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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #175 ("Prohibit Certain Medical Procedures for Minors") **Petitioners:** Darcy Schoening and Wayne Goodall, **v.** **Respondents:** Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern and Dr. Lora Melnicoe, **and** **Title Board:** Theresa Conley, Jeremiah Barry, and Kurt Morrison	**▲COURT USE ONLY▲**
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RESPONDENTS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

/s Mark G. Grueskin
Mark G. Grueskin
Attorney for Respondents

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1. Whether this Court should overturn a Title Board's single subject decision, when the appeal of that issue was filed outside of the time limit provided by law and the Board's single subject decision was correctly made.

2. Whether Proponents just "eliminated" a second subject when, in resubmitting their initiative to the Title Board, they both struck certain language from, and also added legislative findings and new substantive provisions to, the earlier draft of their measure.

3. Whether Proponents' failure to comply with the Title Board's filing requirements in statute was an alternative ground that justified the Board's refusal to consider a resubmitted initiative.

STATEMENT OF THE CASE

A. Statement of Facts.

Darcy Schoening and Wayne Goodall (hereafter "Proponents") proposed Initiative 2023-2024 #175 (the "Initiative" or "#175"). The Initiative purports to restrict minors from accessing or consenting to certain medical procedures dealing with gender affirming care. As the Board ultimately determined, the measure's definition of "medical procedure," coverage of all persons licensed as "health care providers," and expansive penalty provisions (including a private right of action

that could be filed for up to 30 years after health care was administered to a minor) reflected hidden subjects that would work a fraud on voters.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

Initiative #175 was submitted to the Offices of Legislative Council and Legislative Legal Services, and a Review and Comment hearing was held. Thereafter, Proponents submitted a final version of the Initiative to the Secretary of State for purposes of submission to the Title Board. On March 6, the Board found the measure constituted a single subject and set titles.

On March 13, Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern and Dr. Lora Melnicoe ("Objectors" or "Respondents") filed a Motion for Rehearing. Rather than proceed to rehearing as scheduled, Proponents sought a continuance, and the Title Board Secretary informed Objectors of the resulting delay.[1] Accordingly, the rehearing was rescheduled for April 3.

At the April 3 rehearing, the Title Board reversed its earlier decision and ruled that it lacked jurisdiction to set a title for #175. The Board found that the

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[1] *See* Exhibit 1.

initiative contained multiple subjects that had been surreptitiously coiled in the folds of the text of #175.

On April 5, Proponents resubmitted a new version of #175 to the Title Board under the auspices of using language in section 1(5.5) of Article V of the Colorado Constitution, providing that an initiative's proponents may resubmit their revised initiative if the only effect of the resubmittal is the "elimination" of the measure's second subject. Proponents filed their previous measure as the "original" draft, an "amended" version,[2] and their final language. The Board placed the resubmitted version on the agenda for its regularly scheduled hearing on April 17.

On April 11, Objectors filed a Motion to Dismiss Second Title Board Consideration of Initiative #175 For Want of Jurisdiction.[3] The motion alleged four reasons that no title should be set on the resubmitted #175.

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[2] The amended version that is required by statute to be filed with the Title Board is posted on the Secretary of State's initiative website at https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/175AmendedRefiled.pdf (last viewed April 30, 2024). This document is not required by statute to be included in the Board's certified record for appeal ("R."). C.R.S. § 1-40-107(2).

[3] https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/175PublicComment-MotionToDismissRefiled.pdf (last viewed April 30,

At its April 17 meeting, the Board considered the resubmitted initiative and found that it did not simply eliminate a second subject. Instead, it added language to the legislative declaration and to the substantive portions of the initiative. In addition to filing Objectors' Motion to Dismiss, Objectors' counsel spoke against Petitioners' resubmittal.[4] The Board unanimously refused to set titles for the resubmitted #175.

This appeal followed.

SUMMARY OF ARGUMENT

Proponents announced objective is to end medical procedures for sexual transitions by minors. They proposed Initiative #175 to prohibit medical surgeries and drugs that are used for that purpose.

But their measure did not stop there. It also prohibits (and penalizes) the prescription and dispensing of any medications, including antidepressants, to a minor who raises questions about and seeks assistance in coping with this issue. It likewise prohibits anyone – *any* person or entity – from "supporting" a young

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2024). This document is not required by statute to be included in the Board's certified packet for appeal. C.R.S. § 1-40-107(2).

[4] https://csos.granicus.com/player/clip/450?view_id=1&redirect=true (6:04:07-6:05:15).

person who is addressing their sexual identity or lives their life without regard for the sex assigned to them at birth. For good measure, Proponents kick open the courthouse door for lawsuits that do *not* require that a health care provider (defined by law and the initiative to include every person licensed by the State of Colorado, such as pharmacists, athletic trainers, and physical therapists) have the intent that the care they provide will result in gender affirming care for a minor. And the measure allows lawsuits to be brought for 30 years after the health care is provided.

Here, Proponents raise the issue of whether the Title Board erred by agreeing that this initiative contained subjects that were coiled in the folds of their ban on professional medical care. But Proponents are too late. They object to the Board's decision weeks after this courthouse door closed because of the operation of law. Regardless, the Board was correct in refusing to title this measure because it contains multiple subjects.

When Proponents were denied a title by the Board, they refiled their measure with the Board under the guise of complying with the constitutional provision that allows proponents to file a second version of a measure by striking additional subjects. But Proponents didn't just strike their second subject; they

added language and concepts to their measure. And the Constitution is clear: they are only allowed to "eliminate" the second subject, not use it as an excuse for again amending their draft. The Board was right to reject their resubmitted initiative.

In any event, when they resubmitted, Proponents did not file an accurate amended initiative draft. Based on this Court's precedent, that failure alone was a sufficient reason for rejecting this measure even though the Board did not need to reach it.

Thus, the Board correctly rejected this measure for title setting, and the Court should reject Proponents' arguments on appeal.

LEGAL ARGUMENT

I. Proponents have no basis for appealing the April 3 Title Board decision that their original draft of Initiative #175 constitutes multiple subjects.

A. Standard of Review; Preservation of Issue Below.

This Court engages in *de novo* review of statutes governing the Title Board's authority to act. *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 12, 293 P.3d 551. Its objective in this exercise is to ascertain and give effect to the General Assembly's intent. *Id.* (citation omitted).

At the April 17 hearing on the resubmitted version of this measure, Proponents did not specifically challenge the substance of the Title Board's previous finding that their measure violated the single subject requirement. At the April 3 Board hearing, they did respond to Objector's Motion for Rehearing.

B. Petitioners' appeal of the Board's single subject decision is untimely, as this appeal was not filed within the seven-day period required by statute.

Proponents object to the single subject decision that was made on April 3. They filed this appeal on April 24. Thus, Proponents' petition for review, raising their single subject objection, was filed 21 days after the Board's decision in response to the motion for rehearing.

Colorado statute is specific that the proponents have seven (7) days to object to this Court concerning a Board decision based on the motion for rehearing.

> **If… the designated representatives** of the proponents of an initiative petition **for which a motion for a rehearing is filed**… [are] **not satisfied with the ruling of the title board upon the motion**, then the secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, the fiscal summary,,,, together with a certified copy of the motion for rehearing and of the ruling thereon. **If filed with the clerk of the supreme court within seven days** thereafter, the matter shall be disposed of promptly….

C.R.S. § 1-40-107(2) (emphasis added).

Proponents could have filed with this Court by April 10. Instead, they chose to resubmit a modified initiative text to the Title Board. And only when the Board refused to set title for their resubmitted measure did they appeal the Board's single subject decision to this Court.

The initiative process is framed by "stringent time requirements… on the proponents and opponents of initiatives." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219*, 999 P.2d 819, 822 (Colo. 2000). This seven-day limitation on appellate review is just such a time limitation. These timing provisions are important not only to provide structure to the initiative process; they also "provide proponents of initiatives with sufficient time for the collection of signatures and for public debate." *Id.*

Allowing Proponents to delay their initiation of judicial review is contrary to the inherent purposes of setting some limits on appeals from Title Board decisions. Proponents' approach "would entirely defeat the legislative objectives of finality of Board action and an expedited procedure in the event of an appeal." *In re Title, Ballot Title & Submission Clause, and Summary for 1997-98 No. 62*, 961 P.2d 1077 (Colo. 1998) (construing C.R.S. § 1-40-107(2) when it provided only five days for appeal to Supreme Court).

If Proponents are entitled to resubmit a new initiative to Title Board at all, they could not do so and then wait to object to the Board's earlier decision on the motion for rehearing. Their only remedy on the single subject decision was to appeal to this Court. "Together, section 1-40-107(1)(c) and section 1-40-107(2) establish unambiguously that **the only recourse available to a person who objects to the Title Board's decision on rehearing is to petition this court for review**." *In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #74 and #75*, 2020 CO 5, ¶10, 455 P.3d 759 (emphasis added) (hereafter "*In re #74 and #75*"). Given the mandatory, "stringent" time restrictions in this statute, *id.*, ¶11, Proponents certainly could not wait three weeks to appeal the Title Board's granting of the motion for rehearing.

It is noteworthy that the Board decision on the resubmitted initiative did not address the multiple subject issue. It was based solely on Proponents' violation of the requirement that a resubmitted measure only "eliminate" the second subject as opposed to adding new provisions while striking others. Thus, the seven-day period ran from April 3, not from April 17 when the Board again refused to set title for this measure on an entirely different basis.

Finally, there is no safe harbor for the proponents from this filing deadline because they resubmitted their measure to the Title Board. The single subject provision of the Constitution makes this clear. "The revision and resubmission of a measure in accordance with this subsection (5.5) **shall not operate to alter or extend any filing deadline** applicable to the measure." Colo. Const., art. V, sec. (5.5) (emphasis added). Therefore, the fact that Proponents resubmitted their measure does not change when they needed to challenge the Board's April 3 decision. Because their ability to appeal that ruling to this Court expired after April 10, the Court cannot consider the proponents' single subject objection.

C. The Board correctly decided that Initiative #175 contained multiple subjects.

Even if the Court could consider Proponents' single subject claim, there is no basis for reversing the Title Board's decision finding that this measure comprises multiple subjects.

When Proponents were asked what the single subject of #175 was, they informed the Title Board that it was "prohibiting the medical transitioning of

minors."[5] Even at that March 6 hearing, the chair of the Board noted that "the breadth of liability in this measure is extensive."[6] Nonetheless, the Board found that the measure constituted a single subject and set title. R. at 19.

When the Board considered the Motion for Rehearing, it realized that #175 went much further than what Proponents had indicated to them. Instead, the measure sought to prohibit any form of health care that would "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to "treat purported discomfort or distress from a discordance between the minor's sex and asserted identity." This was Initiative #175's stated purpose. R. at 12 (subsection (2)(a), (b) of Section 1 of the initiative). It was also the core of its prohibitions relating to health care providers and its displacement of common law rules regarding a minor's consent. R. at 13 (Proposed Section 12-30-123(2)(a)(I), (II)) and 14 (Proposed Section 12-30-123(5)(a), (b)).

Any violation of this measure could result in a lawsuit by the minor or the parent of the minor "even if the parent consented to the conduct that constituted the

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[5] https://csos.granicus.com/player/clip/434?view_id=1&redirect=true at 3:50:03-09.

[6] *Id*. at 3:50:33-39.

violation." *Id*., (Proposed Section 12-30-123(7)(a)). It could also result in an action by the Attorney General to enjoin violations, seek disgorgement of any profits, and impose penalties of $25,000 per violation. *Id*. at 15, (Proposed Section 12-30-123(8)(b)). In addition, it could result in professional discipline by regulatory authorities of any health care provider regulated under Title 12 of the Colorado Revised Statutes. *Id*., (Proposed Section 12-30-123(9)).

A private cause of action could be instituted even if the person did not intend to provide gender affirming care for the minor. An action authorized by Initiative #175 could succeed "irrespective of whether the medical procedure was performed, provided, prescribed, administered, or attempted with the intent to cause the change" in a person's "anatomy, physiology, or psychology." R. at 14 (Proposed Section 12-30-123(7)(b)).

As Objectors' Motion for Rehearing highlighted, these provisions went well beyond medical procedures that resulted in a person's change of their biological sex. For instance, Initiative #175 prohibited a prescription of an antidepressant that allowed a minor to "identify with, or live as" a person whose sex was not the one assigned at birth. R. at 22-24.

As the Motion also demonstrated, Initiative #175 prohibited any person who "supported" the minor in addressing their identity as a matter of biologically assigned sex. And it was not just limited to medical professionals performing surgical procedures. It applied to every single health care provider licensed to practice under Title 12, which included pharmacists, occupational therapists, and athletic trainers. *Id*.; *see* R. at 15 (Proposed Section 12-30-123(9)). And it provided liability for any "health-care provider, person or other entity" that "supported" the minor. *Id*. at 14 (Proposed Section 12-30-123(7)(a)). Thus, as the Motion pointed out, liability was not limited to health care professionals engaged in the medical transitioning of minors. Instead, it applied to family members and friends (a "person") and community organizations ("other entity"). *Id*. at 24-25.[7]

These provisions had nothing to do with the asserted single subject of the measure, at least as Proponents portrayed their measure to the Board. They said its

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[7] Under recently adopted U.S. Department of Education regulations, school personnel must provide "supportive measures" to a student with gender identity concerns, but that act would render a school nurse or school counselor (as health care providers) and the school (as an "other entity") liable under Initiative #175. *See* 34 C.F.R. §§ 106.2 (defining "supportive measure"); 106.44(g)(1) (setting forth examples of supportive measures to be provided including "counseling"). (https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf) (unofficial copy of rules) (last viewed April 30, 2024).

purpose was "prohibiting the medical transitioning of minors." Besides preventing medical procedures that would change a minor's sex, it prevented any personal support or professional counsel for a person grappling with identity issues. It also prevented anyone from providing services to deal with a person's life situations after obtaining gender affirming care. Liability attached whether or not a health care provider or other person had the "intent" to bring about that change in the minor.

The Title Board agreed this measure was much more complex and multi-faceted than it originally seemed and that its reach beyond just prohibiting medical transitioning of minors would escape the notice of most voters. "[O]ne of the purposes of the single subject requirement is to apprise voters of the subject of each measure, so that surreptitious measures that could result in voter surprise or fraud are not placed on the ballot." *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative 2001-02 # 43*, 46 P.3d 438, 441 (Colo. 2002); *see also* C.R.S. § 1-40-106.5(1)(e)(II). Particularly when it tees up a politically volatile issue, an initiative such as #175 presents "the risk of surprising voters with a surreptitious change, because voters may focus on one change and overlook the

other." *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶39.

Thus, the Title Board properly found the original submission of Initiative #175 to violate the single subject requirement and, as such, refused to set a title.

II. Proponents cannot establish that their resubmittal of Initiative#175 after a rehearing only "eliminat[ed] provisions to achieve a single subject."

A. Standard of Review; Preservation of Issue Below.

The Court evaluates matters of statutory and constitutional interpretation de novo. *In re #74 and #75, supra*, 2020 CO 5, ¶ 8.

Proponents preserved this issue for appeal by resubmitting Initiative #175 which was heard by the Board on April 17. R. at 3-9. The Proponents submitted an amended version in order to get their final draft before the Board for title setting. It is that redlined draft that shows where Proponents only partially complied with the statutory requirement for submission of a draft showing the changes made to the initiative.[8]

B. Proponents added new language and undefined concepts to their measure and did not just "eliminate" their measure's second subject.

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[8] *See* fn. 2, *supra*.

There can be no dispute that the proponents of #175 did more than eliminate the additional subject of their measure. Initially, their measure prohibited any medical care that could affect a minor including transitioning that minor's "sex," defined by Initiative #175 as "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth." R. at 13 (Proposed Section 12-30-123(1)(b)). The original #175 dealt with procedures and medicines that might be implicated should that minor undergo any treatment that changed his or her "sex." *Id.* (Proposed Section 12-30-123(2)(a)).

But in their resubmitted measure, the proponents changed legislative findings to address procedures and medicines that changed a person's "sex or gender."[9] They also changed substantive provisions by replacing "sex" with "gender."[10]

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[9] *See* fn. 2, *supra*, at 1, 3 (Section 1; subsections (1)(a), (c)).

[10] *Id.* at 4, 6 (Proposed Section 12-30-123 (2)(a)(I), (5)(a)).

The term "gender" was not defined in the original #175, and it isn't defined in the resubmitted #175. "Gender" can be construed to be distinct from "sex."[11] But why it was inserted, what the proponents intended by this additional language, and what it means in the context of this initiative, is anyone's guess.

Presumably, proponents had a reason (or at least a justification) for injecting a new concept in their initiative. If so, it was never explained at a review and comment hearing before legislative staff, and it was never explained to the Title Board. *Cf.* C.R.S. § 1-40-105(2) (requiring resubmission of measure to legislative staff where, after review and comment hearing, proponents make "substantial amendment(s)" not in response to review and comment). Those failures deprive the public of the notice about proposed changes to the law that the pre-title setting process affords.

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[11] *See, e.g, D.H. v. Williamson Cnty. Bd. of Educ.,* 638 F. Supp. 3d 821, 826 (M.D. Tenn. 2022) ("'Sex' ordinarily refers to biological sex as determined based on anatomy and other biological factors. 'Gender' is more accurately stated as 'gender identity' or 'gender expression.'") (citation omitted); *Norsworthy v. Beard,* 87 F. Supp. 3d 1104, 1119 (C.D. Calif. 2015) ("gender" means "an individual's sexual identity") (citation omitted); *Dobre v. Amtrak*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (construing "gender" to refer to an individual's sexual identity or socially-constructed characteristics rather that that individual's "sex" which referred to their distinguishing biological or anatomical characteristics).

The fact that the resubmitted #175 refers to "sex ***or*** gender" indicates the two concepts must be distinct from each other. This is true medically, *D.H., supra,* 638 F. Supp. 3d at 826 ("'sex' and 'gender' are often used interchangeably, but they are distinct terms") (citing "What is Gender Dysphoria? - Terminology," American Psychiatric Association, www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria), and as a matter of statutory construction. "As we have long recognized, the use of the word 'or' in this fashion ordinarily demarcates different categories." *Kulmann v. Salazar*, 2022 CO 58, ¶ 33, 521 P.3d 649, 655. What Proponents meant by adding the second category of "gender" is unknown. What is known is that Proponents did not change their language so that Initiative #175 could address precisely the same topic twice in the same sentence, the two references being separated only by the term "or."

Proponents' additions to the initiative text avoided all public discussion or opportunity for explanation. And by introducing a new legal variable into their measure, they clearly did much more than "eliminate" their second subject. As such, the Board correctly refused to set a title for this new measure.

C. "Elimination" of a second subject does not include modifying or adding to the first subject.

Terms in a voter-adopted amendment that are not otherwise defined are interpreted to reflect the intent of the voters that adopted them. "To determine intent, courts first examine the language of the amendment and give words their plain and commonly understood meaning." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). That rule of construction applies to "elimination" as used in section 1(5.5) of Article V imposing the single subject requirement.

"Eliminate" means to "get rid of"[12] or to "remove" something completely.[13] These definitions are not only used by the courts. They also reflect common usage found in multiple publicly available dictionaries that define this term.[14]

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[12] *Henderson v. Colvin*, 2015 U.S. Dist. LEXIS 162926 *12, n.4 (D. Az. 2015), citing Meriam-Webster Online, http://www.merriam-webster.com/dictionary/eliminate

[13] *Logan v. Organic Harvest, LLC*, 2020 U.S. Dist. LEXIS 56617 *10 (N.D. Ala. 2020), citing Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/eliminate

[14] *See* https://www.britannica.com/dictionary/eliminate ("to remove (something that is not wanted or needed): to get rid of (something)"); https://dictionary.cambridge.org/us/dictionary/english/eliminate ("to remove or take away someone or something"); https://www.dictionary.com/browse/eliminate ("to remove or get rid of"); https://www.vocabulary.com/dictionary/eliminate ("1. (verb) terminate, end, or take out; 2. (verb) do away with") (last viewed April 30, 2024).

The plain meaning of "elimination" is clear from voter-approved constitutional amendments as well. For example, when voters approved term limits for state and local public officials, they adopted a provision that allowed voters to address term limits either by changing them or by eliminating them.

> The voters of any such political subdivision may **lengthen, shorten or eliminate** the limitations on terms of office imposed by this Section 11. The voters of the state may **lengthen, shorten, or eliminate** the limitations on terms of office for the state board of education or the governing board of a state institution of higher education imposed by this Section 11.

Colo. Const., art. XVIII, sec. 11(2). Voters have used "eliminate" to mean eradication rather than the modification in other instances as well.

Thus, "eliminate" is a simple, direct act. Its plain meaning is set out above – "get rid of" or "remove." If, in adopting the single subject requirement, voters intended to give initiative proponents the latitude to add to or revamp their measures, subsection (5.5) of section 1 of Article V would have been drafted to state, "unless the revisions involve more than the elimination *or modification* of provisions to achieve a single subject." But it wasn't.

Here, Proponents did not simply remove a second subject, however. They also added legislative findings and provisions of substance to their initial one. These additions do not reflect the "elimination" of a second subject.

The precise contours, meaning, and intent of Proponents' additional provisions are unknown. Proponents added this language without undergoing the review and comment process or explaining their changes to the Board at the April 17 hearing. And given the nature of the additional language they inserted at the last minute, their changes to Initiative #175 fell outside of the bounds of the constitutional provisions relating to single subject.

Thus, the Title Board correctly refused to set titles for the resubmitted #175.

III. The resubmitted Initiative #175 was deficient as Proponents did not submit an accurate, amended version of their measure.

A. Standard of Review; Preservation of Issue Below.

Issues of statutory interpretation are reviewed de novo by this Court. *In re #74 and #75, supra*, 2020 CO 5, ¶ 8.

This issue was preserved, as Objectors raised it in their Motion to Dismiss Second Title Board Consideration of Initiative #175 for Want of Jurisdiction.[15]

B. Because Proponents' resubmitted #175 did not meet the requirements for Title Board filings, the Board lacked jurisdiction to consider it or set titles.

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[15] *See* fn. 3, *supra*, at 2-3.

As raised in Objector's Motion to Dismiss at the Title Board hearing on the resubmitted Initiative #175, Proponents failed to comply with the basic statutory requirements for filing with the Title Board. As such, the Board's refusal to set titles was proper.

In order to invoke the jurisdiction of the Title Board, Proponents file in accord with statute which provides:

> After the review and comment meeting provided in subsections (1) and (2) of this section, a copy of the original typewritten draft submitted to the directors of the legislative council and the office of legislative legal services; **a copy of the amended draft with changes highlighted or otherwise indicated**, if any amendments were made following the last review and comment meeting conducted pursuant to subsections (1) and (2) of this section; and an original final draft that gives the final language for printing shall be submitted to the secretary of state without any title, submission clause, or ballot title providing the designation by which the voters shall express their choice for or against the proposed law or constitutional amendment.

C.R.S. § 1-40-105(4) (emphasis added). Where proponents omit key elements of the measure in their amended and/or final filings, the Title Board may not consider a submission for title setting.

The original Initiative #175 imposed liability on health care providers "irrespective of whether the medical procedure was performed, provided, administered, or attempted with the intent to cause the change." R. at 14 (Proposed

Section 12-30-123(7)(b)). The redlined version of the resubmitted Initiative #175 does not contain this language or show this change.[16] In fact, the redlined version does not show the deletion of the entire original subsection (7)(b)[17] relating to the meaning of compensable "injury" under the initiative. As set forth in the original filing of Initiative #175, this subsection read:

> For purposes of subsection (7)(a) of this section, an injury includes but is not limited to a change to the anatomy, physiology, or psychology of an individual resulting from a medical procedure conducted in violation of this section irrespective of whether the medical procedure was performed, provided, prescribed, administered or attempted with the intent to cause the change.

But this language is not shown as stricken in the resubmitted versions. As such, in that version, the original subsection (7)(c) is shown as the new subsection (7)(b).

In *In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #109*, 962 P.2d 252 (Colo. 1998), Proponents submitted first, second, and third drafts of their measure but failed to include subsection (10) in their last draft. The Title Board refused to set a title for proponents' failure to comply with C.R.S. § 1-40-105(4), authorizing title setting for measures where an original, an

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[16] *See* fn.2, *supra*, at 6.

[17] R. at 14 (Proposed Section 12-30-123(7)(b)).

amended, and a final draft have been timely filed. This Court affirmed the Board's decision.

In the same manner, Proponents here were required to provide to the Board "a copy of the amended draft with changes highlighted or otherwise indicated, if any amendments were made following the last review and comment meeting conducted." *Id*. But they failed to comply with this statute. So not only did they submit a version of their initiative that had been altered beyond what was permitted by the Constitution, they failed to provide an accurate amended version of #175 so the public and the Board could evaluate what provisions changed. As such, their filing was deficient, and the Board should have rejected it on that basis as well.

The Board did not use this basis for rejecting the resubmitted #175. But this Court can use this ground if it sees fit to do so. "[A]s an appellate court, we have discretion to affirm the trial court's dismissal on grounds that the trial court did not rely on." *Educhildren LLC v. Cnty. of Douglas Bd. of Equalization*, 2023 CO 29, ¶26, 531 P.3d 986. Therefore, even if it does not base its decision on the arguments raised earlier in this Brief, the Court can affirm the Title Board's decision not to set titles because the filing was facially deficient.

CONCLUSION

The Title Board correctly refused to set a title for the resubmitted #175, and its decision should be affirmed.

Respectfully submitted this 2nd day of May, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 2, 2024, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Kyle Holter
Peter Baumann
Office of the Attorney General
1300 Broadway, 6th Floor
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Via Colorado Courts E-Filing to Counsel for Proponents:
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Nicholas S. Bjorklund,
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And via Email Service, per the agreement of counsel, to:

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/s Erin Mohr