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MEMORANDUM

June 7, 2007

TO: Bishop Kevin J. Foreman
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FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #33, concerning Prayer/Meditation Time in Public Schools

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.

This proposed initiative is substantially similar to proposed initiative 2007-2008 # 2, submitted by the proponents in January, 2007. Accordingly, the questions and comments set forth in the review and comment memorandum for proposed initiative 2007-08 # 2 apply to this proposed initiative, unless the context otherwise requires, and is incorporated herein.

Purpose

The major purpose of the proposed initiative appears to be:

1. To provide students in public schools a five-minute period of time at the beginning of each school day, to be called "Private Meditation", during which the students can invoke private or group prayer or have quiet time for their own personal meditation, reflection, or curricular purposes.

Comments and Questions

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

Technical questions:

1. To provide notice to the public of the proposed changes to the law and to identify where the new provision is to be placed, an initiative, similar to a bill or referendum, generally refers to the specific statutory or constitutional section that is to be amended or repealed. An initiative usually goes further to provide the specific language within the statutory section or constitutional provision that will be amended or repealed. The language in the proposed measure is unclear concerning where the new language would be placed. Is it the proponents' intent to add an additional subsection (9) to section 22-1-120, C.R.S., or is it the proponents' intent to add an entirely new section (22-1-126) to article 1 of title 22, C.R.S.?

For instance, the standard format for adding a new subsection to section 22-1-120, C.R.S., would read:

SECTION 1. 22-1-120, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

22-1-120. Rights of free expression for public school students. (9) [Begin your language here.]

The standard format for adding a new section to article 1 of title 22, C.R.S., would read:

SECTION 1. Article 1 of title 22, Colorado Revised Statutes, is amended BY THE

ADDITION OF A NEW SECTION to read:

22-1-126. Time for private meditation in public schools. [Begin your language here.]

Would the proponents consider further clarifying the constitutional or statutory sections that are to be amended, repealed, or created by the proposed measure?

Substantive questions:

1. The proponents' proposal appears to intertwine religion and the public school system through the five-minute period called "Private Meditation" during which the "student can invoke private or group prayer or have personal meditation and reflection time.". The First Amendment to the Constitution of the United States requires the separation of church and state, stating, in part, that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof...".

In interpreting the Establishment Clause of the First Amendment, the United States Supreme Court has ruled that, for a statute to be valid under the Establishment Clause, it must: (1) have a secular purpose, (2) have a primary or secondary purpose that neither advances nor inhibits religion, and (3) not foster an "excessive government entanglement with religion". All three prongs of this test must be met for the statute to be constitutional. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Several other states' laws similar to the proponents' proposal have been struck down as being unconstitutional, although some states' statutes referring strictly to time for "reflection" or "meditation" or similar secular activities have been upheld. How would the proponents interpret the purpose and constitutionality of their proposal in light of the Establishment Clause of the First Amendment and Supreme Court and circuit court decisions on similar "moment of silence" statutes?

2. The proponents state that the "Private Meditation" would not be led by a teacher or school staff member. If so, how do the proponents envision the five-minute period would be monitored and enforced?
3. The proponents' proposal provides that, if passed, the measure would become effective beginning with the 2009 calendar year rather than the 2009-2010 school year. Have the proponents considered whether this would be an adequate amount of time for schools and school districts to establish policies to implement the measure, given that the election in which this proposed initiative would be included on the ballot will be held in November 2008? Would the proponents consider changing the effective date of the initiative to the 2009-2010 school year?
4. The proposal as submitted includes language in paragraphs (a), (b), and (c). Is it the proponents' intent that the language in those paragraphs would be included as part of the statutory language specified in the first paragraph of the proposal? Or is the language in those three paragraphs merely a statement of the proponents' intent regarding implementation of the measure and would not be included in the ballot measure? Would the proponents consider clarifying this through use of small caps for all new statutory language (see

Technical Question (3)(b) in the January 5, 2007, memorandum)?

5. Paragraph (a) states that the measure "would be perpetual throughout all Colorado schools", literally meaning "lasting for eternity". What do the proponents mean by this statement? Because the proposed initiative amends a statute, the General Assembly has constitutional authority to change or repeal the measure through passage of a bill by a majority vote at any time, making the use of the word "perpetual" problematic.