

Amendment 46
Discrimination and Preferential Treatment by Governments

1 **Amendment 46 proposes amending the Colorado Constitution to:**

- 2 ♦ prohibit Colorado governments from discriminating against or granting
3 preferential treatment to any individual or group on the basis of race,
4 sex, color, ethnicity, or national origin in public employment, public
5 education, or public contracting;
- 6 ♦ make exceptions for federal programs, existing court orders or other
7 legally binding agreements, and bona fide qualifications based on sex;
8 and
- 9 ♦ provide the same remedies that are available for violations of Colorado
10 anti-discrimination law.

11 **Summary and Analysis**

12 Discrimination is generally defined as granting or denying privileges to an
13 individual based on certain characteristics such as race, age, or sex. The term
14 preferential treatment is commonly used to refer to policies that target historically
15 disadvantaged groups in order to remedy past and current discrimination or to
16 increase diversity.

17 The Equal Protection Clause of the U.S. Constitution protects against unequal
18 treatment of individuals by governments based on such characteristics as race and
19 gender. Currently, governments may consider race and gender when choosing
20 among qualified individuals or firms as long as they do so under a narrowly tailored
21 plan to correct discrimination or promote diversity. The use of quotas and point
22 systems, particularly in college admissions practices, is not allowed.

23 ***Provisions of Amendment 46.*** Amendment 46 adds language to the Colorado
24 Constitution that prohibits discrimination or preferential treatment in the areas of public
25 employment, public education, and public contracting on the basis of race, sex, color,
26 ethnicity, or national origin. The terms "discrimination" and "preferential treatment" are
27 not defined in the measure or in current law.

28 There are various government programs and agencies in Colorado that target
29 assistance to a particular race, gender, or ethnicity that may be affected by
30 Amendment 46. Examples of assistance include programs to help individuals obtain
31 financial aid for college, develop professional skills, or start a business. Private
32 organizations and programs are not affected by the measure.

1 **Exceptions in Amendment 46.** Amendment 46 does not affect the following:

- 2 ♦ *Action required to receive federal funding.* For example, public schools
3 must ensure that girls receive the same access to school athletics
4 programs as boys in order to receive federal funding.
- 5 ♦ *Existing court orders and legally binding agreements that provide a*
6 *remedy for discrimination.* The City and County of Denver, for instance,
7 is under a court order that governs hiring practices for police officers to
8 achieve diversity in the workforce.
- 9 ♦ *Bona fide qualifications based on sex.* In the area of privacy, hiring a
10 female, as opposed to a male, prison guard for the purpose of
11 searching female inmates is an example of a bona fide qualification for
12 public employment based on sex. Amendment 46 expands this
13 exemption to the areas of public education and public contracting.

14 **Remedies for discriminatory practices and preferential treatment.** The
15 measure requires that the remedies that exist for Colorado anti-discrimination law be
16 used for violations of Amendment 46. Additionally, the remedies must be the same
17 regardless of the injured party's race, sex, color, ethnicity, or national origin. Most
18 remedies that exist today relate to employment law. Examples include paying lost
19 wages, hiring or reinstating employees, and orders to stop discriminatory practices.

20 **Arguments For**

21 1) Amendment 46 treats everyone equally in public employment, education, and
22 contracting. Discrimination occurs when people are given preference based on their
23 race or gender rather than their qualifications. Preferential treatment leads to
24 resentment and treats women and minorities as if they cannot succeed on their merits.
25 Furthermore, racial classifications are divisive for society; preferencing one group over
26 another based on race does not promote equal and fair treatment for everyone.

27 2) The idea of giving preference to an individual based on race or gender is
28 outdated for today's society. Race, color, ethnicity, and national origin are becoming
29 more difficult to define as more Americans identify themselves as multi-racial.
30 Amendment 46 aligns state policies with the modern world.

31 **Arguments Against**

32 1) Everyone deserves an opportunity to succeed; however, discrimination still
33 exists in today's society. Programs based on race and gender provide greater access
34 to employment, education, and business opportunities for historically disadvantaged
35 groups. These programs have been successful in promoting diversity and correcting
36 past discrimination, but equality has not yet been achieved. Women and minorities
37 earn less, are under-represented in education and top-paying fields, and receive fewer
38 public contracting dollars when compared to non-minority or male groups.

39 2) The impact of this measure is uncertain and potentially far-reaching.
40 Amendment 46 does not define "preferential treatment" or "discrimination," leaving
41 these terms open to interpretation and lawsuits funded at taxpayers' expense. Entities

1 that do not have sufficient financial resources for a legal challenge may simply
2 discontinue offering programs that appear to target assistance to specific populations.

3 **Estimate of Fiscal Impact**

4 Public colleges and universities may have costs to implement Amendment 46 and
5 to conform their current programs and policies with the amendment. For instance, the
6 University of Colorado System expects to spend \$100,000 to study the impact of the
7 amendment on its policies and programs.