

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

February 13, 2006

TO: Bishop Phillip Porter and Ruben Mendez

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed Initiative Measure 2005-2006 #83, 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 appear to be:

1. To specify that only a union of one man and one woman shall be valid as a marriage in Colorado.
2. To specify that only a union of one man and one woman shall be recognized as a marriage in Colorado.
3. To specify that the measure shall take effect upon proclamation of the vote by the governor.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Standard drafting practice generally identifies the **SECTIONS** of a constitutional measure or a bill with capital letters in bold type in order to distinguish the section numbers of the proposed measure or bill from the actual sections of the article of the state constitution or the actual sections of statute being amended. In addition, the **SECTION** number of the proposed measure or bill is typically followed by a period. To conform to this standard drafting style, would the proponents consider changing the reference to "Section 1:" of the proposed measure to "**SECTION 1.**"?

2. To conform to the style of presentation of the headnotes used in the state constitution, would the proponents consider placing the reference to the new proposed section number of article II, "**Section 31.**", in bold type?

3. To conform to the standard drafting style in which existing law and amendments to existing law are written such that the text of existing law is shown in regular font and the text of newly proposed language is shown in SMALL CAPITALS font, would the proponents consider showing the text of the proposed measure in SMALL CAPITALS font to indicate that the text shown is new language to be added to the state constitution?

4. Typically, the effective date of a proposed measure or a bill to amend a provision of the state constitution or the Colorado Revised Statutes does not appear in the text of the constitutional or statutory measure. Standard drafting style generally makes an effective date clause a separate, non-constitutional or non-statutory section of the measure or bill. To conform to this standard drafting style, would the proponents consider making the following changes:

a. Make subsection (2) of section 31 a separate, non-constitutional provision by creating a separate **SECTION 2.** of the measure entitled "**Effective date.**". The effect of such a change would be that the effective date would appear in the supplement to the 2006 Session Laws, but not in the actual text of the state constitution. An editor's note would follow the newly adopted section of the constitution that would identify the actual date that the new provision went into effect.

b. Eliminate the subsection (1) and subsection (2) designations that the proponents have currently included in "Section 1:" of the measure, if the proponents create a separate "**SECTION 2. Effective date.**" provision in the measure, as recommended in paragraph (a) of this question 4.

5. The materials included in the packet submitted to Legislative Council as part of the "Initiative - Colorado Marriage Amendment" included a proposed "Ballot Title", "Text", "Summary", and "Statement of Purpose". What is the purpose of the portions of the submission entitled "Ballot Title", "Summary", and "Statement of Purpose"? Those portions of the submission entitled "Ballot Title", "Summary", and "Statement of Purpose" are typically not included in a submission of an

initiated measure. Is it the proponents' intent that only the portion of the materials with the heading "Text" be submitted to the Secretary of State for consideration as an amendment to the state constitution, or do the proponents intend to submit the entire packet to be included in the ballot measure? Would the proponents consider removing the portions entitled "Ballot Title", Summary", and "Statement of Purpose" before submitting the proposed measure to the Secretary of State?

6. The proponents have proposed adding the proposed measure as a new section 31 to article II of the state constitution, which article is referred to as the Bill of Rights. Did the proponents purposefully select placing this proposed measure in the Bill of Rights? If so, why?

Substantive questions:

1. In 2000, the Colorado General Assembly amended the "Uniform Marriage Act", part 1 of article 2 of title 14, Colorado Revised Statutes, to provide in section 14-2-104, Colorado Revised Statutes, that a marriage is valid in this state if it is only between one man and one woman. The proposed measure would add a similar, but slightly different, provision to the Bill of Rights, article II of the Colorado Constitution.

a. It would seem the current statute already addresses the subject addressed in the proposed measure. Would the proponents explain the purpose and need for the additional provision in the state constitution? How does adding the proposed measure to the state constitution change or add to the current law?

b. Do the proponents believe that having similar measures in both statute and the constitution might be considered redundant? If not, why not?

c. Do the proponents believe that the two provisions have a different legal impact and may conflict?

d. How do the proponents envision the statutory and constitutional provisions being interpreted together? Do the proponents believe that it is problematic that the two provisions read slightly differently?

e. Of the several states that have similar provisions in their state constitutions restricting marriage to unions only between one man and one woman, do any of those states also have a similar statutory provision? Are the proponents aware of any state in which both constitutional and statutory provisions have been enacted and have been interpreted by the courts? If so, what was the result?

2. 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?

3. The proposed measure provides that only a union of one man and one woman shall be "valid *or* recognized" [emphasis added] as a marriage in this state.

a. By use of the term "or", do the proponents intend for the term "valid" and the term "recognized" to be alternatives? Do the proponents intend for the term "or" to be interpreted to include "and"? If so, might the proponents consider using the term "and"?

b. What do the proponents intend by the statement that "only a union of one man and one woman shall be *valid*... as a marriage in this state" [emphasis added]? What do the proponents intend by the word "valid"?

c. What do the proponents intend by the statement that "only a union of one man and one woman shall be *...recognized* as a marriage in this state" [emphasis added]? What do the proponents intend by the word "recognized"?

d. Do the proponents believe that there is a distinction between the terms "valid" and "recognized", as applied? If so, what is that distinction?

4. For purposes of the determination of gender when a person applies for the issuance of a marriage license, how do the proponents intend for the gender of an applicant to be determined? Specifically, is the gender of an applicant to be determined biologically or by another method? Would persons who initially were members of the same sex, but one of whom is later medically transgendered, qualify as one man and one woman under this proposed measure and therefore qualify to enter into a legally recognizable and valid marriage? What about persons whose gender is unclear from birth? How do the proponents envision the proposed measure being applied to such persons?

5. If a county clerk and recorder from whom a marriage license is requested suspects that the parties are not one man and one woman, how do the proponents envision the measure being enforced by such clerk and recorder? In California, one local jurisdiction began issuing marriage licenses to same-sex couples when same-sex marriages had not been legally authorized. What do the proponents envision being the enforcement mechanism under this provision if a county and recorder in Colorado was to issue a marriage license to a same-sex couple despite this provision?

6. At least one state (Massachusetts) and more than one foreign country (Belgium, Canada, Netherlands, Spain, Great Britain) now authorize marriages between persons of the same sex. If the proposed measure were law, how do the proponents envision laws in Colorado that are specific to married couples, such as wrongful death or inheritance laws, might apply to such couples who are visiting in or later move to the state of Colorado from such foreign jurisdictions?

7. Several states have enacted legislation that authorizes the formal establishment and legal recognition of unions between persons of the same sex, such as domestic partnerships, civil unions, and reciprocal beneficiaries, by way of example.

a. Is it the intent of the proponents that the language of the proposed measure have any impact on persons in a registered or otherwise valid domestic partnership, civil union, reciprocal beneficiary relationship, or other similarly sanctioned same-sex relationship from another jurisdiction, state, or country? If so, would the proponents describe what impact they believe the measure would have?

b. Is it the intent of the proponents that the language of the proposed measure have any impact on persons in a registered or otherwise valid domestic partnership, civil union, or other similarly sanctioned same-sex relationship pursuant to a Colorado law that may be enacted subsequent to the enactment of the proposed measure? If so, would the proponents describe what impact they believe the measure would have?

c. Senate Bill 06-166 currently pending before the Colorado General Assembly this legislative session would, if enacted, authorize persons of the same sex to enter into reciprocal beneficiary agreements in order to receive certain rights. If that bill were to pass and become law in Colorado prior to the enactment of the proposed measure, would the proposed measure have any impact on persons who enter into reciprocal beneficiary agreements pursuant to the new Colorado law? If so, what would that impact be?

8. The proposed measure, if enacted, would be the only provision in the state constitution addressing who is qualified to enter into a valid and recognized marriage in Colorado. However, state law has identified other, additional limitations to marriage in sections 14-2-110 and 14-10-111, Colorado Revised Statutes, including the age of the parties to a marriage and the consanguinity of the parties. By adding a subsequent and specific amendment to the state constitution that addresses only the sex of the parties to the marriage, is it the intent of the proponents to affect these other statutory provisions in current law? Do the proponents believe that the measure might have that effect?

9. In a recent opinion out of the Circuit Court for Baltimore City in Maryland, a court held that Maryland's statutory prohibition against same-sex marriage was inconsistent with Maryland's equal rights and due process constitutional amendments. The court in that opinion, applying a "strict scrutiny" equal protection analysis, found that the statutory provision discriminated, on the basis of gender, against a suspect class and that it was not narrowly tailored to serve any compelling governmental interests. Colorado has a similar equal rights amendment in its state constitution that became effective in 1973. Article II, section 29 of the state constitution provides, "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

a. In light of Colorado's constitutional equal rights amendment, what compelling governmental interests do the proponents believe are served by this proposed measure and how do the proponents believe that this measure is narrowly tailored to serve those interests?

b. Presuming an intermediate level of scrutiny resulting from the disparate treatment of persons based on gender, what important governmental interests do the proponents believe are substantially related to the proposed measure?

c. At least one United States District Court in Florida in reviewing the constitutionality of DOMA (the "Defense of Marriage Act") held that the proper level of review in an equal protection analysis is rational basis. Assuming a rational basis review was applied to the proposed measure, what legitimate state interest do the proponents believe serves as the rational basis for the classification established by the proposed measure?

10. The Fourteenth Amendment to the United States constitution and article XIV, section 1 of the

Colorado constitution provide that a person may not be deprived of life, liberty or property without due process of law. The United States Supreme Court has held that marriage is a fundamental right. It has been argued that the right to select one's marital partner is also a fundamental right that cannot be denied by the state under the due process clause.

a. How do the proponents believe the proposed measure would impact same-sex persons' right to marry under the due process clauses of the United States constitution and state constitution?

b. No federal court has expressly recognized that the right to marry extends to same-sex couples. Do the proponents believe that the proposed measure would resolve controversies related to whether the right to marry extends to same-sex persons? What impact do the proponents believe the measure will have at the national and international levels?

11. In a 2003 case the United States Supreme Court held that a Texas state law that criminalized private sexual conduct between consenting adults of the same sex did not further a legitimate state interest that justified intrusion into the personal lives of homosexuals. Do the proponents believe that the proposed measure would intrude into the personal lives of same-sex couples? If so, what legitimate state interest do the proponents believe would be furthered by such a law?

12. Article V, section 1 (5.5) of the state constitution provides that, "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title...." The provision goes on to say that, "If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." What do the proponents believe is the single subject of the proposed measure?