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MEMORANDUM

TO: D'Arcy Straub and Gene Straub
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 18, 2016
SUBJECT: Proposed Initiative Measure 2015-2016 #114, Concerning Civil Unions and Marriages

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.

Earlier versions of this proposed initiative, proposed initiatives 2015-2016 #25 and 2015-2016 #41, were the subject of memoranda dated July 16, 2015, and September 24, 2015, which were discussed at public meetings on July 16, 2015, and September 24, 2015. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated

here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the **Colorado Constitution** appear to be:

1. To amend article II, section 31 of the Colorado Constitution to delete the statement that only a union of one man and one woman shall be valid or recognized as a marriage in this state.
2. To place new language in article II, section 31 of the Colorado Constitution that says the state of Colorado is required to respect the Establishment, Equal Protection, and Due Process Clauses of the U.S. Constitution for issues concerning civil unions and marriages.

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To add a new article 16 to title 14, C.R.S., known as the "Marriage and Establishment Clause Act".
2. To state that the people of Colorado find and declare that a same-sex couple and an opposite-sex couple are entitled to the same rights, protections, and benefits under the law that are secured by the Equal Protection and Due Process Clauses of the U.S. Constitution.
3. To state that the people of Colorado find and declare that the word "marriage" occurs within various religious authorities and that many citizens hold views on marriage that involve their personal religious beliefs, including religious beliefs that support a same-sex marriage and religious beliefs that oppose a same-sex marriage.
4. To state that the people of Colorado find and declare that the danger of religious intolerance occurs when a government favors or disfavors an issue involving religious beliefs, and that the state as well as local governments comply with the Establishment Clause of the U.S. Constitution when they maintain a position of neutrality on the definition of marriage.
5. To state that the people of Colorado find and declare that the institution of marriage involves a form of individual expression, whether secular or religious,

and a government affords its citizens the liberty to freely express themselves on the institution of marriage according to their own beliefs.

6. To protect the individual liberty of people to define a marriage according to each person's individual beliefs by stating that such individual liberty shall not be abridged by the state or by a local government within the state and that the state or a local government shall not prescribe or recognize any law that implicitly or explicitly defines the word "marriage".
7. To authorize the legislature and any administrative agency of the state or of a local government to prescribe any law or rule that governs a civil union between a same-sex couple or between an opposite-sex couple.
8. To require that all laws or rules inconsistent with this new article and with the amended section 31, article II of the Colorado Constitution be amended or repealed to remedy any inconsistency.
9. To state that the judicial branch, the executive branch, and the state and local governments of Colorado will no longer recognize a marriage established in the state of Colorado before the effective date of this measure as a marriage but will recognize it as a civil union.
10. To state that the judicial branch, executive branch, and the state and local governments of Colorado will not recognize a marriage established outside the state of Colorado as a marriage but will recognize it as a civil union.
11. To state that the effect of this measure is to secure for the people the individual liberty to define a marriage according to their own beliefs.
12. To direct that nothing in this measure is to be construed to increase or decrease a legal right, protection, or benefit owed to an individual through an operation of the law.
13. To direct that nothing in this measure is to be construed to increase or decrease a legal obligation owed by an individual, the state, a local government, or any other entity through an operation of the law.
14. To add a severability clause that applies to the statute in the event that any provision of the article is held invalid and that severs any provisions that are held invalid and allows the remaining provisions of the article to take effect.
15. To state an effective date of July 1, 2017, for the initiated 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. In the new sentence added to article II, section 31 of the Colorado Constitution, what do the proponents mean by the phrase "The state of Colorado shall respect the establishment, equal protection, and due process clauses of the U.S. Constitution"? How will the adoption of the measure create respect by the state of Colorado for the Establishment, Equal Protection, and Due Process Clauses of the U.S. Constitution?
3. In the new sentence added to article II, section 31 of the Colorado Constitution, what do the proponents mean by the words "issues concerning civil unions and marriages"? What specific issues would be addressed?
4. Why have the proponents decided to amend both the Colorado Constitution and Colorado Revised Statutes, rather than just the constitution, which was how the proposed initiative was drafted previously?
5. What effect do the proponents think the new language in article II, section 31 of the Colorado Constitution will have on case law or statutory interpretation of statutes governing civil unions and marriages in this state?
6. As a change to the Colorado Constitution, the portion of the proposed initiative that amends article II, section 31 of the Colorado Constitution may only be amended by a subsequent amendment to the constitution. Is this your intention?
7. As a statutory change, the portion of the proposed initiative that adds a new article 16 to title 14 may be amended by subsequent legislation enacted by the general assembly. Is this your intention?
8. Is it the intent of the proponents that the statutory portion of the proposed amendment explains the purpose and meaning of the new language added to article II, section 31 of the Colorado Constitution?
9. The short title in § 14-16-101 of the proposed initiative only references the Establishment Clause. However, there are also references to the Equal Protection and Due Process Clauses in § 14-16-102. Would the proponents

consider expanding the statutory short title to reflect the additional constitutional clauses that the proposed initiative addresses?

10. Section 14-16-103 (2) of the proposed initiative states that all laws and rules inconsistent with the measure shall be amended or repealed.
 - a. Do the proponents intend that the general assembly take action to amend or repeal any inconsistent laws?
 - b. How will it be determined if the laws are inconsistent with the measure? Who makes that determination?
 - c. Do the proponents have a time frame or deadline for when the inconsistent laws should be amended or repealed?
 - d. Similarly, how will state agencies determine whether a rule is inconsistent with the measure?
 - e. Do the proponents have a time frame or deadline for when inconsistent rules should be amended or repealed?
11. Could the proponents explain the reason for writing the requirement in § 14-16-103 (2) in passive voice and not specifying the actor or entity that is supposed to amend or repeal inconsistent laws and rules?
12. The proposed measure includes a severability clause for the new article. Why have the proponents added a severability clause?
13. The effective date of the proposed initiative has a headnote that refers to applicability; however there is no statement in the text following the headnote that explains the applicability.
 - a. What will be the applicability of the proposed initiative?
 - b. In previous versions, the proponents indicated that the initiative would have a retroactive effect on marriages that had been previously entered into and would convert those marriages to civil unions, and would treat a marriage entered into in another state or jurisdiction as a civil union. Do the proponents intend that the proposed initiative would affect marriages and civil unions entered into prior to the effective date of July 1, 2017? If the intent of the proponents is to have the applicability stated or implied within the text of article 16 of title 14, then the proponents might want to consider removing the word "applicability" from the headnote.

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. The standard drafting language for adding a new article is "In Colorado Revised Statutes, **add** article 16 to title 14 as follows:" instead of "In Colorado Revised Statutes, **add** article 16 *of* title 14 as follows".
2. The standard drafting practice for a short title is to provide the following language after the headnote: "The short title of this article is the " ____ Act" instead of "This article is known as the " ____ Act".
3. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The first letter of the first word of each entry of an enumerated provision should be initial-capitalized. This occurs in § 14-16-104.
4. Section 14-16-104 of the proposed measure does not follow the standard statutory drafting construction and numbering. There should be a "(1)" after "obligation." and before "Other". In addition, "(1)" should be changed to "(a)", and "(2)" should be changed to "(b)".
5. It is standard drafting practice to avoid using archaic terms. In § 14-16-105, instead of using "thereof", use "of this article".