DATE FILED: May 9, 2024 4:30 PM

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▲**
Attorneys for Respondents: Mark G. Grueskin, #14621 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com; nate@rklawpc.com	Case Number: 24SA117

RESPONDENTS' ANSWER 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).

Choose one:

X It contains 1,981 words.

☐ It does not exceed 30 pages.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Proponents allege that Objectors' description of Initiative #175 is "clearly not true on its face," "misleading," "simply incorrect," and "also not accurate." Pet. Op. Br. at 11, 12, and 13. This Answer Brief responds to those characterizations of Proponents' initiative insofar as they might affect the Court's legal determination concerning the Title Board's rulings that it lacked jurisdiction to set titles for the original and the resubmitted versions of #175.

As to Proponents' specific legal arguments, Objectors believe their Opening Brief Review ("Obj. Op. Br.") responds to all substantive arguments Proponents have raised, consistent with their Petition for Review.[1]

SUMMARY OF ARGUMENT

Proponents now argue that the disagreement over Initiative #175's second subject is based on Objectors' erroneous interpretation of their measure. But at hearing, Proponents admitted they had drafted the measure so vaguely that their

[1] Petitioners contend that the title set on March 6 was fair and accurate. Pet. Op. Br. at 15-22. This argument was not raised in their Petition for Review, and the Court need not address it for that reason alone. *Cf. Vikman v. International Bhd. of Elec. Workers, Local Union No. 1269*, 889 P.2d 646, 658-59 (Colo. 1995). Moreover, as addressed in Objector's Opening Brief, the Board lacked jurisdiction to consider the original and the resubmitted versions of Initiative #175, and, as such, clear title was never considered by the Board and is not before this Court. *See* C.R.S. § 1-40-107(2) (providing a party may appeal where the party "is not satisfied with the rule of the title board upon the motion," and permitting the Court to review the board's action).

measure warranted correction. For reasons set forth in Objectors' Opening Brief, Proponents' chosen course correction deviated from the Constitution and caused new problems that could not be cured. Thus, the Title Board correctly found it lacked jurisdiction to set titles, both on April 3 and April 17.

LEGAL ARGUMENT

Objectors raise three points here.

First, according to Proponents, "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. This is clearly not true on its face…." Pet. Op. Br. at 11. In an attempt to prove their point, Petitioners state, "On their page 2 [of the Motion for Rehearing], 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." *Id*.

Here's the problem: Proponents quoted ***half*** a sentence from Objectors' Motion for Rehearing. The full sentence stated: "'Health care provider is defined to mean any "professional, establishment, or facility" **that is licensed or permitted 'pursuant to this title' (i.e., Title 12 of the Colorado Revised Statutes)**. Proposed Section 12-30-123(1)(b)." R. at 22 (emphasis added). This reference is simply a paraphrase of Proponents' own definition of "health care provider" which means "a

health care professional, establishment, or facility licensed, registered, certified, or permitted pursuant to this title." *Id*. at 13 (Proposed C.R.S. § 12-30-123(1)(b)). Regulatory authorities are given jurisdiction and "shall proceed pursuant to this title 12" whenever they receive notice of an alleged violation. *Id.* at 15 (Proposed C.R.S. § 12-30-123(9)(a)).

Within the Title 12 heading of "Health Care Professions and Occupations," there are two dozen regulatory schemes covering health care professionals:

Article 200. Acupuncturists
Article 205. Athletic Trainers
Article 210. Audiologists
Article 215. Chiropractors
Article 220. Dentists and Dental Hygienists
Article 225. Direct-Entry Midwives
Article 230. Hearing Aid Providers
Article 235. Massage Therapists
Article 240. Medical Practice
Article 245. Mental Health
Article 250. Naturopathic Doctors
Article 255. Nurses and Nurse Aides
Article 260. Nurse Aides
Article 265. Nursing Home Administrators
Article 270. Occupational Therapists and Occupational Therapy Assistants
Article 275. Optometrists
Article 280. Pharmacists, Pharmacy Businesses, and Pharmaceuticals
Article 285. Physical Therapists and Physical Therapist Assistants
Article 290. Podiatrists
Article 295. Psychiatric Technicians
Article 300. Respiratory Therapists
Article 305. Speech-Language Pathologists
Article 310. Surgical Assistants and Surgical Technologists
Article 315. Veterinarians

The examples discussed in the Motion addressed professionals licensed under these healthcare articles who could provide some health care function to a minor that falls well short of the medical transitioning procedures Proponents claim is their sole concern. *Id.* 22-23. As the Motion for Rehearing pointed out, *id*. at 23, any of these health care providers (or the licensed facilities at which they work) could be held accountable to regulators for their acts so a minor could either: "identify with, or live as" a person whose sex did not match their biological assignment at birth; or, alternatively, deal with the "discomfort or distress" of any inconsistency between their assigned sex and their gender identity. *See id.* at 13 (Proposed C.R.S. § 12-30-123(2)(a)).

In case there was doubt about the broad applicability of Initiative #175, Proponents placed their statutory amendment in Article 30 of Title 12.

> This article 30 applies to articles 200 to 315 of this title 12 except to the extent otherwise specified in this article 30 or another part or article of this title 12. The requirements of this article 30 are in addition to the requirements established in any other part or article of this title 12.

C.R.S. § 12-30-101. Thus, every person in the regulated health care industry – not just those who may perform procedures that result in transition of a minor's sex – are covered by this initiative.

The Motion for Rehearing thus reflected the breadth that Proponents built into their initiative. That Motion was uncomfortably accurate for Proponents because of the problems their chosen language created. But the Motion was, and is, accurate.

Second, Proponents contend that Initiative #175 actually has an intent requirement because the violation section uses "for the purpose of" allowing a minor to identify with, or live as, a person whose gender identity is not a function of the assigned biological sex or to address discomfort or distress in such situations. Pet. Op. Br. at 12. Proponents assert this despite the language in Initiative #175 that states compensable injury exists "**irrespective** of whether the medical procedure was performed, provided, prescribed, administered, or attempted **with the intent** to cause the change." R. at 14 (Proposed C.R.S. § 12-30-123(7)(b)) (emphasis added).

Consider a surgeon who performs a "medical procedure" upon a minor at age 17 that results in the minor's change in sex. Under Initiative #175, there is no question this doctor would have committed a "violation" of #175.

But assume that same minor got a prescription for an antidepressant at age 15 from a psychiatrist to deal with family or peer disapproval of the minor's questioning about gender identity. Assume further that the minor filled the prescription at a pharmacy, and the pharmacist had no information about the reason for the prescription to the minor. Because a "medical procedure" ("prescribing… or

dispensing a drug") occurred even though there was no "intent to cause the change" resulting from the surgery (and thus violate #175), both the psychiatrist and the pharmacist would be subject to a lawsuit and licensing actions under #175 because their acts produce "a change to the… psychology of an individual" and therefore an "injury" under #175. R. at 13, 14 (Proposed C.R.S. § 12-30-123(1)(d)(II), (7)(b)).

As a change in a person's psychology is an "injury," a minor or the parent of a minor could "bring a civil cause of action" to seek compensation at any point within the thirty (30) years after the minor's 18th birthday. *Id*. at 14, 15 (Proposed C.R.S. 12-30-123(7)(a), (f)(I)). But no intent to violate Initiative #175 was required in health care providers' acts to make them liable, given others' subsequent acts.

In effect, Proponents ask the Court to read "irrespective of whether the medical procedure was performed… with the intent to cause the change" out of their measure. Of course, this is not an option, and the interpretation of #175 that both the Title Board and Objectors came to is accurate and inescapable.[2]

Third, Proponents insist that all other medical treatments, short of a "medical procedure" that changes a person's sex, are permitted: "[A] well-established and

[2] Proponents basically admit as much. "[T]he 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**." Pet. Op. Br. at 13. (emphasis added).

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." Pet. Op. Br. at 13. But as pointed out above, "injury" is expressly not dependent on intent under Initiative #175.

The only question is whether this other treatment occurs at some time before or after a violation of this measure occurs. Thus, any medical service that relates in even a tangential way to the minor's change of assignment of sex would subject the health care provider to litigation and professional discipline if the minor had gender affirming care before the age of 18. The Board recognized that this is the direct result of the text of Initiative #175, even if the medical service wasn't specifically provided to lead to or facilitate a violation of this initiative.

Notwithstanding Proponents' position before this Court, at rehearing, Proponents came to understand that their measure was written to penalize acts that were not prescribed or provided to alter a person's sex. They said their measure was drafted to accomplish one end, but they acknowledged it was actually drafted so that it furthered unrelated objectives. "Given that's not the intent and that it reads vaguely, do we have the opportunity to amend that here today? Or can we amend

that and then have another hearing?"[3] In conceding they needed another chance to bring their measure into compliance with the single subject requirement, Proponents admitted they fell short of their most important duty. "The ultimate responsibility for formulating a clear and understandable proposal for the voters to consider belongs to the proponents of the initiative." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 262 (Colo. 1999). Any hardship attributable to timing of these decisions falls squarely on Proponents alone.[4]

Within the forty-eight hours after rehearing, Proponents would redraft their measure and resubmit it to the Title Board. As addressed in the Title Board's Opening Brief and Objector's Opening Brief, this redrafting exceeded constitutional bounds by adding language and concepts that went far beyond merely eliminating

---

[3] Statement of Darcy Schoening, April 3, 2024 Rehearing, https://csos.granicus.com/player/clip/443?view_id=1&redirect=true at 6:28:22-38.

[4] Had Proponents not requested a delay of the rehearing scheduled for March 20, *see* Exhibit 1 to Objectors' Opening Brief at 1, they could have resubmitted a new draft by March 22. *See* https://leg.colorado.gov/content/how-file-initiatives ("Last day for submitting a proposal for the 2024 election: March 22, 2024, 5:00 p.m"). Under that scenario, Proponents could have been before the Board for title setting on April 17 and avoided the last-minute scramble to fix #175. "The proponent of a proposed initiative controls to a great extent the timing and progress of the initiative process by choosing the filing dates for submission to the secretary of state." *In re Title, Ballot Title & Submission Clause, & Summary for #26 Concerning Sch. Impact Fees*, 954 P.2d 586, 590 n.3 (Colo. 1998).

their extra subject(s). The Board properly decided it lacked jurisdiction to consider this resubmitted #175.

CONCLUSION

Proponents cannot evade the initiative text they filed for title setting. It constituted multiple subjects, hidden from the Title Board in its initial consideration for title setting and from voters in the petitioning and voting stages.

The Title Board correctly decided it could not set titles, either as to the original form that had surreptitious elements or the resubmitted form that exceeded the Constitution's language about "elimination" of a second subject. Those decisions should be affirmed.

Respectfully submitted this 9th day of May, 2024.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
mark@rklawpc.com
nate@rklawpc.com
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 9, 2024, to the following:

Counsel for the Title Board:
Michael T. Kotlarczyk
Kyle M. Holter
Peter G. Baumann
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Via Colorado Courts E-Filing to Counsel for Proponents:
Michael W. Melito
Melito Law LLC
1875 Lawrence, Suite 730
Denver, CO 80202

Nicholas S. Bjorklund,
Birch Grove Legal PLLC
1525 Josephine St
Denver, CO 80206

Jeffrey P. Patty
jeff.patty@gmail.com

/s Erin Mohr