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## MEMORANDUM

**TO:** D'Arcy Straub and Gene Straub

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** September 24, 2015

**SUBJECT:** Proposed Initiative Measure 2015-16 #41, 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.

An earlier version of this proposed initiative, proposed initiative 2015-16 #25, was the subject of a memorandum dated July 16, 2015. Proposed initiative 2015-16 #25 was discussed at a public meeting on July 16, 2015. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, 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 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 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 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 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 would recognize it as a civil union.

9. To state that the judicial branch, executive branch, and the state and local governments of Colorado would not recognize a marriage established outside the state of Colorado as a marriage but would recognize it as a civil union.
10. 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.
11. 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 or 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.

## **Substantive Comments and Questions**

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

1. Subsection (1) of the measure includes four purposes and findings, and subsection (2) contains the substantive or operative text of the measure. Is it the intent of the proponents that the purposes and findings in subsection (1) would aid the courts, the state, and local governments in interpreting the intent of subsection (2)?
2. Since the United States Supreme Court held in *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015), that same-sex couples have a fundamental right to marry and this measure seems to be changing the availability of marriage in Colorado, is the measure contrary to what the Supreme Court has said about the fundamental right to marry? What is the purpose of subsection (1) (A) when it states 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"? After *Obergefell*, isn't that the case now? How do the provisions of subsections (2) and (3) meet the purpose stated in subsection (1) (A)?
3. In subsection (1) (B) of the measure, what do the proponents mean by the phrase "various religious authorities"? How does subsection (1) (B) aid in the interpretation of the measure?
4. What is the intent of subsection (1) (C) which states that Colorado laws should be neutral on the definition of marriage?

5. How does subsection (1) (D) aid in the interpretation of the measure?
6. Subsection (2) (A) refers to protecting individual liberty by limiting government authority to govern the union of a couple. The measure says, "The individual liberty to define a marriage according to a person's individual beliefs shall not be abridged by the state or a local government prescribing or recognizing any law that implicitly or explicitly defines the word 'marriage'." This sentence appears to have two main concepts—an expression that the government should not abridge the individual liberty of a person to define marriage according to the person's individual beliefs and a requirement that the government should not prescribe or recognize any law that implicitly or explicitly defines the word "marriage". As a matter of drafting, it would be clearer if these two concepts were expressed in two separate sentences and written in active voice.
7. What do the proponents mean by the phrase "individual liberty to define a marriage according to a person's individual beliefs"? Would it be more accurate to say that individuals have the right to hold individual beliefs about marriage? What is the legal basis for saying that individuals have an individual liberty right to define "marriage"?
8. If the measure passes and people can define a marriage according to their own individual beliefs, who would be authorized to perform a marriage ceremony?
  - a. Would a judge or any other governmental official be able to perform or solemnize a marriage ceremony? Would there no longer be secular marriages at the court house?
  - b. If the only officiants for a marriage ceremony would be representatives of a religious faith or a particular religion, is the measure denying nonreligious couples the right to be married? Would this be an infringement of those individuals' liberty and expression?
9. Is it the proponents' intent to eliminate all local laws that define marriage or recognize marriage? What types of local laws would be impacted by subsection (2) (A)?
10. Do the proponents believe that the language in subsection (2) (A), which refers to the state or a local government not prescribing or recognizing any law that implicitly or explicitly defines the word "marriage", will prohibit a county clerk and recorder from issuing a marriage license on or after the effective date of this measure? As a drafting practice, the measure would be easier to understand if this prohibition was directly stated. By prohibiting a state or local government from "implicitly or explicitly defining" the word "marriage", is it the intent of

the proponents to eliminate the right of individuals to enter into a civil marriage in Colorado and to eliminate the right of individuals who may have been validly married in another jurisdiction to have their marriages recognized in Colorado? If so, that result may not be achieved by the indirect method of only addressing the "definition" of marriage. A court interpreting this measure may view the language more narrowly and only apply it to statutory or constitutional definitions and may not interpret the measure as eliminating civil marriages altogether. Similarly, by referring to prohibiting laws that define "marriage", a county clerk and recorder may interpret the measure as only applying to laws defining marriage and may not interpret the measure as preventing the clerks and recorders from issuing a marriage license. By narrowing the measure to prohibiting defining "marriage" implicitly or explicitly and by not directly stating the prohibited conduct in the measure, the measure may not actually be interpreted with the result the proponents have previously indicated that they want to achieve.

11. What do the proponents mean in subsection (2) (B) by the words "any administrative agency"?
12. To avoid ambiguity, it is standard drafting practice to use the same terms consistently throughout a measure unless the drafters intend different meanings to be attributed to the language. In subsection (2) (C), the measure refers to "[t]he judiciary, the executive, and any other governmental authority of the state or a local government" recognizing marriages. In the context of recognizing marriages, the phrase "any other governmental authority of the state or a local government" seems to describe an executive branch agency. If that is what the proponents mean, it would be clearer and would avoid ambiguity to say that "[t]he judicial branch and the executive branch of the state or of a local government shall recognize...."
13. Subsection (2) (C) states that the judiciary, the executive, and any other governmental authority of the state or a local government shall *recognize* a marriage established in the state of Colorado *before* the effective date of this section as a civil union. Do the proponents mean that these governmental entities must "treat" a marriage as a civil union? Why did the proponents use the word "recognize" in the measure?
14. Subsection (2) (C) is similar to the previous measure #25 in that it appears to state a policy that marriages formed in Colorado *before* the measure would now be treated and *recognized* as civil unions.

- a. Is it the intent of the proponents that Colorado courts and executive branch agencies would no longer *recognize* any marriages, including a marriage between a same-sex couple as well as a marriage between an opposite-sex couple?
  - b. Would all marriages entered into under *prior* Colorado law now be considered a civil union?
  - c. Is it the intent of the proponents that Colorado courts and executive branch agencies would not recognize a marriage validly entered into in another jurisdiction, such as for wrongful death or probate cases or dissolution of marriage?
15. Is it the intent of the proponents that if same-sex couples or opposite-sex couples who were validly married in another state or in another country moved to Colorado, those marriages would be treated by Colorado courts as civil unions? If so, how does this comply with the Full, Faith, and Credit Clause of the U.S. 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 the legal rulings and legal actions, including marriages and marriage licenses issued by other states?
16. What do the proponents believe will be the effect of the measure on persons in Colorado who can only receive a civil union license and later move out of state to a jurisdiction that does not recognize civil unions? Would those individuals be unable to avail themselves of the laws of the other jurisdiction for, by example, inheritance or wrongful death or dissolution of marriage?
17. Subsection (2) (C) appears to have a retroactive effect on marriages that were performed in Colorado or outside of Colorado prior to the effective date of the proposed measure by providing that those marriages will be recognized and treated as civil unions after the passage of the measure. Have the proponents considered whether a retroactive application may conflict with constitutional principles of due process if the application of this measure deprives a person who was legally married of a vested right or benefit based on the status of being married under the law?
18. What is intended by the first phrase of subsection (3) which states that the effect of this section is to secure for the people the individual liberty to define a marriage according to their own beliefs?
19. Subsection (3) appears to be a statement of construction to guide the courts and others in interpreting the effect of the measure. Subsection (3) says that

- "nothing within this section shall be construed to increase or decrease a legal right, protection, or benefit owed *to* an individual through an operation of the law" (*emphasis added*). How do the proponents intend that the phrase "increase or decrease a legal right, protection, or benefit owed to an individual through an operation of the law" will guide the courts and others in interpreting and applying this measure? Can the proponents articulate what legal rights, protections, or benefits are affected? What do the proponents mean by "an operation of the law"? Do the proponents mean how the courts would interpret the law and apply it in the future if this measure were to pass? By referring to "owed to an individual", are the proponents meaning a right, protection, or benefit that is owed to an individual because that individual was legally married under laws in effect prior to this measure? How can this construction be applied by other jurisdictions to which a couple may move in the future?
20. Subsection (3) also states that "nothing within this section shall 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" (*emphasis added*). What do the proponents mean by "increase or decrease a legal obligation"? To what legal obligations are the proponents referring? To whom is the legal obligation owed? What do the proponents mean by the phrase "through an operation of the law"?
21. What is the effect of the measure on individuals' rights and obligations under federal law? For example, what is the effect on the ability of married persons to file joint individual income tax returns or have survivor benefits under social security? Will couples in Colorado no longer be able to avail themselves of these benefits? What about Colorado laws based on federal law?
22. What is the effect of the measure on the rights of a person who was validly married in Colorado prior to the effective date of this measure and who wants to establish that he or she is a surviving spouse in order to obtain legal rights based upon the marriage? If the marriage is to be treated as a civil union, how can the surviving spouse establish that he or she is eligible for benefits that require the person to have been married? If the original marriage certificate has been lost, can a county clerk and recorder issue a certified copy of a marriage certificate for a marriage entered into in Colorado before the proposed measure takes effect?
23. A plain meaning interpretation of subsection (3) may be that the measure does not affect a legal right, protection, or benefit owed to a person who was legally married prior to the passage of this measure. However, subsection (2) (C) of the

measure appears to eliminate a married person's legal right under Colorado law to continue to be treated as a married person. Subsection (2) (C) could be interpreted to mean that a person who is legally married under the laws of Colorado prior to this measure would no longer have the right to have his or her marriage recognized as a marriage but would instead have it recognized as a civil union.

- a. How is subsection (2) (C), which appears to retroactively eliminate a married person's legal right to be married under Colorado law, to be read with subsection (3)? A person who is already legally married under Colorado law could argue that his or her legal rights to be treated as a married person are being decreased or negatively affected by this measure when his or her marriage is treated in the future as a civil union. How should the statement of construction in subsection (3) be reconciled with subsection (2) (C)?
  - b. Subsection (2) (C) says that a person who is legally married in another state would not have their marriage recognized as a marriage under Colorado laws, but instead it would be recognized as a civil union. A person who is legally married in another state could argue that his or her legal rights are being decreased or negatively affected if that marriage is treated by Colorado as a civil union and not a marriage. How should the statement of construction in subsection (3) be reconciled with subsection (2) (C)?
  - c. If the effect of this measure is to eliminate the right of any couple to obtain a marriage license from the state, how can the measure be reconciled with the U.S. Supreme Court's ruling in *Obergefell* that same-sex couples have a fundamental right to marry and have the right to obtain a marriage license? How can the measure be reconciled with other U.S. Supreme Court cases on the fundamental right to marry? How should the statements of construction in subsection (3) be reconciled with subsection (2) (C)?
  - d. What is the intended effect of subsection (3) on an individual's legal rights, protections, or benefits and on an individual's legal obligations?
24. What effect do the proponents believe the measure would have on existing civil unions? What do the proponents believe the General Assembly should do with the current law on civil unions?

25. Do the proponents intend for the General Assembly to repeal or amend laws that address marriage?
26. 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?
27. Since the measure does not have a specified effective date, if approved by voters, it appears the measure would become effective upon proclamation of the governor as outlined in Article V, Section 1 (4) of the Colorado Constitution. Would the proponents consider specifying an effective date to allow for implementing legislation to be enacted by the General Assembly?

## **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. In subsections (1) and (2), all paragraph letters should be shown in lowercase letters. For example, instead of "(A)", use "(a)".
2. In subsection (1) (A), the word "applicability" in the heading should be initial capitalized.
3. In subsection (1) (B), if the proponents intend to make two findings and declarations in that sentence, the comma after the word "authorities" should be deleted. In addition, in the same sentence, the word "that" should be inserted between "and" and "many".
4. If the intent of subsection (3) is to have two parallel statements of construction, it would aid in the understanding of subsection (3) to put a colon after the phrase "nothing within this section shall be construed" and then to insert an (a) and a (b) before both clauses. In addition, the comma between the words "law" and "or" should be changed to a semicolon.