

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Natalie Menten and Donald L. Creager III
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: October 2, 2019
SUBJECT: Proposed initiative measure 2019-2020 #127, concerning Petitions

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 and the Colorado Revised Statutes appear to be:

1. To modify the following aspects of the petition process: filing procedures, deadlines, government administration, signature form and review, number of signatures required, protest and appeals, voter information, enforcement, and election timing;

2. To extend initiatives and referenda to counties and other local governments;
3. To expand the scope of what might be included in a petition from the current single-subject requirement to very broad topics;
4. To expand the Colorado Supreme Court's role in reviewing petitions;
5. To restrict Colorado General Assembly's authority to make bills petition exempt;
6. To require voter approval to amend a provision in a petition that was approved by voters or for a bill that is on the same topic as that from a referendum that voters rejected;
7. To eliminate the requirement that constitutional amendments, other than those that are limited to repealing a provision, must be approved by 55% of the voters;
8. To eliminate Legislative Council Staff's Blue Book; and
9. To exempt petitions from campaign finance laws.

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. Do you intend for the initiative to be effective upon the governor's proclamation?
3. Article XXII addressed "Intoxicating Liquors" prior to its repeal in 2008. Why did you use this article number for the new article in the proposed initiative?
4. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?

- b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

The following questions relate to section 1 (1) of the proposed initiative and the definition of "subjects."

- 5. Do you intend for provisions in article V, section 1 of the Colorado Constitution that do not conflict with subsection (1) to continue to apply to statewide initiatives?
- 6. Does the phrase "petition rights shall exist" mean that the people have the right to bring initiatives and referenda?
- 7. Given that there is only one secretary of state, should the first "any" in the second sentence only modify "county election office"?
- 8. What does "handle any state or local petition" mean?
- 9. For local issues, if only county election offices are authorized to handle a local petition, does that mean that all local petitions must be decided at coordinated elections administered by a county? So, for example, if there is a petition related to a metro district, the county would need to conduct the election and the metro district would be prohibited from conducting it?
- 10. By requiring any county election office to handle any state or local petition, it would appear that citizens could file a petition for an initiative to amend Denver's ordinances in Durango, or vice versa, and the City of Golden would be required to handle a state petition. Is that your intent?
- 11. Some special districts and other local governments have boundaries in more than one county. What is the county election office for this district?
- 12. The following questions and comments relate to the draft reviews:
 - a. What is a draft review?
 - b. Who conducts the review and who participates in it?

- c. What is meant by "four days after state initiatives begin"? Is it four calendar days? If so, are other deadline days in the proposed initiative also calendar days?
- d. Is there any draft review process for local initiatives?
- e. Can the petition filer make any changes based on the draft review?

13. The following questions and comments relate to the ballot title:

- a. Does the requirement that state initiatives must be written as a single subject, which means a very broad topic, apply regardless of how narrow the initiative is? For example, would an initiative that only changes the deadline for mailing a property tax notice of valuations have a single subject of "taxes"?
- b. Under article V, section 1 (5.5) of the Colorado Constitution, "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title;..." Is it your intent to expand what might be included in a petition by expanding the definition of "subject" for purposes of the ballot title?
- c. Currently, the Supreme Court requires that a ballot title for an initiative include the single subject and identify the central features of the measure. Do you intend to change that standard?
- d. If the ballot title for a state initiative is limited to a very broad topic, then is the 60-word limit really only for local ballot titles?
- e. Is there any requirement for what must be included in the ballot title for a local initiative?
- f. Does the 6-day notice requirement mean that the Secretary of State or local election office gives 6 days notice, or that those offices receive 6 days notice? If it is the former, must a ballot title be set for every initiative filed and is there any deadline for those offices to give the notice? If it is the latter, are the persons who write the initiative the persons who are required to give the notice?
- g. Who writes the state ballot title? A local ballot title?

14. Is a single-subject protest different from a ballot title protest, or is it a type of ballot title protest?

15. What type of protests may be made about a local ballot title?

16. Who can file a protest for a ballot title?
17. If the court fails to make a timely decision, is the ballot title valid as originally set?
18. Insofar as the proposed initiative states that only timely court decisions may stop extra subjects, is it your intent that an initiative ballot title must be set after the 6-day notice? So if a state initiative included changes related to judges, taxes, and executive powers, the title board would be required to find a very broad topic that included everything, and then, if someone protested, the Supreme Court could stop the extra subject?
19. What does "stop extra subjects" mean in the example in the prior question?
20. If a measure was not challenged within the 2-day deadline, does this mean that the initiative in the example in question 17 could not be challenged after the election for violating the single-subject requirement?
21. Is it your intent that after a ballot title is set, the Colorado Supreme Court must make changes to the ballot title rather than remanding the matter back to a district for it to modify the title in accordance with its order?
22. Given the quick deadlines, that protests apply to local ballot titles, and the thousands of local governments in the state, will the Colorado Supreme Court be able to handle the additional workload that may be required by the proposed initiative?
23. Does "four days later" mean four days after the ballot is set or reset or upheld by the Colorado Supreme Court?
24. To whom and where do election offices deliver the sample petition sections?
25. What is meant by "adapting 1992 forms"? Is it your intent to invalidate any petition requirements that have been passed since 1992—for example, the requirement in section 1-40-110 (3), C.R.S., that a petition section include a fiscal impact abstract on the first page?
26. "Any adult" is authorized to "circulate petitions," while "any two adult citizens" may begin a petition. Was it your intent to allow non-U.S. citizens to circulate petitions?

The following questions and comments relate to section 1 (2) of the proposed initiative.

27. Is an "entry" a required signature? So for any petition, the general requirement, with a few specified exceptions, is that petition for a district must have 5% of the district's active registered electors sign a petition in order for it to be referred to voters?
28. Who is responsible for annually determining the number of required entries that would be required for the thousands of local governments in the state?
29. Is the "110,000 entries at first" a limit on the total number of signatures required for a state constitutional measure that applies until potentially modified every four years?
30. Is it accurate to say that the first sentence in this subsection does not apply to statewide statutory initiatives, and those initiatives actually require the signatures of 3 1/3% of the state's active registered electors? If so, it might be helpful to make this requirement explicit.
31. Is the 9,000-quadrennial increase independent of the 5% requirement or a cap on the 5% requirement? For example, if the signature requirement for constitutional initiatives was 111,000 beginning in 2021, could the General Assembly increase the signature requirement to 120,000 in 2025 and 129,000 in 2029, and so on, regardless of the number of active registered electors in the state?
32. An address typically includes the town, city, or county. Since you have separately listed the address in the district and the town, city, or county as permissible in an entry line, do you mean the street address?
33. If random or statistical entry sampling is inadmissible, is a line-by-line analysis the only permissible way to verify signatures?
34. Is a district required to verify the signatures?
35. Do the geographic signature requirements in article V, section 1 (2.5) of the Colorado Constitution still apply to constitutional initiatives?

The following questions and comments relate to section 1 (3) of the proposed initiative.

36. Who files the required entries and with whom are they filed?
37. Insofar as the secretary of state or any county election office is required to handle any state or local petition, can the required entries be filed with the secretary of state or any county election office? If you intend for state initiatives

to be filed with the secretary of state and for local district initiatives to be filed with a particular county election office, then you should make this clear.

38. What is a neutral election office and who determines it? For example:
- a. What is a neutral election office for an initiative to change a City and County of Denver ordinance?
 - b. What is a neutral election office for South Denver Metro Fire District?
 - c. What is a neutral election office for a state initiative?
39. If a neutral election office is different from the local government for which an initiative is filed, that would seem to mean that another local government would be responsible for the cost of verifying the signatures. (For example, signatures for a petition in Jefferson County are verified by the Douglas County election office.) Is that your intent?
40. Does counting the entries include verification of their validity?
41. What types of protest of the reported entries are permissible?
42. Will a protest involve any questions of fact? If so, is the Colorado Supreme Court, which is an appellate court, the best court to take evidence and initially consider a protest?
43. Is "that report" the Colorado Supreme Court's determination about a protest?
44. If signer registration is "presumed valid," does that mean that the neutral election office must likewise presume validity when counting the signatures? Or is that just a standard for a court?
45. How does one become a "foe"? Can more than one person be a foe?
46. Who issues an invalidity report? Is it the neutral election office, the Colorado Supreme Court, or both?
47. If a neutral election office issues an invalidity report, it appears that the deadlines for the court protest and the 15-day cure period concurrently apply? Is that your intent? If not, you might consider clarifying how the cure period interacts with potential appeals.
48. Is "that court" in which cure entries may be protested the Colorado Supreme Court?

49. Insofar as the 15-day report requirement appears to only apply to the initial protest, how long does that court have to review any of the separately filed cure protests?

The following questions and comments relate to section 1 (4) of the proposed initiative.

50. What does "first filed" mean? Does it include any protest, court proceeding, or cure period?
51. What does the first sentence of this subsection mean? Is it establishing a deadline 92 days before a November election for any measure to be placed on a November ballot?
52. How does this deadline work for local governments that conduct elections on a date other than the statewide November election?
53. Is the petition filer the person who originally files the initiative ballot or who files the petition entries? Are those the same person?
54. Is there any information required in the petition filer comments? If it is the "Yes" summary in election notice, than can it be inferred that the filer comments should be limited to explaining how the initiative changes Colorado law?
55. Is there any review of petition filer comments? If not, what happens if the statement is incorrect? For example, the filer comments for an initiative to raise taxes begins with the following statement "This measure does not increase taxes in any way."
56. Is there any requirement about what information a filer or foe website must contain? Is there any check on the veracity of the statements on those websites? (Consider the example from the prior question.)
57. Given the requirement for the ballot, must a person who wants to bring an initiative also create a website?
58. With whom are the filer websites filed?
59. Who determines which foe website to use: the neutral election office, a county election office, or someone else?
60. What happens if there are no foe websites? This may not be an issue for statewide elections but could be for smaller local districts.

61. For state initiatives, is the filer website deadline August 2 of the year in which the measure will be on the ballot?
62. If local petition elections are not limited to November elections, then how does the August 2 deadline work? If they are limited to November elections, does the deadline work the same as for the state?
63. What is the purpose of the last sentence in subsection (4)? Is it a statement of intent? Even so, does the initiative give the citizens the right to vote or registered electors of a district?
64. Does the proposed initiative change the number of votes required for petition to become law or amend the constitution?

The following questions and comments relate to section 2 of the proposed initiative.

65. Does section 2 of the proposed initiative modify article V, section 1 (3) of the Colorado Constitution, which states that the referendum power does not apply to laws "necessary for the immediate preservation of the public peace, health, or safety...?"
66. An "emergency" is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."¹ That a situation must be unforeseen for a petition-clause exemption is different from the current exception to the referendum power. Is this intended?
67. Is the "one budget" the general appropriation bill that is described in article V, section 32 of the Colorado Constitution?
68. Is it 75% of the members elected to each chamber (for example, see article XIX, section 1 of the Colorado Constitution), or 75% of the members voting on the petition-exemption?
69. Section 2 states that each emergency claim "shall receive strictest supreme court scrutiny and decisions, without deference."
 - a. Is this review automatic? Or is the General Assembly required to file a bill with the court, similar to interrogatories?

¹ "Emergency", merriam-webster online, <https://www.merriam-webster.com/dictionary/emergency> (accessed on September 28, 2019).

- b. How do you intend the strictest scrutiny standard to work?
 - c. Will the review of the grounds for a safety clause involve a factual inquiry? If so, is the Colorado Supreme Court, which is an appellate court, able to do this review?
70. "Rejected topics" is not qualified in the proposed initiative. Do you intend for the last sentence to only apply to bills for which there were statutory entries filed and the voters rejected the ballot title?
71. What are "rejected topics" as used in the last sentence?
72. Is a topic broader than a bill's single-subject that is expressed in the bill title?
73. If the voters reject a bill that made a certain act a felony in 2020, would all future bills creating felonies be required to have voter approval?

The following questions relate to section 3 of the proposed initiative.

74. If you intend for the definitions to only apply to article XXII, then you should clarify the scope of the definitions. (**Definitions.** As used in this article XXII:).
75. The definition of "district" includes "all local and home rule governments," but home-rule municipalities and counties are a type of local government. Why separately identify "home rule governments"?
76. What does "enterprise" mean as used in the definition of district? Do you intend for the term to have the same meaning as set forth in TABOR? If so, then you might consider a cross-reference to TABOR, and if not, you might consider defining it.
77. What is an example of an authority that you intend to include in the definition of "district"?
78. The Colorado channel authority, which is created in section 24-49.9-101, C.R.S., is a body corporate and a political subdivision of the state governed by a board. How would petition rights work with this authority?
79. The division of parks and wildlife in the department of natural resources is an enterprise, but it is also an executive agency of the state government that only has the authority to administer laws enacted by the Colorado General Assembly. How would petition rights work with this enterprise?
80. For purposes of the definition of "petition":

- a. Is an initiative or referenda "begun" when it is first submitted to a district? If not, what does "begun" mean?
- b. Does a "citizen" include residents and nonresidents of Colorado?
- c. How does the phrase "any time" expand or change the definition?
- d. Is the type of petition broader than those subject to article V, section 1 (10) of the Colorado Constitution?
- e. Why have you exempted zoning measures from the proposed initiative?

The following questions and comments relate to section 4 of the proposed initiative.

- 81. Is it your intention that the state enforce petition rights for all of the local districts in the state?
- 82. Does the fine apply after a criminal conviction?
- 83. Is the third sentence a statement of intent? Do you intend for the provision to have a legal effect?
- 84. The following questions and comments relate to the fifth sentence in section 4:
 - a. There is no limitation on this language. Does it only apply to hearings and filings identified in this article? If so, you should clarify the scope.
 - b. "Hearings" and "filings" are the subjects of both clauses in the sentence. Do you mean that any participant in a hearing or a person who files a document may use a telephone or email, as applicable?
 - c. Does "hearings" include any hearings that the Colorado Supreme Court conducts in accordance with the proposed initiative, so that if the Colorado Supreme Court has to conduct a hearing, they would need to permit people to participate by telephone?
- 85. Is the following correct: If the voters approve a provision in a petition, then that provision can only be amended by a bill that is referred to and approved by the voters or through an initiative approved by the voters?

The following questions and comments relate to section 5 of the proposed initiative.

- 86. Given that it is in smaller font, without a bold heading, and it includes a statement to "(Do not print section 5.)", did you intend to include section of the proposed initiative? If not, the remaining questions related to section 5 can be skipped.

87. Do you intend to repeal all of the constitutional and statutory provisions identified? If so, it would be helpful for voters to show the provisions that are being repealed using the format described in the technical comments.
88. If all of the identified provisions in article V, section 1 of the Colorado Constitution are repealed, and not just those that are superseded by the proposed initiative:
- a. How many votes are needed for voters to approve a statutory or constitutional initiative or referenda?
 - b. Can the governor veto a petition?
 - c. When can petition elections occur?
 - d. What is the remedy if a petition contains more than one subject?
 - e. If there is no Blue Book, is the General Assembly free to establish the requirements for any statewide ballot information booklet?
89. Is it your intent to exempt petitions from fair campaign laws?
90. Do you intend for voters to vote on the actual repeal of the statutory provisions identified in article 40 of title 1, C.R.S.? Or that any provisions in the article that conflict with the proposed initiative would be superseded and no longer enforceable?
91. What other conflicting laws in article 40 of title 1, C.R.S., are there?

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. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. Before the amending clause, number each section, part, etc. that is being amended or added with a section number. For example:

SECTION 1. In the constitution of the state of Colorado, **add** article XXII as follows:

2. The proponents appear to be adding a new Article XXII to the Colorado Constitution. Article XXII, regarding "Intoxicating Liquors" already exists, and though it is repealed, the heading is preserved for historical purposes. Would the proponents consider relocating the new article?
3. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes. The use of italics for emphasis is not a standard drafting practice.
4. It is standard drafting practice to only capitalize proper nouns. For example, "Right to Vote" should not be capitalized.
5. Please write numbers as words rather than digits. For example, "seventy-five percent" and "ten days".
6. Section 3 of the proposed initiative is a definitions section. Definitions are typically formatted in the following manner, with an introductory portion explaining to what section of law the definitions apply, and with quotations around the defined term for clarity:

"Section 3. Definitions. AS USED IN THIS ARTICLE XXII, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "DISTRICTS" MEAN THE STATE AND ALL LOCAL AND HOME RULE GOVERNMENTS..."

7. Section 5 of the proposed initiative concludes with the phrase "(Do not print section 5.)." Initiative language includes everything following the enacting clause. Please amend or remove any notes or initiative language the proponents do not wish to include. Additionally, section 5 includes a series of commands regarding the repeal of both constitutional and statutory provisions, which should be presented with the appropriate amending clauses (see technical comment 1).
8. When referencing entire articles in the Colorado Revised Statutes, it is standard drafting practice to write out the article and title to clearly identify what is being cited. For example, in section 5 of the proposed initiative, standard drafting practice would be to write out "article 45 of title 1", not "1-45".