

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157

EMAIL: OLLS.GA@STATE.CO.US

MEMORANDUM (2)(D)(iii)¹

TO: Statutory Revision Committee

FROM: Jane M. Ritter, Office of Legislative Legal Services

DATE: August 11, 2017

SUBJECT: Unconstitutional provisions related to same-sex marriages in section 14-2-104, C.R.S.

Summary and Analysis

This matter was brought to the staff's attention through a search of the Colorado Revised Statutes for references to statutory provisions that have been found unconstitutional by the Colorado or United States Supreme Court.

In this case, the United States Supreme Court ruled in *Obergefell v. Hodges*² that the right to marry is a fundamental right and that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.

Section 14-2-104 (1)(b), C.R.S., states that a marriage in Colorado is only valid if it is between one man and one woman. Subsection (2) further states that a marriage performed outside of Colorado is not valid if it is not performed between one man and

¹ This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS) in the course of its statutory duty to provide staff assistance to the Statutory Revision Committee (SRC). It does not represent an official legal position of the OLLS, SRC, General Assembly, or the state of Colorado, and is not binding on the members of the SRC. This memorandum is intended for use in the legislative process and as information to assist the SRC in the performance of its legislative duties.

² *Obergefell v. Hodges*, 576 U.S. ___ (2015). Due to the length of the opinion, *Obergefell* is not attached here. It is available online at https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

one woman. Finally, subsection (3) refers to an otherwise valid common law marriage between one man and one woman:

14-2-104. Formalities. (1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if:

- (a) It is licensed, solemnized, and registered as provided in this part 1; and
- (b) It is only between one man and one woman.

(2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state.

(3) Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman:

- (a) Entered into prior to September 1, 2006; or
- (b) Entered into on or after September 1, 2006, that complies with section 14-2-109.5.

Statutory Charge³

Amending section 14-2-104, C.R.S., meets the Committee's statutory charge to remedy a defective section of law – one that has been declared unconstitutional by the United States Supreme Court.

Recommendation/Proposed Bill

Should the Statutory Revision Committee accept staff recommendation to amend the statute to comply with the *Obergefell* decision, a draft bill is attached⁴ that demonstrates the change. Additionally, staff would like to consult with other experts regarding the effect of this change and, more generally, the alignment of this statute with the *Obergefell* decision.

³ The Statutory Revision Committee is charged with "[making] an ongoing examination of the statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms" and recommending "legislation annually to effect such changes in the law as it deems necessary in order to modify or eliminate antiquated, redundant, or contradictory rules of law and to bring the law of this state into harmony with modern conditions". § 2-3-902 (1), C.R.S. In addition, the Committee "shall propose legislation only to streamline, reduce, or repeal provisions of the Colorado Revised Statutes." § 2-3-902 (3), C.R.S.

⁴ See **Addendum A**.

Addendum A
Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

BILL (2)(I)(iii)

Temporary storage location: S:\LLS\2018A\Bills\Pre-Draft\18-SRC same sex marriage.wpd

LLS NO. 18-####.## Jane Ritter x4342

COMMITTEE BILL

Statutory Revision Committee

A BILL FOR AN ACT

101 **CONCERNING AMENDING STATUTORY PROVISIONS RELATING TO**
102 **SAME-SEX MARRIAGES THAT WERE RULED UNCONSTITUTIONAL**
103 **BY THE UNITED STATES SUPREME COURT.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

Statutory Revision Committee. The bill amends provisions of statutes related to same-sex marriages to reflect a 2015 decision by the United States supreme court that ruled that the fourteenth amendment requires a state to license a marriage between 2 people of the same sex

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

and to recognize a marriage between 2 people of the same sex when their marriage was lawfully licensed and performed out of state.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **amend** 14-2-104 as
3 follows:

4 **14-2-104. Formalities.** (1) Except as otherwise provided in
5 subsection (3) of this section, a marriage is valid in this state if:

6 (a) It is licensed, solemnized, and registered as provided in this
7 part 1; and

8 (b) It is ~~only~~ between one man and one woman OR TWO PERSONS
9 OF THE SAME SEX.

10 (2) Notwithstanding the provisions of section 14-2-112, any
11 marriage contracted within or outside this state that does not satisfy
12 ~~paragraph (b) of subsection (1)~~ SUBSECTION (1)(b) of this section ~~shall~~ IS
13 not be recognized as valid in this state.

14 (3) Nothing in this section ~~shall be~~ IS deemed to repeal or render
15 invalid any otherwise valid common law marriage between one man and
16 one woman OR TWO PERSONS OF THE SAME SEX:

17 (a) Entered into prior to September 1, 2006; or

18 (b) Entered into on or after September 1, 2006, that complies with
19 section 14-2-109.5.

20 **SECTION 2. Act subject to petition - effective date.** This act
21 takes effect at 12:01 a.m. on the day following the expiration of the
22 ninety-day period after final adjournment of the general assembly (August
23 ■, 2018, if adjournment sine die is on May ■, 2018); except that, if a
24 referendum petition is filed pursuant to section 1 (3) of article V of the
25 state constitution against this act or an item, section, or part of this act

1 within such period, then the act, item, section, or part will not take effect
2 unless approved by the people at the general election to be held in
3 November 2018 and, in such case, will take effect on the date of the
4 official declaration of the vote thereon by the governor.

