Certification of Word Count: 2,280

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 AUG - 6 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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ANSWER BRIEF OF PETITIONERS

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Polly Baca, Kristy Schloss, and Ron Montoya ("Petitioners"), through their undersigned counsel, respectfully submit the following Answer 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. SUMMARY OF THE ARGUMENT

1. Violation of the Single Subject Requirement:

a. Prohibiting "discrimination" and both discriminatory and *non-*discriminatory forms of "preferential treatment" within a single initiative violates the single subject requirement.

b. Linking prohibitions upon discrimination to prohibitions upon remedies for discrimination, and linking these prohibitions in the areas of public employment, public education, and public contracting, all within a single initiative, violates the single subject requirement.

2. Fairness and Accuracy of the Title:

a. The title misrepresents and obfuscates the primary subject of the initiative – prohibition of all forms of state-sponsored "preferential treatment."

b. The title omits key disclosures from its opening phrase.

c. The title contains an impermissible catch phrase.

II. ARGUMENT

A. Violation of the Single Subject Requirement.

1. Prohibiting "discrimination" and both discriminatory and *non-*discriminatory forms of "preferential treatment" within a single initiative violates the single subject requirement.

The principal operative proclamation of this initiative is "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" (emphasis added). The proponents have chosen to use two distinct terms, up front, side by side, on equal footing, in the text of their measure. The question is whether these two terms – "discriminate" and "preferential treatment" – are part and parcel of a single *subject* or whether they constitute two subjects inappropriately linked within a single initiative.

The answer to this question turns on the scope of the term "preferential treatment." As discussed at some length both before the Title Board and in Petitioners' Opening Brief, "preferential treatment" may indeed involve governmental actions that effectively "discriminate" by comparatively advantaging or disadvantaging one person or group *vis a vis* another. Petitioners have posed

other examples of "preferential treatment," however, which confer *no* comparative advantage or disadvantage whatsoever – *e.g.*, informational outreach, dual-language public notices, gender-specific health care programs, and programs honoring accomplishments or addressing concerns that happen to focus upon or impact racial, ethnic, or gender groups on a non-uniform basis. Programs of this nature do not "discriminate against" anyone in common understanding.

It would not be a difficult exercise for the Proponents to address and wholly eliminate this issue. All they would have to do is state that their initiative does not impact the kinds of *non*-discriminatory programs cited above – either because these programs do not constitute "preferential treatment" or because the initiative only addresses discriminatory "preferential treatment." Yet, before the Title Board and in their Opening Brief, they consistently (and despite clear and repeated invitation by both these Petitioners and the Board) decline to do so. Rather, they simply invert the question, declaring that "Government sponsored preferential treatment *is* discrimination" – Resp. Op. Br., p. 7 (emphasis in the original) – and that "discrimination and preferential treatment are simply two sides of the same principle. To grant preferential treatment to one is to discriminate against another." Resp. Op. Br., p. 10. Petitioners would not quibble with this proposition in the context of those forms of preferential treatment that confer at least some

degree of comparative advantage or disadvantage; they disagree, however, with regard to the many other forms that do not.

More troubling is the evolving position of the Title Board. As noted in Petitioners' Opening Brief, the Board identified the single subject issue posed above and asked precisely the right questions. Pet. Op. Br., pp. 15-16. Yet, in the wake of a manifestly evasive and circular response, the Board proceeded – candidly and fully acknowledging the importance of this step – to its own conclusion that the measure addressed only "preferential treatment that is discriminatory in nature." Pet. Op. Br., p. 15. The Board's Opening Brief disregards the distinction altogether and argues the point more energetically than even the Proponents are willing – proclaiming sweepingly that preferential treatment "is only a form of discrimination" (Bd. Op. Br., pp. 3, 5), that "there is no substantive difference between 'discrimination against' and 'preferential treatment' towards individuals or groups" (Bd. Op. Br., p. 12), and that "it cannot be denied that [preferential treatment] is a form of discrimination" (Bd. Op. Br., p. 13). Finding insufficient support from the Proponents for these aggressive pronouncements, the Board grounds its position in a group of opinions involving post-adoption challenges to similar initiatives in other states addressing either (a)

application to indisputably discriminatory forms of preferential treatment[1] or (b) the compatibility of such state laws with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[2] Respectfully, neither of these issues has been raised by the Petitioners or is before this Court in the context of the present title setting appeal.

Acknowledging that its own interpretive stance on the issue of whether the initiative contains a single subject – the issue that *is* before this Court – is subject to disagreement, the Board accuses the Petitioners of asking it to "choose sides in the philosophical and political debates that underlie this measure." Bd. Op. Br., p. 13. Respectfully, determining whether the measure contains a single subject does not require the Board to "choose sides" in the political debate. Petitioners are simply asking the Board to demand sufficient certitude and clarity from the Proponents to determine whether the *two* terms and concepts the Proponents have chosen as the focus of their initiative address a single subject – discrimination.

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[1] *See, e.g.*, Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000), discussed by the Board at pp. 7-9 of its Opening Brief, as well as by Petitioners at pp. 14-15 of their Opening Brief. The California Supreme Court was interpreting and addressing a post-adoption challenge to the application of a similarly worded initiative to a manifestly discriminatory municipal contracting program and expressly limited its holding to a form of "preferential treatment" that required private contractors dealing with the city to notify, solicit, negotiate with, and justify rejection of bids from minority and women enterprises as distinguished from pure nondiscriminatory outreach programs not at issue. Id. at 1085.

[2] See Bd. Op. Br., pp. 9-12.

The problem is that the Proponents – having carefully chosen to add the term "preferential treatment" to their text on an equal footing with the term "discriminate against" – refuse to disclaim its application to the myriad forms of patently non-discriminatory programs posed by the Petitioners (or to argue that Petitioners are wrong and that those types of programs should themselves be viewed as discriminatory).

The question boils down to whether the subject of this initiative is discrimination or whether the *subjects* of this initiative are (1) discrimination and (2) any other state activity that imparts purely a benefit in a non-neutral fashion. The Petitioners are simply asking the Board to require the Proponents to provide it sufficient guidance to allow it to determine, upon some basis other than pure unsupportable administrative fiat, whether this initiative contains one subject or two. If the Proponents elect to stonewall (which perhaps suggests the answer), and the Board cannot adduce this basic and essential information, the Board cannot answer the single-subject question. If the Board cannot answer this question, it cannot in good faith, and consistent with its charge under §1-40-106.5, C.R.S. (2006), set a title.

2. Linking prohibitions upon discrimination to prohibitions upon remedies for discrimination, and linking these prohibitions in the areas of public employment, public education, and public contracting, all within a single initiative, violates the single subject requirement.

Petitioners stand upon their arguments with regard to these two issues as presented in pp. 18-21 of their Opening Brief.

B. Fairness and Accuracy of the Title.

1. The title misrepresents and obfuscates the primary subject of the initiative – prohibition of all forms of state-sponsored "preferential treatment."

However one may view the sweep of the term "preferential treatment," the Proponents believed it sufficiently important – and distinct from the generally understood concept of "discrimination" – to state it separately in the opening words of the text of their initiative: "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." The concept represented by the term "preferential treatment" was important enough to the Proponents to set forth separately – alongside "discriminate against" – in the first ten words of the 280-word text of their initiative. The Petitioners agree that this concept is crucial, not only as representing a separate subject, but – as discussed on pp. 22-23 of their

Opening Brief – as the real operative component (in terms of change from existing law and the core political and social issues that will define the substantive debate over the merits) of the entire initiative.

The Title Board – on its own, without request by the Proponents, over the objection of the Petitioners, and inconsistent with the textual language of the measure itself – has taken a different tack. While everyone else involved apparently views the concept represented by the term "preferential treatment" to be at least important enough to present and specify up front and alongside the concept of discrimination, the Board relegates it to the level of an implementation detail – behind introductory title language stating unequivocally that this is a constitutional amendment solely "*concerning a prohibition against discrimination by the state.*"

Whether or not this Court concurs with the Petitioners that the initiative contains more than one subject and that the title obfuscates the second one, it is indisputable (and indeed undisputed) that the proposed prohibition upon "preferential treatment" is the principal thrust of this measure, the principal operative change in the law to be wrought, and the principal political and social issue to be debated. Outside of that context, however defined, no one is realistically suggesting that the law either currently permits or should permit the

state to "discriminate against" individuals or groups on the basis of race, sex, color, ethnicity, or national origin.

Even if one joins the Title Board and accepts the Proponents' proposition that "preferential treatment" – in all its forms and manifestations – is simply a subcategory of "discrimination," the Board has been clearly apprised that this is a matter of debate in terms of common understanding and will be a disputed political issue. The Proponents, while arguing that one is part of the other, understood the need to be clear in the opening words of their measure that they were dealing with *both concepts* – placing them textually on an equal footing. The voters deserve no less from the Board. What they've gotten is a title that states that this is all about – and *only* about – "discrimination." Worse, what they've gotten is a substantively biased title that comes down squarely and unequivocally on one side of a significant piece of the ultimate political debate – *officially declaring to the voters that "preferential treatment" per se amounts to "discrimination."* This is patently and egregiously unfair.

2. The title omits key disclosures from its opening phrase.

Petitioners stand upon their arguments with regard to this issue as presented on p. 24 of their Opening Brief.

3. The title contains an impermissible catch phrase.

As discussed at pp. 24-26 of Petitioners' Opening Brief, and in the separate *Amicus Curiae* Brief of Victor R. Ridder, the term "preferential treatment" has acquired a political stigma. Proponents suggest that it is merely "descriptive" – Resp. Op. Br., pp. 18-20.[3] The Title Board notes that the phrase has been used in similar measures (and presumably titles) in three other states – Bd. Op. Br., p. 19 – though neglecting to note that the passage of the measures in each of those states suggests, if anything, the negative power of those words.

As this Court has noted, "[t]he existence of a slogan or catch phrase is determined in the context of contemporary political debate." In re Proposed Initiatives for 1997-1998 #s 102 and 103, 961 P.2d 1092, 1100 (Colo. 1998). Evidence of the stigma attached to the phrase "preferential treatment" is squarely before this Court in the poll cited by Petitioners on p. 25 of their Opening Brief and the separate analysis of *Amicus Curiae* Ridder. The Court can also apply its own observation of the current social and political environment. As "descriptive" as these words may be in the Proponents' view, other less politically "loaded" phrases

[3] The Proponents also tweak the Petitioners for (1) criticizing the Board for not presenting the term "preferential treatment" prominently in the title, while concurrently (2) arguing that the term is a catch phrase. As discussed in part B(1), above, it is the *concept*, as distinguished from the *term*, that should be presented prominently in the title. For example, "the state shall not treat persons differently based upon . . . ."

could have been used in the title (as suggested on p. 26 of Petitioners' Opening Brief) – indeed must be used in the title in a less biased and more prominent fashion. The use and effect of these words in the text of the measure is well-advised and strategic, and the Proponents have every right to use them. The incorporation of these specific words into the title, however, is both unnecessary and unfair.

III. CONCLUSION

The Petitioners renew their request that the Court reverse the actions of the Title Board and 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 6th day of August, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2007, a true and correct copy of the foregoing **ANSWER BRIEF OF PETITIONERS** was served via hand delivery to the following addressees:

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