

Amendment 46
Discrimination and Preferential Treatment by Governments

1 Two ballot measures propose amending the Colorado Constitution to prohibit
2 discrimination and preferential treatment by Colorado governments: **Amendment 46,**
3 **discussed below**, and Amendment ?, discussed on page ?. Both measures:

- 4 ♦ prohibit Colorado governments from discriminating against or granting
5 preferential treatment to any individual or group on the basis of race,
6 sex, color, ethnicity, or national origin in public employment, public
7 education, or public contracting.

8 Amendment 46:

- 9 ♦ prohibits programs and policies that give preferential treatment based
10 on these characteristics.

11 Amendment ?:

- 12 ♦ prohibits programs and policies that use quotas or award points based
13 on these characteristics.

14 Voters may choose to vote for one, both, or neither of the measures. Neither
15 measure is dependent upon passage of the other. If both measures pass and conflict
16 in any way, the measure that receives the most votes prevails. If both measures pass
17 and do not conflict, then both will be implemented.

18 **Summary and Analysis**

19 Discrimination generally means granting or denying privileges to an individual
20 based on certain characteristics such as race, age, or sex. The term preferential
21 treatment is often used to refer to policies that target historically disadvantaged groups
22 in order to remedy past and current discrimination or to increase diversity.

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

29 Both Amendment 46 and Amendment ? add provisions in the Colorado
30 Constitution prohibiting discrimination and preferential treatment by Colorado
31 governments in the areas of public employment, public education, and public
32 contracting. Table 1 compares the two measures.

	Table 1. Provisions of Amendment 46 and Amendment ?		
	Issue	Amendment 46	Amendment ?
1 2 3 4 5 6 7	Does the measure prohibit <i>discrimination</i> and <i>preferential treatment</i> by government on the basis of race, sex, color, ethnicity, or national origin?	Yes	Yes
8 9 10 11	What government programs and policies does the measure ban?	Any preferential treatment based on race, sex, color, ethnicity, or national origin	Any use of quotas or point systems based on race, sex, color, ethnicity, or national origin
12 13 14 15	In what areas does the measure prohibit discrimination and preferential treatment?	Public employment, public education, and public contracting	Same as Amendment 46
16 17 18 19	What types of court-ordered remedies involving preferential treatment are permissible under the measure?	Court orders and other legally binding agreements currently in effect	Current and future court orders and other legally binding agreements
20 21 22 23	Can governments in Colorado participate in federal programs that require preferential treatment?	Yes, if funding depends on such preferential treatment	Yes, regardless of funding
24 25 26 27 28 29	Does the measure permit discrimination based on sex if it is necessary for a particular government's operation?	Yes, for public employment, public education, and public contracting	Yes, for public employment

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

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

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

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

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

19 **Arguments For Amendment 46**

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

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

30 **Arguments Against Amendment 46**

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

38 2) The impact of this measure is uncertain and potentially far-reaching.
39 Amendment 46 does not define "preferential treatment" or "discrimination," leaving
40 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 for Amendment 46**

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