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MEMORANDUM

TO: D'Arcy Straub and Gene Straub
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: July 16, 2015
SUBJECT: Proposed initiative measure 2015-16 #25, concerning Civil Unions and Marriages

Section 1-40-105 (1), Colorado Revised Statutes (hereafter C.R.S.), 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 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 amend Section 31 of Article II 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 state that the state may prescribe any law that defines and regulates a civil union between a same-sex couple or between an opposite-sex couple.
3. To state that a marriage is recognized as a form of religious expression of the people of Colorado.
4. To state that the state shall not abridge a marriage by prescribing or recognizing any law that implicitly or explicitly defines a marriage in opposition to any particular religious belief.
5. To state that the state shall not abridge a marriage by prescribing or recognizing any law that implicitly or explicitly defines a marriage in agreement with any particular religious belief.
6. To state that a marriage established in Colorado before the effective date of this measure would no longer be recognized as a marriage but would be recognized as a civil union.
7. To state that a marriage established outside of the state of Colorado would not be recognized as a marriage but would be recognized as a civil union.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. The measure strikes through the current language in Section 31 of Article II which states that "Only a union of one man and one woman shall be valid or recognized as a marriage in this state". Courts in the Tenth Circuit, which includes Colorado, have ruled in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and in *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) that language similar to Section 31 of Article II is unconstitutional. When the U.S. Supreme Court declined to hear appeals of these Tenth Circuit cases last fall, the matter was considered settled for states in the Tenth Circuit, and on October 7, 2014, then Colorado Attorney General John Suthers declared that there were no longer any legal barriers to same-sex marriage in Colorado. On June 26, 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. __ (2015), that similar language in the constitutions and statutes of other states was unconstitutional. Is it the intent of the proponents to eliminate the language being stricken in response to the decision in *Obergefell v. Hodges*? Could the proponents explain the reason for striking this language from Section 31 of Article II?
2. The measure says: "The state may prescribe any law that defines and regulates a civil union between a same-sex or opposite-sex couple".

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- a. The legislative branch, acting through the General Assembly, is the branch of government that has the power to pass laws. By using the word "state", do the proponents mean that the General Assembly may adopt laws defining, establishing, and regulating civil unions?
 - b. Section 1 of Article V of the Colorado Constitution also reserves to the people the power of the initiative. By using the word "state", do the proponents mean that an initiative could adopt laws defining, establishing, and regulating civil unions?
3. In 2013, the General Assembly passed legislation authorizing the creation of a civil union between two parties, regardless of gender, which means that a civil union can be formed by a same-sex couple or by an opposite-sex couple. The civil union law specifies the types of rights, benefits, and responsibilities that are granted to the parties to a civil union. What effect does this measure have on the civil unions law as currently set out in Article 15 of Title 14, C.R.S.? When this measure refers to a civil union, do the proponents mean a civil union authorized under Article 15 of Title 14, C.R.S.?
4. In the first sentence, what do the proponents mean by "define and regulate" with respect to civil unions?
5. In the second paragraph, the measure says "marriage ... shall not be abridged through the state prescribing or recognizing any law that implicitly or explicitly defines a marriage in opposition or agreement with any particular religious belief". In drafting legislation and construing statutes, there is a difference between "prescribing a law", which generally would be construed to be a power that is exercised by the legislative branch, i.e., the General Assembly, and in "recognizing a law", which would generally be construed to be a power that is exercised by the judicial branch, acting through the courts. What do the proponents intend by this language? If the proponents agree there is a distinction between those two functions, the measure would be clearer if it separated out the different actions that are intended and what entity in the state is taking those actions.
6. Under current law in section 14-2-109, C.R.S., a marriage may be "solemnized by a judge of a court, by a court magistrate, by a retired judge of a court, by a public official whose powers include solemnization of marriages, by the parties to the marriage, or in accordance with any mode of solemnization recognized by any religious denomination or any Indian nation or tribe." Colorado law allows a marriage to be solemnized without any religious aspect at all — what some might refer to as a "civil ceremony" at the court house. In the second

- paragraph, the measure refers to marriage being "recognized as a form of religious expression of the people of Colorado".
- a. Are there other forms of expression besides a religious one that can be found to exist through marriage? Is this statement meant to be exclusive?
 - b. How can the state law say marriage is a form of religious expression of the people in Colorado, when there is such diversity of religious beliefs and nonreligious beliefs about marriage in the state?
 - c. Do you intend that a marriage can only be performed and solemnized through a religious ceremony? If the measure were to pass, can two people still be legally married by a judge in a civil ceremony?
 - d. Would this measure disallow a marriage between two individuals who are agnostic and have no religious beliefs?
 - e. What do the proponents intend by the phrase "recognized as a form of religious expression of the people of Colorado"?
7. In the second paragraph, the measure says that a marriage "shall not be abridged through the state prescribing or recognizing any law that implicitly or explicitly defines a marriage in opposition or agreement with any particular religious belief".
- a. If an action by the state were challenged under this section, how is the opposition to or agreement with any particular religious belief to be determined? Who makes that determination? Could making that determination potentially violate the Establishment Clause of the First Amendment of the U.S. Constitution, which prohibits states from enacting laws that establish religion?
 - b. Since there are religions that are accepting of same-sex marriages and there are religions that are not accepting of same-sex marriages, is the effect of this language that the Colorado General Assembly cannot adopt laws that define and recognize same-sex marriage because they would likely be contrary to or in agreement with someone's religious beliefs?
 - c. Is it the proponents' intent through this language to eliminate all state laws that define marriage? Is it the proponents' intent through this language to prevent the General Assembly from ever passing laws in the future that define marriage?

- d. Is it the proponents' intent that the current laws on marriage in the Colorado Revised Statutes would need to be repealed by the General Assembly if this measure were to pass? What about all of the laws in Colorado that relate to marriage and to spousal rights?
 - e. The General Assembly has enacted laws setting forth other restrictions on marriage, such as requiring a minimum age to marry, prohibiting bigamous marriages, and prohibiting marriages between certain relatives. What affect would this measure have on those limitations on marriage?
 - f. Since there are religions that are accepting of same-sex marriages and there are religions that are not accepting of same-sex marriages, is the effect of this language that Colorado courts cannot recognize a marriage that is considered in opposition to someone's religious belief? Doesn't that arguably mean that the courts could not recognize a marriage between same-sex couples or a marriage between opposite-sex couples because there are adherents of some religions who have beliefs that are in favor of or against each of those types of marriages?
 - g. Could the phrase "particular religious belief" be interpreted to encompass aspects of marriage that are not related to the gender or sexual orientation of the parties, but cover something else, such as a religious belief against interfaith marriages or interracial marriages? Is the measure intended to address those situations?
 - h. What is meant by "any particular religious belief"?
8. In the third paragraph, the measure says "a marriage established in the state of Colorado before the effective date of this section and a marriage established outside the state of Colorado shall be recognized as a civil union". A plain-meaning reading of the first portion of this sentence is that the measure converts *all* marriages that were entered into in Colorado prior to the effective date of this measure to civil unions, including those between opposite-sex couples as well as those between same-sex couples. The measure could be interpreted to mean that a lawful marriage (of a same-sex couple or of an opposite-sex couple) established in Colorado before this measure is effective is redefined as a civil union and is required to be recognized as a civil union and not as a marriage. Is that the intent of the proponents?
9. Is it the intent of the proponents that the measure would **retroactively** change the status of a legally valid marriage into a civil union?

- a. Since a civil union arguably has a lesser status than a marriage and extends fewer rights to the parties than a marriage, what would be the effect upon the married couple's rights, benefits, and responsibilities subject to state and federal laws?
- b. If a marriage were converted to a civil union, what happens to the rights of a married couple who had relied on the spousal status, for such things as the right to inherit from a spouse, the right to intestate succession, the right to life insurance as a surviving spouse? What about the legitimacy of children born to the people while there were married? What about a claim for wrongful death of a spouse?
- c. Have the proponents considered whether it is legally possible to convert a marriage to a civil union retroactively?
- d. How would the proponents address the concerns or rights of people who might prefer to be considered "married" over having a "civil union"?

10. **Question #10 addresses the proposed measure's effect on same-sex couples who were married in Colorado or who seek to get married in Colorado.** In *Obergefell v. Hodges*, the U.S. Supreme Court ruled that same-sex couples have a fundamental right to marry and that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. If the effect of the language in the third paragraph is to say that the law in Colorado is to recognize a same-sex marriage, that was established prior to or after the passage of this marriage, not as a marriage but as a civil union, how does that comply with the decision in *Obergefell v. Hodges*?

- a. Isn't this an unlawful infringement of the right to marry that was found to be a fundamental right in *Obergefell v. Hodges*?
- b. Is there an ambiguity in the measure with respect to same-sex couples who seek to be married after the passage of this measure? By using the words "before the effective date of this section" and distinguishing between marriages established in Colorado and those established outside of Colorado, the measure creates an ambiguity or lack of clarity about whether a marriage of same-sex couples can be formed in Colorado on or after this measure. The measure says that a marriage established in Colorado before this measure is effective is recognized as a civil union and addresses marriages established in other states (those are to be civil unions) but it is ambiguous about what happens to couples who want to

be married in Colorado after the effective date of the proposed measure. See the chart in question #14.

11. **Question #11 addresses the proposed measure's effect on same-sex couples who are married or were married in another state.** The third paragraph also says that "a marriage established outside the state of Colorado shall be recognized as a civil union". Is it the intent of the proponents that Colorado law and Colorado courts would not recognize any marriage between same-sex couples that was entered into in another state as a marriage and, instead, would treat it under Colorado law as a civil union?

- a. In *Obergefell v. Hodges*, the U.S. Supreme Court ruled that under the Fourteenth Amendment to the U.S. Constitution a state is required to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. In light of that ruling, how does this measure comply with the decision in *Obergefell v. Hodges*? Isn't this an unlawful infringement of the right to marry that was found to exist in *Obergefell v. Hodges*?

12. **Question #12 addresses the proposed measure's effect on opposite-sex couples who seek to be married in Colorado after the effective date of this measure.** The measure says in part that "a marriage established in the state of Colorado before the effective date of this section ... shall be recognized as a civil union" and "a marriage established outside the state of Colorado shall be recognized as a civil union". What happens to an opposite-sex couple who wants to get married in Colorado on or after the effective date of this section? By using the words "before the effective date of this section" and distinguishing between marriages established in Colorado and those established outside of Colorado, the measure creates an ambiguity or lack of clarity about whether a marriage of opposite-sex couples can be formed in Colorado on or after this measure. Is this a gap that is not covered in the measure? Or, is the intent of the proponents that Colorado laws and Colorado courts would not recognize a marriage of opposite-sex couples on or after the passage of this measure?

13. **Question #13 addresses the proposed measure's effect on opposite-sex couples who are married or who were married in another state.** Is it the intent of the proponents that Colorado law and Colorado courts would not recognize a marriage between opposite-sex couples that was entered into in another state as a marriage and, instead, would treat it under Colorado law as a civil union?

14. As mentioned in questions #10 and #12, it appears that there is an ambiguity in the measure as to the effect of the measure on the recognition of marriages in

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Colorado that are created before the effective date of the proposed measure and after the effective date of the proposed measure. To illustrate what we believe is this gap or ambiguity, we have created this chart. As a matter of drafting, it is advisable to avoid ambiguous statutes and to more directly state what the measure is intended to do.

Chart on Proposed #25

Based on the language in the third paragraph

Type of Marriage	Established Before the Effective Date of the Measure	Established On or after the Effective Date of the Measure
A [same-sex] marriage established in Colorado	Recognized & Treated as a Civil Union	Unknown - Ambiguous
An [opposite-sex] marriage established in Colorado	Recognized & Treated as a Civil Union	Unknown - Ambiguous
A [same-sex] marriage established outside of Colorado	Recognized & Treated as a Civil Union	Recognized & Treated as a Civil Union
An [opposite-sex] marriage established outside of Colorado	Recognized & Treated as a Civil Union	Recognized & Treated as a Civil Union

Can the proponents respond to the perceived ambiguity as noted in this chart?

15. **Question #15 addresses the proposed measure's effect on couples in a common law marriage.** Is it the intent of the proponents that the proposed measure would also apply to common law marriages, which marriages have historically been recognized by case law in Colorado? Would a common law marriage also be converted into a civil union or be treated as a civil union? Can common law marriages be recognized after the effective date of this measure? What about recognition of a common law marriage that was established in another state?
16. In the third paragraph, what do the proponents mean by the words "For the resolution of matters under the laws of the state"? What "matters" are the proponents contemplating being resolved? For example: Who is a putative spouse? What are the inheritance rights of a spouse? What are the rights of a

spouse to elect against a will or through intestate succession? How to treat a wrongful death claim? How to handle a dissolution of a marriage or a civil union?

17. Also in the third paragraph, what do the proponents mean by "recognized as a civil union"? Does "recognized" mean marriages will be automatically (by operation of law) converted into civil unions? Is the intent of the measure to create a process by which a marriage will be transformed into something else?
18. To summarize, reading the entire section as a whole, if this proposed measure were to be approved by the voters, is it the intent of the proponents that Colorado would no longer recognize *any* marriages, including a marriage between a same-sex couple as well as a marriage between an opposite-sex couple?
 - a. Would *all* marriages now be considered a civil union?
 - b. Would county clerks and recorders in Colorado have continuing authority to issue marriage licenses if this measure were to pass?
 - c. Would county clerks and recorders in Colorado only be authorized to issue civil union licenses if this measure were to pass?
19. It is well-settled law that states must follow U.S. Supreme Court decisions interpreting the U.S. Constitution. The Supremacy Clause in Article VI of the U.S. constitution delineates that the U.S. Constitution is the "supreme law of the land". When Arkansas passed laws seeking to nullify the U.S. Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), that required desegregation of public schools, Arkansas asked the U.S. Supreme Court to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify the Court's holding in *Brown v. Board of Education* had been further challenged and tested in the courts. The U.S. Supreme Court rejected that request and ruled in *Cooper v. Aaron*, 358 U.S. 1 (1958), that the U.S. constitution prevails and the U.S. Supreme Court's decisions interpreting it controls. Is it the proponents' intent that this proposed measure could be used as a method for Colorado to attempt to resist the effect of the U.S. Supreme Court's decision in *Obergefell v. Hodges*?
20. What about the Full, Faith, and Credit Clause of the United States Constitution, Article IV, Section 1, which requires states to respect the public acts, records, and judicial proceedings of other states and requires states to

recognize rulings and legal actions (marriages) of other states? How does this measure comply with that clause?

21. 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?
22. Under Section 1-41-102 (1), C.R.S., amendments to the Colorado constitution initiated by the people that do not arise under Article X, Section 20 of the Colorado constitution can only appear on the ballot during a general election. Therefore, if this measure is qualified for the ballot, the measure would be on the ballot in 2016. What will be the effective date of the proposed initiative?
23. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this the proponents' intention?

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. Each constitutional section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In the constitution of the state of Colorado, **amend** section 31 of article II as follows:"
2. The measure has three separate paragraphs that are not numbered. Constitutional provisions are often divided into separate subsections that are numbered. Consider numbering each paragraph as a separate subsection, such as (1), (2), and (3).
3. In the first paragraph, it would avoid ambiguity to write "between a same-sex couple or between an opposite-sex couple".
4. In the second paragraph, the phrase "in opposition or agreement with any religious belief" should be written to say "in opposition to or in agreement with any religious belief".