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SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203 ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board	FILED IN THE SUPREME COURT JUL 16 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE AND SUMMARY FOR 2007-2008, #31 **Petitioners**: POLLY BACA, KRISTY SCHLOSS, and RON MONTOYA, Objectors, v. **Respondents**: VALERY ORR and LINDA CHAVEZ, Proponents, and **Title Board**: WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO	**▲COURT USE ONLY▲**
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OPENING BRIEF OF PETITIONERS

TABLE OF CONTENTS

Attachments:

1. Text of Proposed Initiative for 2007-2008 #31
2. Title Set for Proposed Initiative for 2007-2008 #31
3. Transcript of Title Board Rehearing, June 20, 2007, on Proposed Initiative for 2007-2008 #31

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Polly Baca, Kristy Schloss, and Ron Montoya ("Petitioners"), through their undersigned counsel, respectfully submit the following Opening Brief in support of their Petition for Review of Final Action of the Ballot Title Setting Board Concerning Proposed Initiative for 2007-2008 #31 ("Prohibition on Discrimination and Preferential Treatment by Colorado Governments"):

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The proposed initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2006):

a. The initiative asks the voters to prohibit governmental *discrimination against* specified individuals and groups and, in the same measure, to prohibit grants of both discriminatory *and non-discriminatory* forms of "preferential treatment" to those individuals and groups;

b. The initiative asks the voters to approve a prohibition against governmental discrimination and, concurrently, a prohibition against a principal remedy for governmental discrimination; and

c. The initiative asks the voters to prohibit both discrimination and "preferential treatment" in the three specific areas of public employment, public contracting, and public education, with widely different, disconnected, and non-

apparent implications that would affect governmental functions and limitations across these areas of impact.

2. The title set for the proposed initiative is unfair and misleading in contravention of § 1-40-106, C.R.S. (2006), in the following respects:

a. The title unfairly and inaccurately suggests in its opening phrase that the initiative primarily or solely concerns "discrimination" and that "preferential treatment" is simply a subcategory of "discrimination," thereby misrepresenting the principal subject and legal change to be wrought by the initiative;

b. The title omits key information from its opening phrase, *i.e.*, that the initiative is applicable to all levels and instrumentalities of state and local government and specifically and exclusively to public employment, public contracting, and public education; and

c. The title draws from the text of the measure a politically loaded shorthand catch phrase – "preferential treatment" – which phrase is unfairly and inaccurately suggestive of disadvantaging a non-"preferred" person or group, and which phrase would inevitably become a campaign slogan and emotionally tip the substantive debate upon a measure with potentially far different and broader effects.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Before the Title Board.

This Original Proceeding is brought pursuant to § 1-40-107(2), C.R.S. (2006), seeking review of the actions of the Ballot Title Setting Board regarding proposed Initiative for 2007-2008 #31. The Petitioners are registered electors who timely submitted a Motion for Rehearing before the Title Board raising the objections presented herein pursuant to § 1-40-107(1), C.R.S. (2006).

The Title Board conducted its initial public meeting and set titles for proposed Initiative for 2007-2008 #31 on June 6, 2007. Petitioners filed a Motion for Rehearing pursuant to § 1-40-107(1), C.R.S. (2006), on June 13, 2007. The Motion for Rehearing was heard at the next meeting of the Title Board on June 20, 2007. At the rehearing, the Board denied Petitioners' Motion. Petitioners filed their Petition for Review with this Court on June 25, 2007.

B. Statement of Facts.

Proposed Initiative for 2007-2008 #31 – textually captioned "Nondiscrimination by the State" – seeks to amend Article II of the Colorado Constitution to add a section providing that "The State shall not discriminate against, or grant 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."

This proclamation is followed by one definitional paragraph (defining "State" to include virtually all forms of statewide or local governmental instrumentality), three exceptions (for "bona fide qualifications based on sex," existing court orders or consent decrees, and actions to establish or maintain eligibility for federal funding), and three operational provisions concerning effective date, remedies, and self-execution and severability.

The issues posed by this seemingly straightforward initiative are obviously controversial and packed with history and emotion. What is sought by the proponents is a significant shift in public policy pertaining to race, ethnicity, and gender, and the imposition of new constitutional constraints upon public institutions throughout the state. The voters are being asked to approve this change. They are at least entitled to clarity, candor, and fairness in the manner in which this proposal is presented to them.

III. SUMMARY OF THE ARGUMENT

1. The proposed initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2006):

a. The initiative asks the voters to prohibit governmental *discrimination against* specified individuals and groups and, in the same measure, to prohibit grants of "preferential treatment" to those individuals and groups. While some types of "preferential treatment" may involve a "reverse" form of discrimination, there are many public programs that confer "preferential treatment" without the slightest "discriminatory" effect. To the extent these are included within the concept and prohibition of "preferential treatment" – an inclusion which the proponents have consistently failed to disclaim and appear to be preserving – the initiative contains multiple subjects with no necessary or proper connection and is dangerously surreptitious and prone to surprise.

b. The initiative asks the voters to approve a prohibition against governmental discrimination and, concurrently, a prohibition against a principal remedy for discrimination – "preferential treatment" in both its arguably discriminatory and non-discriminatory forms. It is quite likely that many voters would favor the first prohibition while being less enthralled with the second, particularly when narrowly tailored to remedy the former. The measure effectively enlists support for a broad prohibition upon all forms of "preferential treatment" by linking it to a prohibition upon discrimination.

c. The initiative asks the voters to prohibit both discrimination and "preferential treatment" in the three distinct and disparate areas of public employment, public contracting, and public education. The societal and legal implications in each of these areas are substantially different, leading to potentially surprising and inconsistent results while dragooning support for prohibitions in one area from the context of another.

2. The title set for the proposed initiative is unfair and misleading in contravention of § 1-40-106, C.R.S. (2006), in the following respects:

a. The title unfairly and inaccurately suggests in its opening phrase that the proposed constitutional amendment primarily or solely "concern[s] a prohibition against discrimination by the state" when both the language and effect of the initiative – in also generally prohibiting "preferential treatment" – is far broader. The implication is that "preferential treatment" is simply a subcategory of "discrimination," which is not the case. The opening phrase also conceals and misrepresents the fact that the primary legal change to be wrought by the initiative is the broad prohibition of "preferential treatment."

b. The title omits key information from its opening phrase, *i.e.*, that the initiative is applicable to all levels and instrumentalities of state and local

government and specifically to public employment, public contracting, and public education.

c. The title unnecessarily draws from the text of the measure a politically loaded shorthand catch phrase – "preferential treatment." This phrase has acquired a public onus unfairly suggestive of disadvantaging a non-"preferred" person or group and would inevitably become a campaign slogan designed to appeal to emotion, tip the substantive debate, and obscure the true scope of the initiative.

IV. ARGUMENT

A. Standard of Review.

This Court begins, of course, with the presumption that the actions of the Title Board are valid and will generally decline to address the merits of a proposed initiative, interpret its language, or predict its application. In re Initiative for 1999-2000 #235(A), 3 P.3d 1219, 1222 (Colo. 2000). "When necessary, however, we will characterize the proposal sufficiently to enable review of the Title Board's action." In re Initiative for 1999-2000 #258(A), 4 P.3d 1094, 1098 (Colo. 2000). "While we may not address the merits of a proposed initiative or suggest how an initiative might be applied if enacted . . . we must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative

proposals containing multiple subjects has been violated." In re Initiative for 1997-1998 #30, 959 P.2d 822, 825 (Colo. 1998). The same would certainly hold for a review sufficient to adjudge the fairness and accuracy of the title.

B. Single Subject.

The General Assembly has described Colo. Const. art. V, § 1(5.5)'s single-subject requirement for ballot initiatives as intended to inhibit two principal practices: "(I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their own merits;" and "(II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters." § 1-40-106.5(e), C.R.S. (2006). This Court has recognized the single-subject requirement to be "intended to prevent voters from being confused or misled and to ensure that each proposal for change is considered on its own merits." In re Proposed Initiative for 1997-1998 #74, 962 P.2d 927, 928 (Colo. 1998).

Recently, the Court enunciated two principles for addressing the single subject requirement: "First, consistent with the goal of preventing the inadvertent

passage of a surreptitious provision, an initiative may not hide purposes unrelated to the Initiative's central theme . . . . Second, consistent with the goal of prohibiting a single legislative act from addressing disconnected or incongruous measures, an initiative grouping distinct purposes under a broad theme will not satisfy the single subject requirement." In re Proposed Initiative for 2005-2006 #55, 138 P.3d 273, 277-78 (Colo. 2006). *Cf.,* In re "Public Rights in Waters II," 898 P.2d 1076, 1080 (Colo. 1995).

The Court's holding in 2005-2006 #55 drew a dissent, criticizing the majority upon the facts of that case for equating "subjects" with "purposes" or "effects" – 138 P.3d at 283-85 (Coats, J., dissenting). In the present case, Petitioners respectfully submit that the distinction that troubled the dissent in 2005-2006 #55 is absent. As discussed below, these Petitioners are not asking the Court to delve into the "purposes" which the proponents may be seeking to accomplish through the present initiative or to parse the wide range of "effects" the initiative may have if adopted. Rather, this initiative very much involves multiple "subjects."

1. The disparate subjects of "discrimination" and "preferential treatment."

The text of the proposed initiative opens with its principal directive: "The State shall not discriminate against, or grant preferential treatment to" the

enumerated classes of individuals or groups in the specified areas. The initial question is whether these two separately stated concepts – "discriminate against" and "grant preferential treatment to" – define a single subject. This is a question both the Petitioners and the Title Board have pursued, and which the proponents have declined to clarify. See *infra* at pp. 15-17.

The difficulty is not simply that either of these terms – particularly "preferential treatment" – is broad, undefined, and vague *itself* in terms of scope, purposes, and effects. That alone may be permissible in the context of a "single subject," as perhaps with "due process" as suggested by the dissent in 2005-2006 #55, *supra*, at 284 (Coats, J., dissenting). The problem here is that *two* broad concepts are linked in a single measure (a situation not posed by 2005-2006 #55). When that is done, it is incumbent upon the Title Board (and, respectfully, this Court) to assure that these two concepts *together* form a single "subject."

While there may be some conceptual overlap – as with "due process" and the right to a trial by jury in suits at common law – the *subject* of "preferential treatment" sweeps well beyond the ambit, or *subject*, of "discrimination" as that term is generally defined and commonly understood. And the proponents have adamantly sought to preserve the full scope and hazy limits of that sweep. See *infra* at pp. 15-17.

In both its technical and popularly understood legal sense – and certainly contextually here – "discrimination" involves "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class . . . ." Black's Law Dictionary 500 (8th ed. 2004). A "privilege" is a "*right or immunity* granted as a peculiar benefit, advantage, or favor" – Webster's Third New International Dictionary, Unabridged, Merriam-Webster 2002, http://unabridged.merriam-webster.com (8 Jul. 2007) (emphasis added). Either through conferral or denial, the essential precept of "discrimination" is that the individual or group *not* accorded the privilege is disadvantaged in some way *vis a vis* another individual or group that *is* accorded the privilege.

"Preferential treatment" – as that undefined term may generally be understood – can certainly involve forms of "discrimination." "Reverse discrimination" has indeed been defined as "preferential treatment of minorities, usu. through affirmative-action programs, *in a way that adversely affects members of a majority group*." Black's Law Dictionary 500 (8th ed. 2004) (emphasis added). Quotas, points, tie-breakers, set-asides, indeed anything that plays a role in selectively conferring or denying some manner of privilege or which arguably places a "thumb-on-the-scale" in a win/lose context – whether for benign or not so benign purposes – may, in a definitional and commonly understood sense, be

"discriminatory." In all such cases, as with "discrimination" generally, someone is – for better or worse – disadvantaged *vis a vis* someone else.

But "preferential treatment" involves a good bit more than that. Pertinent to the context of the present initiative, "preferential treatment" may involve race, ethnic, or gender conscious programs that confer no right or privilege and disadvantage *no one* – and therefore "discriminate against" no one. "Preferential treatment" may even involve programs that have no race or gender consciousness at all, but merely happen to *impact* one group differently from another.

Justice Kennedy's concurrence, and the Chief Justice's response for the plurality to Justice Breyer's dissent, in the very recent Seattle and Louisville school district cases before the United States Supreme Court, illustrate the former category. Concurring in the Court's invalidation of schemes of indisputably "discriminatory" (though arguably justifiable) racial classifications in the context of school district pupil assignments, Justice Kennedy nevertheless opined that "School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic sight selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollment,

performance, and other statistics by race." Parents Involved in Community Schools v. Seattle School District No. 1, __ U.S. __, 2007 U.S. Lexis 8670, at *160, 2007 WL 1836531, at *46 (June 28, 2007) (Kennedy, J., concurring). Responding to Justice Breyer's dissent, the Chief Justice noted that the plurality opinion did not implicate such things as "where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools . . . ." Id., Lexis at *79, WL at *26. Such programs were simply not viewed as "distribut[ing] burdens or benefits on the basis of individual racial classifications" requiring strict scrutiny. Id., Lexis at *35, WL at *11. Put slightly differently, no one would be legally disadvantaged; no one would be subjected to "discrimination." Yet the beneficiaries of these programs may be viewed as benefiting from a form of "preferential treatment."

The second category – programs that may simply and incidentally *impact* groups differentially – are even more distinct from "discrimination." Diversity outreach programs by universities and governmental employers and contractors are often designed and targeted to reach and create awareness of opportunities in communities that other forms of public communication and outreach may be missing; they do not exclude or "discriminate against" anyone; they do not supplant other forms of communication or outreach – they simply expand the

scope and reach of communication regarding public programs and opportunities. Health care programs, *e.g.*, pre-natal care, may have a gender-specific impact that in no way disadvantages the other gender. Spanish language public notices benefit certain ethnic groups more than others without disadvantaging, or "discriminating against," anyone. A secondary school program honoring the transition of young men to manhood in the African-American community or providing support and counseling to teen mothers disadvantages or "discriminates against" no one – though such programs beneficially impact certain racial, ethnic, or gender groups differently from others and may be viewed as "preferential treatment."

It is certainly possible to define "preferential treatment" – or use another term – in such a way as to limit its application to actions and programs that are indeed "discriminatory" in nature. Doing so would alleviate the concern that a broader and distinct subject has been linked in this initiative to a prohibition against "discrimination." In fact, the California Supreme Court grafted such a narrowing interpretation upon a similarly worded initiative in the context of a case manifestly involving "discriminatory," "preferential treatment" (a municipal mandate that contractors notify, solicit, and negotiate with minority and women owned businesses and that the rejection of their bids be justified), defining "preferential" as "a giving of *priority or advantage* to one person . . . *over others*."

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1082 (Cal. 2000) (emphasis added). The court distinguished mandates of "reasonable good faith outreach to all types of subcontractor enterprises" – Id. at 1085 – thus allowing overall "outreach" to be enhanced as long as no group was accorded a right or benefit over another.

This Court could certainly engage *sua sponte* in a similar interpretive exercise here. In fact, the Title Board did precisely that:

> MR. CARTIN: I think that discrimination is the connector. I think that discrimination is what makes – gives the measure congruity between the purpose – the purpose of the measure. I think it has a single subject. [Rehearing Tr. p. 47, ll. 1-5]
>
> . . .
>
> MR. HOBBS: I do view the measure as prohibiting preferential treatment that is discriminatory in nature. *And that's kind of important to my resolution of the single subject requirement* . . . [Rehearing Tr. p. 50, ll. 7-10 (emphasis added)]

The difficulty here is that the text of the measure is *not* so self-limiting and the proponents have persistently declined to provide a basis upon which the Title Board or this Court can create such a limitation for them. In fact, they have indicated precisely the opposite – inverting the analysis and suggesting that "preferential treatment" (however defined and in its broadest patently non-discriminatory form) should be viewed *per se* as "discrimination:"

> MR. CARTIN: . . . So, I guess I have a – kind of a two part question. And my first question is, the items that are referenced there,

diversity recruitment programs, gender-specific health care programs, provisions of official notices in languages other than English, would the provisions of the measure prohibit those programs?

MR. WESTFALL (counsel for the proponents): I don't really want to get into an interpretation on an application on a program-by-program basis. All I can respond by saying is the intent of the measure is to just restate what we've looked at and our response and the key language and that is *government sponsored preferential treatment is discrimination.*

So to the extent to which you have government sponsored preferential treatment in the defined areas based upon defined categories, the measure covers that. [Rehearing Tr. p. 26, l. 24 – p. 27, l. 16 (emphasis added)]

. . .

MR. CARTIN: So let's say, for example, to give some concreteness to this, *assuming that diversity recruitment programs would be prohibited by the measure*, [quotes from objectors' argument that this would constitute a separate subject from prohibiting discrimination]. What's your response to that statement, to that argument?

MR. WESTFALL: I just get back to the basic principles of the measure. I mean, as we cited in our – you know, citing the American Heritage. The different definitions of preferential means of, related to, or giving an advantage or preference of preferential treatment. And, again, to the extent which anything is government sponsored and equates to essentially discrimination by granting preferential treatment.

On the plain language of the measure, it seemed to be implicated. Exactly how that's going to effectuate on a program-by-program basis, I don't think that's where we should be at today in discussing the measure. [Rehearing Tr. p. 30, l. 8 – p. 31, l. 7 (emphasis added)]

To the very limited degree that the proponents have been willing to clarify the "subject(s)" of their proposed initiative, they have indicated that the measure would indeed prohibit *both* "discriminatory" programs (*i.e.*, programs that accord

or deny a right or privilege and result in at least some level of comparative disadvantage to an individual or group based upon the specified categories) *and* programs that may be viewed as "preferential" in view of their beneficial impact but which accord or deny no rights or privileges and comparatively disadvantage no one.

This is not a question of predicting future application or effect, as it perhaps would be were the initiative directed exclusively at a single concept.[1] Rather, this is a question of being able to determine whether the initiative contains a single subject or multiple subjects – whether the *two* concepts of "preferential treatment" and "discrimination" are necessarily or properly connected (as the proponents argue) and whether the implications of joining these two concepts in a single measure are inherently confusing or misleading to the voters. Upon the record we have and the guidance from the proponents with which we have been provided, we are, at best (and despite both Petitioners' and the Title Board's inquiry), left in the

[1] *But see*, In re Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238, 242 (Colo. 1990), regarding "a legal standard that is new and likely to be controversial."

dark,[2] though in fact with an acknowledgment that manifestly non-discriminatory forms of "preferential treatment" (*i.e.*, diversity outreach) would "seem[] to be implicated" along with "discrimination." Two subjects have been rolled together here, with broad social implications and the very real potential to surprise the voters.

2. Linking prohibitions upon discrimination to prohibitions upon remedies for discrimination.

The discussion in part 1, above, focuses upon the disjuncture between "discrimination" and non-discriminatory forms of "preferential treatment." A second concern involves all forms of "preferential treatment," both discriminatory and non-discriminatory. Particularly, even patently discriminatory forms of "preferential treatment" are generally employed by governmental entities for the purpose of remedying or alleviating the effects of past governmental or non-governmental discrimination. In this regard, it is quite likely that a substantial number of voters would readily favor a prohibition upon governmental discrimination, but may less readily favor a blanket prohibition upon all forms of remedial "preferential treatment." The effect of the present initiative is to enlist

[2] If there is lingering doubt, this Court has provided the appropriate response: "[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." In re Proposed Initiative for 1999-2000 #25, 974 P.2d 458, 465 (Colo. 1999).

voter support for the latter – a proposition that well may not be able to pass upon its own merits – by coupling it with the former.

This, of course, is quintessential "logrolling" or "Christmas treeing." In re "Public Rights in Waters II," *supra*, 898 P.2d at 1079. It is one of the evils sought to be avoided by the single subject requirement – id. – albeit generally in the context of subjects found to have "no necessary or proper connection." § 1-40-106.5(e)(I), C.R.S. (2006). The proponents (and the Board) may argue that the "logrolling" effect should not be of concern as long as a "necessary or proper connection" exists, as it arguably may between the subject of prohibiting governmental *discrimination* against the specified groups and the subject of prohibiting *discriminatory* forms of governmental "preferential treatment." The problem here is that the subject of "preferential treatment" has, quite forcefully, *not* been so limited, and the connection between the subjects is certainly neither "necessary" nor – in view of its sweep – "proper."

3. Linking the areas of public employment, public education, and public contracting.

The prohibitions of this initiative are addressed jointly to the areas of public employment, public education, and public contracting. In the view of at least one court in the context of a similar initiative, this was a fatal violation of the single subject requirement. Advisory Opinion to the Attorney General, 778 So.2d 888,

893 (Fla. 2000) ("the omnibus petition contains the same fatal flaw by combining three distinct subjects which constitute separate and distinct functional operations of government – public education, public employment, and public contracting").

At first blush, this may seem less than compelling in the context of such Colorado precedent as In re Initiative on Parental Rights, 913 P.2d 1127, 1131 (Colo. 1996). But the "distinct functional operations of government" in these three areas carry implications that run quite a bit deeper. On the one hand, outreach and diversity in the area of public education – covered here in all its primary, secondary, and higher education levels – is indisputably key to the effort to "help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees." Parents Involved in Community Schools, *supra*, 2007 U.S. Lexis at *252, 2007 WL at *78 (Breyer, J., dissenting). Public employment and contracting, however important, cannot claim a societal impact at quite this level.

Additionally, the initiative contains in its third paragraph an explicit exception to all of its prohibitions for "bona fide qualifications based on sex." This is a legal exception to prohibitions upon discrimination that has not heretofore been recognized or sanctioned outside of the area of employment, *i.e.*, "bona fide

occupational qualifications" based on religion, sex, or national origin as codified in section 703(e)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1). *See, e.g.*, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200-01 (1991). Expanding this general concept, albeit limited to sex and however ultimately determined to be applicable, into areas of education and contracting is quite a different matter from acknowledging it in the limited context in which it has been applied historically – employment. What may come as no surprise to the voters in the area of employment may come as quite a surprise indeed in the areas of education and contracting. These are different subjects, not necessarily or properly related, and most certainly not clearly expressed in the title as required by Colo. Const. art. V, § 1(5.5) and § 1-40-106.5(1)(a), C.R.S. (2006).[3]

C. Fairness and Accuracy of the Title.

Titles are required to "correctly and fairly express the true intent and meaning" of a proposed initiative – § 1-40-106(3)(b), C.R.S. (2006) – "enabling informed voter choice." In re Proposed Initiative for 1999-2000 #37, 977 P.2d 845, 846 (Colo. 1999), quoting In re Proposed Initiative for 1999-2000 #29, 972

[3] The voters are entitled to be clearly apprised regarding the proposal of "a legal standard that is new and likely to be controversial." Parental Notification of Abortions for Minors, *supra*, 794 P.2d at 242.

P.2d 257, 266 (Colo. 1999). In setting a title, the Board should, and the Court does, "consider the public confusion that might be caused by misleading titles." § 1-40-106(3)(b), C.R.S. (2006).

1. Misrepresentation and obfuscation of the primary intent and meaning of the initiative.

The title commences with the language, "An amendment to the Colorado constitution *concerning a prohibition against discrimination* by the state, and, in connection therewith, prohibiting the state from discriminating against or granting preferential treatment to . . . ." (emphasis added). The implication, unequivocally, is that this initiative is about the subject of *discrimination* – and that "preferential treatment" is only a form or subcategory thereof.

As discussed above in part B(1), this is not the case under either a formal definition or common understanding of the term "discrimination." Independent of single subject concerns, the title – like the language of the measure itself – must at a bare and hardly sufficient minimum disclose at the outset that this is an amendment "concerning a prohibition against discrimination *and* grants of preferential treatment" (though, as discussed below, using less politically loaded language).

In reality, the prohibition against grants of "preferential treatment" is indisputably the primary subject and thrust of, and change to be wrought by, this

initiative. Absent a compelling (or, in the case of sex, at least important) governmental interest, prohibiting the state and its instrumentalities from discriminating against individuals or groups on the basis of race, sex, color, ethnicity, or national origin is already well guaranteed by Colo. Const. art. II, § 25 – *see, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982) – to say nothing of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Parents Involved in Community Schools, *supra*, 2007 U.S. Lexis at *35, 2007 WL at *11.[4] What is new and different is the blanket prohibition upon grants of "preferential treatment," however defined or delimited. The text of the measure itself, for all its faults, distinguishes these two concepts in its first eleven words. For the title to do less – tucking the principal change in the law twenty-six words downstream and cloaked behind an initial inaccurate and misleading pronouncement that the initiative "concern[s] a prohibition against discrimination by the state" – is, respectfully, inexplicable. It is misleading in that it informs the voters that they are dealing exclusively with discrimination. In fact, they are being asked to vote upon a whole lot more.

[4] This is, of course, not to mention the myriad state and federal statutes prohibiting discrimination.

2. Omission of key disclosures from the opening phrase of the title.

Two key aspects of the initiative have been omitted from the opening phrase of the title and are buried deep in its text. The fact that the initiative's prohibitions are applicable specifically to the areas of public employment, public education, and public contracting does not appear until the fourth and fifth lines of the title. And while the title immediately represents the initiative as prohibiting discrimination "by the state," we do not learn until the second to last phrase of the title that "state" includes all forms of statewide and local governmental bodies and instrumentalities located within the state. This critical information belongs up front, where it will not be missed by the voters.

3. The title contains an impermissible catch phrase.

This Court has long cautioned against the use of catch phrases in ballot titles. A catch phrase consists of "phrases or words which could form the basis of a slogan for use by those who expect to carry on a campaign . . . ." Say v. Baker, 322 P.2d 317, 320 (Colo. 1958). The prohibition on the use of catch phrases "recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion." 1999-2000 #258(A), *supra*, 4 P.3d at 1100. "By drawing attention to themselves and triggering a favorable [or unfavorable]

response, catch phrases generate support for [or opposition to] a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." Id. In so doing, catch phrases "distract voters from consideration of the proposal's merits." Id.

The catch phrase here is "preferential treatment." These words carry an onus, are emotionally packed, and suggest that a non-"preferred" group is being unfairly disadvantaged while a "preferred" group (presumptively a racial minority) is being accorded a right or privilege it does not deserve. As discussed above, this is not necessarily, or even generally, the case. But that is the appeal of these particular words. A recently released nationwide Pew Research Center poll reveals a 70% net favorable attitude toward "affirmative action programs designed to help blacks, women, and other minorities get better jobs and education;" a 91% favorable attitude toward making sure "everyone has an equal opportunity to succeed;" yet a 62% *unfavorable* attitude toward improving the position of blacks and other minorities "even if it means giving them preferential treatment." Trends in Political Values and Core Attitudes: 1987-2007, pp. 70 (Q.4.e), 89 (Q.20F1.c), 91 (Q.20F1.l), The Pew Research Center for the People and the Press (March 22, 2007), at http://people-press.org/reports/display.php3?ReportID=312. The point could not be made more clearly.

The fact that the phrase "preferential treatment" appears in the text of the initiative itself does not justify its use in the title. 1999-2000 #258(A), *supra*, 4 P.3d at 1100. Other phrases could have been used, *e.g.*, the state "shall not consider" or "shall not treat persons differently based on . . . ." *Cf.*, Advisory Opinion, *supra*, 778 So.2d at 889.

The proponents of this initiative are seeking voter approval for a significant and highly controversial change in the social policy of this state (however narrowly or broadly the subjects of their initiative may be interpreted). The issue is already laden with emotion, rhetoric, and misperceptions. Respectfully, the ballot title should not be permitted to contribute to the diversion of the voters from the substance of the issues at hand.

V. CONCLUSION

For the reasons set forth above, the Petitioners request the Court to reverse the actions of the Title Board and to direct the Board to strike the titles, ballot titles, and submission clauses and return proposed Initiative for 2007-2008 #31 to its proponents.

Respectfully submitted this 16th day of July, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2007, a true and correct copy of the foregoing **OPENING BRIEF OF PETITIONERS** was served via hand delivery to the following addressees:

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