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Ohio Constitutional Modernization Commission

Committee on Constitutional Revision and Updating

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Thank you for this opportunity to share the League's thoughts with you.

When Ohio passed the constitutional amendments in 1912 authorizing initiative and referendum, it provided Ohio citizens a powerful tool for directly participating in Ohio's government when the more usual route of indirect action through our elected representatives proved inadequate.

There is currently no reason to limit or curtail that opportunity. Over the last several decades the constitutional initiative process had begun to be used to advance narrow commercial interests. In response to the growing prospect of commercially-driven initiatives, in 2015 the legislature proposed an amendment to require that future amendments affecting commercial interests could be approved only after a two-step voting process. The League supported that proposal. The amendment passed by a large margin in 2015.

Attempting to pass an initiated Constitutional amendment is not something good government groups take lightly. In our efforts to reform redistricting, we worked and worked with the legislature to find a solution. Only when those efforts absolutely failed did we go the initiative route. Millions of dollars are needed to get the required signatures. According to information from the National Conference of State Legislatures (updated in 2008) (attached), Ohio is surpassed only by two states – California and Florida – in the number of signatures required. Both of those states are quite a bit larger than Ohio, and actually have a requirement of only 8% of the total votes cast statewide in the last presidential election (Florida) or the last gubernatorial race (California). Only Florida has a requirement for geographical distribution of signatures. Ohio is a large state with many media markets, and millions of dollars are needed to educate the public about the benefits of the initiative.

The League recognizes that some initiated Constitutional amendments would more properly be initiated statutory amendments. Petitioners tend to use the Constitutional amendment route because statutory amendments still have a high signature requirement and the same high cost of

educating voters, but can be changed by the legislature immediately after passage. To encourage more groups to pursue initiated statutes rather than Constitutional amendments, the solution is to make the statutory process easier, not to make the Constitutional route even harder than it already is.

We oppose the changes being considered to the initiated constitutional amendment process that make the process more difficult for petitioners:

- There has been discussion of raising the passage rate from a simple majority to a 55% approval by voters. Ohio also has a tradition of “when in doubt, vote no” when it comes to ballot issues. Most initiated amendments already fail to achieve a simple majority of voter approval. There is no need to make this change, but if it is considered, the same passage rate should apply to amendments placed on the ballot by the General Assembly. If we want to only include amendments with broad consensus, we should include all proposed amendments.
- Petitioners could file a petition only during a limited time of the year. If a petition is ready to be filed in December, petitioners are required to wait, thus causing some of their signatures to become invalid because signors have moved or died or otherwise been removed from the roles of voters.
- Petitioners would have to face the voters twice. This would require two expensive educational campaigns and increase the amount of money good government groups would have to raise to pass an initiative.
- Petitioners would have to wait for a presidential or gubernatorial election year. Petitioners should be able to have an initiative placed on the next general election after they qualify for the ballot. Gubernatorial and Presidential years have a larger turnout, but “off years” may provide less expensive access to media to educate voters.

We support making changes to the statutory initiative process to make it a more attractive option in appropriate situations:

- Decrease the number of signatures required. The current proposal of requiring 5% up front rather than 3% up front plus an additional 3% later has benefits and limitations. The benefit is that the total number of signatures is lower. That may also be a limitation because the proposed number may still be too high. In addition, the hurdle to initially get the proposal before the legislature is raised from 3% to 5%, thus making that step more difficult. To make this even more attractive, the signature requirement could just be reduced to 3% and no requirement for supplementary signatures.
- A safe harbor of 3-5 years has been suggested in which no changes can be made by the legislature in an initiated statute. This should be extended to up to 10 years with the legislature able to put it on the ballot in the interim if something proves to be unworkable. The number of years in a “safe harbor” could be part of the initiative so the voters could consider how long it would be binding.

- Do not limit petitioners to submitting petitions only during a 30-day period.

Other issues applying to both Constitutional and statutory initiatives:

- We support the proposal to clarify which if two conflicting proposed amendments approved at the same election would prevail. The one with the most votes should prevail.

BALLOT BOARD

I would like to direct the Committee’s attention to a part of the initiative and referendum process that hasn’t been discussed. Rather than performing an administrative function of aiding voters when they are voting on initiatives, the Ohio Ballot Board may be trying to influence the outcome of the vote by the language they approve which is placed on the ballot. Sometimes this is the voters’ only information about an issue, most often it is their last piece of information before deciding “yes” or “no”. According to an article on November 5, 2016 in The New York Times, corporate lobbyists are reaching out to Secretaries of State and attempting to influence their role in the initiative process, and in particular to influence ballot language. In Ohio the Ballot Board consists of the Secretary of State and four more members, with no more than two of the same political party. Effectively, the political composition of the Ballot Board is determined by the political party of the Secretary of State. This composition provides a structure that could be influenced by partisanship.

This Committee is reviewing Section 1 of Article 2 of the Ohio Constitution. Section 1g of Article 2 refers to Section XVI of the Ohio Constitution. That section sets forth the process undertaken by the Ballot Board to provide ballot language when the legislature places a Constitutional amendment on the ballot. It applies the same process to initiated amendments and statutes. The Ballot Board is to certify the ballot language to the Secretary of State no later than 75 days before the election. If petitioners do not believe the Ballot Board is correctly identifying the substance of their proposal or properly explaining the proposal, they may challenge it no later than 65 days before the election. The Constitution gives the Ballot Board great discretion in developing ballot language and it will not be overturned by the Ohio Supreme Court unless “it is such as to mislead, deceive or defraud the voters.”

In two recent cases, the ballot language approved by the Ballot Board was overturned by the Ohio Supreme Court.

State ex rel. Voters First v. Ohio Ballot Bd., 133 Ohio St. 3d 257, 2012-Ohio-4149 was decided September 12, 2012, based on ballot language approved by the Ballot Board on August 15, 2012. The Court said:

{¶ 31} We conclude that the ballot language approved by the board omits material provisions concerning the commission-member selection process and the commission’s criteria for redistricting.

{¶ 47} We agree with relators’ contention regarding the language approved by the ballot board in paragraph five of its summary, which states that the proposed amendment would “[m]andate the General Assembly to appropriate all funds as

determined by the Commission.” That statement is inaccurate and prejudicial because it indicates that the General Assembly must appropriate all funds to the commission without qualification.

State ex rel. ResponsibleOhio v. Ohio Ballot Bd., Slip Opinion No. 2015-Ohio-3758, was decided September 16, 2015, based on ballot language approved by the Ballot Board on August 18, 2015. The Court said:

{¶ 10} Based on the foregoing, relators have established that the Ballot Board’s ballot language inaccurately states pertinent information and omits essential information. The cumulative effect of these defects in the ballot language is fatal because the ballot language fails to properly identify the substance of the amendment, a failure that misleads voters.

{¶ 13} Due to the short time remaining to finalize ballots, the court will entertain no additional motions in this case.

From a petitioner’s perspective, having ballot language determined by a political entity which in the past has written and approved ballot language that “omits material provisions” and “is inaccurate and prejudicial” and “omits essential information” and “misleads voters” is a large obstacle. To compound matters, the Ballot Board doesn’t take these actions until after signatures and been collected – a huge expense in time and money. In addition, at a practical level, because of the timeframes, petitioners have one chance to appeal to the Ohio Supreme Court. After the Court rejects the ballot language, it is sent back to the very same Ballot Board for revisions. After that, time doesn’t permit another appeal.

Some proposals for improving the process are:

- Have petitioners develop ballot language and submit it to the Attorney General’s Office along with the language that will be on the petitions used to gather signatures. Approval or denial will occur earlier in the process. In addition there will be more time for the Ohio Supreme Court to hear a second appeal, if necessary.
- Have the Ballot Board meet and develop and approve ballot language before signatures are gathered.
- Change the standard of review by the Ohio Supreme Court from language which “is such as to mislead, deceive or defraud the voters” to a standard more easily proved by petitioners, such as “prejudicial”. This could encourage the Ballot Board to be more careful when approving language because the petitioners would be more likely to succeed on an appeal to the Ohio Supreme Court. It would also provide voters with more neutral and accurate information about their choices.

Thanks you for your time and attention. I would be happy to answer any questions.