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Colorado General Assembly

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MEMORANDUM

TO: Charles Dukes and Roberta Lynn Moreland
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 1, 2023

SUBJECT: Proposed initiative 2023-2024 #98, concerning the conduct of 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.

This initiative was submitted with a series of initiatives including proposed initiatives 2023-2024 #99 and #100. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiative 2023-2024 #99 and #100, except as necessary to fully understand the issues raised by the revised proposed initiative. 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.

Purposes

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

1. To create the "all-candidate primary election" process that requires every candidate for a "covered office", as defined in the proposed initiative, to petition onto the ballot for the primary election by collecting signatures from registered electors;
2. To allow candidates for a covered office to obtain signatures from electors who are affiliated or unaffiliated with a political party, and to require that all candidates who qualify for the ballot, regardless of political party affiliation or nomination, or lack thereof, appear on the same ballot;
3. To allow all electors, regardless of political party affiliation or lack thereof, to vote for one candidate per covered office in the all-candidate primary election;
4. To specify that the all-candidate primary election does not determine the nominee of a political party or group but instead narrows the number of candidates whose names will appear on the ballot at the general election;
5. To specify that the order in which candidates who qualify for the all-candidate primary election will appear on the ballot is determined by lot and specify the process for determining the number of candidates who will advance to the general election;
6. If two or more candidates in the all-candidate primary election received an equal number of vote and resolution of the tie is required to determine which candidate or candidates advance to the general election, to require the tie to be resolved by lot;
7. To specify that if a candidate who advanced to the general election becomes unable to appear on the general election ballot, the candidate receiving the next greatest number of votes at the all-candidate primary election replaces the withdrawing candidate on the general election ballot;
8. To require that general elections for covered offices and vacancy elections for representatives to congress be conducted by instant runoff voting, whereby voters rank one or more of the advancing candidates in order of preference on the ballot;

9. To specify how the ballots for general elections for covered offices will be formatted;
10. To specify that a candidate for a covered office for receives a majority of the top-ranked votes on the general election ballot wins the general election for that covered office;
11. To prohibit the use of a vacancy committee to fill a vacancy in the Colorado General Assembly and to require that such vacancies be filled by an election conducted through a process whereby the candidate that receives a majority of the votes is elected;
12. To require that all votes lawfully cast be counted by the end of the day on election day, or as soon as practicable thereafter, specify processes to ensure the accurate and timely count of ballots, and specify how the tabulations of the votes will be reported;
13. To require the secretary of state to promulgate rules to implement the initiative and to provide guidance and advice to governing bodies and designated election officials on the conduct of elections using instant runoff voting; and
14. To require the General Assembly to provide the necessary money so that counties have adequate staffing, systems, and technology to timely complete the counting and reporting of election results.

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. Regarding the "Declaration of the People of Colorado", is it your intent that the declaration language will appear in the state constitution? If so, the declaration will need to be added as a new section to the constitution as you have done in sections 2 through 6 of the proposed initiative.
3. Regarding section 2 of the proposed initiative, which creates a proposed new section 13 of article VII of the state constitution (section 13) and requires every candidate for a covered office to petition onto the ballot for the all-candidate primary election by collecting signatures from registered electors:

- a. Is it your intent that the caucus and assembly processes will be eliminated as a means of ballot access for candidates for covered office if the proposed initiative is approved by a majority of eligible electors at the 2024 general election?
- b. If so, for candidates for covered offices who are disabled and rely on mobility devices or for candidates for covered offices who do not have the financial means to petition onto the ballot, would eliminating the caucus and assembly process create a disparity in candidates' abilities to access the ballot?
- c. If your intent is to eliminate the caucus and assembly processes for candidates for covered office to access the ballot, is it also your intent that the General Assembly would make the necessary conforming amendments to the Colorado Revised Statutes if the initiative is approved by a majority of eligible electors at the 2024 general election?
- d. If a candidate for a covered office is affiliated with a political party, is it your intent that that the candidate may obtain signatures from electors registered with any political party, even if it is not the party with which the candidate is affiliated?
- e. In the definition of "covered offices" in subsection (3)(A) of section 13 of the proposed initiative, you specify that the "general assembly" is a "covered office". However, the General Assembly is not an office. Is it your intent to include state senators and state representatives who would serve in the Colorado General Assembly in the definition of "covered offices"?
- f. In the definition of "covered offices" in subsection (3)(A) of section 13 of the proposed initiative, you specify that "United States representative in congress" is a "covered office". Does this refer to a candidate for a representative to the United States house of representatives?
- g. The definition of "state officer" in subsection (3)(B) of section 13 of the proposed initiative includes "the governor and lieutenant governor". Currently, a candidate for governor selects a running mate for lieutenant governor, and pursuant to section 3 of article IV of the state constitution, the "governor and the lieutenant governor shall be chosen jointly by the casting by each voter of a single vote applicable to both offices." Is it your intent that the initiative will change the way in which a candidate for lieutenant governor currently accesses the ballot?

4. Regarding section 3 of the proposed initiative, which creates a proposed new section 14 of article VII of the state constitution (section 14) and requires an all-candidate primary elections process for covered offices:
 - a. Other than requiring that candidates for covered offices use the petition process to gain access to the ballot, does the initiative change any other criteria or qualifications for a candidate for a covered office to qualify for the ballot?
 - b. Subsection (1) of section 14 of the proposed initiative states that all electors are eligible to vote for one candidate per covered office. Is your intent that election officials will continue to prepare multiple ballot styles that are specific to individual districts and that an eligible elector will be eligible to vote for one candidate per covered office that appears on the elector's ballot or is your intent that an eligible elector will be able to cast a vote for a candidate for every covered office statewide?
 - c. Subsection (2) of section 14 of the proposed initiative states that the proposed initiative does not prevent political parties, organizations, or groups from nominating or endorsing candidates for covered offices, which raises the following questions:
 - i. Is it your intent to allow organizations or other groups other than political parties to nominate candidates as opposed to merely endorsing candidates? If not, you might consider separating the nominating and endorsing portions of this language to make it clear that only political parties may nominate candidates.
 - ii. Would these nominations or endorsement occur through the assembly designation process or through some other means?
 - d. The proposed initiative states in subsection (3)(A) of section 14 that "[a]t the primary election for these covered candidates, only the four candidates receiving the greatest number of votes shall advance to the general election." To clarify, is your intent that for covered offices, only the four candidates that receive the greatest number of votes at the primary election will advance to the general election?
 - e. In subsection (3)(B) of section 14 of the proposed initiative, the phrase "these offices" is used. Do you mean "covered offices"? If so, consider using the defined term "covered offices" here and throughout the initiative.

- f. Subsection (3)(C) of section 14 of the proposed initiative states that if it is not possible to determine which four candidates received the greatest number of votes due to a tie, that the candidates to proceed to the general election ballot will be determined by lot. This seems to assume that the tied candidates are tied for fourth place. What if there is a tie for first, second, or third place? In this case would the tied candidates and the other candidates who are higher than fourth place proceed to the general election ballot? Or, would the candidate to proceed be determined by lot regardless?
- g. Subsection (3)(D) of section 14 of the proposed initiative specifies that if a candidate who advances from the primary election to the general election becomes unable to appear on the general election ballot then the candidate receiving "the next greatest number of votes at the primary election" takes the withdrawing candidate's place. However, if the withdrawing candidate received the first, second, or third highest number of votes at the primary election, then the candidate with the "next greatest number of votes at the primary election" would already be on the general election ballot. Is it your intent that the candidate with the fifth-highest number of votes would replace the withdrawing candidate?
- h. Who is responsible for making the determinations required throughout subsection (3) of section 14 of the proposed initiative? Is it the county clerk or designated election official? The secretary of state? Please consider clarifying the responsible person or position.
- i. Subsection (4) of section 14 of the proposed initiative directs the secretary of state to promulgate rules concerning write-in candidates and withdrawing candidates for the all-candidate primary election. However, the initiative does not specifically mention that write-in candidates are allowed. Are write-in candidates allowed only for the primary election ballot?
- j. In addition, it seems that candidate withdrawals are an issue in connection with the general election ballot rather than the primary election ballot. If this is the case, should the rule-making requirement in section 14 of the proposed initiative be expanded to address the all-candidate primary election and the process by which candidates are placed on the general election ballot?

5. Regarding section 4 of the proposed initiative, which creates a proposed new section 15 of article VII of the state constitution (section 15) and requires general elections for covered offices to be conducted by instant runoff voting:
 - a. Subsection (1) of section 15 of the proposed initiative states that "[e]lectors shall vote in general elections...". "Shall" implies a duty or requirement and while voters are encouraged to vote, they are not required to vote. Is it your intent that eligible electors *may* vote in general elections...?
 - b. Subsection (1) of section 15 of the proposed initiative references voters ranking "advancing candidates". This term is not defined. By the time of the general election, couldn't the candidates on the ballot simply be referred to as "candidates" on the general election ballot?
 - c. The last sentence of subsection (1) of section 15 of the proposed initiative requires vacancy elections for United States representatives in congress to be conducted using instant runoff voting. Does this requirement apply to vacancy elections for United States senators too? If so, this sentence should be clarified.
 - d. Subsection (2)(A) of section 15 of the proposed initiative requires the secretary of state to place the names of the candidates advancing from the all-candidate primary election on the general election ballot. Would the secretary of state be responsible for the ballot design for all elections even when they are not statewide elections?
 - e. Subsection (3) of section 15 of the proposed initiative states that a voter may choose as many or as few candidates for a covered office as the voter wishes. It then states that a voter may choose just one candidate per covered office. Is the intent of the second sentence to clarify that a voter does not have to rank all four candidates if they don't want to or to limit a voter to choosing only one candidate? Regardless, the phrasing of the second sentence could be read to contradict the first sentence and should be clarified. What is the intent of the second sentence? Could a voter decline to choose any candidate for a particular covered office?
 - f. Subsection (5)(A) of section 15 of the proposed initiative requires the secretary of state to promulgate rules regarding, among other issues, reporting results in an election using "ranked choice voting". The term "ranked choice voting" is not defined and is not used elsewhere in the proposed initiative. Is ranked choice voting the same as "instant runoff

voting" as used in subsection (1) of section 15? Please consider defining these terms and using them consistently in the proposed initiative.

- g. Subsection (5)(B) of section 15 of the proposed initiative requires the secretary of state to provide guidance and advice to "governing bodies". This term is not defined. Do you mean governing bodies of local governments? Please consider clarifying or defining this term.
6. Regarding section 5 of the proposed initiative, which creates a proposed new section 16 of article VII of the state constitution (section 16) and requires vacancies in the Colorado General Assembly to be filled by an election conducted through a process whereby the candidate receiving a majority of the votes is elected rather than filled by a vacancy committee:
- a. Is it your intent that the General Assembly will introduce legislation to repeal the vacancy committee process if the proposed initiative is approved by a majority of the electors at the 2024 general election?
 - b. Subsection (2) of section 16 of the proposed initiative states that vacancies in the General Assembly shall be filled by an election. Does this section refer to vacancies that occur on or after the effective date of the proposed initiative or beginning on some other date?
 - c. In addition, subsection (2) specifies that a vacancy shall be filled by an election conducted through a process whereby the candidate receiving a majority of the vote is elected. This subsection does not specify that "ranked choice voting" or "instant runoff voting" must be used and does not specify that electors will rank the candidates. Is your intent that one of these processes be used for vacancy elections or are vacancy elections to be conducted using some other type of voting process?
 - d. If the proposed initiative is approved by a majority of the electors at the 2024 general election, could implementing "ranked choice voting" or "instant runoff voting" as required in section 15 of the proposed initiative cause confusion among electors?
7. Regarding section 6 of the proposed initiative, which creates a proposed new section 17 of article VII of the state constitution (section 17) and requires the timely reporting of election results:
- a. Subsection (3) of section 17 of the proposed initiative states that election officials shall request sufficient staff and resources to foster the timely reporting of election results. To which entity would an election official

make such a request? Which entity is responsible for providing the staff and other resources? Is the state solely responsible and solely required to provide funding specified in subsection (6) of section 17? Do counties and other local governments have to contribute? Is it a combined effort with funding provided by both the state and local governments?

- b. Subsection (4) of section 17 of the proposed initiative specifies how results of an election that use instant runoff voting must be tabulated. How is this tabulation different from the way election results are currently reported?
 - c. Could the timely reporting of election results required by section 17 of the proposed initiative result in tabulation errors due to the quick turnaround, in spite of increased financial and staffing resources?
 - d. How would the timely reporting of election results required by section 17 of the proposed initiative impact electors' right to cure signature inconsistencies or deficiencies?
 - e. How would the timely reporting of election results required by section 17 of the proposed initiative impact the counting of votes pursuant to the "Uniform and Overseas Citizens Absentee Voting Act"?
 - f. What does it mean to take all precautions necessary to ensure the secrecy of the counting procedures? Are counting procedures, as opposed to counting results, normally kept secret?
8. Regarding section 7 of the proposed initiative, is it your intent that this provision will appear in the state constitution? If so, please add an amending clause and specify the section of the constitution that is being added as you did for sections 2 through 6 of the proposed initiative.
9. The proposed initiative seems to use the terms "voter", "elector", and "registered elector" interchangeably. Is it your intent that these terms have different meanings? If so, please consider defining these terms. If not, please consider using one term consistently throughout the proposed initiative.

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 or subsection, including the declaration of the people of Colorado; and
 - b. The first letter of proper names. References to people or processes that are not proper names need not be capitalized.
2. The following is the standard drafting language used for creating a definition:
 - (1) "As used in this section [and in sections ____] unless the context otherwise requires:
 - a. "[Term]" means (the definition for the term).
 - b. "[Term]" means (the definition for the term)."
3. It is standard drafting practice to use the singular form of a noun whenever possible.
4. The letters following subsection numbers should not be capitalized or shown in small capital letters. For example, "(3)(a)" rather than "(3)(A)".