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| **SUPREME COURT, STATE OF COLORADO**<br>2 East 14th Avenue<br>Denver, Colorado 80203 | Supreme Court Case No:<br>2024SA117 |
| Original Proceeding<br>Pursuant to § 1-40-107(2), C.R.S.<br>Appeal from the Initiative Title Setting Review Board<br>Petitioners:<br><br>Wayde Goodall and Darcy Schoening<br><br>v.<br>Respondents:<br><br>Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern, and Dr. Lora Melnicoe<br><br>and,<br>Title Board:<br><br>Theresa Conley, Kurt Morrison, and Jeremiah Barry | |
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| **PETITIONER'S OPENING BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 6,436 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

*/s/ Nicholas S. Bjorklund*
Nicholas S. Bjorklund, Atty. No. 50298
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**B.** Whether the Title Board erred in holding that the revisions made and submitted by Petitioners on April 5, 2024, were impermissible per the Colorado Constitution.

## STATEMENT OF THE CASE

### I. Statement of Relevant Facts

Proposed Initiative 2023-2024 #175 ("Initiative #175") would prohibit a health-care provider from performing gender transitioning surgery on or providing gender transitioning medication to minors. The initiative accomplishes this by defining and stating the action prohibited and by providing enforcement mechanisms for the same. The enforcement mechanisms include a private right of action for any damages resulting from a violation of the prohibited activity, with damages including any change occurring to the minor as a direct result of the prohibited surgery or medication. There is also a duty for the Colorado Attorney General to bring an action to enjoin further violations and enforce the provisions of the measure through a civil penalty, and there is a duty for the appropriate regulatory authority to take immediate action, including via a finding of unprofessional conduct, against individuals performing the prohibited activity.

## II. Nature of the Case and Proceedings Before the Title Board

Wayde Goodall and Darcy Schoening, each registered electors of El Paso County and the State of Colorado (collectively, the "Petitioners") are the designated representatives for the proposed Initiative #175. They properly filed the measure with the Initiative Title Setting Review Board (the "Title Board") on February 22, 2024 ("Original Measure"). Secretary of State Certified Record "R." at 11. Prior to filing it, Petitioners submitted the text, as required in accordance with Article V, Section 1(5) of the Colorado Constitution and section 1-40-105(1), C.R.S., to Legislative Council Staff and the Office of Legislative Legal Services, amending the measure accordingly.

At the initial Title Board hearing held on March 6, 2024, the Title Board unanimously approved the measure as containing a single subject as required by Article V, Section 1(5.5) of the Colorado Constitution and Section 1-40-106.5, C.R.S., and set a title.[1] R. at 19. The Title Board set the ballot title and submission clause as follows:

> Shall there be a change to the Colorado Revised Statutes prohibiting a healthcare provider from performing gender transitioning surgery on or providing medication to a minor under 18 years of age, and, in connection therewith, imposing liability on the healthcare provider that performed the procedure and any person who assisted until the minor is 48 years old or 10 years after their death; a healthcare provider is liable even if the minor and parent consented to the procedure; allowing

[1] The board approved the measure as a single subject 3-0 at 4:11:10 during the hearing on March 6, 2024. The audio can be found here: https://bit.ly/3UG5DWA.

> any person to advise the state's attorney general of a prohibited procedure and requiring the attorney general to file a lawsuit against the provider and anyone that assisted for up to 20 years after the prohibited procedure occurred? (hereinafter, the "Initiative Title")

R. 21 (as properly reflected on page 1 of the Motion for Rehearing).

A motion for rehearing was filed on March 13, 2024, by third parties. R. at 21. At the rehearing on April 3, 2024, the original decision was reversed, and the title setting was denied on the grounds that the measure contained multiple subjects, contrary to Article V, Section 1(5.5) of the Colorado Constitution, leading the Title Board to hold that it lacked jurisdiction to set title. R. at 19.

While Petitioners maintain that the language submitted on February 22, 2024, which was originally approved by the Title Board, constitutes a single subject, they chose to revise and resubmit the measure as permitted by Article V, Section 1(5.5) of the Colorado Constitution, which allows a measure to "be revised and resubmitted for fixing of proper title without the necessity of review and comment." On April 5, 2024, in a good faith effort to accommodate both the Title Board and those who filed the motion for rehearing, Petitioners submitted to the Title Board revisions that changed some language from the measure to limit and clarify but not change the scope or meaning of the measure so as not to be so substantial as to require additional review and comment ("Revised Measure"). R. at 3.

Per the Colorado Secretary of State's website, the last day for a Title Board hearing for measures that will appear on the November 2024 General Election ballot

was April 17, 2024.[2] The hearing for the revised language submitted by Petitioners was set for that day. R. at 17. At the hearing, the Title Board denied the setting of title for the now revised language, citing that the board lacks jurisdiction as the Petitioners "not only eliminated but added language" and, therefore, had failed, in its view, "to file the measure in accordance with Article V, Section 1(5.5) of the Colorado Constitution." R. at 17.

The Title Board's decision at the rehearing on April 3, 2024, that the measure did not represent a single subject and the Title Board's decision not to permit the revised language submitted on April 17, 2024, were both made in error.

**III. Jurisdiction**

Petitioners now seek review of the Title Board's actions before this Court pursuant to 1-40-107(2), C.R.S. They have timely filed their Petition for Review, preserving the issues, within seven days from April 23, 2024, the date on which the Secretary of State furnished the certified copies required by Section 1-40-107(2), C.R.S. R. at 1.

## SUMMARY OF THE ARGUMENT

The Title Board's decision to set title on March 6, 2024, was appropriate. The Original Submission of Initiative #175 contains only a single subject of prohibiting

[2] Colorado Secretary of State 2023-2024 Initiative Calendar can be found here: https://bit.ly/4aXdXa5.

a specific kind of medical procedure from being conducted on minors. The remaining provisions, which are directly connected therewith, go to securing and enforcing the stated prohibition against any health-care provider or person that violates it and are each limited by and only triggered upon a violation of the prohibited activity. The elements of the measure all point in the same direction to the central purpose of prohibiting the medical gender transitioning of minors and do not represent "logrolling" or any attempt to gain support from conflicting factions by the use of multiple subjects.

The question before this Court, however, is not whether this represents good policy, but whether the ballot title and submission would be clear for the voters. The Initiative Title set on March 6, 2024, does not present any risk of voter surprise nor is it misleading. While the title is not required to include every possible impact, it fairly and clearly presents the single subject of the measure as a choice for voters. It is not confusing nor ambiguous, and it rightly defines the initiative. Moreover, all arguments raised that go to the merits and potential impacts of the measure are irrelevant as to whether the measure is indeed a single subject. Therefore, the Title Board's subsequent decision at the Rehearing on April 3, 2024, denying title setting "on the grounds that the initiative contains multiple subjects," should be reversed. R. 19.

The Title Board also erred when it held that the Revised Measure submitted by Petitioners on April 5, 2024, was impermissible pursuant to the Colorado Constitution. The Title Board wrongly interpreted an "or" in Article V, Section 1(5.5) of the Colorado Constitution to be an "and" leading it to deny the Petitioners a hearing on their revisions, believing the Constitution prohibited it from having jurisdiction. R. 17. While the Title Board's interpretation was incorrect, even under the Title Board's reading of the Constitution, the revisions did not eliminate nor add any new provisions to the measure. They merely altered, in a non-substantive manner, existing provisions with the changes made in direct response to the Title Board's holding on April 3, 2024. Accordingly, the Title Board's decision to deny the Petitioners a hearing to set title on April 17, 2024, should be reversed.

## ARGUMENT

### I. Initiative #175 Contains a Single Subject

#### A. Standard of Review; Preservation of the Issues

Pursuant to Article V, section 1(5.5) of the Colorado Constitution, "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title."

This Court has repeatedly held that "one subject" is achieved when a proposed initiative "tends to effect or to carry out one general objective or purpose," *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 13, 395

P.3d 318, 321 (Colo. 2017). Additionally, an initiative does not violate the single-subject requirement simply because it contains provisions necessary to effectuate its purpose. *See In re Title, Ballot Title and Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶ 7, 328 P.3d 155, 159 (2014). Rather, so long as they are interrelated, such provisions "are properly included within [the initiative's] text." *Id.*; *see also In re Title, Ballot Title and Submission Clause for 2009–2010 #45*, 234 P.3d 642, 646 (Colo. 2010) ("An initiative may contain several purposes, but they must be interrelated.... Implementing provisions that are directly tied to the initiative's central focus are not separate subjects." (Citation omitted)). In reviewing the Title Board's actions, this Court's limited role is to construe the single-subject requirement liberally to avoid unduly restricting the initiative process. *In re 2013–2014 #90*, 2014 CO 63, ¶ 12, 328 P.3d at 160.

This Court should hold that Initiative #175 contains a single subject: prohibiting a health-care provider from performing gender transitioning surgery on or providing gender transitioning medication to minors. Here, Respondents contend that Initiative #175 contains multiple subjects. They are wrong.

The Respondents incorrectly argue that subsections of Initiative #175 are violative of the single subject requirement because they: 1) Penalize providers of healthcare, unrelated to gender transitioning medical procedures; and 2) Establish

liability for any person's "support" of a minor who accesses gender transitioning medical procedures.

However, both provisions "tend to ... carry out [the] one general objective" of limiting gender transitioning medical procedures by providing a means for enforcing the prohibitions against medical personnel. The enforcement mechanisms within Ballot Initiative #175 are ones that allow for regulatory enforcement for those medical personnel who engage in the prohibited activities, private civil causes of action with an expanded statute of limitations and mandated legal action by the Attorney General. The provisions are thus interrelated and necessarily and properly connected to the subject of prohibiting a health-care provider from performing gender transitioning surgery on or providing gender transitioning medication to minors. *See, e.g., In re 2009–2010 #45*, 234 P.3d at 647 (finding provisions "seek[ing] to achieve the central purpose of the initiative" to be "directly connected and related" to the initiative's single purpose).

A measure has more than one subject, however, if it has "two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002) (quoting *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076, 1078, 1078-79 (Colo.1995)). The limitation of a measure to a single subject is not intended to prevent voters from exercising their right to vote

on a matter on the basis of a policy decision. *See* C.R.S. § 1-40-106.5(2). It is intended, instead, to prevent "incongruous subjects" from being "in the same measure." *Id.* (internal quotations omitted). This safeguard is to prevent the potential for voters to only favor "part of an initiative and the potential for voter surprise." *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 16. It is not intended to prevent a measure from being determined by the people when that measure tends to "carry out one general objective." *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶¶ 11, 17. While the Court has a presumption in favor of the Title Board's actions, it can and should overturn the Title Board when clear. *See In re Title, Ballot Title, & Submission Clause for 2013–2014 #76*, 2014 CO 52, ¶ 8; *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶¶ 8–9.

This argument was preserved with the filing of the Petition for Review on page 5 on April 24, 2024.

**B. Effects Do Not Go to a Single Subject**

The Court is not to consider the policy or effect an initiative may have if passed. *See In re Title, Ballot Title, & Submission Clause for 2019–2020 #3*, 2019 CO 57, ¶ 8. Instead, it is to focus its evaluation on whether a measure has a singular purpose. In doing so, it should "examine the initiative's wording to determine whether it comports with the constitutional single-subject requirement." *Id.* It is not,

on the contrary, the purpose of this review to "address the merits of the proposed initiative" *Id.* That responsibility remains with the voters. Likewise, the Court is not to "suggest how [the measure] might be applied if enacted." *Id.* For a measure that "tends to … carry out one general objective … [the] effects th[e] measure could have on Colorado … law if adopted by voters are irrelevant." *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶¶ 11, 17 (quotations omitted).

### C. The Initiative is a Single Subject

Initiative #175 does not constitute "logrolling," nor does it present a risk of voter surprise or fraud. "Logrolling" is the "joining together of multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or even conflicting interests." *See Matter of Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative Pub. Rts. in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995), *as modified on denial of reh'g* (July 31, 1995). Here, the initiative is about the single purpose of prohibiting specific medical procedures for minors and providing enforcement for the same. Everything in the measure points in the same direction. When all of the provisions of a measure "point in the same direction," the "risk of logrolling is low." *See In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 33.

Second, voters will not be at risk of surprise or fraud with Initiative #175 because the initiative is clear. The policy decision being what it is will be for their

determination, but the measure does not contain "a surreptitious provision coiled up in the folds of a complex initiative" that is designed to or that will inadvertently cause voters to pass something they did not intend. *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 12 (quotations omitted). Instead, it represents a single subject that is not misleading.

### D. Issues Raised in the Motion for Rehearing are not Issues of a Separate Central Purpose

Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern and Dr. Lora Melnicoe (collectively, the "Respondents") filed, through their counsel, the Motion for Rehearing. R. 21. In it, they first argued that the Title Board lacked jurisdiction to set title because the Original Measure consisted of more than one subject. They are mistaken.

#### 1. Argument Related to Scope of Impact Beyond Gender Transition

Respondents contend that the initiative would impact professionals other than health-care providers. They argue that it opens the door to all professionals licensed under Article 12. *Id.* This is clearly not true on its face, but it is made even more clear by simply reviewing how their argument is presented in their Motion for Rehearing. On their page 2, as the lead example of their position, they state that a "'Health care provider' is defined as any 'professional, establishment, or facility.'" This is misleading. The definition in the measure states that a "'Health-care Provider' means a *health-care* professional, establishment, or facility …." (emphasis

added). R. 13. The edits here by Respondents removing the relevant context is what is truly impactful.

Likewise, Respondents argue that the proposed section 12-30-123(7)(b) "incredibly" does not have "regard to the intent." R. 23. This is again simply incorrect. The proposed section, on its face, is only applicable "from a medical procedure conducted *in violation of this section*." (emphasis added) R. 14. Per proposed section 12-30-123(2)(a), in defining a violation of the "section," a "health-care provider shall not perform or offer to perform on a minor, or administer or offer to administer to a minor, a medical procedure *if the performance or administration of the procedure is for the purpose of* …" (emphasis added). A violation of the section is expressly limited by a requirement that a person be performing or administering the procedure for "for the purpose of" the listed prohibited basis. A health-care professional cannot violate the section unless the professional acts purposefully.

Lastly, the Respondents argue that proposed section 12-30-123(2)(a)(II) would prevent health-care professionals from treating minors suffering from "distress and discomfort," preventing, for example, even the administration of routine care like antidepressants. R. 23. This is also not accurate. The language here from the Original Measure, though later revised in the Revised Measure, aligns with the single subject of prohibiting a health-care provider from performing gender

transitioning surgery on or providing gender transitioning medication to minors. Essentially, a provider cannot perform or administer a medical procedure for the purpose of "treating purported discomfort or distress *from a discordance* between the minor's sex and asserted identity." R. 13 (emphasis added). The health-care professional can absolutely treat discomfort and distress in a minor. She can absolutely treat a minor with gender identity concerns too. The professional just cannot do it for the purpose of treating a discordance between the minor's sex and asserted identity. In other words, the health-care professional cannot perform gender transitioning surgery on or provide gender transitioning medication to that minor, but the professional can provide all other care if not done for the purpose of treating the discordance between the minor's sex and asserted identity, which by definition would be done to foster a transition. This definitional language is intended to prevent a health-care professional from avoiding application of the proposed statute by claiming the procedure or medication is intended not to transition the minor from one gender to another, but is instead intended to treat the discomfort or distress from a discordance between the minor's sex and asserted identity. So, a well-established and medically justified treatment to address physical or mental discomfort or distress that is not intended to transition a minor or affirm a gender identity inconsistent with the minor's sex would not be prohibited under the initiative.

Nevertheless, this argument is also moot as to the language in the Revised Measure, which addresses this objection, clarifying that the prohibited procedures are only those administered "for the purpose of medically changing the gender of the minor." R. 5. The Court should simply disregard this argument as moot in that instance.

**2. Argument Related to Scope of Liability**

Respondents next argued that the measure would inadvertently ascribe liability to individuals merely encouraging a minor or being otherwise supportive of a minor seeking the prohibited medical procedures. R. 24. This again is misconstruing the plain meaning of the text. Proposed section 12-30-123(7)(a) provides for an injured minor to seek relief "against a health-care provider, person, or entity alleged to have violated this section or a health-care provider, person, or entity that supported the alleged violation of this section." R. 14. Respondents quote the Cambridge dictionary with the concept of support meaning encouragement, but the language here is about ascribing liability to a person that "*supports the violation*." R. 24, and R. 14. (emphasis added). This is not about providing encouragement to the minor. It is about providing material assistance to those violating the section. In accordance with Black's Law Dictionary, a legal dictionary, support refers to providing the means for something. The first and relevant definition states that "support" means to "supply a means of survival and livelihood," as with child

support for example.[3] In this case, the plain meaning would be to actively engage in the violation of the statute by knowingly providing the material means of support to directly violate it.

In conclusion to Respondent's arguments, Initiative #175 is a single subject in both its unrevised text for the Original Measure and its revised text in the Revised Measure.

## II. The Original Initiative Title Meets the Standard for Clarity

### A. Standard of Review; Preservation of the Issues

Pursuant to Article V, section 1(5.5) of the Colorado Constitution, "No measure shall be proposed by petition containing more than one subject, *which shall be clearly expressed in its title*." (Emphasis added). "The Title Board's duty in setting a title is to summarize the central features of a proposed initiative," and "is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause." *In re 2013–2014 #90*, 2014 CO 63, ¶ 24. The Colorado Supreme Court "will not consider whether the Title Board set the best possible title. Rather, the title must fairly reflect the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board." *Id.* ¶ 25 (internal citations omitted); *see*

[3] Black's Law Dictionary, definition of "Support": https://thelawdictionary.org/support/

*also In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 24. Ultimately, the purpose of the clear title requirement is to "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re 2013–2014 #90*, 2014 CO 63, ¶ 23. "When it sets a title, the Title Board 'shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear.'" *Id.* (quoting C.R.S. § 1-40-106(3)(b) (2013)).

This argument was preserved with the filing of the Petition for Review, on page 5 on April 24, 2024.

**B. The Original Title Set on March 6, 2024 was Clear and Not Misleading**

The Initiative Title set by the Title Board on March 6, 2024, meets the standards for a clear title presenting the single subject of the measure. The title concisely captures the prohibition element and the enforcement elements of the measure. It does not use confusing terminology or present bias. It succinctly defines the issue in a way that will be clear to voters, avoiding any surprise and does not, by omission or otherwise, create anything that would be misleading.

## C. Respondents Claims Regarding Title Being Misleading

### 1. The Use and Definition of Minor is Not Confusing

In section II.A. of the Motion for Rehearing, Respondents claim that the Original Title is so overly broad as to create confusion because it states that the measure "prohibit[s] a healthcare provider from performing gender transitioning surgery on or providing medication to a minor under 18 years of age." R. 27. The Respondents read the terms "gender transitioning" as only applying to "surgery" and not also to the provision of "medication." They believe the voting populace will be confused into believing the initiative is attempting to prohibit all medication for minors. This is an unreasonably strained reading of the Original Title.

In the case of *In re 2013–2014 #90*, 2014 CO 63, the Colorado Supreme Court considered whether the title set by the Title Board satisfied the clear title requirement. In that case, opponents of the measure argued that the title was misleading because it did not "reflect the definition of 'oil and gas development' set out in the initiatives' text." *Id.* ¶ 26. They argued that voters would be misled by the title language because the title did not include the definition of oil and gas development contained in the initiative and a possible reading of that definition would restrict the measure to only the development of oil and gas owned by the State of Colorado. *Id.* ¶ 28.

The proponents countered by explaining that the initiative applied to all oil and gas within the state's geographic borders, and referred to language contained within the proposed initiative to support this interpretation. *See id.* ¶ 29. The Colorado Supreme Court stated that "[i]n construing the text of a proposed initiative, we employ general rules of statutory construction and accord the language of the proposed initiative and its titles its plain meaning." *Id.* ¶ 31. In applying those general rules of statutory construction, the court concluded that, in context and read as a whole, "oil and gas development" means the development of oil and gas within Colorado's geographic borders and the title was therefore not misleading on this point. *See id.*

Here, the challenged language appears in the first clause of the Original Title, which reads as follows: "Shall there be a change to the Colorado Revised Statutes prohibiting a healthcare provider from performing gender transitioning surgery on or providing medication to a minor under 18 years of age . . . ." R. 21. When interpreting a statute, the court gives words their ordinary meaning and reads them in context. *See, e.g., Jefferson Cty. Bd. Of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). The context of the initiative and its title is prohibiting medical procedures to alter the birth sex of a minor under the age of 18. An ordinary reading of the sentence would lead a reasonable Colorado voter to conclude that this initiative prohibits gender transitioning surgery or gender transitioning medication.

Similar to the case of *In re 2013–2014 #90*, the Original Title does not set forth the definitions contained within the initiative, but does provide a clear statement of the nature of the initiative such that "the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, [is able to] determine intelligently whether to support or oppose" the initiative. *Id.* ¶ 23.

Second, Respondents argue that the phrase "a minor under 18 years of age" is redundant, and presumably would also be misleading to such a material degree as to confuse voters. Nothing in the Colorado Constitution or section 1-40-106, C.R.S. requires a title to be free of redundancy, and Respondents do not explain how a redundant phrase renders the Original Title so unclear as to fail the clear title requirement. Further, we disagree that the phrase is redundant at all. Within the Colorado Revised Statutes today, there are numerous laws that distinguish between youths and children, between rights for those under 12, under 18, and those under 21. *See, e.g.*, C.R.S. §§ 15-14-203(2) (minor over age of 12 may consent or refuse a guardian); 18-7-401(2) (defining, for purposes of child prostitution, as a child any person under the age of 18); 18-12-108.5(1)(a) (person under the age of 18 may not possess a handgun); 18-12-112.5 (person under the age of 21 cannot purchase a firearm). Further, other states have enacted legislation dealing with matters of gender-identity that have application specifically to minors under ages other than 18, for example, Florida prohibits the discussion of gender-identity in public school

classrooms with any minors "in prekindergarten through grade 8." *See* Fla. Stat. § 1001.42(8)(c)(3) (prohibiting classroom instruction regarding matters related to sexual orientation or gender identity in prekindergarten through grade 8, except when required by statute). It is possible, then, that the public would no longer assume that a minor means a person under 18. The clarity is potentially helpful, not confusing or misleading.

In both cases, the language, even if not the best possible language for the title, is clear.

**2. The Title is Devoid of Political Catchphrases**

In section II.B. of the Rehearing Motion, Respondents claim that "gender transitioning surgery" is a political catchphrase. R. 27. We disagree.

Words that accurately describe the subject of a measure do not constitute marketing speak or bias as a political catchphrase simply because a politician has used them. Words however that attempt to persuade by their connotation rather than describe, such as "affirming care" when referring to such procedures, do carry those prejudices. "Gender transitioning surgery" is descriptive, not biased.

**3. The Title is Not Required to List Every Aspect of the Measure**

In Section I.B. of the Rehearing Motion, Respondents claim that the title is misleading because it does not highlight the provision in the measure regarding common law. R.25. The proposed language in 12-30-123(5) states that the measure

supersedes common law standards that might otherwise conflict. Nothing about this language is misleading, but instead avoids potential litigation regarding whether the statute intended to abrogate any common law provisions. In Colorado, statutes abrogate the common law if they were intended to abrogate the common law. *C.f. Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 611 (Colo. 2005). Abrogation may be express or implied, but must be more than a mere apparent connection between the statute and a common law rule. *Id.* Here, even excluding the language of which the Respondents complain, any common law rule allowing a minor to consent to a medical procedure is abrogated to the extent the procedure in question is prohibited by the statute. *See* Proposed Section 12-30-123(4), C.R.S. (providing that it is not a defense to liability under the section that the minor or the minor's parent consented to the violation). In an effort to make the abrogation express, rather than implied, however, Petitioners included subsection (5). Subsection (5) does not add a new subject, as Respondents claim, but instead makes express what the rest of the statute necessarily implies. Ultimately, Respondents' objection to subsection (5) is a disagreement with the substance of the initiative, which is an improper use of the title board process and is not a valid grounds for the denial of title setting. Instead, the title should be set so the electorate can decide on the merits of the initiative.

### 4. The Effective Date is Clear and is Sufficient as Provided by LCS and OLLS

In section I.C. and II.C of the Rehearing Motion, Respondents claim the Effective Date is potentially confusing. R.26. We disagree. The language provides that the initiative becomes effective on the date that the vote on the initiative is officially declared by the governor, if it is approved by the people and becomes law. In order to arrive at the conclusion urged by Respondents, the Court would need to violate a long-standing rule of statutory interpretation, namely that statutes are construed to avoid an absurd result. *See Barnhart v. Am. Furniture Warehouse Co.*, 2013 COA 158, ¶ 14.

Respondents claim that the phrase "next general election" means the 2026 general election. As Respondents point out, a title cannot now be set for an initiative to be voted on in the 2026 general election. To read the language as Respondents suggest would be to believe that Petitioners are seeking to add a statute that will only become effective if it is voted upon a second time, presumably requiring a second initiative to vote on whether the statute, already adopted, should become effective. This is an absurd reading of the language and it should be rejected.

Further, the language for the effective date was pulled directly from a technical note provided by the Office of Legislative Legal Services to the proponents of 2023-2024 initiative #104.[4] Technical note #5 states:

> The effective date clause should be drafted as follows:
>
> SECTION X. Effective date. This initiative takes effect if it is approved by the people at the next general election and becomes law, and, in such case, this takes effect on the date of the official declaration of the vote thereon by the governor.

The same language is also the language used in 2023-2024 initiatives #170 & #171, which have been approved by the Title Board for circulation.[5] Overall, the language was provided by state attorneys for the use of initiatives seeking to be on the ballot for 2024 and to be effective upon passage soon thereafter upon declaration of the vote by the governor, not in 2026.

## III. The Petitioners' Revisions Were Permissible Under the Colorado Constitution

### A. Standard of Review; Preservation of the Issues

The question of whether the Title Board had jurisdiction under Article V, Section 1(5.5), of the Colorado Constitution is a question of constitutional construction. "[M]atters of constitutional and statutory construction present

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[4] Memorandum from Legislative Council Staff and Office of Legislative Legal Services for 2023-2024 Initiative #104, dated December 8, 2023: https://bit.ly/4a0kY91

[5] Colorado Secretary of State 2023-02024 Initiative Filings, Agendas, & Results: https://bit.ly/4aYvhMa

questions of law that [the Colorado Supreme Court] review[s] de novo." *Ward v. State*, 2023 CO 45, ¶ 26. The Court "read[s] words and phrases in context, affording them their plain and ordinary meanings. If the language is clear and unambiguous, then [the Court] will apply it as written, and [the Court] need not resort to other tools of construction." *Id.* (internal citations omitted).

The argument was preserved with the filing of the Petition for Review on page 5 on April 24, 2024.

### B. The Title Board Erred When it Incorrectly Interpreted the Colorado Constitution

The constitutional provision at issue here is as follows:

> the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, *unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest*.

Colo. Const. art. V, § 1(5.5) (emphasis added).

#### 1. The Title Board Incorrectly Interprets the "or" to be an "and"

The Title Board pursuant to item #13 of the current version of its Policies & Procedures, interprets the "or" in Article V, Section 1(5.5) to be an "and" such that no revisions may contain additions irrespective of whether the revisions are

substantial, leading them to wrongly deny the Petitioners, in this case, title.[6] Their policies & procedures state:

> **13. Resubmissions to meet single subject.** If the Title Board determines that it cannot set a title because the proposed initiative contains more than one subject, the proponents may eliminate provisions without making other changes in an attempt to comply with the single subject requirement and, as permitted by article V, section 1(5.5) of the Colorado Constitution, resubmit the proposal to the Title Board for a new hearing without going through the review and comment process specified in §1-40-105, C.R.S. The Title Board will consider such a direct resubmission unless it determines that the revisions are so substantial that additional review and comment would be in the public interest. The Title Board will not consider a resubmission and a motion for rehearing at the same time.

Policies and Procedures of Title Board, No. 13.

The Title Board's interpretation means that the Constitution only allows for the elimination of provisions if done to get to a single subject AND then only if those revisions are not so substantial as to require comment in the public interest. The proper reading, however, is that the two clauses stand apart. The first "unless" is more akin to a safe harbor for the second. If the eliminations do not do more than remove those provisions necessary to get to a single subject, then no additional review and comment is necessary. If they do, be it by removing more than needed to get to a single subject or by adding new provisions, then the Title Board must determine whether comment is necessary in the public interest.

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[6] Title Board's Policies Procedures, approved Dec 16, 2020; amended December 15, 2021: https://bit.ly/4ahKua5

This makes the most sense from a coherence perspective too. If a proponent of a measure revises an initiative in such a way as to remove only those portions from the measure that stem from a second or different subject, then by definition you do not need to go back through public comment because the subject that remains has already been through it. If, however, a proponent of a measure makes changes within the subject to be presented to the people, then, if those changes are substantial, the Constitution would require that the proponents go back through the comment phase in the public interest.

Here, the language revised included both the elimination of language and the addition of language, but the changes were minimal, were in direct response to comments from the Title Board related to clarifications about the single subject, and did not amount to anything so substantial as to warrant returning the measure to the comment phase in the public interest.

**2. The Title Board Incorrectly Interprets "Provision" to Mean Any Language**

Further, Article V, Section 1(5.5) only requires additional review for "revisions involv[ing] more than the elimination of provisions to achieve a single subject . . . ." The Title Board's interpretation of this language misconstrues "provisions" to mean "language." On the contrary, a revision that does not eliminate a provision, but merely alters the language of a provision in a non-substantive manner, is neither the addition nor elimination of a provision; it is less than an

elimination of a provision. Here, Petitioners simply clarified a provision, which is not a revision that is "more than the elimination of provisions," but is in fact less. The requirement of the constitutional provision is that review and comment is required for revisions involving more than the elimination of provisions to achieve a single subject. Clarifying language is not "more than the elimination of provisions." The changes here were simply clarification, and so they do not require review and comment.

## CONCLUSION

The Court should reverse the decision of the Title Board from the rehearing on April 3, 2024, and affirm the Initiative Title set by the Title Board on March 6, 2024, order that the title for Initiative #175 be approved for circulation. In the alternative, the Court should reverse the decision of the Title Board from the hearing on April 17, 2024, affirm the language of the Revised Measure is a single subject, and remand the case to the Title Board to set a title accordingly.

Respectfully submitted on May 2, 2024.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, I electronically filed a true and correct copy of the foregoing OPENING BRIEF with the clerk of the court via the Colorado Courts E-Filing system and on all parties and their counsel of record:

| **Person Served** | **Method** |
|---|---|
| Title Board<br>c/o Office of the Attorney General<br>1300 Broadway, 10th Floor<br>Denver, CO 80203<br>Counsel for the Title Board | Colorado Courts e-Filing |
| Petitioners Wayde Goodall & Darcy Schoening<br>c/o BIRCH GROVE LEGAL PLLC<br>1525 Josephine St<br>Denver, CO 80206<br>Counsel for Petitioners | Colorado Courts e-Filing |
| Respondents Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern, and Dr. Lora Melnicoe<br>c/o Recht Kornfeld, P.C.<br>1600 Stout Street, Suite 1400<br>Denver, CO 80202 | Colorado Courts e-Filing |

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