

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 qualifications based on sex; and
- 8 ♦ provide the same remedies that are available for violations of Colorado
9 anti-discrimination law.

10 **Summary and Analysis**

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

16 The Equal Protection Clause of the U.S. Constitution protects against unequal
17 treatment of individuals by governments based on such characteristics as race and
18 gender. Currently, governments may consider race and gender when choosing
19 among qualified individuals or firms as long as they do so under a narrowly tailored
20 plan to correct discrimination or promote diversity.

21 ***Provisions of Amendment 46.*** Amendment 46 adds language to the Colorado
22 Constitution that prohibits discrimination or preferential treatment in the areas of public
23 employment, public education, and public contracting on the basis of race, sex, color,
24 ethnicity, or national origin. The terms "discrimination" and "preferential treatment" are
25 not defined in the measure or in current law. There are various programs in Colorado
26 that target assistance to a particular race, gender, or ethnicity that may be affected by
27 Amendment 46. Examples of assistance include programs to help individuals obtain
28 financial aid for college, develop professional skills, or start a business.

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

- 30 ♦ *Action required to receive federal funding.* For example, the Colorado
31 Department of Transportation provides assistance to women- and
32 minority-owned businesses to compete for federally funded projects.
33 The state cannot receive federal highway money without the program.

1 ♦ *Existing court orders and legally binding agreements.* The City and
2 County of Denver, for instance, is under a court order that governs
3 hiring practices for police officers to achieve diversity in the workforce.

4 ♦ *Bona fide qualifications based on sex.* In the area of privacy, hiring a
5 female prison guard for the purpose of searching female inmates is an
6 example of a bona fide qualification based on sex.

7 ***Remedies for discriminatory practices and preferential treatment.*** The
8 measure requires that the same remedies for Colorado anti-discrimination law be used
9 for violations of Amendment 46. Most remedies that exist today relate to employment
10 law. Examples of remedies available under current employment law for discrimination
11 include paying lost wages, hiring or reinstating employees, and orders to stop
12 discriminatory practices. Additionally, the remedies available must be the same
13 regardless of the injured party's race, sex, color, ethnicity, or national origin.

14 **Arguments For**

15 1) Amendment 46 treats everyone equally in public employment, education, and
16 contracting. Discrimination occurs when people are given preference based on their
17 race or gender rather than their qualifications. Preferential treatment leads to
18 resentment and treats women and minorities as if they cannot succeed on their merits.
19 Amendment 46 provides a legal remedy for people who are discriminated against by
20 government.

21 2) The idea of giving preference to an individual based on race or gender is
22 outdated for today's society. Race, color, ethnicity, gender, and national origin are
23 becoming more difficult to define as more Americans identify themselves as
24 multi-racial. Furthermore, racial classifications are divisive for society; preferencing
25 one group over another based on race does not promote equal and fair treatment for
26 everyone.

27 **Arguments Against**

28 1) Programs based on race and gender provide greater access to employment,
29 education, and business opportunities for historically disadvantaged groups. These
30 programs have been successful in promoting diversity and correcting past
31 discrimination, but equality has not yet been achieved. Women and minorities earn
32 less, are under-represented in top-paying fields, and receive only a fraction of public
33 contracting dollars when compared to non-minority or male groups.

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

39 **Estimate of Fiscal Impact**