutes a “recognizable community of interest”? Who recognizes communities of interest?
21. Establishing fair and competitive districts is in the last set of priorities for the drawing of districts. Is it the proponents’ intent that the nonpartisan staff is prohibited from splitting any city or town to establish a fair and competitive district?
22. The initial plans are prepared and published prior to the public hearings. May nonpartisan staff amend the initial plans based on the public hearings prior to a vote on the initial plans by the Commission?
23. The measure requires the Commission to vote on any second or third plan within seven days after the plan is submitted to it, but there is no time frame for when the Commission is to vote on an initial plan after the forty-five day period for public hearings throughout the state. Do the proponents believe that it is necessary or advisable to establish a time requirement for when the Commission shall vote on an initial plan?
24. The measure provides that "the commission shall promptly publish and provide the nonpartisan staff written reasons why the plan was not approved." How do the proponents intend that this be accomplished? Do the proponents intend that each member of the Commission who voted against the plan shall submit written reasons for that vote to the nonpartisan staff? If so, may commissioners communicate among themselves on the reasons?
25. Section 48 (2) (a) (I) establishes time limits on when the initial plans must be published by nonpartisan staff, but there are no time limits on when nonpartisan staff must publish a second or third plan. Do the proponents believe that establishing such time limits is necessary or advisable?
26. The proponents have renamed the Commission the Colorado redistricting commission. Section 48 (4) refers to the Commission’s “reapportionment duties.” Should this refer to the Commission’s “redistricting duties”?
27. Do the proponents believe that the Commission will have sufficient time to complete its work within the revised timeline, especially if the general election following the appointment of the Commission includes a presidential election?

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. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., **SECTION 1.**, **SECTION 2.**). For example:

SECTION 1. In the constitution of the state of Colorado, **add** section 43.5 to article V as follows:

and

SECTION 2. In the constitution of the state of Colorado, **amend** section 44 of article V as follows:

2. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, in section (48) (2) (a) (II): "including but not limited to sections 24-6-401 and 402, C.R.S.".
3. Section 48 (2) (a) (II) is drafted as an introductory portion to sub-subparagraphs (A) through (D). It, however, does not end with a colon. Consider renumbering sub-subparagraphs (A) through (D) as subparagraphs (III) through (VI) or drafting (2) (a) (II) so that it ends with a colon and introduces each sub-subparagraph that follows it.
4. Section 48 (2) (c) (IV) should end with a semicolon, not a comma.
5. The new language, in small caps, should still follow regular grammatical conventions, and the first words that begin sentences in sections 48 (1) (a), (1) (c), (2) (a) (II) (B), (2) (a) (II) (D), and (2) (a) (IV) should begin with a capital letter.
6. The noun "staff" is treated as a singular noun and should be paired with a singular verb. Consider rephrasing section 48 (2) (a) (I) (c) to read: "Nonpartisan staff members may only communicate with other nonpartisan staff members who have been identified ..."
7. The following words are misspelled: "workproduct" should be spelled "work product" and "website" should be spelled "web site".