1851 CENTER FOR CONSTITUTIONAL LAW

September 12, 2013

Ohio Constitutional Modernization Commission

Constitutional Revision & Updating Committee

RE: Proposed Alterations to the Ohio Constitution's Initiative and Referendum Guarantees

Mr. Chairman and Members of the Commission:

Since 2008, I have directed the 1851 Center for Constitutional Law - - a public charity focused on legal action and education with particular emphasis on the Ohio Constitution. During that time, I have counseled on statewide initiated statutes, statewide constitutional amendments, city charter amendments, and local tax levy repeal and/or reduction efforts. Consequently, I've become exceedingly familiar with Ohio's state and local I&R processes.

In response to your request for my comments on Ohio's constitutional provisions governing initiative and referendum, I'd like to (1) articulate the case for preservation and/or advancement of robust initiative and referendum in Ohio; and (2) chronicle solutions to challenges presented by the current system.

A. The Case for Accessible Initiative and Referendum

As a result of my dealings with Ohio government, I have become a proponent of preserving, advancing, and *actually using* Ohio's initiative and referendum procedures. This may initially appear strange, since I&R is widely accepted as reflecting a "progressive" political philosophy, and my own political philosophy is diametrically opposed to the underpinnings of that philosophy (As an important aside, Ohioans' right to initiate a constitutional amendment actually predates the progressive era: it was enacted in 1851). There are several reasons for this:

(1) Access to I&R gives Ohioans the capacity to behave as civic adults, rather than the children of legislators and other public officials. Without I&R, Ohioans are left to lobby, or plead with, the legislative and executive branch for political change.

I&R provides Ohioans with their own political currency, a means to cut out the middleman and circumvent public officials who are not advancing Ohioans' interests: it breaks the political class's

similar to that at the state level, opponents can lay in the weeds and move to invalidate an effort on legal grounds well after citizens have worked hard to gather their signatures. (Examples: Toledo; Westerville).

D. Conclusion

Ohio is not "in danger of becoming California." And to the extent it is, it is because state and local government officials, not citizens, are constantly placing tax hikes and constitutional amendments before the voters. The success or failure of citizen and government-initiated ballot issues alike would better reflect public sentiment if placed only on general election ballots, where voter turnout is at its maximum.

Further, the initiative makes Ohioans better citizens, serves as an important check on government, and is no more arbitrary than the votes casts by public officials. And limiting, regulating or complicating the initiative process does nothing to limit its use by well-funded politically-connected groups; instead it shuts out the very people I&R was intended for: average citizens.

Finally, concern over the dilution of the Ohio Constitution should cause this commission not to reduce initiative and referendum rights, but instead to enhance the accessibility of the initiated statute in the ways outlined above.

Should you have any questions, please feel free to contact me by email at MThompson@OhioConstitution.org or by phone at (614) 340-9817.

Best Regards,

Maurice A. Thompson
Executive Director

passage of tax increases and constitutional amendments that may not pass on the November general election ballot, and may not reflect Ohio voters' will. Such important issues should be removed from special and primary election ballots, and only permitted on general election ballots.

(2) Even the playing field between the Ohio General Assembly and the citizens. Since 1913, the Ohio General Assembly has initiated 150 constitutional amendments, while citizens have only initiated 68 - - less than half as many. This is despite the fact that the General Assembly already maintains lawmaking power. Either it is too easy for the GA to initiate, or too difficult for citizens to initiate; or perhaps some of each. This commission should strive to create greater parity, since the entire purpose of I&R is to improve citizens' influence, rather than legislators.

(3) Render initiated statutes a better investment. Currently the difference in signatures is marginal. Six percent, or roughly 230,000 signatures for a statute that could simply immediately be altered, repealed, or subject to referendum, versus roughly 380,000 signatures for a constitutional amendment. Further, the General Assembly can maneuver to defeat an initiative by sitting on it for four months, leaving very little time to then gather the needed 115,000 signatures to qualify for the ballot; or it can change the proffered statute in several substantive areas, and thereby puncture, fracture, and hobble the advocates' political movement. This risk-reward trade-off likely explains while only 12 initiated statues, versus 218 constitutional amendments, have seen the ballot since 1913. I advise my investors to steer clear of the initiated statute - - for the most part, if not useless, it's at least a bad investment. Here are several mechanisms to decrease the costs and risks of the initiated statute:

- significantly lower the signature threshold for initiated statutes.
- Forbid legislative amendment or elimination for a significant period of time, or require a super-majority to overturn it.
- Forbid referendum of an initiated statute, whether passed by the voters or by the General Assembly, upon presentation. (Of note, however, this could result in gamesmanship to reduce the efficacy of citizens' referendum rights). There is precedent for this, as initiated statutes are already not subject to veto by the Governor, via Article II, Section 1.
- Remove the requirement that initiated statutes supplemental petitions be submitted 125 days prior to the election: where the General Assembly sits on the statute for four months, this gives advocates between 30 and 50 days to gather approximately 115,000 valid signatures - - a very difficult task for a paid effort, and an impossible one for a volunteer organization, particularly with petition approval procedures.

(4) The 125 day requirement for constitutional amendments simply isn't necessary, and hurts grass-roots efforts. This should be reduced back to 90 days. The 125 day limit cuts off all of August, when students may work, and when county fairs and other events are held. It forces volunteers to gather signature in the more dangerous winter months, which also discourages participation.

(5) Address local initiatives, as permitted by Section 1f, Article II. Submission procedures lack uniformity and entrap even competent legal counsel. Meanwhile, without a pre-approval procedure

monopoly over public policy. As those who ratified I&R in 1912 explained, access to the initiative and referendum render the individuals, rather than public officials, as the ultimate "sovereign" in state and local government.

(2) I&R advance public education on and responsibility for public policy. Ballot issues facilitate and incentivize Ohioans, as advocates and voters, to become educated on actual issues. There is no need for debate on a candidates' hair, their treatment of animals, or even the truthfulness of their campaign promises. Instead, Ohioans avoid this subterfuge, and directly educate themselves on the issues. Meanwhile, if we presume that Ohioans are sufficiently educated to vote for wise candidates who then implement public policy, then we must also accept that Ohioans are sufficiently intelligent vote for the policies themselves.

(3) I&R provides an additional check on government. Just like the judiciary, I&R serves as a bulwark against arbitrary government power, as exercised by the legislative or executive branch. However, the judiciary is a somewhat limited bulwark: it may only curtail enactments that violate the state or federal constitution. Conversely, I&R can curtail enactments that would otherwise be constitutional, or proactively move to protect rights when the legislature and/or the courts refuse to act.

B. The Case Against Reduction of Access to I&R

Raising signatures requirements, narrowing petitions circulation windows, or implementing other additional hurdles to accessing I&R is the wrong direction for Ohio, for several reasons:

(1) Driving up the costs of I&R will only foreclose participation by average grass-roots volunteers. It will do nothing to foreclose participation by large, well-organized, and politically-connected corporate and labor interests, who have the economic clout to deal with these hurdles. This is antithetical to the very purpose of I&R, which is to empower average citizens, who may not have as much access to the legislature and political levers as is enjoyed by these larger interests.

(2) Reducing access to I&R aggrandizes the Legislative branch. In the absence of effective I&R, the legislative branch has the capacity to become unbridled. The threat of referendum keeps the legislature honest. And the right to initiative allows Ohioans to implement political change when the legislature is at full capacity, tied up with other issues. Such a monopoly on public policy is unhealthy, since legislators' incentives often take greater account of interest group politics than the citizens' wills.

(3) Paternalism is unnecessary. Ohio voters have rejected the 98 of the 218 issues presented to them over the past century.

C. Improving Ohio's I&R System

Simply because I defend the concept of I&R does not mean that I believe Ohio's system is ideal. Indeed there are several issues to which this Commission should direct its attention:

(1) Review how frequently *government*, not citizens, initiate ballot issues. Government, whether the general assembly or local school boards, frequently, perhaps purposefully, place ballot issues before voters *at primary and special elections*, where voter turnout is extraordinarily low. This results in the