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MEMORANDUM

March 19, 2008

TO: Mary Phillips, Clara Nevarez, and Andrew Paredes

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #82, concerning Discrimination/Preferential Treatment by Colorado Governments

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.

An earlier version of this initiative was the subject of a memorandum dated January 23, 2008, Proposal 2007-2008 #61, which was discussed at a hearing on January 28, 2008. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

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 define the term "preferential treatment" as adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin;
4. To specify that nothing in the new section of the constitution is to be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program;
5. To specify that nothing in the new section of the constitution is to be interpreted as invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case;
6. To define the term "state" to include, but not be limited to, the state of Colorado, any agency or department of the state, any public institution of higher education, any political subdivision, or any governmental instrumentality of or within the state.

Comments and Questions

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

Technical questions:

1. Would the proponents consider following standard drafting practices regarding capitalization, which provides that only the initial letter of words that are proper nouns or the first word of a sentence be capitalized? Specifically, would the proponents consider using a lower case letter for the first letter of the word "state" as it appears in subsections (1) and (4) of the proposal?
2. The proposal contains two definitions, one of which appears in the text of subsection (1), and the other appears in subsection (4), which defines the term for the entire new section of the constitution. Under standard drafting practices, defined terms that apply to an entire section of law are contained in a single subsection of the measure and are split into paragraphs in alphabetical order. For example, in the current proposal, the term "preferential treatment"

could be defined in subsection (4) with the definition of "state" as follows:

"(4) AS USED IN THIS SECTION:

(a) "PREFERENTIAL TREATMENT" MEANS

(b) "STATE" MEANS, BUT IS NOT LIMITED TO, "

Would the proponents consider placing all defined terms in a single location in the measure?

3. In subsection (3), is it the intent of the proponents that both "court" and "ordered" modify "remedy" as a compound modifier? If so, would the proponents consider placing a hyphen between "court" and "ordered" to create a compound modifier?

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 measure?
2. In subsection (1) of the measure, what is meant by the term "quotas"? What is meant by the phrase "awarding points"? Would this provision prohibit a public institution of higher education, when considering candidates for enrollment, to rank one candidate higher than another because of the first candidate's race, sex, color, ethnicity, or national origin?
3. In comparison to proposed measure 2007-2008 #61, this proposal does not contain the language "Nothing in this section shall be interpreted as limiting the State's authority to act consistently with standards set under the United States Constitution, as interpreted by the United States Supreme Court, in public employment, public education, or public contracting." That language appears to have been replaced by the new language in subsections (2) and (3) of the proposal. What is the substantive impact of removing the language that appeared in the former measure? Does the new language in subsections (2) and (3) have a different effect?
4. Would the current measure have a different impact on affirmative action plans currently in place than proposal 2007-2008 #61? How would the current measure impact existing affirmative action programs? How would the measure impact current affirmative action plans that were court-ordered or the result of a settlement decree or consent decree? Would the measure prevent future court-ordered affirmative action plans, settlement decrees, or consent decrees?
5. In subsection (2) of the measure, what is meant by the term "federal program"? What type of action would be exempted in order to establish or maintain eligibility for a federal program? Who would be able to take such action?

6. In subsection (3), what is meant by the phrase "court ordered remedy or consent decree in a civil rights case"? What would be encompassed by the term "civil rights case"? Are all discrimination lawsuits or actions "civil rights" cases? Does the court-ordered remedy or consent decree need to be in effect on or before this proposal takes effect, or would this provision also apply to future court-ordered remedies or consent decrees in civil rights cases? Would the proponents consider clarifying whether this provision would apply only to existing court-ordered remedies and consent decrees or whether it applies to existing and future court-ordered remedies and consent decrees?