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MEMORANDUM

May 2, 2006

TO: Mercedes E. Cameron, Peggy E. Dahms, James W. Ditto, Mary Hollender, and Roberta M. Nieslanik

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed Initiative Measure 2005-2006 #139, concerning Domestic Partnerships

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 provide a legislative declaration stating that the people of Colorado find that domestic partnerships further important societal goals and do not affect the sanctity of marriage between one man and one woman.
2. To define "domestic partnerships" as a formalized relationship between two adults who are of the same gender and who are excluded from the marriage laws of Colorado, are not partners in another domestic partnership, are not married to another person of the opposite gender, and are not related by adoption or by blood.

3. To state that notwithstanding any other provision of law, a domestic partnership is a valid relationship between eligible adults of the same gender.
4. To state that, notwithstanding any other provision of law, a domestic partnership is a relationship that is not similar to marriage.
5. To direct the General Assembly to enact legislation necessary to implement this measure no later than May 1, 2007.
6. To require that the General Assembly enact legislation to implement the measure and that any legislation enacted shall be consistent with the responsibilities, benefits, and protections set forth in House Bill 06-1344, as passed by the Colorado House of Representatives and the Colorado Senate during the 2006 legislative session.

Comments and Questions

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

Technical questions:

1. Subsection (4) of the proposed measure provides that the General Assembly shall enact implementing legislation "No later than May 1, 2007,". Although the dates for the next session of the General Assembly have not officially been set, the expected dates are January 10, 2007, through May 9, 2007. Often, the General Assembly enacts legislation during the final days of the session. Is there a reason for setting the date in the measure at May 1, 2007, prior to the anticipated final day of the regular 2007 legislative session? What would happen if the General Assembly passed the implementing legislation after May 1, 2007, but still during the 2007 session? To avoid a potential timing problem in complying with the requirements in the measure, would the proponents consider replacing the specific date with a direction that the legislation be enacted during the first regular session of the sixty-sixth General Assembly?
2. As a drafting style, the reference to the 2006 legislative session in subsection (4) of the proposed measure would generally be referred to as "the second regular session of the sixty-fifth General Assembly". In addition, subsection (4) uses both the term "general assembly" and the "state house of representatives and state senate". As a matter of drafting style and to avoid ambiguity in the law, drafters try to avoid using two different terms for the same thing. Moreover, it is not accurate to refer to legislation being passed by the House and the Senate since legislation is actually passed by the General Assembly. The House and the Senate actually pass different versions of the bill, which could lead to misinterpretation of the language of the measure as implying the passage of the reengrossed version or the rerevised version rather than the final act. Would the proponents consider referring to passage of the bill "as passed by the second regular session of the sixty-fifth General Assembly"?
3. When referring to legislation introduced in the house of representatives, the first letter of the words House Bill should be capitalized (i.e., House Bill 06-1344). Would the proponents consider capitalizing the words "House Bill" in subsection (4)?

4. Subsection (4) of the proposed measure indicates that House Bill 06-1344 has passed. At the time of the preparation of this review and comment memo, House Bill 06-1344 had not yet been enacted by the general assembly. If House Bill 06-1344 is not enacted by the General Assembly, this measure, as currently drafted, would contain a potential legal defect. Since the language of the measure needs to be finalized and submitted to the secretary of state's office by May 7, 2006, prior to the end of the session, the outcome of House Bill 06-1344 may be hard to predict. When legislators want to tie the passage of one piece of legislation to another it is generally done specifically so that there are no legal questions about the effectiveness of the two pieces of legislation. In this circumstance, House Bill 06-1344 is a referred bill that would appear on the ballot at the same time that this measure would also be on the ballot. Have the proponents considered clarifying what would happen if one measure is approved by the voters and the other one fails? More specifically, what do the proponents believe would be the result if the voters approve this initiative but fail to approve House Bill 06-1344? Would the proponents consider adding a subsection to the measure to clarify that this measure shall only take effect if the General Assembly passes House Bill 06-1344 and only if the voters approve the ballot question referred to the voters in House Bill 06-1344?

5. It was a little hard to tell what was bolded in the proposed measure. **SECTION 33.** and the headnote "**Domestic partnerships.**" should appear in bold type as we have shown in this question.

Substantive questions:

1. The proponents have proposed adding the measure as a new Section 33 to Article II of the state constitution, which is referred to as the "Bill of Rights". Did the proponents purposefully select placing this measure in the Bill of Rights rather than in another portion of the constitution? Could the proponents articulate what type of right is implicated by this section?

2. Subsection (1) of the proposed measure states that the measure will "not affect the sanctity of marriage". What do the proponents mean by the "sanctity of marriage"? What do the proponents intend by stating that the measure does not affect the sanctity of marriage?

3. Subsection (2) of the proposed measure uses the term "formalized relationship". What do the proponents mean by the term "formalized relationship"? How does the measure provide for formalization of a domestic partnership relationship?

4. Subsection (2) of the proposed measure uses the term "adults". What do the proponents mean by the term "adult"?

5. Subsection (2) of the measure appears to provide the requirements for entering into a domestic partnership and subsection (3) of the measure refers to the establishment of a "valid relationship between *eligible* adults of the same gender" (emphasis added). Are the proponents intending that subsection (2) be construed as providing not only the definition but also the eligibility requirements for entering into a valid domestic partnership? What do the proponents mean by the term "eligible adults" in subsection (3)?

6. The proposed measure appears to be tied to House Bill 06-1344 and yet the definition of "domestic partnership" as defined in the proposed measure and in House Bill 06-1344 are slightly

different. The constitutional measure is written in the plural while House Bill 06-1344 is written in the singular with respect to the parties. The plural language causes an ambiguity with respect to the parties involved. Would the proponents consider clarifying in the measure that neither partner is married to another person or to another person nor is a partner in another domestic partnership?

7. Subsection (3) has a heading that says "Recognition of domestic partnerships." The text of subsection (3) does not use the word "recognition" in it. Is that an intentional omission? Because subsection (3) has the heading "Recognition of domestic partnerships" and refers to "a unique and valid relationship" does that mean that the relationship is a "unique and valid *legal* relationship" *recognized* in this state? What do the proponents intend to be the effect of subsection (3)? Would the proponents consider clarifying the purpose of this subsection?

8. Subsection (3) uses the phrase "Notwithstanding any other provision of law,". What kind of laws does this cover? Does this include a statute in the Colorado Revised Statutes? Does this include a provision in the Colorado constitution? Specifically, what laws are the proponents intending to preempt?

9. Subsection (3) states that "a domestic partnership ... is not similar to marriage". What do the proponents intend by this statement?

10. Subsection (4) directs the general assembly to enact legislation implementing this measure and directs that the legislation "shall be consistent with the responsibilities, benefits and protections set forth in House Bill 06-1344 as passed by the state house of representatives and state senate during the 2006 legislative session".

a. Is it the proponents' intent that this measure be "tied" to the passage of House Bill 06-1344 by the General Assembly? If so, what is the intent of the proponents in tying this measure to House Bill 06-1344?

b. House Bill 06-1344 refers a ballot question to the voters asking them if they would authorize an amendment to the Colorado Revised Statutes to create domestic partnerships between same-sex couples. House Bill 06-1344 creates section 14-15-117, Colorado Revised Statutes, which directs the general assembly to enact implementing legislation to implement the law on domestic partnerships, "including the benefits, protections and responsibilities of partners in a domestic partnership" as outlined in that legislation. If House Bill 06-1344 already provides for implementing legislation, what is the purpose of subsection (4) of the proponent's measure? Why do the proponents think that this measure needs to be done to address implementing legislation?

11. One comment about subsection (4) is that it may be subject to legal challenge on the grounds that it is unconstitutionally vague since a person of ordinary intelligence would have to guess at what benefits, protections, and responsibilities are to be extended to domestic partners. Do the proponents think this measure is clear enough to withstand such a challenge? Will the voters understand what they are being asked to vote on?

12. Do the proponents foresee any conflict between a statute and a constitutional amendment that say essentially the same thing? Do the proponents anticipate any conflict between a statute and a constitutional amendment each of which might be approved by the voters that differ in content?

13. Some states (Massachusetts and Vermont) and more than one foreign country (Belgium, Canada, Netherlands, Spain, Great Britain) now authorize the formal establishment and legal recognition of unions between persons of the same sex, such as domestic partnerships and civil unions, by way of example. Is this proposal intended to provide legal recognition of same-sex unions or domestic partnerships from other states or other countries? How will this measure change current law with respect to the recognition of domestic partnerships or civil unions from other states or other countries?

14. One of the bills considered during the 2006 legislative session but not adopted was Senate Bill 06 -166 which would have created reciprocal beneficiary agreements that would have extended certain rights or benefits on a contractual basis to persons of the same sex and to other persons who are related to one another. How would the proposed measure affect those types of agreements if similar legislation were to pass in the future?

15. How will the proposed measure change current law with respect to the creation of domestic partnerships or civil unions in Colorado?

16. There is another citizen-initiated measure proposed for the ballot, # 83, which provides that "...only a union of one man and one woman shall be valid or recognized as a marriage in Colorado." If both this measure and that measure were to be approved by the voters at the same election, how do the proponents believe this proposed measure will interrelate with the proposed initiative #83? Do the proponents believe the two measures could be interpreted together so as to give effect to both, or do the proponents believe that the two measures would be in conflict with one another?

17. There is another citizen-initiated measure proposed for the ballot, #109, which would amend the constitution of the state of Colorado to provide that "Neither the state nor any of its political subdivisions may create or recognize a legal status similar to that of marriage as defined in Colorado Revised Statutes 14-2-101 through 14-2-104 (2005)."

a. Proposed initiative #109 provides that the state cannot create or recognize a legal status similar to that of marriage; this proposal provides that a domestic partnership does not affect the sanctity of marriage and is not similar to marriage. If #109 and #139 were both to pass, how would the proponents envision the two constitutional measures would be reconciled? Do the proponents believe the two proposals conflict?

b. Proposed initiative #109 provides that the state cannot create or recognize a legal status similar to that of marriage. House Bill 06-1344, to which this measure refers, authorizes the creation and recognition of domestic partnerships. Section 14-15-106 (1), Colorado Revised Statutes, created in House Bill 06-1344 states "A domestic partner shall have the benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rules, policy, common law, or any other source of civil law, as are granted to spouses." If both #109 and #139 were to pass, how do the proponents envision the two measures would be reconciled? Do the proponents believe the two proposals conflict?

c. If both measures were to be approved by the voters at the same election, how do the proponents think the proposed measure will affect the proposed initiative #109? Do the proponents believe the two measures would be interpreted to work together? Do the proponents believe they conflict with one another? What if both measures are enacted by the voters at the same election?

18. How would the proposal be enforced?