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BALLOT TITLE BOARD

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MOTION FOR REHEARING

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

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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.

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