

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

May 7, 2007

TO: Valery Orr and Linda Chavez

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #31, concerning Nondiscrimination by the State

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To prohibit the state from discriminating against any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
2. To prohibit the state from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment,

public education, or public contracting.

3. To make the amendment apply to action taken after the effective date of the amendment.
4. To exempt the state from the prohibitions against sex-based discrimination and sex-based preferential treatment in cases where bona fide qualifications based on sex are reasonably necessary to the normal operation of public employment, public education, or public contracting.
5. To exempt the state from the prohibitions of the amendment if the prohibitions would be interpreted to invalidate a court order or consent decree in force as of the effective date of the amendment.
6. To exempt the state from the prohibitions of the amendment if discriminatory or preferential treatment action must be taken to establish or maintain eligibility for a federal program, and if failure to take the action would result in the loss of federal funds to the state.
7. To define "state" to include, but not be limited to, the state of Colorado, an agency or department of the state, a public institution of higher education, a political subdivision of the state, or a governmental instrumentality of or within the state.
8. To allow the remedies available under current Colorado anti-discrimination law as the remedies available for violations of the amendment, regardless of the injured party's race, sex, color, ethnicity, or national origin.
9. To state that the amendment is self-executing, and that if any part of the amendment is found to conflict with federal law or the United States constitution, the amendment is to be implemented to the maximum extent allowed by such law or constitution.
10. To specify that any provision of the amendment that is held to be invalid is severable from the remaining portions of the amendment.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. To conform to standard drafting practices, would the proponents consider:
 - a. Putting the new constitutional language in SMALL CAPS?
 - b. Capitalizing only the initial letter of words that are proper nouns or the first word of a sentence, i.e., "United States Constitution" should be "United States constitution" and "State of Colorado" should be "state of Colorado"?
2. Section 2-4-102, Colorado Revised Statutes, in the rules of statutory construction, states that "The singular includes the plural, and the plural includes the singular.", therefore, in subsection (8) it is not necessary to say "part or parts of this section are found". Would the proponents consider changing the phrase to "part of this section is found"?

Substantive questions:

1. Section 1 (5.5) of article V of the state constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed amendment?
2. In subsection (1) of the proposed amendment, the proponents use the phrase "grant preferential treatment," but the phrase is not defined. What do the proponents mean by the phrase "grant preferential treatment"? Does "preferential treatment" mean granting a benefit to an individual or group based solely on the individual's race, sex, color, ethnicity, or national origin, or is does it mean providing an individual or group "additional points" in determining who receives a benefit? Does "preferential treatment" include a greater benefit provided to a person because of his or her race, sex, color, ethnicity, or national origin? Would the proponents consider defining the phrase? Is it the proponents' intent that the General Assembly would define the phrase by statute?
3. How would the proposal impact affirmative action plans currently in place? How would the proposal impact current affirmative action plans that were court-ordered or the result of a settlement decree or consent decree? Would the proposal prevent future court-ordered affirmative action plans, settlement decrees, or consent decrees? How would the measure impact cases filed prior to the effective date of the measure that are not resolved until after the effective date of the measure?
4. The amendment prohibits discrimination against or preferential treatment to any "group." What is meant by the term "group"? Does the term include only formally-organized groups

- or organizations? Does the term include groups of people that are connected only by virtue of a common trait, such as the same sex or race? Would the proponents consider defining the term? Do the proponents intend that the General Assembly would define "group" by statute?
5. The amendment prohibits discrimination or preferential treatment "in the operation of public employment, public education, or public contracting."
 - a. What is meant by the term "public employment"? Who is a "public" employer or employee? What types of entities do the proponents intent to include in the term "public employment"? Does it only include employment by the state of Colorado? Does it include employment by a city or county in the state? Does it apply to employment with a public authority like the Statewide Internet Portal Authority? Does it apply to employment with a special district, like the Scientific and Cultural Facilities District, the Regional Transportation District, or a water and sanitation district? Would the proponents consider defining the term "public employment? Do the proponents intend that the General Assembly would define this term by statute?
 - b. What is meant by the term "public education"? Does the term include tax-supported kindergarten through 12th grade schools including charter schools? Does the term include tax-supported higher education institutions? Would an educational institution that receives any federal, state, or local government support be included? Would a religious-based educational institution that receives some public funding be included? Would the proponents consider defining the term? Do the proponents intend that the General Assembly would define this term by statute?
 - c. What is meant by the term "public contracting"? Does the term include public contracts that give preference to Colorado commodities or services or to Colorado residents in bidding for state contracts as required by article 18 of title 8, Colorado Revised Statutes? Would the proponents consider defining the term? Do the proponents intend that the General Assembly would define this term by statute?
 6. In subsection (2), what do the proponents mean by the phrase "after the section's effective date"? Do the proponents intend the section to apply on the day after the effective date of the section, or the minute after the effective date of the section? In subsection (4), the phrase "as of the effective date of this section" is used. Do the proponents intend this phrase to have a different meaning than the phrase "after the section's effective date"? Would the proponents consider clarifying when the amendment takes effect? Would the proponents consider using consistent terminology with regard to the effective date of the section and the language in subsection (4)?
 7. Subsection (3) appears to allow an exemption from the prohibition against sex-based discrimination or preferential treatment when "bone fide qualifications based on sex . . . are reasonably necessary to the normal operation of public employment, public education, or public contracting." However, the measure does not define "bona fide qualifications based on sex," "reasonably necessary", and "normal operations".

- a. How do the proponents intend this exemption to operate? What circumstances would trigger this exemption? Who makes a determination that "bona fide qualifications based on sex" exist and how is that determination to be made? Do the proponents wish to clarify how the exemption would operate and what constitutes "bonafide qualifications based on sex" in the context of public employment, education, and contracting? Would the proponents consider defining the phrase? Do the proponents intend that the General Assembly would specify by statute how this exemption would operate?
 - b. What is meant by the phrase "reasonably necessary"? Would the proponents consider defining the phrase? Do the proponents intend that the General Assembly would define this phrase by statute?
 - c. What is meant by the phrase "normal operation"? Would the proponents consider defining the phrase? Do the proponents intend that the General Assembly would define this phrase by statute?
8. With regard to subsection (4), what is meant by the phrase "any court order or consent decree"? Do the proponents intend this language to apply only to court orders or consent decrees relating to a discrimination action or lawsuit? Would it apply to any type of court order or consent decree in any type of case? What does the phrase "in force as of the effective date of this section" mean? Does the provision apply to a court order or consent decree in effect on or before the effective date of the section? Would this provision apply to a court order or consent decree issued after the effective date of the section? Would the proponents consider clarifying the language and intent of this subsection (4)?
 9. Subsection (5) appears to allow an exemption from the prohibition against discrimination or preferential treatment if such action is necessary to establish or maintain eligibility for a federal program and if failure to act would result in a loss of federal funds to the state.
 - a. What is meant by "federal program"? Would the proponents consider clarifying the meaning and scope of this term?
 - b. What type of action would be exempted in order to establish or maintain eligibility for a federal program? Can the proponents explain how this exemption would operate?
 - c. What is meant by the phrase "loss of federal funds to the state"? Is the phrase limited to those programs for which the **state** receives federal funds? Would the phrase apply to a county that participates in a federal program and receives federal funds?
 10. Subsection (6) appears to define the term "state" to include the state, any agency or department thereof, any public institution of higher education, and political subdivision, and any governmental instrumentality of or within the state.

- a. What is meant by the term "political subdivision"? Does the term include: home rule cities? statutory cities? counties? cities and counties? special districts? governmental authorities? fire districts? school districts? state boards and commissions? Does the term include quasi-governmental organizations such as a housing authority? Would the proponents consider defining the term?
 - b. What is meant by the term "governmental instrumentality"? Would the proponents consider defining the term?
 - c. Would laws requiring a preference for Colorado labor in public works financed by public moneys, such as article 17 of title 8, Colorado Revised Statutes, be invalidated?
11. With regard to subsection (7), what is meant by "then-existing Colorado anti-discrimination law." Is it the proponents' intent that the remedies available under article 34 of title 24, Colorado Revised Statutes, would be available to persons alleging a violation of the measure? If the remedies under current antidiscrimination laws are modified in the future, would the modified remedies be available, or would complainants be limited to the remedies that are available under such laws as they existed on the date the measure becomes effective? Would the proponents consider clarifying this provision?
12. In subsection (8), what is meant by "self-executing"? Do the proponents intend that the General Assembly should not enact legislation to further clarify the measure in statute? Do the proponents intend to preclude the ability of the General Assembly to enact legislation to implement the measure?
13. In subsection (8), what is meant by the phrases "found to be in conflict" and "held invalid." Does this language require that a court determine that a portion of the measure is "in conflict" with federal law or is "invalid"? Could a public institution of higher education "hold" that a portion of the measure is invalid and that the institution is not obligated to comply with that "invalid" provision? Could a public employer determine that a provision conflicts with federal law and therefore inapplicable to the public employer? Who needs to make the determination that a provision is "in conflict with federal law" or is "invalid"?