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MEMORANDUM

January 23, 2008

TO: Clara Nevarez and Andrew Paredes

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #61, concerning Federal Standards for 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.

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 specify that nothing in the new section of law is to be interpreted to limit the state's

authority to act consistently with standards set under the United States Constitution, as interpreted by the United States Supreme Court, for public employment, public education, or public contracting;

4. 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.

Comments and Questions

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

Technical questions:

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative:

"Be it Enacted by the People of the State of Colorado:"

To comply with this constitutional requirement, would the proponents consider adding such an enacting clause at the beginning of the proposed measure?

2. An amending clause, which follows the enacting clause, is used to identify what law is being amended and in what specific location, either in the Colorado constitution or the Colorado Revised Statutes, the language will appear so as to provide notice to the public of the proposed changes to the law.
 - a. Would the proponents consider adding an amending clause to the proposed measure, following the enacting clause, that specifies where the proponents intend the proposed language to appear, i.e., either in the state constitution or in the Colorado Revised Statutes?
 - b. If the proponents intend the new language to appear in the state constitution, would the proponents specify in the amending clause the particular location within the state constitution, including article and section numbers, where the language should appear? For example, if proponents want to add the proposed new language as a new section in the Bill of Rights in Article II of the state constitution, then an amending clause would read as follows: "Article II of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:".
 - c. Alternatively, if the proponents intend the proposed new language to appear in the Colorado Revised Statutes, would the proponents specify in the amending clause the particular location within the Colorado Revised Statutes, including title, article, and

section numbers, where the language should appear? For example, if the proponents want the proposed new language to appear in the Colorado Revised Statutes in a location similar to the location of other anti-discrimination laws, they might consider placing the new language in a new part 10 of article 34 of title 24 of the Colorado Revised Statutes, with an amending clause that reads: "Article 34 of title 24, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:".

- d. When identifying the location for the proposed language, would the proponents consider choosing a section number that is not already being used for another provision of law so as to avoid conflict and confusion?
3. In Colorado, when a proposed measure adds new language to the Colorado Revised Statutes or the state constitution, certain drafting conventions are used.
- a. New language is generally shown in small capital letters [THIS IS AN EXAMPLE OF NEW LANGUAGE IN SMALL CAPITAL LETTERS], rather than in italics. Would the proponents consider indicating the proposed new language with small capital letters?
 - b. Each section of the Colorado Revised Statutes and the state constitution begins with a section heading that includes the section number and a short description of the section contents, all of which appears in bold typeface. For example, section 12 of article II of the state constitution has the following section heading: "**Section 12. No imprisonment for debt.**" Similarly, section 1-2-205, Colorado Revised Statutes, has the following section heading: "**1-2-205. Self-affirmation made by elector.**" If the proponents decide to specify constitutional or statutory sections that are to be created as discussed in technical question No. 2 of this memorandum, would the proponents consider adding a section heading in bold typeface?
 - c. Constitutional and statutory provisions are usually divided into component parts using the following structure: Subsection, or, for example, "(1)," followed by paragraphs, or, for example, "(a)," followed by subparagraphs, or, for example, "(I)," ending with sub-subparagraphs, or, for example, "(A)." The provision of the measure identified as "[1]" deviates from this structure. Would the proponents consider following the standard structure for constitutional and statutory provisions? For example, the proponents could identify the first paragraph of new language as subsection "(1)" and the second paragraph as subsection "(2)." Alternatively, the proponents could identify the first sentence of the first paragraph as subsection "(1)," the second sentence of the first paragraph as subsection "(2)," and the second paragraph as subsection "(3)."
 - d. Only the initial letter of words that are proper nouns or the first word of a sentence are capitalized, i.e., "State" and "State's" should not be capitalized. Additionally, "United States Constitution" should be "United States constitution" and "United States Supreme Court" should be "United States supreme court."

- e. The following is the standard drafting language used to introduce the definition subsection of a provision: "As used in this section,". Additionally, when a term is defined, the standard drafting language is to use quotation marks around the defined term, as it appears in the measure, followed by the term "means". For example, when defining the term "state," standard drafting practice would be as follows: "As used in this section, "state" means" If this format is used, the proponents should also consider modifying the phrase "but not necessarily be limited to" to something like "but is not limited to". Would the proponents consider modifying the language in the paragraph labeled as "[1]" to follow this standard drafting practice?
 - f. If, as suggested below in the substantive questions, the proponents choose to define other terms contained in the measure, would the proponents consider following standard drafting practice by using the introductory language for definitions, described in question 3.e. above, followed by a colon, and then listing the quoted terms and their definitions, in alphabetical order, as separate lettered paragraphs?
4. When do the proponents intend for the proposed measure to become effective? Do the proponents wish to include a specified effective date? If an effective date is not specified, an initiative adopted by the people takes effect upon proclamation of the vote by the Governor.

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 the first sentence of the proposed measure, 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 in implementing legislation?
3. How would the proposed measure impact affirmative action plans currently in place? 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? 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 proposed measure 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" in implementing legislation?

5. The proposed measure 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 intend 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 in implementing legislation?
 - 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 in implementing legislation?
 - 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 in implementing legislation?
6. The proposed measure does not appear, on its face, to allow an exemption from the prohibition against discrimination or preferential treatment when a "bona fide occupational qualification reasonably necessary to the normal operation" of the employer exists, as allowed in section 24-34-402 (4), Colorado Revised Statutes, and as allowed under federal law. Is it the proponents's intent that the second sentence of the measure allow for such exceptions when a person's sex or age may be taken into account when making an employment decision?
7. Do the proponents intend that the proposed measure would invalidate laws requiring a preference for Colorado labor in public works financed by public moneys, such as article 17 of title 8, Colorado Revised Statutes?

8. Part [1] of the proposed measure appears to define the term "state" to include, but not be limited to, 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. Since the phrase "but not necessarily be limited to" modifies the definition of the "state," who determines whether a person or entity that is not specifically included in the definition is actually included for purposes of the requirements of the measure? Do the proponents intend that the General Assembly would further determine and define the scope and applicability of the term "state" in implementing legislation?
 - b. 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? Do the proponents intend that the General Assembly would define the term in implementing legislation?
 - c. What is meant by the term "governmental instrumentality"? Would the proponents consider defining the term? Do the proponents intend that the General Assembly would define the term in implementing legislation?