

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

February 6, 2013

TO: Marley Wiggin and Zofie Mandelski

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #1, concerning Marriage

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 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 eliminate the existing restriction in the state constitution in Section 31 of Article II that a valid or recognized marriage in this state can only be of a union of one man and one woman.
2. To amend Section 31 of Article II to also allow a union of one man and one man to be valid and recognized as a marriage in Colorado.
3. To amend Section 31 of Article II to also allow a union of one woman and one woman to be valid and recognized as a marriage in Colorado.

4. To provide for the legal recognition of a union of same-sex persons as a marriage in Colorado.
5. To maintain and provide for the legal recognition of a union of one man and one woman as a marriage in Colorado.

### **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. It is standard drafting practice to include an amending clause telling the reader what is being amended in the Colorado constitution. For example, "In the constitution of the state of Colorado, **amend** Section 31 of Article II as follows:".
2. The proposed measure is amending Section 31 of Article II of the Colorado constitution. The proper format is to include the section number and the headnote being amended before showing the text of the section. A headnote should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in lower-case letters. For example, **Section 31. Marriages - valid or recognized.** The proposed initiative should include the section number and the current headnote or an amended headnote.
3. When amending a section of the Colorado constitution, strike type [~~striketype~~] is used to show the existing language to be repealed, and small caps [SMALL CAPS] are used to show new language. Current law cannot be repealed without showing it as such in strike type. Also, the current language of the section should be in lower-case letters, while the language being added should be the only language shown in small caps. Stricken text should precede new text where such changes appear together.

### **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. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. It appears that the measure is referring to three different types of unions that would each be treated as valid or recognized as marriage in Colorado. However, the use of

the word "and" before "one woman and woman" creates an ambiguity about whether there could be different combinations of pairs. If the proponents intended that there be three different types of unions permitted, it would avoid any ambiguity if the word "or" was used instead of the word "and" before the phrase "one woman and woman". It would also help with clarity if the word "or" was inserted after "A union of one man and one woman,". If this is the intent of the proponents, the three types of unions could be separated by the word "or", and the commas would then be unnecessary. For example: "A union of one man and one woman or one man and one man or one woman and woman".

4. The text of the measure refers to "one man and one woman" and to "one man and one man" and to "one woman and woman". Did the proponents intend for the last phrase to be "one woman and one woman" so that it is parallel with the others? If not, what is the intent of the phrase "one woman and woman"?
5. A bill pending before the Colorado General Assembly, Senate Bill 13-011, authorizes the creation of civil unions between any two unmarried persons, regardless of gender. How will the proposed measure affect the creation of and recognition of civil unions in Colorado if Senate Bill 13-011 were to pass?
6. Some states (Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, and Vermont) and the District of Columbia and some foreign countries (including but not limited to Belgium, Canada, the Netherlands, and Spain) authorize the formal establishment and legal recognition of unions between persons of the same sex as marriage and issue marriage licenses to same-sex couples. Is this proposal intended to provide legal recognition of same-sex marriages from other states and other countries?
7. Other states (Delaware, Hawaii, Illinois, New Jersey, and Rhode Island) have enacted laws that authorize the formal establishment and legal recognition of unions between persons of the same sex, such as domestic partnerships or civil unions. In these states, the union is not considered a marriage. How will this measure change current law with respect to the recognition of domestic partnerships or civil unions from other states or other countries?
8. Section 14-2-104 (1) (b), C.R.S., states that "... a marriage is valid in this state if: ... (b) It is only between one man and one woman." How will this measure affect this statute? Is it the intent of the proponents that the General Assembly would pass implementing legislation to amend this statute if this proposed measure were to pass?
9. Section 14-2-104 (2), C.R.S., states that "any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section (14-2-104, C.R.S.) shall not be recognized as valid in this state". In other words, that statute means that any marriage contracted within Colorado or outside of Colorado that is not between one man and one woman is not recognized as valid in Colorado. How will this measure affect this statute? Is it the intent of the proponents that the

General Assembly would pass implementing legislation to amend this statute if this proposed measure were to pass?

10. Do the proponents foresee that there are any other statutes that would need to be amended by the General Assembly to implement the changes in the constitution if this proposed measure were to pass?
11. Do the proponents believe that the proposed measure would resolve controversies related to whether the right to marry in Colorado extends to same-sex persons?
12. Is it the intent of the proponents that the proposed measure would apply to common law marriages, as well, which marriages have historically been recognized by case law in Colorado? In addition, section 14-2-104 (3), C.R.S., states that a common law marriage can only be between one man and one woman. Is it the intent of the proponents that the General Assembly would pass implementing legislation to amend section 14-2-104 (3), C.R.S., if this proposed measure were to pass?
13. Section 14-2-110, C.R.S., prohibits marriages between certain types of closely-related blood relatives, for instance a marriage between an ancestor and a descendant (like a grandparent and a grandchild) or between a brother and a sister, or between an uncle and a niece are not allowed. Is it the intent of the proponents that the same kinds of prohibited marriages would not be allowed for unions between persons of the same gender? Is it the intent of the proponents that the General Assembly would pass implementing legislation to address this?
14. Odd-year election proposals are limited to state matters arising under Article X, Section 20 of the Colorado constitution. Because the topic of this measure does not qualify for an odd-year election, this measure can not be on the ballot until the 2014 election. If the measure does not provide a specific effective date, the proposed measure would take effect pursuant to Article V, Section 1 (4) of the state constitution, "from and after the date of the official declaration of the vote by proclamation of the governor, but not later than thirty days after the votes have been canvassed by the secretary of state", which is typically late December or early January following the election. Do the proponents intend for the measure to take effect as soon as possible or would the proponents want to state a specific date for the measure to take effect after the official declaration of the vote by the governor, thus allowing for some implementation time by state and local agencies?