

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.

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 non-
35 minority or male groups. Programs that consider race and gender provide greater
36 access to employment, education, and business opportunities for historically
37 disadvantaged groups. These programs that have been successful in promoting
38 diversity and correcting past discrimination, but equality has not yet been achieved.

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

6 **Estimate of Fiscal Impact**

7 The impact on state and local revenues or spending cannot be estimated because
8 the number of programs affected is unknown. Government agencies, including public
9 colleges and universities, may have costs and/or savings to conform current programs
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14 used to refer to policies that assist historically disadvantaged groups in order to
15 remedy past and current discrimination or to increase diversity.~~ THE PHRASE
16 PREFERENTIAL TREATMENT IS RELATIVELY NEW AND ONLY JUST NOW BEGINNING TO BE
17 CONSTRUED IN CALIFORNIA. NOBODY KNOWS HOW THE PHRASE WILL BE APPLIED BY
18 COURTS IN COLORADO TO EXISTING PROGRAMS.

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20 governments based on such characteristics as race and gender. Currently,
21 governments may consider race and gender when choosing among qualified
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**ROBERTO CORRADA'S COMMENTS ON LAST DRAFT OF
AMENDMENT 46**

**Amendment #46
Discrimination and Preferential Treatment by Governments**

August 11, 2008

Regarding 3rd Draft, No. 46:

I have a few remaining objections that I've stated before but have not been implemented, however, I will object here only to Legislative Counsel's attempt to define preferential treatment when the proponents repeatedly refused to do so before the Title Board. The proponents chose deliberately and strategically to bypass a definition so that they could achieve an advantage at the Title Board and before the Colorado Supreme Court. If they had defined the phrase in the official legal proceedings on the Initiative, they would have been open to even perhaps a fatal attack. They chose not to define the phrase at any stage, and were vehement about refusing to define the phrase. It is not fair for the Legislative Counsel's Office to now insert itself here. The proponents made their choice, and the chips should fall where they may before the electorate. There is no "common usage" of the words preferential treatment, and so that statement at line 14 should be omitted. The proponents have not distinguished preferential treatment from affirmative action, and that remains a problem for them. It is wrong for them to deny a definition in legal proceedings and then waffle on the term publicly.

The Summary and Analysis should simply say that the phrase preferential treatment is a relatively new phrase that is only just now beginning to be construed in California. Nobody knows how the phrase will be applied by courts in Colorado to existing programs.

Thanks,

Roberto L. Corrada
Professor of Law

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27 There are various government programs and agencies in Colorado that target
28 assistance to a particular race, gender, or ethnicity THAT MAY BE REQUIRED. IF
29 AMENDMENT 46 IS PASSED, SUCH PROGRAMS AND AGENCIES CAN CONTINUE TO EXIST AND
30 PROVIDE AASSISTANCE, BUT WILL BE REQUIRED TO ADMINISTER SUCH ASSISTANCE WITHOUT
31 REGARD TO RACE, GENDER, OR ETHNICITY OF APPLICANTS AND PARTICIPANTS. ~~that may be~~
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**JESSICA PECK CORRY'S COMMENTS ON LAST DRAFT OF
AMENDMENT 46**

**Amendment #46
Discrimination and Preferential Treatment by Governments**

August 13, 2008

To: Jennifer Moe Jennifer.moe@state.co.us
Legislative Council Amendment 46 Drafting Team

CC: Robin Jones <robin.jones@state.co.us>
Christie Lee christie.lee@state.co.us
Sara McPhee Sara.McPhee@state.co.us
Debbie Grunlien <debbie.grunlien@state.co.us>

Sent via e-mail on August 13, 2008

Dear Ms. Moe,

Thank you for meeting with Rob and me yesterday to discuss our ongoing concerns about the drafting process for Amendment 46 and Initiative 82. As requested, here are our final written comments concerning both initiatives.

Below, we have divided our final analysis of the three proposed drafts into three individual categories. First, we have responded concerning the draft version of Amendment 46 that assumes Initiative 82 is not on the ballot. You received our latest comments on that version late last week. The only addition to our written comments can be seen below, reflecting progress from our meeting yesterday concerning the fiscal note.

Second, we have responded (building on our concerns voiced in our written response to the above version last week, and as also expressed in our meeting yesterday) concerning the version of Amendment 46 that assumes Initiative 82 is on the ballot.

Third, we have responded (again building on concerns already expressed) concerning Initiative 82, should it be certified for the ballot.

Please let me know if you have any questions. I can be reached by phone at 720-628-5756 or by email at JPC@coloradocri.org. Thank you for your time.

Sincerely,

Jessica Peck Corry

Amendment 46 bluebook language (assuming Initiative 82 is not on the ballot)

Please consider this suggested change in addition to the changes we advocated in our written comments last week.

Page 3, Line 4: Based on our understanding from yesterday’s meeting, we are assuming that reference to the university’s suggested \$100,000 fiscal impact will be struck because it is both argumentative and speculative. Similarly, we will accept that our projection of significant projected cost savings will be struck because it based on the assumption that the university would cut administrative positions upon passage of Amendment 46. While the university would be morally obligated to cut positions tied to administering race and gender-based programming, we cannot definitely prove that the university would do so.

We propose the following language under “Estimate of Fiscal Impact,” striking lines 4 to 7, and instead reading: “Public colleges and universities, as well as public agencies, may have costs and cost savings associated with implementing Amendment 46.”

August 8, 2008

To: Christie Lee christie.lee@state.co.us
Legislative Council Amendment 46 Drafting Team

CC: Robin Jones <robin.jones@state.co.us>
Jennifer Moe jennifer.moe@state.co.us
Sara McPhee Sara.McPhee@state.co.us
Debbie Grunlien <debbie.grunlien@state.co.us>

Sent via e-mail on August 8, 2008

Dear Ms. Lee,

We are very concerned about the joint bluebook analysis, as presented, of Amendment 46 and Initiative 82. Given that these two initiatives have drastically different purposes (Amendment 46 seeks to abolish racial and gender preferences while Initiative 82 seeks to preserve them) we believe that your analysis, as presented, may bias and confuse voters.

We would like to see both initiatives presented individually in the bluebook, separate from one other, to be considered on the basis of their own merits. While Initiative 82's supporters want people to believe that their effort only serves to clarify the language of Amendment 46, nothing could be further from the truth. If

people want to maintain race and gender preferences, they should vote for 82. If they want to abolish such preferences, they should vote Amendment 46.

Additionally, we have spoken with several election law attorneys, none of whom can recall ever seeing a joint presentation of two competing initiatives. We are concerned that combining these initiatives may set a damaging precedent.

I look forward to speaking more with you on Tuesday about this. Please let me know if 9 a.m. works for you and the rest of the drafting team.

Below, you will see our third draft analysis of Amendment 46. We are generally satisfied with its content, with a few stated and important exceptions. We believe this document is much closer toward achieving the goal of voter education than the combined analysis referenced above.

Please contact me with any further questions. I can be reached by phone at 720-628-5756 or via email at JPC@ColoradoCRI.org. On behalf of our campaign, thank you once again for your efforts to help voters understand this very important initiative.

Sincerely,

Jessica Peck Corry
Executive Director
Colorado Civil Rights Initiative

Page 1, Line 9: Prior to “Colorado”, the word “existing” should be added.

Page 1, Lines 28-32: To be complete, this section should include the following: “There are various government programs and agencies in Colorado that target assistance to a particular race, gender or ethnicity that may be required. If Amendment 46 is passed, such programs and agencies can continue to exist and provide assistance, but will be required to administer such assistance without regard to race, gender, or ethnicity of applicants and participants. Examples of assistance include programs to help individuals obtain financial aid for college, develop professional skills, or start a business. Private organizations and programs are not affected by measure.”

Page 3, Line 3 (Fiscal Impact): This section is argumentative and not based in fact. We strongly argue that no costs are associated with removing race and gender restrictions from publicly financed education, contracting, or employment programs. University studies are optional and should not be listed as a definite cost.

In addition, this section excludes the analysis we sent Legislative Council previously concerning the fiscal impact of our proposed initiative. I have included below the information we sent to be included in this section. If Legislative Council excludes such analysis from the final draft, we would like to have a conversation

before such a decision is made. This information is crucial to helping voters understand the true impact of our initiative.

In other states where race and gender preference programs have ended (including California, Washington, and Michigan), taxpayers have experienced significant cost savings.

According to Justin Marion, author of “How Costly Is Affirmative Action? Government Contracting and California’s Proposition 209 (November 2006),” Proposition 209’s ban on preferences (passed by CA voters in 1996) resulted in the average bid submitted on state-funded projects falling between 3.1 and 5.6 percent in total costs relative to federally funded projects, for which preferences still applied.

[link: http://people.ucsc.edu/~marion/Papers/Prop209_nov2006.pdf].

Similarly, current taxpayer costs relating to the administration of preference programs at public Colorado universities, and for public employers and contracting agencies, would also benefit from increased efficiency and lower overhead. Currently, the University of Colorado at Boulder devotes more than \$20 million annually to its diversity efforts; an end of preferences would allow administrators to focus more on outreach programs and less on administering preference programs. For an analysis of the cost of diversity programs, please see a report I co-authored for the Independence Institute, titled “A Color Scheme: Questions Raised by Accounting and Business Practices within the University of Colorado at Boulder’s Multi-Million Dollar Diversity Administration (January 2008).”

[link: <http://www.i2i.org/articles/1-2007.pdf>]

**COLORADO LEAGUE OF WOMEN VOTERS' COMMENTS ON LAST
DRAFT OF AMENDMENT 46**

August 9, 2008

I think the 2nd draft with the comparisons does the best job of describing what Amendment 46 and Initiative 82 are proposing and the differences. The League of Women Voters of Colorado would prefer that draft to be used in the blue book.

Thanks for all the hard work you have done. It is a great service to the people of Colorado--

Alice Ramsey
VP Program League of Women Voters of Colorado
303-841-7839
alice@ramsisle.com

Last Draft as Mailed to Interested Parties

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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
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33 exists in today's society. Programs based on race and gender provide greater access
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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.

AMENDMENT 46
CONTACT LIST

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AMENDMENT 46
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Amendment 46
Discrimination and Preferential Treatment by Governments

1 **Ballot Title:** An amendment to the Colorado constitution concerning a prohibition
2 against discrimination by the state, and, in connection therewith, prohibiting the state
3 from discriminating against or granting preferential treatment to any individual or group
4 on the basis of race, sex, color, ethnicity, or national origin in the operation of public
5 employment, public education, or public contracting; allowing exceptions to the
6 prohibition when bona fide qualifications based on sex are reasonably necessary or when
7 action is necessary to establish or maintain eligibility for federal funds; preserving the
8 validity of court orders or consent decrees in effect at the time the measure becomes
9 effective; defining "state" to include the state of Colorado, agencies or departments of
10 the state, public institutions of higher education, political subdivisions, or governmental
11 instrumentalities of or within the state; and making portions of the measure found
12 invalid severable from the remainder of the measure.

13 **Text of Proposal:**

14 *Be it Enacted by the People of the State of Colorado:*

15 Article II of the constitution of the state of Colorado is amended by the addition of the
16 following section:

17 SECTION 31: NONDISCRIMINATION BY THE STATE

18 (1) THE STATE SHALL NOT DISCRIMINATE AGAINST, OR GRANT PREFERENTIAL
19 TREATMENT TO, ANY INDIVIDUAL OR GROUP ON THE BASIS OF RACE, SEX, COLOR,
20 ETHNICITY, OR NATIONAL ORIGIN IN THE OPERATION OF PUBLIC EMPLOYMENT, PUBLIC
21 EDUCATION, OR PUBLIC CONTRACTING.

22 (2) THIS SECTION SHALL APPLY ONLY TO ACTION TAKEN AFTER THE SECTION'S
23 EFFECTIVE DATE.

24 (3) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING BONA FIDE
25 QUALIFICATIONS BASED ON SEX THAT ARE REASONABLY NECESSARY TO THE NORMAL
26 OPERATION OF PUBLIC EMPLOYMENT, PUBLIC EDUCATION, OR PUBLIC CONTRACTING.

27 (4) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS INVALIDATING ANY COURT
28 ORDER OR CONSENT DECREE THAT IS IN FORCE AS OF THE EFFECTIVE DATE OF THIS
29 SECTION.

1 (5) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING ACTION THAT
2 MUST BE TAKEN TO ESTABLISH OR MAINTAIN ELIGIBILITY FOR ANY FEDERAL PROGRAM,
3 IF INELIGIBILITY WOULD RESULT IN A LOSS OF FEDERAL FUNDS TO THE STATE.

4 (6) FOR THE PURPOSES OF THIS SECTION, "STATE" SHALL INCLUDE, BUT NOT
5 NECESSARILY BE LIMITED TO, THE STATE OF COLORADO, ANY AGENCY OR DEPARTMENT
6 OF THE STATE, ANY PUBLIC INSTITUTION OF HIGHER EDUCATION, ANY POLITICAL
7 SUBDIVISION, OR ANY GOVERNMENTAL INSTRUMENTALITY OF OR WITHIN THE STATE.

8 (7) THE REMEDIES AVAILABLE FOR VIOLATIONS OF THIS SECTION SHALL BE THE SAME,
9 REGARDLESS OF THE INJURED PARTY'S RACE, SEX, COLOR, ETHNICITY, OR NATIONAL
10 ORIGIN, AS ARE OTHERWISE AVAILABLE FOR VIOLATIONS OF THEN-EXISTING COLORADO
11 ANTI-DISCRIMINATION LAW.

12 (8) THIS SECTION SHALL BE SELF-EXECUTING. IF ANY PART OF THIS SECTION IS FOUND
13 TO BE IN CONFLICT WITH FEDERAL LAW OR THE UNITED STATES CONSTITUTION, THE
14 SECTION SHALL BE IMPLEMENTED TO THE MAXIMUM EXTENT THAT FEDERAL LAW AND
15 THE UNITED STATES CONSTITUTION PERMIT. ANY PROVISION HELD INVALID SHALL BE
16 SEVERABLE FROM THE REMAINING PORTIONS OF THIS SECTION.