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MEMORANDUM

July 3, 2013

TO: Jeremy Mathis and Lisa Starcher

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-14 #43, 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 section 31 of article II of the Colorado constitution that only the union of one man and one woman is a valid or recognized marriage in this state.
2. To amend section 31 of article II of the Colorado constitution to allow a union of same-sex couples to be valid and recognized as a marriage in this state.
3. To amend section 31 of article II of the Colorado constitution to allow a union of different-sex couples to be valid and recognized as a marriage in this state.

4. To amend section 31 of article II of the Colorado constitution to require unions of same-sex couples and unions of different-sex couples to be treated equally in all respects under the law with no legal distinction between the unions.

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. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. The format of the amending clause should follow the standard drafting practice. For example, "In the constitution of the state of Colorado, **amend** section 31 of article II as follows:".
3. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section. The measure should have a left tab indentation before the bolded words "**Section 31. Marriages - valid or recognized.**".
4. It is standard drafting practice to use small capital letters (rather than ALL CAPS) to show the language being added to the Colorado constitution. THIS IS AN EXAMPLE OF SMALL CAPITAL LETTERS.
5. Although the text of the proposed initiative should be shown in small capital letters, a large capital letter should be used to show capitalization for the first letter of the first word of each sentence.
6. The comma after the word "state" is grammatically incorrect and is not needed because the "AND" is not connecting two separate independent sentences. In addition, the period after the word "state" does not need to be shown stricken; it may be deleted without showing the strike-type.
7. It is standard drafting practice to use the singular form and plural form consistently throughout a provision. It is also preferred to use the singular form whenever possible. The language in the proposed initiative uses both the plural "unions" and the singular when it refers to the unions being recognized "as a marriage". It would add to the clarity of the measure to use the singular form throughout the measure.

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. Section 31 currently states that "Only a union of one man and one woman shall be valid or recognized as a marriage in this state...". The proposed initiative changes that to read "UNIONS OF SAME-SEX AND DIFFERENT-SEX COUPLES shall be valid or recognized as a marriage in this state...". The use of the word "or" in the phrase "valid or recognized" may have been related to the use of the word "only" in the current language of section 31. Since the word "only" is being removed from section 31, would the measure be more clear if it used the phrase "valid and recognized" in the text and in the headnote? Do the proponents believe there is a difference between stating "valid or recognized" and "valid and recognized"?
3. It appears that the measure is referring to two different types of unions that would each be treated as valid and recognized as a marriage in Colorado--unions of same-sex couples and unions of different-sex couples. The language is somewhat ambiguous about the unions being created. It would avoid this ambiguity if each union was more specifically described and if the language was written in the singular form. For example: "A UNION OF A SAME-SEX COUPLE AND A UNION OF A DIFFERENT-SEX COUPLE shall be valid or recognized as a marriage in this state...". Is this what the proponents are intending?
4. Is the use of the term "couple" in the proposed measure intended to limit marriage to the union of two persons?
5. What do the proponents mean by the term "different-sex couples"? Do you mean "opposite-sex couples" or "heterosexual couples"? Would the proponents consider using a term that might be more commonly understood by the public?
6. What do the proponents mean by the phrase "with no legal distinction"? What do the proponents believe is the specific purpose for these words?
7. During the 2013 legislative session, the Colorado General Assembly enacted Senate Bill 13-011, which authorizes the creation of civil unions between any two unmarried persons regardless of gender. Because of the current language in section 31 of article II, there is language in Senate Bill 13-011 that acknowledges the existence of section 31 of article II and which makes it clear that a civil union is not a marriage, because a marriage is only a union of one man and one woman. What is the effect of the proposed measure on the creation of and recognition of civil unions entered into in Colorado? Is it the intent of the proponents that the General Assembly would need to amend the statutes authorizing civil unions?
8. Some states have enacted laws that authorize the formal establishment and legal recognition of unions between persons of the same sex that are not marriage, such as domestic

partnerships or civil unions. How will this measure change current law with respect to the recognition of domestic partnerships or civil unions from other states or countries?

9. Is this proposal intended to provide legal recognition of same-sex marriages from other states and other countries?
10. 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?
11. 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, 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?
12. Do the proponents foresee that there are any other statutes not discussed in questions 10 and 11 that would need to be amended by the General Assembly to implement the changes in the constitution if this proposed measure were to pass?
13. 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?
14. Section 14-2-110, C.R.S., prohibits marriages between certain types of closely related blood relatives. For example, a marriage between an ancestor and a descendant (like a grandparent and a grandchild) or between a brother and sister are not allowed. Section 14-15-105, C.R.S., has a similar prohibition for persons entering into a civil union. Is it the intent of the proponents that the same kinds of prohibitions would exist for marriages between persons of the same gender? Is it the intent of the proponents that the General Assembly would pass implementing legislation to address this?
15. 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 cannot 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 Colorado 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 the 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?