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 **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 DOMENCIO	**▲COURT USE ONLY▲**
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BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITTIONERS

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I. Interest of *Amicus Curiae*

The American Civil Liberties Union of Colorado ("ACLU of Colorado") is an affiliate of the American Civil Liberties Union ("ACLU"). It is a non-profit organization dedicated to defending, expanding and protecting the civil rights and liberties of all people in Colorado. The ACLU of Colorado works in conjunction with other ACLU affiliates located throughout the United States, as well as national ACLU offices in New York City and Washington, D.C. As part and parcel of the ACLU's mission, the ACLU of Colorado has long fought to challenge unconstitutional governmental discrimination, fight discrimination in the private sphere, erase the vestiges of *de facto* and *de jure* discrimination, and supported race and gender-conscious programs designed to promote diversity. The ACLU has participated in public education, legislative action, and litigation regarding these issues in areas such as affirmative action, conditions of confinement, criminal justice, education, juvenile justice, voting rights, racial profiling, the right to counsel and indigent defense, and healthcare.

The ACLU of Colorado is comprised over 11,000 members who support and have an interest in challenging and preventing unconstitutional discrimination, remedying past discrimination, and promoting diversity. The ACLU of Colorado's members include women, people of color, and people who identify as being of a

particular ethnicity or national origin. Proposed Initiative 2007-2008 #31 ("proposed initiative") may directly impact the ACLU of Colorado's members and fits squarely within the ACLU of Colorado's mission and legal experience.

As written, it is impossible for the ACLU of Colorado or its members, who are also voters, to discern how Proposed Initiative 2007-2008 #31 would impact a range of constitutionally permissible laws and programs designed to prevent unconstitutional discrimination, remedy past discrimination, or that simply take race, gender, ethnicity and/or national origin into some account. For this reason, the ACLU of Colorado supports the position of the Petitioners in this case.

II. Summary of Argument

The proposed initiative would amend the constitution of Colorado to prevent the state from "discriminat[ing] against, or grant[ing] *preferential treatment* to," certain classes of persons (emphasis added). The phrase "preferential treatment" has no common meaning, nor it is not defined anywhere within the initiative. It may or may not prohibit a wide range of constitutionally permissible laws and programs affecting persons of a particular race, sex, color, ethnicity or national origin. As the phrase has no clear meaning and is submitted without definition, the proposed initiative is ambiguous, misleading and inaccurate, and the effect of a "yes" vote on the proposed initiative is unclear.

III. Argument

It is well established law in Colorado that proposed amendments and their titles must be definite and unambiguous, and allow voters to have a clear understanding of a "yes" or "no" vote on the proposed amendment. *See* C.R.S. § 1-40-106(3)(b); *In re Proposed Initiative Concerning "Automobile Insurance Coverage,"* 877 P.2d 853 (Colo. 1994). To this end, Colorado statutes and caselaw a) limit proposed amendments to a single subject, *see* Colo. Cont. art. V § 1(5.5); C.R.S. § 1-40-106.5; b) prohibit titles which are misleading, inaccurate or fail to reflect the central feature of the proposed amendment, *see* C.R.S. § 1-40-106(3)(b); *Matter of Ballot title 1997-98 No. 74*, 962 P.2d 927 (Colo. 1998); c) and prohibit titles which contain an impermissible catch phrase, *see Say v. Baker*, 322 P.2d 317, 320 (Colo. 1985). As an active participant in debate, public education and litigation regarding programs that take race, sex, color, ethnicity and/or national origin into some account, the ACLU of Colorado is aware that that the term "preferential treatment" is ambiguous, inexact, and carries wholly disparate meanings in a variety of contexts. As used in the proposed initiative, it is in direct conflict with the proscriptions outlined above.

The meaning of the term "preferential treatment" is the subject of robust debate and varies greatly. Some argue that the term "preferential treatment" refers

specifically to affirmative action programs, while others argue that it does not encompass those programs, and still others argue that it includes affirmative action programs *and* a broader range of race or gender-conscious programs. Some have attempted an alternative approach to defining "preferential treatment" by arguing that it refers only to programs that directly disadvantage others, while others would propose that it implicates all programs that take these factors into account. These different interpretations of the phrase demonstrate how several different voters could have an equal number of different understandings regarding the meaning of the proposed initiative.

A detailed exploration of the many meanings of "preferential treatment" demonstrates the confusion that the term engenders. For example, one reading of term implicates only programs that would "prefer" a person of one class to the disadvantage of a person from another class. Under this interpretation, the phrase "preferential treatment" would not include programs that provide additional opportunities or resources to one class without disadvantaging others, such as a special recognition or award for women, designated scholarships to persons of color, or holidays celebrating a certain country or ethnic heritage.

Alternatively, the term "preferential treatment" has also been defined as a

> ...job or employment preference given to someone who is of the right race, ethnicity, or gender as defined in the government's approved list of

> historically disadvantaged...Since preferential treatment is based on race and gender it is quite discriminatory.

Definition: Preferential Treatment, *Adversity.net*, http://www.adversity.net/Terms_ Definitions/TERMS/Preferntial_Treatment.htm (accessed July 13, 2007). Compared to other interpretations, this reading of the phrase "preferential treatment" in the context of the proposed initiative would seem prohibit all programs that may be race or gender conscious, even if they do not disadvantage any other class of persons.

Yet another understanding of "preferential treatment" holds that the phrase does not encompass affirmative action programs at all, as those programs are meant to remedy past discrimination. That interpretation holds:

> Affirmative action has been mislabeled "preferential treatment"...[i]n reality it is a kind of social restitution and an attempt to create a more democratic society.

Myths and Facts about Affirmative Action, *IUPUI Affirmative Action Office*, http://www.iupui.edu/~aao/myths.html (accessed on July 13, 2007). This definition of "preferential treatment" was adopted by university officials in Michigan:

> Preferential treatment equates to the consideration of any race, ethnicity, gender or class in admissions...The university has determined that *affirmative action does not equate to any form of preferential treatment.*

"Political Science Students ask 'Now What?' after Proposal 2," *The South End* (March 30, 2007) (emphasis added). The understanding of the term was demonstrated practically in California, where an exit poll of voters who voted for Proposition 209, which prohibited "preferential treatment," revealed that over a quarter did not believe they were banning affirmative action by casting a "yes" vote to ban "preferential treatment." Eric Pooley, *Fairness or Folly?*, Time, 33, 35 (June 23, 1997).

Not only does the phrase "preferential treatment" have no commonly accepted meaning in the public sphere, but courts and legal scholars have conceived a number of different definitions as well. The California Supreme Court has understood the term to be very expansive:

> ...preferential treatment...viewed in its ordinary, natural sense, refers to any kind of treatment favoring one group or individual over another. The prohibition is not limited to set-asides, quotas, and plus factors, but extends to all preferences granted to the target groups.

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1072 (Cal. 2000). Alternatively, another legal scholar has explored the position that "preferential treatment" does not exist unless the treatment "correspondingly disadvantages others." Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 Yale L. & Pol'y Rev. 431, 453 (2000) (internal quotations omitted). Yet another

legal scholar has attempted to define the phrase by looking at the word "preference" in particular:

> Preference is a narrower term, used only when a person would not have received a benefit but for her race or gender. Set-asides, quotas, and selection processes in which race is used as a 'plus' that provides a decisive advantage would qualify as preferences. Some uses of race and gender, however, may not constitute preferences per se. For instance, one could regard a notification program that targets underrepresented races as an allocation of public funds based on race, and thus, a 'preference.' However, assuming that information about a government program is publicly available and that obtaining information does not ensure one's acceptance into the program, no real benefit has been distributed or denied on the basis of race...The nonminority or male who does not benefit from the targeted recruiting does not suffer if there were other avenues through which the information was accessible to him.

The Constitutionality of Proposition 209 As Applied, 111 Harv. L. Rev. 2081, 2083-84 (1998). Finally, another legal scholar suggests looking beyond whether or not there was merely a "comparative disadvantage," and examine instead whether the program conferred some benefit or advantage to a "less qualified" person of the "preferred" class:

> ...preferential treatment...include[s] the hiring or promotion of a minority or woman *over a more qualified nonminority or male.*

James S. Fishkin, *The Quest for Justice*, 90 Mich. L. Rev. 1347, 1350 (1992) (emphasis added).

Given the myriad of varying interpretations outlined above, a voter reading the plain language of the proposed initiative would have no clear understanding

about the meaning of a "yes" vote. In other words, a voter could read the proposed initiative and believe that it simply codified prohibitions against discrimination pursuant to caselaw under Colo. Const. Art. II § 25 and the Equal Protection Clause of the Fourteenth Amendment, and reasonably cast a "yes" vote based on that understanding; another voter who supported expanding those prohibitions to include "affirmative action" programs while leaving other race and gender conscious programs intact could read the proposed initiative and reasonably cast a "yes" vote; another voter who supported extending prohibitions only to programs that were race or gender conscious *and* also "comparatively disadvantaged" members of another class could read the proposed initiative and reasonably cast a "yes" vote; another voter who supported prohibiting all race or gender conscious programs regardless of a lack of a "comparative disadvantage" could read the proposed initiative and reasonably cast a "yes" vote, and so on. Thus, quite apart from the merits of the proposed initiative or the ultimate legal effect of the phrase, the proposed initiative simply makes it impossible for a voter to know what a "yes" vote on the ballot will signify.

The meaning of the term "preferential treatment" is so confused, in part, because it has largely become a "catch phrase" for affirmative-action opponents. Perhaps for this very reason, this Court has wisely held that such "catch phrases"

are disfavored in initiatives because the meaning is highly subjective and emotionally charged, and with little actual connection to the true content of the initiative. *See In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). Such is clearly the case here.

IV. Conclusion

The meaning of the phrase "preferential treatment," is ambiguous, undefined, and as a catch phrase is highly subjective and misleading. Consequently, it is wholly unclear how the proposed initiative seeks to impact, if at all, existing or future constitutionally permissible programs, and voters would not understand the meaning of a "yes" vote on this constitutional amendment. For this reason, the ACLU of Colorado supports the position of Petitioners in requesting that the Court reverse the action of the Title Board.

Respectfully submitted this 16th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify on this 16th day of July, 2007, a true and correct copy of this **MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS** was placed in the United States mail, postage prepaid, to the following:

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