

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 existing
10 Colorado anti-discrimination law.

11 **Summary and Analysis**

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

16 The U.S. Constitution protects individuals against unequal treatment by
17 governments based on such characteristics as race and gender. Currently,
18 governments may consider race and gender when choosing among qualified
19 individuals or firms as long as they do so under a narrowly tailored plan to correct
20 discrimination or promote diversity. The use of quotas and point systems, particularly
21 in public college admissions practices, is rarely allowed.

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

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

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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) Discrimination still exists in today's society, which deprives some individuals of
33 an opportunity to succeed. Women and minorities earn less, are under-represented in
34 top-paying fields, and receive fewer public contracting dollars when compared to
35 non-minority or male groups. Programs that consider race and gender provide greater
36 access to employment, education, and business opportunities for historically

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1 disadvantaged groups. These programs have been successful in promoting diversity
2 and correcting past discrimination, but equality has not yet been achieved.

3 2) The impact of this measure is uncertain and potentially far-reaching.
4 Amendment 46 does not define "preferential treatment" or "discrimination," leaving
5 these terms open to interpretation and lawsuits funded at taxpayers' expense. Entities
6 that do not have sufficient financial resources for a legal challenge may simply
7 discontinue offering programs that appear to target assistance to specific populations.

8 **Estimate of Fiscal Impact**

9 The impact on state and local revenues or spending cannot be estimated because
10 the number of programs affected is unknown. Government agencies, including public
11 colleges and universities, may have costs and/or savings to conform current programs
12 and policies with the measure. Costs that may result from potential legal challenges
13 to the measure cannot be estimated.