

ORIGINAL

<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue, Denver, Colorado 80203</p>	<p>FILED IN THE SUPREME COURT</p> <p>JUN 25 2007</p> <p>OF THE STATE OF COLORADO SUSAN J. FESLER, CLERK</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p> <p>Petitioners: POLLY BACA, KRISTY SCHLOSS, and RON MONTROYA, Objectors,</p> <p>v.</p> <p>Respondents: VALERY ORR and LINDA CHAVEZ, Proponents,</p> <p>and</p> <p>Title Board: WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners: Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone No.: 303/256-3978; Fax No.: 303/292-3152 E-mail: eramey@ir-law.com</p> <p>Jean E. Dubofsky, #880 Jean E. Dubofsky, P.C. 1000 Rosehill Drive Boulder, Colorado 80302 Phone: 303/447-3510; Fax: 303/447-2801 E-mail: jeandubofsky@comcast.net</p>	<p>Case No.</p> <p>07SA197</p> <p>07SA197</p>
<p>PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #31 ("PROHIBITION ON DISCRIMINATION AND PREFERENTIAL TREATMENT BY COLORADO GOVERNMENTS")</p>	

Polly Baca, Kristy Schloss, and Ron Montoya ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to § 1-40-107(2), C.R.S. (2006), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2007-2008 #31 ("Prohibition on Discrimination and Preferential Treatment by Colorado Governments").

I. ACTIONS OF THE BALLOT TITLE SETTING BOARD

The Title Board conducted its initial public meeting and set titles for proposed Initiative 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 hereby seek review of the final action of the Title Board with regard to proposed Initiative 2007-2008 #31 pursuant to § 1-40-107(2), C.R.S. (2006).

II. ISSUES PRESENTED

1. Does the proposed initiative violate the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2006), by combining in one measure broad prohibitions of "discrimination" and "preferential treatment?"

2. Does the proposed initiative violate the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2006), by combining in one measure prohibitions of "preferential treatment" in the areas public employment, public contracting, and public education?

3. Does the proposed initiative violate the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2006), by combining in one measure a prohibition of discrimination and the adoption and sanctification of a wholly new form of discrimination?

4. Is the title misleading in contravention of § 1-40-106, C.R.S. (2006), in failing to disclose the adoption and sanctification of a wholly new form of discrimination in the context of an initiative purporting to prohibit discrimination generally?

5. Is the title misleading in contravention of § 1-40-106, C.R.S. (2006), in suggesting by its opening clause that the prohibition of "preferential treatment" is simply a subcategory of prohibiting discrimination?

6. Is the title misleading in contravention of § 1-40-106, C.R.S. (2006), by omitting key information from its opening clause?

7. By use of the term "preferential treatment," does the title contain an impermissible catch phrase?

III. SUPPORTING DOCUMENTATION

As required by § 1-40-107(2), C.R.S. (2005), a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted herewith.

IV. RELIEF REQUESTED

Petitioners respectfully request this Court to reverse the actions of the Title Board with directions to decline to set a title and return the proposed Initiative to the proponents.

Respectfully submitted this 25th day of June, 2007.

ISAACSON ROSENBAUM P.C.

By: 

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and

Jean E. Dubofsky, #880
JEAN E. DUBOFSKY, P.C.
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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June, 2007, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #31 ("PROHIBITION ON DISCRIMINATION AND PREFERENTIAL TREATMENT BY COLORADO GOVERNMENTS")** was placed in the United States mail, postage prepaid, to the following:

Richard A. Westfall, Esq.
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Jayne Wills



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **MIKE COFFMAN**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #31".....

.....

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 22nd day of June, 2007.

A handwritten signature in black ink that reads "Mike Coffman".

SECRETARY OF STATE

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BALLOT TITLE BOARD

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE FOR 2007-2008 # 31 ("PROHIBITION ON DISCRIMINATION AND PREFERENTIAL TREATMENT BY COLORADO GOVERNMENTS")

Polly Baca, Kristy Schloss, and Ron Montoya ("Petitioners"), being registered electors of the State of Colorado, respectfully submit the following Motion for Rehearing, pursuant to C.R.S. § 1-40-107(1), concerning the actions of the Title Board at the hearing on June 6, 2007, regarding Proposed Initiative for 2007-2008 # 31 ("Prohibition on Discrimination and Preferential Treatment by Colorado Governments"). Petitioners respectfully submit that 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), and that the Board does not, therefore, have jurisdiction to set a title. Petitioners also respectfully submit that the title, ballot title and submission clause established by the Title Board are unfair and do not fairly express the true meaning and intent of the proposed constitutional amendment as required by §1-40-106, C.R.S. (2006). In support of this Motion, the Petitioners submit the following specific objections.

Violation of Single Subject Requirement

1. The initiative expressly addresses two separate subjects by purporting to prohibit "discrimination" and to prohibit "preferential treatment."

a. While some forms of "preferential treatment" may be viewed as a subclass of "discrimination" by some voters, there are many forms of governmental action that may be classified as "preferential treatment" but are in no way "discriminatory."

Discrimination has been defined as "the effect of a law or established practice that

confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap." Black's Law Dictionary 500 (8th ed. 2004). There are many forms of "preferential treatment" that neither confer nor deny privileges (as that term is commonly understood) to any class – *e.g.*, diversity recruitment programs, gender-specific health care programs, provision of official notices in a language other than English. Prohibiting "preferential treatment" of this nature is a distinct and separate subject from prohibiting discrimination. The proponents have repeatedly declined to define what they mean by "preferential treatment," thus creating a surreptitious measure that will have the effect of surprising and misleading the voters.

b. "Preferential treatment" – in either an arguably discriminatory or nondiscriminatory form – is generally applied as a remedy for past or existing discrimination. It is not uncommon for a voter to oppose discrimination, yet favor certain forms of "preferential treatment" as a remedy for discrimination. This measure is designed to enlist the support of voters who would favor one measure – prohibiting discrimination – in support of another measure – to prohibit "preferential treatment" – which would be less likely to pass on its own merits (*i.e.*, quintessential "logrolling").

2. The initiative purports to prohibit both discrimination and preferential treatment in three distinct areas – public employment, public contracting, and public education.

a. Considerations in the area of public education are very distinct from those in the areas of employment and contracting. Prohibiting "preferential treatment" may well not only affect issues of access or admission, but may involve curricular choices, extra-curricular activities, public support for racially or ethnically or gender imbalanced schools or institutions, etc.

b. The initiative contains an exception for "bona fide qualifications based on sex." This is a form of legalized discrimination that has, to date, only found recognition in the context of employment, *i.e.*, "bona fide occupational qualifications." See, *e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991). The effect of the initiative would be to extend a form of discrimination heretofore sanctioned in one area into two new areas. This surreptitious effect would be a surprise and unfair to the voters.

3. The initiative contains a provision legalizing a form of discrimination – "bona fide qualifications based on sex" – beyond the context in which that concept has heretofore been recognized ("bona fide occupational qualifications") and thereby creating and sanctioning a new form of discrimination within a measure that purports to prohibit discrimination. These are incongruous effects, surreptitious in nature, that will indisputably surprise and mislead the voters.

Title is Unfair and Misleading

1. The title contains a catch phrase – "preferential treatment" – that may not be used even if the term is used in the measure itself. This is a politically "loaded" phrase suggestive of disadvantaging a non-"preferred" person or group while the effect of the measure will be far broader, and one designed to "tip the substantive debate" surrounding the issue to be submitted to the electorate. See, *e.g.*, In re Proposed Initiative for 1999-2000 #258(A), 4 P.3d 1094 (Colo. 2000).

2. The initial phrase of the title suggests that this is primarily or exclusively a measure "concerning a prohibition against discrimination by the state, and, in connection therewith," containing a variety of implementing provisions. The key, and separate and distinct,

prohibition on "preferential treatment" is wholly omitted from this introductory language. This is unfair and misleading to the voters.

3. The introductory phrase to the title suggests that the measure involves a prohibition on discrimination "by the state" – and it is not until later that one learns that this includes agencies or departments of the state, public institutions of higher education, political subdivisions, and governmental instrumentalities of or within the state. This is unfair and misleading to the voters.

4. The introductory phrase to the title omits reference to the fact that the initiative is applicable to the three distinct areas of public employment, public contracting, and public education. This is unfair and misleading to the voters.

5. The introductory phrase to the title omits reference to the fact that the initiative is applicable only to discrimination and "preferential treatment" based upon race, sex, color, ethnicity, and national origin. This is unfair and misleading to the voters.

6. The title does not disclose that a significant effect of the initiative will be to *create and sanction* a wholly new form of discrimination – in the context of an initiative facially represented by the title as designed to *prohibit* discrimination – through the recognition of "bona fide qualifications based on sex." This is misleading (both in itself and as failing to disclose this surreptitious second subject) and manifestly fraudulent upon the voters. If an initiative adopts a new legal standard, particularly one that is likely to be controversial, the voters are entitled to be clearly apprised of this fact in the title. *See, e.g., In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990).

Respectfully submitted this 13th day of June, 2007.

ISAACSON ROSENBAUM P.C.

By: 

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Final #31

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

Article II of the constitution of the state of Colorado is amended by the addition of the following section:

SECTION 31: NONDISCRIMINATION BY THE STATE

(1) 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.

(2) THIS SECTION SHALL APPLY ONLY TO ACTION TAKEN AFTER THE SECTION'S EFFECTIVE DATE.

(3) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING BONA FIDE QUALIFICATIONS BASED ON SEX THAT ARE REASONABLY NECESSARY TO THE NORMAL OPERATION OF PUBLIC EMPLOYMENT, PUBLIC EDUCATION, OR PUBLIC CONTRACTING.

(4) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS INVALIDATING ANY COURT ORDER OR CONSENT DECREE THAT IS IN FORCE AS OF THE EFFECTIVE DATE OF THIS SECTION.

(5) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING ACTION THAT MUST BE TAKEN TO ESTABLISH OR MAINTAIN ELIGIBILITY FOR ANY FEDERAL PROGRAM, IF INELIGIBILITY WOULD RESULT IN A LOSS OF FEDERAL FUNDS TO THE STATE.

(6) FOR THE PURPOSES OF THIS SECTION, "STATE" SHALL INCLUDE, BUT NOT NECESSARILY BE LIMITED TO, THE STATE OF COLORADO, ANY AGENCY OR DEPARTMENT OF THE STATE, ANY PUBLIC INSTITUTION OF HIGHER EDUCATION, ANY POLITICAL SUBDIVISION, OR ANY GOVERNMENTAL INSTRUMENTALITY OF OR WITHIN THE STATE.

(7) THE REMEDIES AVAILABLE FOR VIOLATIONS OF THIS SECTION SHALL BE THE SAME, REGARDLESS OF THE INJURED PARTY'S RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN, AS ARE OTHERWISE AVAILABLE FOR VIOLATIONS OF THEN-EXISTING COLORADO ANTI-DISCRIMINATION LAW.

(8) THIS SECTION SHALL BE SELF-EXECUTING. IF ANY PART OF THIS SECTION IS FOUND TO BE IN CONFLICT WITH FEDERAL LAW OR THE UNITED STATES CONSTITUTION, THE SECTION SHALL BE IMPLEMENTED TO THE MAXIMUM EXTENT THAT FEDERAL LAW AND THE UNITED STATES CONSTITUTION PERMIT. ANY PROVISION HELD INVALID SHALL BE SEVERABLE FROM THE REMAINING PORTIONS OF THIS SECTION.

Proponents:

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Ballot Title Setting Board

Proposed Initiative 2007-2008 #31¹

The title as designated and fixed by the Board is as follows:

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 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; allowing exceptions to the prohibition when bona fide qualifications based on sex are reasonably necessary or when action is necessary to establish or maintain eligibility for federal funds; preserving the validity of court orders or consent decrees in effect at the time the measure becomes effective; defining "state" to include the state of Colorado, agencies or departments of the state, public institutions of higher education, political subdivisions, or governmental instrumentalities of or within the state; and making portions of the measure found invalid severable from the remainder of the measure.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be 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 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; allowing exceptions to the prohibition when bona fide qualifications based on sex are reasonably necessary or when action is necessary to establish or maintain eligibility for federal funds; preserving the validity of court orders or consent decrees in effect at the time the measure becomes effective; defining "state" to include the state of Colorado, agencies or departments of the state, public institutions of higher education, political subdivisions, or governmental instrumentalities of or within the state; and making portions of the measure found invalid severable from the remainder of the measure?

Hearing June 6, 2007:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 3:40 p.m.

Hearing June 20, 2007:

Motion for Rehearing denied.

Hearing adjourned 4:09 p.m.

¹ Unofficially captioned "Prohibition on Discrimination and Preferential Treatment by Colorado Governments" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.