

<p><b>SUPREME COURT, STATE OF COLORADO</b>  2 East 14<sup>th</sup> Avenue  Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to C.R.S. § 1-40-102(2)  Appeal from the Ballot Title Board</p>	<p><del>DATE FILED</del>  May 8, 2026 5:26 PM</p>
<p>In the Matter of the Ballot Title of Proposed Initiative 2025-2026 #283</p> <p><b>KAREN MIDDLETON</b>  Petitioners,</p> <p>v.</p> <p><b>ANGELA EICHER and FAYE BARNHART</b></p> <p>and</p> <p><b>COLORADO BALLOT TITLE SETTING BOARD:</b> Michael Dohr, Theresa Conley, and Kurt Morrison  <b>Respondents.</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p>
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<p><b>RESPONDENTS OPENING BRIEF</b></p>	

## 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).**

**X** It contains 2,203 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).**

**X** 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/Scott E. Gessler  
Scott E. Gessler

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## **I. ISSUES PRESENTED FOR REVIEW**

A. A ballot title and submission clause need only describe the central features of a ballot measure. Here, the title states that the Proposed Initiative #283 repeals the right to abortion. But the Petitioner demands that the title include every detail of the ballot measure, including the legal effects of repealing a constitutional right. Did the Title Board err in setting a ballot title and submission clause that accurately and fairly describes the central feature of the measure?

## **II. NATURE OF THE CASE**

This case is an appeal of the Title Board's recent decision to set a title and submission clause for Proposed Ballot Initiative 2025-2026 #283.

Following Review and Comment hearing, the Legislative Council Staff and Office of Legislative Legal Services at the General Assembly issued their Memorandum on March 24, 2026. Proponents Eicher and Barnhart filed their initiative text with the Title Board and subsequently appeared before the Title Board on April 15. At that time, the Board granted setting a title, 3-0.

Petitioner Middleton filed a *Motion for Rehearing* on April 22, 2026, which the Title Board considered on April 24, 2026. The Title Board denied the *Motion for Rehearing* in its entirety, 3-0.

Petitioner Middleton appealed on May 1, 2026.

### **III. SUMMARY OF ARGUMENT**

This Court properly defers to the ballot title and submission clause set by the title board and will not overturn it unless it is insufficient, inaccurate, or misleading. Here, the ballot title accurately describes to voters the central feature of the ballot measure – the repeal of the constitutional right to abortion. This fully conveys the meaning of the measure, it is fair, and it does not mislead voters.

By contrast, the language proposed by the Petitioner would fundamentally misconstrue the effect of the measure, by stating that the measure would “allow” governments to impede, deny, or discriminate against individuals. That is untrue, because Colorado statute states that abortion is a fundamental right, and the measure does not affect the statutory provision. Alternatively, the Proponent would seek to introduce confusing language that functions as a triple negative and that contains catch phrases. Finally, any proposed language would be redundant and improperly describe the legal effect of the measure.

### **IV. STANDARD OF REVIEW AND PRESERVATION OF ISSUES**

In reviewing Title Board action, this Court “draw[s]” all legitimate presumptions in favor of the propriety of the Title Board’s decision and will only overturn the Board’s decision in a clear case.<sup>1</sup> At the same time, this Court’s

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<sup>1</sup> *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 2017 CO 57, 20.

“deference . . . is not absolute; [it has] an obligation to examine the initiative’s wording to determine whether it comports with the constitutional requirements.”<sup>2</sup> “In conducting this limited inquiry, [this Court] employ[s] the general rules of statutory construction and give words and phrases their plain and ordinary meaning.”<sup>3</sup>

The issues in this appeal were set forth and preserved in Petitioners’ *Motion for Rehearing*.

## V. ARGUMENT

### A. The title correctly conveys the central features; it is not insufficient, unfair, or misleading.

“The Title Board has broad discretion in drafting titles, and [this Court] gives deference to its exercise of that authority.”<sup>4</sup> When reviewing a ballot title and submission clause, the Court does not “consider whether the Title Board set the best possible title,”<sup>5</sup> but rather the Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and

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<sup>2</sup> *Fine v. Ward (In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128)*, 2022 CO 37, ¶ 9 (internal quotations and citations omitted).

<sup>3</sup> *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for 2015-2016 #132)*, 2016 CO 55, ¶ 11.

<sup>4</sup> *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #63*, 2016 CO 34, ¶ 23.

<sup>5</sup> *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17.

submission clause.”<sup>6</sup> This Court will reverse the title set by the Board “only if a title is insufficient, unfair, or misleading.”<sup>7</sup>

“The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative;”<sup>8</sup> it “is not required to set out every detail of an initiative.”<sup>9</sup>

Here, the Title Board properly exercised its discretion and set the ballot title and submission clause, as follows:

Shall there be an amendment to the Colorado Constitution repealing the current constitutional right to abortion?

This Court should defer to the Title Boards judgment. First, the title correctly and accurately summarizes the central, overriding feature of the initiative—the repeal of the right to abortion currently contained within the Colorado Constitution. The measure itself repeals a very short and limited section of the Colorado Constitution, that consists of two sentences, only:

**Section 32. Abortion.** ~~The right to abortion is hereby recognized. Government shall not deny, impede, or discriminate against the exercise of that right, including prohibiting health insurance coverage for abortion.~~

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, ¶ 8.

<sup>8</sup> *In re Title, Ballot Title & Submission Clause for 2013-2014* #90, ¶ 24.

<sup>9</sup> *In re Title, Ballot Title, & Submission Clause for 2007-2008* #62, 184 P.3d 52, 60 (Colo. 2008); *see also Matter of Title, Ballot Title & Submission Clause for 2015-2016* #63, 2016 CO 34, ¶ 23.

The central feature of the initiative is contained entirely in the first sentence, because the second sentence merely elaborates the normal protections afforded a constitutional right. The title and submission clause therefore properly summarizes the measure's central feature—the repeal of the right to abortion.

Second, the Title Board is not required to set forth every detail of the initiative. When setting a title for Proposed Initiative #283, the Title Board faced a choice; to include the central provision of the initiative (repeal of the right to abortion), or to include both that central provision and the additional repeal of four constitutional details that implement the constitutional right. Accordingly, if the title and submission clause were to include more than the central purpose of the initiative, it would by necessity include every detail of the initiative. This incorrect and inappropriate alternative comes about because of the brevity of the constitutional amendment subject to repeal; a first sentence that establishes the right to abortion, and a second sentence contains a series of four implementation details.

Finally, this Court has no cause to overrule the Title Board, because the ballot title is neither insufficient, nor unfair, nor misleading. First, the title is sufficient. It describes the measure's central feature fully and completely. And it fully informs voters that they will be repealing a right, that it is a right to abortion, and that the right is a constitutional right. Second, it fairly describes the initiative, plainly using the word “abortion,” and avoiding any catch phrases or appeals to emotion. And finally, the title is not misleading, because it accurately describes what the measure does.

**B. The Respondents propose an inaccurate, confusing, and misleading title and submission clause.**

The Petitioner’s *Motion for Rehearing* challenged the ballot title and submission clause as incomplete, and she proposed the following language. Her additions are underlined (in redline) below:

Shall there be an amendment to the Colorado Constitution repealing the current constitutional right to abortion, and, in connection therewith, allowing the state and local governments to deny, impede, or discriminate against the exercise of that right when the right to abortion is no longer recognized in the state Constitution?<sup>10</sup>

In support of the change, she argued that “[t]his is the *only* logical way to provide voters, who are being asked to repeal Amendment #79, [sic] with the same information they had when they adopted it.”<sup>11</sup>

But by stating that the measure would “allow[] the state and local governments to deny, impede, or discriminate,” the Petitioner’s change would create a ballot title and submission clause that fundamentally misstated the effect of the initiative. Even after passage of the measure, abortion remains a “fundamental right” as a matter of Colorado law. Specifically, Colorado statute defines the right to an abortion as a fundamental right; “[a] pregnant individual has a fundamental right to continue a

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<sup>10</sup> *Motion for Rehearing*, p. 2 (emphasis supplied), attachment, Certified Documents, p. 3.

<sup>11</sup> *Id.*, (the actual initiative was Amendment #89).

pregnancy and give birth or to have an abortion and to make decisions about how to exercise that right.”<sup>12</sup> Thus, under current statute (which would remain in place upon voter approval of Initiative #283), and well established case law, a government may not deny, impede, or discriminate against a person based upon the exercise of a fundamental right.<sup>13</sup>

Alternatively, the Petitioner proposes language that is extremely confusing. In her *Petition for Review*, the Petitioner slightly alters her objection to the title, formulating the advisory issue in this appeal as follows:

Whether the Board violated the clear title requirement by failing to inform voters that the proposed repeal of the constitutional right to abortion “removes the constitutional restriction prohibiting” all levels of government in the state from denying, impeding, or discriminating against the exercise of that right?

Instead of stating that the initiative “allows” governments to discriminate, the Petitioner’s proposed solution states that the measure “removes the constitutional restriction prohibiting . . .” Although not outright inaccurate, this formulation is highly confusing, because the wording functions as a triple negative. It “removes” (which means “to take away; withdraw”), a “restriction” (which is something that

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<sup>12</sup> Colo. Rev. Stat. Ann. § 25-6-403(2).

<sup>13</sup> See, e.g., *Lujan v. Colorado State Bd. of Education*, 649 P.2d 1005, 1014–15 (Colo. 1982) (“[a]s in other jurisdictions, we have come to recognize that the equal protection guarantee insures that all individuals be treated fairly in their exercise of fundamental rights”); *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994), *aff’d*, 517 U.S. 620, 116 S. Ct. 1620 (1996).

“prevent[s] or prohibit[s] beyond a certain limit”),<sup>14</sup> that “prohibits” (which means “to prevent [or]preclude”).<sup>15</sup> This is a highly confusing, ambiguous, and unclear formulation.

Furthermore, the Petitioner’s additional proposed language is unnecessary and improper. As discussed above, the existence of a fundamental right inherently means that a government cannot discriminate against individuals exercising that right. The ballot title and submission clause states that the measure repeals the constitutional “right” to abortion—that language also conveys that the measure withdraws constitutional protections that attach to that—or any—right.

Relatedly, this Court properly eschews any consideration or discussion of the merits of a proposed initiative,<sup>16</sup> and a title “need not explain the meaning or potential effects of the proposed initiative on the current statutory scheme.”<sup>17</sup> Here, the Petitioner asks that the title include a description of the purported effects of the

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<sup>14</sup> “Restrict,” The American Heritage Dictionary of the English Language (5th Edition), available at <https://www.wordnik.com/words/restrict> last accessed May 8, 2026.

<sup>15</sup> “Prohibit,” The American Heritage Dictionary of the English Language (5th Edition), available at <https://www.wordnik.com/words/prohibit>, last accessed May 8, 2026.

<sup>16</sup> *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 9.

<sup>17</sup> *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 16.

measure on current law. The Court should properly reject the Petitioner’s challenge on this ground alone.

Finally, any formulation that states the measure would allow discrimination would constitute an impermissible catch phrase. This Court has made clear that a title and submission clause may not include a catch phrase:

By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content itself, but merely on the wording of the catch phrase. Slogans are brief, striking phrases designed for use in advertising or promotion that encourage prejudice in favor of the proposal, impermissibly distracting voters from the merits of the proposal. The purpose of the rule prohibiting catch phrases is to prevent prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and to avoid distracting voters from consideration of the proposed initiative's merits.<sup>18</sup>

More succinctly, “[c]atch phrases are terms that work in favor of a proposal without contributing to voter understanding; they trigger a favorable response to the proposal based not on its content but on its wording”<sup>19</sup>

As used in public policy discussions, “discrimination” is always a bad thing. Our society rightly condemns racial discrimination, gender discrimination, age discrimination, and many other forms of discrimination. Accordingly, any language that would allow discrimination, or remove protections against discrimination, would

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<sup>18</sup> *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 227 & # 228*, 3 P.3d 1, 7 (Colo.2000) (internal quotations and citations omitted).

<sup>19</sup> *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 26.

inject a catch phrase into the ballot title and submission clause. Likewise, a “right” is normally considered a good thing. Thus, redundant and unnecessary language that states the measure allows government to “impede” or “deny” a right would also constitute a catch phrase. This Court should accordingly reject any entreaty to include such a catch phrases.

## **VI. CONCLUSION**

For the reasons state above the Court should deny the Petitioners request and affirm the Title Board’s ballot title and submission clause for Proposed Initiative 2025-2026 #283.

Respectfully submitted this 8<sup>th</sup> day of May 2026,

GESSLER BLUE LLC

*s/ Scott E. Gessler*  
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## CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2026, I electronically filed the foregoing with the Clerk of the Court using the CCES system, which notified all parties and their counsel of record.

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