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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT AUG 0 3 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from Ballot Title Board	▲ **COURT USE ONLY** ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008 #31 POLLY BACA, KRISTY SCHLOSS AND RON MONTOYA, OBJECTORS, Petitioners, v. VALERIE ORR AND LINDA CHAVEZ, PROPONENTS AND WILLIAM HOBBS, DANIEL CARTIN AND DANIEL DOMENICO, TITLE BOARD, Respondents.	Case No.: 07SA197
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, DEPUTY ATTORNEY GENERAL, * 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

ANSWER BRIEF OF TITLE BOARD

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William A. Hobbs, Daniel Cartin and Daniel Domenico, as members of the Title Board (hereinafter "Board") hereby submit their Answer Brief. Because the Board filed an Opening Brief, this brief will respond only to issues raised in the Objectors' Opening Brief and in the amici briefs that were not addressed in the Board's Opening Brief.

STATEMENT OF THE ISSUES

The Board hereby incorporates the statement of issues set forth in its Opening Brief.

STATEMENT OF THE CASE

The Board hereby incorporates the statement of the case set forth in its Opening Brief.

STATEMENT OF THE FACTS

The Board hereby incorporates the statement of the facts set forth in its Opening Brief.

SUMMARY OF THE ARGUMENT

Objectors have not presented any arguments that warrant reversal of the Board's decision. Objectors' arguments ignore persuasive precedents from other

states concerning the strong relationship of discrimination and preferential treatment.

The term "preferential treatment" is not a catch phrase.

ARGUMENT

I. The measure contains only one subject.

Objectors argue at length that "preferential treatment" is different from discrimination. (Objectors' Brief, pp. 7-18.) In particular, they contend that preferential treatment includes actions involving overt discrimination and benign discrimination where persons may suffer discrimination but are not disadvantaged (Objectors' Brief, p. 13). They also attempt to distinguish two forms of preferential treatment, which they argue are separate subjects. According to Objectors, preferential treatment includes government discrimination for the purpose of alleviating past government discrimination and government action taken for the purpose of remediating discrimination. (Objectors' Brief, p. 18.)

Objectors misapprehend the theme of #31. The theme is best stated by Justice Mosk in his analysis of Proposition 209, a twin to #31. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). Proposition 209 "command[ed] governmental actors to treat all individuals and groups equally in

the *operation* of public employment, public education and public contracting." (Emphasis added.) *Id.* at 1089. Proposition 209 is a mandate for the government to treat all persons and groups equally and to remove both "barriers and entrances." *Id.* at 1091.

As the Court recently noted, it "will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions" regarding single subject. *In re Title, Ballot Title and Submission Clause for 2005-2006 # 55,* 138 P.3d 273, 278 (Colo. 2006). #31's central theme is the prohibition of unequal treatment in any form by the government based upon race, sex, color, ethnicity, or national origin. The rationale for any disparate treatment is immaterial. Both discrimination and preferential treatment, even as defined by Objectors, relate to government actions that treat individuals or groups differently based solely on identified characteristics. Therefore, the measure has a single subject.

II. "Preferential Treatment' is not a catch phrase.

The Objectors and amici Victor Ridder and American Civil Liberties Union, argue that the term 'preferential treatment" is a catch phrase. The Court must reject this claim.

Two courts which reviewed similar initiatives concluded that the titles incorporating the words "preferential treatment" are fair and impartial. In *Lungren*

v. Superior Court, 48 Cal. App. 4th 435, 55 Cal. Rptr.2d 690 (1996), the California Court of Appeals reviewed the titles for Proposition 209. The ballot title stated: "Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities." Certain citizens objected to the title, arguing, among other things, that the title was not fair and impartial. The court summarily rejected this claim. *Id.* 48 Cal. App. 4th at 443, 55 Cal.Rptr.2d at 694.

The Michigan Court of Appeals rejected a similar argument. *Coalition to Defend Affirmative Action and Integration v. Board of State Canvassers*, 686 N.W.2d 287 (Mich. App. 2004). Like California's proposal, the Michigan measure provided that the state could 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." The title stated:

> A proposal to amend the constitution to prohibit the University of Michigan and other state universities, the state and all other state entities from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin.

Again, certain citizens claimed that the titles were unfair. The Court concluded "that there is simply no merit to plaintiffs' contention that the language is 'propaganda' or is misleading." *Id.* at 293.[1]

Objectors and amici Ridder cite to a poll to support the argument that the phrase is a "catch phrase". *Trends in Political Values and Core Attitudes*: 1989-2007, Pew Research Center for The People & The Press (March 22, 2007)("*Trends*"). The poll purports to measure trends on current issues, including support for affirmative action and preferential treatment. The Court may not consider this poll.

The hearings conducted by the Board are designed to allow the public to present views on proposed measures to assist the Board's determinations regarding single subject and the content of any title that is set. *In re Title, Ballot Title and Submission Clause and Summary Concerning "Fair Treatment II"*, 877 P.2d 329, 333 (Colo.1994)(*"Fair Treatment II"*); *In re Title, Ballot Title and Submission*

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[1] Ridder notes that the term was used in a radio advertisement in Michigan by supporters of the amendment. The radio advertisement was broadcast in 2006. The Michigan court's decision was issued in 2004. Based upon the chronology, it is fair to conclude that the proponents did not believe that "preferential treatment" was a catch phrase. The court had already ruled that the titles, which included the phrase, were fair and impartial.

Clause and Summary Entitled W.A.T.E.R., 831 P.2d 1301, 1306 (Colo. 1992). Citizens may voice objections at two stages of the proceeding before the Board. They may object at the hearing or at the rehearing. *Fair Treatment II,* 831 P.2d at 1306. The failure to raise a contention in a motion for rehearing precludes review by this Court. *In re Proposed Ballot Initiative On Parental Rights*, n. 3, 913 P.2d 1127, 1130 (Colo. 1996). The Board has primary responsibility for reviewing the statements and arguments of the citizenry. As with an appeal from a district court decision, the Court cannot consider a matter that was not raised before the lower body.

The administrative record does not reflect that the Pew poll was presented to the Board or discussed before the Board. For this reason, the court cannot consider this document.

In addition, the poll itself is not relevant to the debate in Colorado. The authors of the poll concede that it may not accurately reflect the views of Colorado voters:

> Changes nationally in the beliefs of Americans on social, political and religious values tell a revealing but incomplete story. The proportion of voters who hold certain politically relevant core beliefs varies widely from state to state, further complicating an already complicated 2008 election campaign.

Trends, p. 5. The national results may not reflect public opinion in Colorado. Thus, any statements about preferential treatment in the report are not necessarily relevant to Colorado.

Even if the Court concludes that it may consider the poll, it does not support the argument that the term "preferential treatment" is a catch phrase. "'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 No. 258(A),* 4 P.3d 1094, 1100 (Colo. 2000). "Catch phrases" distract from consideration of the merits of a proposal. *Id.* The Court must distinguish between those terms "that provoke political debate and impede public understanding, and those terms that are merely descriptive of the proposal." *Id.*

Statements in Objectors' Opening Brief support the conclusion that the term is merely descriptive. They note that "'preferential treatment' may involve race, ethnic, or gender conscious programs that confer no right or privilege and

disadvantage *no one*." (Objectors' brief, p. 12.). Objectors also state that it is "possible to define 'preferential treatment'—or use another term—in such a way as to limit its applications and programs that are indeed discriminatory in nature." (Objectors' Brief, p. 14.) Objectors recognize that the term merely describes ways in which governments administer programs or enforce laws that may benefit or harm identifiable groups. The term does not detract from debate on the merits of a proposal. To the contrary, "preferential treatment" is a neutral phrase that does nothing more than describe a type of government activity.

The argument of Objectors and Ridder confuses the popularity of a proposal with prejudice. The fact that opposition to preferential treatment may be popular does not mean that the term itself is prejudicial. The Court recently rejected a contention that the phrase "term limits" constituted a "catch phrase". The concept of limiting terms of elected officials is popular. But the phrase "term limits" is a neutral term that merely describes the content of the measure. *In re Title, Ballot Title and Submission Clause and Summary for 2005-2006 #75*, n. 4, 138 P.3d 267, 272 (Colo. 2006). The phrase "term limits", though reflecting a popular concept, is not a catch phrase.

Assuming that the poll accurately reflects public opinion in Colorado about preferential treatment, the term "preferential treatment" is not a catch phrase.

CONCLUSION

For the above-stated reasons, the Court must affirm the action of the Title Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same in the United States mail, Express Mail, postage prepaid, at Denver, Colorado, this 3rd day of August 2007 addressed as follows:

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