No. 24-216

In the

Supreme Court of the United States

ADVANCE COLORADO, ET AL.,
Petitioners,
v.
JENA GRISWOLD, COLORADO SECRETARY OF STATE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the government-speech doctrine completely immunize Colorado's intentional efforts to undermine Petitioners' ballot measures, by forcing them to include false and pejorative language on the petition that they circulate to voters for signatures?

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INTEREST OF *AMICUS CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is dedicated to protecting individual and collective liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. Colorado's requirement in this case infringes Petitioners' right to avoid compelled speech enshrined in the First Amendment and the right to participate in Colorado's initiative process without agreeing to the unconstitutional conditions. The compelled speech in this case and the unconstitutional condition it imposes are all the more galling because they force Petitioners to argue against their own interest in the initiative,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

essentially depriving Petitioners of the ability to make their case to petition signers and voters.

Finally, Colorado's required financial impact statement appears to rely on "static scoring" rather than a "dynamic scoring" analysis, which would account for the macroeconomic effects of the proposed changes, taking into account how the proposed changes might alter economic behavior. The Buckeye Institute has prepared multiple tax reduction scoring proposals and found that in many cases tax reductions result in an increase in gross domestic product, boost investment, spur consumer spending, and add jobs. Colorado's predictions of lost revenues caused by a tax reduction may well be misleading voters. Yet, regardless of which method is used to generate the economic prediction that Colorado requires to accompany petitions and appear on the ballot, it is merely a prediction—an opinion regarding what might happen. Competing opinions are a healthy and necessary component of an initiative campaign. But, they have no place in official ballot language bearing the government's imprimatur.

SUMMARY OF THE ARGUMENT

In describing the constitutional governance of our diverse federal republic, historians and legal scholars have often used the metaphor of a continuing conversation. See, e.g., Joseph J. Ellis, *American Dialogue: The Founders and Us* (2018). This conversation recognizes that the struggle to balance the government's power to govern with the checks vital to protecting against that power's abuse—or as Madison put it, to "first enable the government to control the governed; and in the next place oblige it to

control itself,"—is perennial. The Federalist No. 51, at 294 (James Madison) (Sterling Publishing Co., Inc. 2021). While the Framers largely distrusted direct democracy, especially at the federal level, the early 1900s saw progressive reformers in states across the nation add to the continuing conversation by placing additional popular checks on state government power through various initiative and referendum provisions to state constitutions. This movement towards popular democracy emerged because citizens felt that they lacked a real voice in state legislation. In today's political vernacular, people felt "unheard" by legislatures that they believed were captive to special interests. The initiative gave reformers not only a new means to express their opinions to their fellow citizens but an actual legislative voice to enact their proposed reforms.

The use of the ballot initiative process and the policy advocacy that accompanies the process are core political speech. This Court has been clear that the "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus* v. *American Federation of State, County, and Mun. Employees, Council 31*, 585 U.S. 878, 892 (2018) (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977)). The *Janus* majority, for example, considered it beyond debate that the First Amendment would prohibit a state from "requir[ing] all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties." *Id.* Yet, expressing support for a particular position is exactly what Colorado's statute requires. This violates both the First Amendment's protection against compelled

speech and, because it conditions the use of the initiative process on making this compelled statement, the unconstitutional conditions doctrine.

The insult added to the constitutional injury here is that the statute's compelled speech—the statement against interest that Colorado requires—does not even need to be accurate. The Colorado revenue cost disclosure is based on simple static scoring of the proposed ballot measure calculated by government employees who need not provide any of their underlying assumptions or calculations. And so, neither the petitioners nor the public can determine if the state's impact predictions are valid. Accordingly, it is impossible to tell if the supposed tax reduction impacts even consider changes in economic activity or other actions that the ballot measure might incentivize. In other words, the statute requires citizens advocating for tax reform to articulate the fiscal worst-case scenario when collecting signatures and at the election. Dynamic scoring provides a more accurate picture of the actual effects of a reform and would at least bring the compelled speech closer to serving the "truth in advertising" that Colorado offers as justification for its statute.

Accepting this case will allow the Court to address Colorado's attempt to stifle our nation's continuing conversation on self-governance by conditioning the use of the initiative process on mouthing the government's preferred message.

ARGUMENT

I. Referendum and Initiative as Speech

Although the direct democracy of initiative and referendum provisions is most closely associated with the progressive reforms of the early 1900s, it shares its pedigree with the nation's founding. In the year before he wrote that the "Governments instituted among Men" derive "their just powers from the consent of the governed," Thomas Jefferson proposed the first statewide referendum procedure for inclusion in Virginia's Constitution of 1775. David Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 3 (1989). And while that provision did not make the final cut, the proposed language demonstrates that the Founding generation was familiar with direct democracy to bypass legislator obstinance. So, while the Framers included numerous counter-majoritarian features in the Constitution, they left states alone to determine the amount of direct citizen participation desirable in state lawmaking.

But by the late 1800s Americans began to realize that they lacked the "ability to reign in an out-of-touch government or a government [marked] by inaction." Nicholas Theodore, *We the People: A Needed Reform of State Initiative & Referendum Procedures*, 78 Mo. L. Rev. 1401, 1403 (2013). More specifically, reformers believed that state legislatures were captive to special interest groups, such as railroads, that the Second Industrial Revolution propelled into power. K.K. DuVivier, *The United States as a Democratic Ideal? Internatl. Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 831 (2006). Reformers, thus, proposed "the citizen-initiated referendum as an

alternative mechanism for creating laws--a means of circumventing legislatures rather than working with them." *Id.* These progressives argued that referendums could correct the control of government by moneyed interests and could force action when elected officials became "paralyzed by inaction." *Id.* And while economic progressives were the first to champion the need for the initiative, social conservatives—pushing temperance laws—also saw the initiative as a means to work around moribund state legislatures. Then, as now, even if the initiative was unlikely to pass, the mere fact that it appeared on the ballot often spurred legislators to action. As Woodrow Wilson characterized it, the citizen-initiated referendum was the "gun behind the door" of the legislature. *Citizens Against Rent Control/Coal. for Fair Hous.* v. *City of Berkeley, Cal.*, 454 U.S. 290, 310–311 (1981) (White, J., dissenting).

The Court has thus hailed the speech associated with citizen-initiated referendum as a "basic instrument of democratic government" protected by the First Amendment. *City of Cuyahoga Falls, Ohio* v. *Buckey Community Hope Foundation*, 538 U.S. 188, 196 (2003). Indeed, speech related to initiative or referendum is the epitome of "core political speech." *Meyer* v. *Grant*, 486 U.S. 414, 421–422 (1988); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

II. The "Additional Damage" of Compelled Speech in the Initiative Process

Just as the First Amendment protects core political speech in the initiative and referendum process, it protects the right not to speak. See *Janus,* 585 U.S. at

892. Indeed, "[t]he autonomy to speak freely necessarily includes the freedom to remain silent." *Hiers* v. *Board of Regents of the Univ. of N. Texas Sys.*, No. 4:20-CV-321-SDJ, 2022 WL 748502, *14 (E.D. Tex. Mar. 11, 2022). This is because "*all* speech inherently involves choices of what to say and what to leave unsaid, . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (quoting *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*, 515 U.S. 557, 573 (1995)).

This Court has thus recognized that "[w]hen speech is compelled, . . . additional damage is done." *Janus*, 585 U.S. at 893. Compelled speech forces individuals "into betraying their convictions." *Id.* "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," and thus, "a law commanding 'involuntary affirmation' of objected-to beliefs' requires 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 633 (1943)).

Thus, in B*arnette*, the Court held that the state could not require children to recite the Pledge of Allegiance. *Barnette*, 319 U.S. at 642. In *Hurley* the Court held that parade organizers did not have to accept participants that they believed "affec[t] the[ir] message." *Hurley*, 515 U.S. at 572. In *Janus*, the Court held that the government could not require nonunion public employees to pay service fees to public-sector unions. *Janus*, 585 U.S. at 886. And, in *303 Creative LLC* v. *Elenis*, held that the government requiring a sole member-owner of a graphic design firm to create

websites "celebrating marriages she does not endorse" was "more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely." 600 U.S. 570, 589 (2023).

And while this Court's jurisprudence does not recognize degrees of constitutional infirmity, the imposition that Colorado places on Petitioners here can be particularly noxious because it requires them to subvert their own protected core political speech at the very moment they are speaking. The requirement does not merely force Petitioners to accept in their parade marchers who *might* dilute or confuse their message, require a nominal contribution to a union with which the employee *may* disagree, or require an individual to create messages that run contrary to her *personal* religious convictions. Colorado requires citizens making a political argument to argue the other side of the matter as part of their advocacy. The *Janus* majority took note of Jefferson's observation that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 585 U.S. at 893 (quoting *A Bill for Establishing Religious Freedom*, *in* 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950). To compel an advocate to "propagate opinions which he disbelieves and abhors" directly and as a condition of his advocacy seems somehow even worse.

To the extent that Colorado seeks refuge in the relatively recent doctrine of "government speech," that argument was rejected in *303 Creative* and seems inapplicable here too. In *303 Creative*, the Court noted that "to be sure, our cases have held that the

government may sometimes "'requir[e] the dissemination of purely factual and uncontroversial information,' particularly in the context of 'commercial advertising.'" *303 Creative*, 600 U.S. at 596 (quoting *Hurley*, 515 U.S. at 573). "But this case," like *303 Creative*, "involves nothing like that." *Id.*

To be sure, Petitioners must utilize the government's electoral infrastructure to get the initiative petition to the voters. For example, they must use standardized government forms, follow uniform signature requirements, and abide by similar logistical requirements. This is typical for the exercise of many constitutional rights. But logistical requirements are content neutral and apply the same burden to any petitioners regardless of their point of view. Colorado's requirement, on the other hand, requires Petitioners to espouse a particular point of view—which is the government's point of view—not that of Petitioners. Colorado's mandatory language creates, at best, mixed speech. And like the "Live Free or Die" motto that New Hampshire required to appear on its license plates, it is impermissible. *See Wooley*, 430 U.S. at 714. In *Wooley*, of course, this Court held that even though the motto was in essence government speech, the legislature could not compel Granite State motorists to mouth it by affixing it to their cars.

Again, this case involves more than reciting a pledge or sporting a well-worn motto on one's vehicle, or even, like *303 Creative*, performing services that could imply the endorsement of certain marital arrangements. Colorado instead requires political advocates to argue against their own cause as part of

their advocacy. Justice Souter, writing for the Court in *Hurley*, summed up the appropriate limit of government speech:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579.

III. The Colorado statute imposes an unconstitutional condition on the exercise of First Amendment rights through the initiative process.

If compelled speech was not bad enough of a constitutional imposition, Colorado makes it all the worse by requiring the compelled speech as the price of participation in the initiative process. The U.S. Constitution does not contain an "all-encompassing 'Unconstitutional Conditions Clause.'" *Knight* v. *Metropolitan Govt. of Nashville & Davidson Cnty., Tennessee*, 67 F.4th 816, 824 (6th Cir. 2023) (quoting *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908, 911 (6th Cir. 2019)). Nevertheless, this Court has long recognized that "[t]he government may not deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights." *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). The unconstitutional conditions doctrine thus "forbids

burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

The unconstitutional conditions doctrine is "not anchored to any single clause of the Constitution," but rather serves as a "constitutional 'glue,' filling in the interstitial space left between the enumerated individual rights and structural limitations on government power." Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. Pa. J. Const. L. 1167, 1170–71 (2019). Without the structural support provided by the "interstitial glue" of the unconstitutional conditions doctrine, the constraints our Constitution places on government power, embodied by the combination of individual rights and structural limits, would collapse. Simply put, the doctrine prevents the government from simply "contracting" its way around the Constitution. *Id.* (citing Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 V. L. Rev. 479, 491 (2012)).

As the "modern regulatory and welfare state" has expanded, and governments have come to provide "more goods, services, and exemptions," governments' opportunities to condition such benefits on the "sacrifice of constitutional rights" have likewise increased. Adam B. Cox & Adam M. Samantha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. Legal Analysis 61, 69 (2013).

And while governments have typically taken advantage of these opportunities to extract revenue—for example, conditioning a land-use permit on the applicant's funding of unrelated expenditures, see *Knight,* 67 F.4th 816—Colorado's requirement is as unconstitutional as conditions aimed at property. Rather than citizens consenting to be governed in exchange for the *protection* of their inalienable rights, citizens must trade their First Amendment rights for the "privilege" of taking part in the initiative process. This inversion of the constitutional order is particularly ironic here, where the state requires citizens to sacrifice their First Amendment rights to access the state's mechanism intended to give citizens a greater voice in their government. The state offers citizens a voice to override their legislature, only so long as the citizens agree to carry the legislature's message as well.

Turning again to Jefferson:

> [T]he purposes of society do not require a surrender of all our rights to our ordinary governors: that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right . . . .

Letter From Thomas Jefferson to Noah Webster (Dec. 4, 1790), *in* 6 The Works of Thomas Jefferson 201

(1905). If the legislature, individual legislators, or other elected officials believe that an initiative is bad fiscal policy, they are free to make that argument on their own. Society's purposes in ensuring a robust debate do not require Petitioners to surrender their First Amendment rights to make the legislators' case for them.

IV. Colorado's mandatory ballot language regarding tax reduction is unverifiable and can mislead voters.

Even if the First Amendment permitted the government to force petitioners to carry the government's message along with Petitioners' message, the government information conveyed ought to be factual. Economic predictions are just that—predictions. They are akin to expert opinions offered in court. They are informed opinions, subject to debate and rebuttal by opposing experts. In *Cook* v. *Gralike*, 531 U.S. 510, 524 (2001), Missouri state officials attached labels to candidates' names on the ballot that were "pejorative, negative, [or] intentionally intimidating," the same reasoning should be applied to citizen-led ballot initiatives. The language in contention in *Cook*, which branded candidates with "politically damaging" labels based on lack of support of a particular policy decision, was purposefully meant to function as a "scarlet letter." *Id.* This Court held that such labeling exceeded the purported intention of "informing voters" and instead became an attempt to "dictate [an] electoral outcome[ ]." *Id.* at 525 (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833–44 (1995)). But while Missouri's classifications of candidates might, despite their disparaging effect,

sometimes be *accurate*, Colorado's mandatory language does not even surmount that low bar. It requires Petitioners to set forth the government's opinion as if it were a fact.

Here, the state based its opinion on two Fiscal Impact Statements (FIS) prepared by the Legislative Council Staff.[2] Every citizen-initiated petition seeking a tax reduction must include a tax impact prediction based on a corresponding FIS tax impact summary—without any detailed economic or mathematical calculation. Colo. Rev. Stats. §1-40-105.5. Yet the FIS is merely *an* economic prediction—or speculation—that is then endorsed by the state; it is not fact. Indeed, government tax impact predictions are seldom accurate and governments are quite adept at explaining ex post facto why their economic predictions did not come to fruition.

Further, the FIS does not show how it arrived at its financial predictions. Rather than a full economic analysis, the FIS is developed away from prying eyes within a "black box of government." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001). Consequently, others cannot replicate the State's concealed calculations to either confirm or challenge them.

The FIS's calculations appear, at least in the instances before the Court, to be simple math. This methodology is sometimes known as static scoring.

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[2] The Legislative Council Staff is a nonpartisan body that serves as the "research arm" of the Colorado General Assembly. The Council Staff is tasked with researching topics to support legislative committees and the creation of fiscal notes in addition to other ancillary functions.

"Static scoring (conventional scoring) is an estimation method that, unlike dynamic scoring, assumes that tax changes have no impact on taxpayer behavior and thus have no effect on important macroeconomic measures like GDP, investment, and jobs. This provides a one-dimensional perspective about the effects of tax changes." *Static Scoring (Conventional Scoring)*, Tax Foundation.[3] By contrast, dynamic scoring takes into account the effects of tax changes. "Dynamic scoring provides important context as to how taxes affect the economy by accounting for a policy's macroeconomic and behavioral effects." *Dynamic Scoring*, Tax Foundation.[4]

And, depending on the chosen calculations, assumptions, and frameworks, different economists can come to wildly different conclusions as to the precise ramifications of a fiscal policy. The consequences of the Affordable Care Act (ACA) demonstrate the inaccuracies of government economic predictions. Over the ACA's four-year rollout period, proponents and opponents hotly contested what the bill's effect on the national deficit would be. Proponents of the bill claimed that it would reduce the deficit. See Jeanne Lambrew, *Official Sources Agree: The Affordable Care Act Reduces the Deficit*, The Whitehouse (April 9, 2012)[5] ("According to the official Administration and Congressional scorekeepers, the Affordable Care Act will reduce the deficit: its costs

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[3] https://taxfoundation.org/taxedu/glossary/static-scoring/.

[4] https://taxfoundation.org/taxedu/glossary/dynamic-scoring/.

[5] https://obamawhitehouse.archives.gov/blog/2012/04/09/official-sources-agree-affordable-care-act-reduces-deficit.

are more than fully paid for."); see also John Holahan, *Timely Analysis of Immediate Health Policy Issues* 3 (2010)[6] ("The CBO has estimated that health reform will reduce the deficit . . . .").

Opponents of the ACA insisted that the bill would drastically increase the deficit. See Charles Blahous, *The Fiscal Consequences of the Affordable Care Act* 5 (2012)[7] ("Over the years 2012-21, the ACA is expected to add at least $340 billion and as much as $530 billion to federal deficits"); see also *The Impact of the Health Care Law on the Economy, Employers, and the Workforce: Hearing before the H. Comm. on Education and the Workforce*, 125th Cong. 9 (2011) (statement of Paul Howard, Senior Fellow and Director, Manhattan Institute for Policy Research) ("[T]he Affordable Care Act is much more likely to increase the deficit than reduce it.").

Both sides agreed that the outcome was clear but disagreed on what the "clear" outcome was. Both sides supported their positions with economic analyses that would almost surely satisfy any trial court's application of the *Daubert* test. See *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Yet both cannot be right. Indeed, even hindsight is not 20/20 here, where trying to determine which opinion was closer to the mark is muddled by the methodology used

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[6]https://www.urban.org/sites/default/files/publication/29006/412182-Will-Health-Care-Reform-Increase-the-Deficit-and-National-Debt-.PDF.

[7] https://www.mercatus.org/system/files/The-Fiscal-Consequences-of-the-Affordable-Care-Act.pdf.

to measure the deficit, not to mention over a decade of intervening events.

Economic modeling and, in this case, the effect of tax changes, typically involve making a number of assumptions about the variables being considered. When attempting to predict what will happen when such a change is put into effect, economists must make a series of assumptions about everything from how businesses make decisions about the tradeoff between labor and capital to the savings patterns of individuals. And while economists may disagree about which assumptions should be utilized or create models testing changes to these assumptions, the overall aim is to form a realistic basis upon which the potential outcomes of a particular tax policy can be projected.

Dynamic scoring takes more variables into account. Consequently, dynamic scoring is often regarded as more accurate, though more difficult. Even the federal government has recognized the need to apply dynamic scoring when evaluating tax changes. See generally Cong. Research Serv., R43381, *Dynamic Scoring for Tax Legislation: A Review of Models* (updated 2023).[8] Consider a policy change in which a state is considering lowering its current flat personal income tax rate. Using static scoring, the bureaucrats analyzing the effects of the proposed change would simply multiply the change in rates by the total taxable income within the state to calculate the decrease in revenue to state coffers.

While this approach has surface appeal and is easy to calculate, it fails to account for a "macroeconomic

[8] https://crsreports.congress.gov/product/pdf/R/R43381/10.

impact analysis" of the tax change. *Id.* at 2. For example, it does not account for how individuals and businesses within the economy *respond* to a decrease in the personal income tax rate. When such a rate decreases, individuals keep more of their income, which is then either spent, saved, or invested. If spent, the additional spending may result in higher demand for goods and services, which may increase revenue for businesses and allow them to expand, pay their workers more, and hire additional workers. Those workers could spend more, which starts the cycle over. If saved, money transferred to financial institutions would be more available to financial institutions, which might make loans at lower rates of interest. If invested, the money might be used by companies for additional research or development. Or dividends might be increased to shareholders. This, in turn, could allow for the creation of new businesses and for businesses already in existence to, again, expand, pay their workers more, and hire additional workers, thus fueling a new series of cycles of growth. When this happens, the economy grows and the potential tax base on which the now lower personal income tax rate is levied has changed. Regardless, any sort of tax scoring methodology that fails to account for the potential second- and third-order effects described cannot truly be said to offer realistic predictions about how a given tax policy change will affect the economy in question.

The Buckeye Institute's prior applications of dynamic scoring show the usefulness of accounting for all relevant factors. For example, The Buckeye Institute modeled four tax reduction scenarios for the state of Georgia using dynamic scoring. In three of the

four tax reduction proposals, the proposed tax cuts would significantly *increase* Georgia's gross domestic product, boost investment, spur consumer spending, and add jobs. In the fourth proposal, the results were generally neutral. Rae Hederman, Jr., Zachary D. Cady, & Trevor W. Lewis, The Buckeye Institute, *Next Steps for Georgia Tax Reform* (2024).[9]

In another analysis conducted for Kansas, The Buckeye Institute used dynamic scoring to evaluate four tax-cutting proposals: one cutting corporate and personal income taxes and sales taxes, one cutting corporate income taxes only, one cutting personal income taxes only, and one cutting only sales taxes. Each yielded significant economic growth and additional business investment. Zachary D. Cady, Rea S. Hederman Jr, & Trevor Lewis, The Buckeye Institute, *Reforming Kansas Tax Policy* (2023).[10]

To be sure, dynamic scoring has its critics. For example, perhaps the most famous iteration of dynamic scoring comes in the form of economist Arthur Laffer's eponymous curve, which supported the idea that a *decrease* in tax rates would, at a certain point, *increase* tax revenues. Many economists dispute Laffer's conclusions and argue that his analysis is flawed and incomplete. See, e.g., Bret N. Bogenschnieder, *Political Fact Checking in the Tax Context*, 49 Ohio N.U.L.Rev. 1, 3 (2022) (citing Alan S. Blinder, *Thoughts on the Laffer Curve*, *in* The Supply-

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[9] https://www.buckeyeinstitute.org/library/docLib/2024-03-07-Next-Steps-for-Georgia-Tax-Reform-policy-report.pdf.

[10] https://www.buckeyeinstitute.org/library/docLib/2023-12-11-Reforming-Kansas-Tax-Policy-policy-report.pdf.

Side Effects of Economic Policy 86, 91 (1981) (describing the Laffer Curve as "demonstrably false."). Unsurprisingly, because the analysis carries political implications, economists' views of Laffer often coincide with their politics. And politicians on both sides of the aisle have a stable of economists that they may call as expert witnesses in making their case for one policy or another.

But, the accuracy of the rival scoring methods is beside the point. Neither—like any human prediction—is infallible; results will turn on the variables included and the economist's judgment and the rigor of the analysis. Indeed, this is perhaps the rare point on which most economists can agree. See Bret Bogenschneider, *Causation, Science & Taxation*, 10 Elon L. Rev. 1, 30–31 (2018) ("Econometrics as applied to taxation is also often not conducted in a way that is replicable or falsifiable, and applies the scientific method in reverse where the hypothesis is derived after the initial regressions are applied to the dataset. Perhaps this is why so many scientists have declared economics not to be in the nature of a true 'science.'") (citations omitted); Arnold Kling, *The Congressional Budget Office & the Demand for Pseudoscience*, 36 Yale L. & Pol'y Rev. 1, 5 (2017) ("Out of the large pool of plausible causal variables in a particular setting, the mathematical economist necessarily must select only a few to represent in a mathematical model. Such simplifications can work if the omitted potential causal variables can be demonstrated to be unimportant, as is often the case in physics or engineering. However, in economics, one theorist's idea of a variable that can be omitted may be another theorist's idea of a critical causal factor.").

That is to say, any economic prediction, no matter how well-informed, is opinion. Unfortunately, Colorado is not statutorily obligated to provide the background of its conclusions as to the economic effects of the proposed tax cuts. And the language it is foisting upon citizen petitioners for tax cuts is, at best, Colorado's prediction of the ramifications of any proposed tax cut. To require Colorado's unverifiable predictions in the ballot language—as if it is fact—is, at best, mistaken. At worst, it is an active attempt to suppress the political will of Coloradans. Regardless of whether Colorado intends to purposefully deceive, or does so incidentally, hardly matters; either way, it offends the First Amendment.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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