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

BRIEF IN OPPOSITION

PHILIP J. WEISER
Attorney General

SHANNON WELLS STEVENSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Shannon.Stevenson@coag.gov
(720) 508-6000

RUSSELL D. JOHNSON
Deputy Solicitor General

J. GREGORY WHITEHAIR
Senior Assistant Attorney General

PETER G. BAUMANN
Assistant Solicitor General

LEO T. NGUYEN
Assistant Attorney General
Fellow

Counsel for Respondent

QUESTION PRESENTED

Under Colorado law, citizen-initiated ballot measures have their "titles"—paragraph-length descriptions of the measure—set by a three-member Title Board. The titles are set at a public hearing at which anyone can lobby the Board to include or delete language in the title. Once title is set, Colorado law provides for a mandatory, expedited appeal to the Colorado Supreme Court, which ensures the title describes the initiative "succinctly, accurately, and fairly and in a manner that will not mislead voters." *In re Title, Ballot Title & Submission Clause for 2019-2020 #293*, 466 P.3d 392, 393 (Colo. 2020). The final version of the title appears on petitions approved by the Secretary of State and circulated by signature-gathers under a bolded disclaimer saying that the "ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:". And if enough signatures are collected, the title ultimately appears on Coloradans' ballots.

The question presented is whether the title set by the Title Board, subject to review by the Colorado Supreme Court, and distributed to voters on state-approved petitions and ultimately on state-certified, county-printed ballots, is an individual's or organization's protected speech, or whether, as the court of appeals held, it is government speech.

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INTRODUCTION

Since the 1940s, Colorado has exercised plenary control over the ballot titles for citizen-initiated measures. Those titles are crafted by the state Title Board and appear only on signature petitions approved by the government, ballots drawn and printed by the government, and voter information booklets drafted by the government. And on the signature petitions—the place where the title allegedly is most likely to be confused for private speech—Colorado places a disclaimer at the top of every page informing readers that the title is crafted by the state Title Board.

Nonetheless, Petitioners brought this challenge under the First Amendment, alleging that the ballot title is Petitioners' private speech, not the government's. And although Petitioners now try to reframe their challenge to instead invoke this Court's precedents for government-compelled speech, that is not how Petitioners pled or argued this case in either of the courts below.

As to the preserved question, whether the titles are government speech or private speech, the court of appeals carefully and faithfully applied this Court's modern government speech precedents to Colorado's unique factual circumstances. And given both the fact-dependent nature of that inquiry, and the broad diversity among states as to how ballot titles are drafted and approved, it is unlikely the Court would be able to articulate any helpful rule beyond the guidance provided by its prior precedents.

Finally, this case is a poor vehicle to address whatever concerns Petitioners raise about the

government speech doctrine, or even the government-compelled speech doctrine, in the ballot title context. Petitioners' challenge is moot. And even if the case, as a whole, is capable of repetition yet evading review, that exception to mootness cannot save this interlocutory appeal, which arose from the denial of a preliminary injunction tied to the 2024 election. And Petitioners' attempts to frame this as a straightforward case belie the unworkability of their ultimate position. The Petition should be denied.

STATEMENT OF THE CASE

I. Colorado's ballot measure framework.

Colorado citizens enjoy a robust right to initiate legislation. *See, e.g.*, COLO. CONST. art. V, § 1(1), (2). Subject to few limitations, citizens can draft and circulate for signatures almost any proposed statutory provision or constitutional amendment. *Id.* § 1(2). The rights to make law through initiative and referendum are, respectively, the "first" and "second" "power[s] . . . reserved by the people" in the Colorado constitution. *Id.* § 1(2), (3).

But although citizens may draft and propose their own initiatives, they do not enjoy the right to determine how those initiatives are described on state-issued petitions and ballots. Instead, since 1941, the paragraph-long description of the measure that is ultimately submitted to voters—which Colorado calls the ballot "title"—has been set by a three-person Title Board. *See* 1941 Colo. Sess. Laws 480. In its current form, the Board consists of the secretary of state, the attorney general, and the director of the state office of legislative legal services, or their designees. COLO. REV. STAT. § 1-40-106(1) (2024). Representatives of the

proponents of an initiative, known as "designated representatives," *id.* § 1-40-104, must present their measure to the Title Board, which "by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment," *id.* § 1-40-106(1). The designated representatives must attend any meeting of the Title Board at which their measure is discussed, *id.* § 1-40-106(4)(a), but it is the Board, not the designated representatives, that sets the title. In fact, supporters of an initiative are prohibited by statute from even recommending a proposed title when they submit their initiative to the Title Board. *Id.* § 1-40-105(4).

The Title Board drafts the title at a public meeting, during which anyone, including the designated representatives, can comment on the Board's proposal. *Id.* § 1-40-106(1). Once title is set, any voter who "is not satisfied with the titles . . . and who claims that they are unfair or that they do not fairly express the true meaning and intent" of the proposed measure, may seek rehearing before the Title Board. *Id.* § 1-40-107(1)(a)(I).

If, after rehearing, that voter or any other interested party is still dissatisfied with the title, they enjoy a right of mandatory appeal directly to the Colorado Supreme Court. On appeal from the Title Board, the court will reject the title if it does not summarize the measure "succinctly, accurately, and fairly and in a manner that will not mislead voters." *In re Title, Ballot Title & Submission Clause for 2019-2020 #293*, 466 P.3d 392, 393 (Colo. 2020). The process is heavily utilized. During the 2023-2024 ballot-issue cycle, 314 unique measures were presented to the Title

Board,[1] and the Colorado Supreme Court considered 41 separate title board appeals.[2]

Once a title has been set, proponents of the measure may begin collecting signatures to qualify the measure for the general election ballot.

Although designated representatives and original proponents of a measure *may* be part of the signature gathering effort, they are not the only persons that can circulate a petition for signatures. In fact, a predecessor of one Petitioner here, Advance Colorado, spent over $1.5 million in 2020 collecting signatures for two measures it did not draft or present to the Title Board. *Colo. Dep't of State v. Unite for Colo.*, 551 P.3d 687, 694 (Colo. App. 2024), *certiorari granted Unite for Colo. v. Colo. Dep't of State*, No. 24SC281, 2024 WL 4906452 (Colo. Nov. 25, 2024).

Regardless of who is collecting signatures, the signatures must be captured on petitions printed "in such form as may be prescribed pursuant to law," COLO. CONST. art. V, § 1(2), and must include (1) the full text of the measure, *id.*, and (2) the title set by the Title Board, COLO. REV. STAT. § 1-40-110(2). Most importantly, at the top of every page of the petition is a statement, in bold: "**The ballot title and submission clause as designated and fixed by**

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[1] Available at https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/.

[2] Available at https://www.coloradojudicial.gov/taxonomy/term/580?topic=78&wrapped=true. This includes challenges both to the title itself and to whether the proposed measure violates Colorado's single-subject requirement. *See* COLO. CONST. art. V, § 1(5.5).

the Initiative Title Setting Review Board is as follows:". App. at 3a n.1.

Once proponents have collected signatures on the petition, the petition is submitted to the Secretary of State to verify whether proponents have collected enough valid signatures. COLO. REV. STAT. § 1-40-116. The Secretary then issues a statement of sufficiency or insufficiency, *id.* § 1-40-117, which may be cured, *id.* § 1-40-117(4), or challenged in state court, *id.* § 1-40-118.

Ultimately, the ballot title is required to appear in only three places: (1) the ballot itself,[3] *id.* § 1-40-102(2), (2) the official voter information booklet (called the "Blue Book") prepared and published by the general assembly's nonpartisan research staff and mailed to voters before an election, COLO. CONST. art. V, § 1(7.5), and (3) on the signature petition, COLO. REV. STAT. § 1-40-110(2). Proponents and opponents of the measure are not required to use or refer to the title in any of their own printed materials, radio or television advertisements, or in any interactive communication with voters.

II. Factual background.

In 2021, the Colorado General Assembly passed House Bill 21-1321 ("HB 21-1321"). H.B. 1321, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021). The purpose of the legislation was to ensure voters were exposed to complete information about the "fiscal impact of statewide ballot measures that would result in a

[3] The text of the measure is not printed on the actual ballot. Instead, the ballot includes only the title that has been set by the Title Board.

change in district revenue." *Id.* Under HB 21-1321, when an initiative implicates reductions in tax revenue, the title must begin:

> Shall there be a reduction to the (description of tax) by (the percentage by which the tax is reduced in the first full fiscal year that the measure reduces revenue) thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to (the three largest areas of program expenditure) by an estimated (projected dollar figure of revenue reduction to the state in the first full fiscal year that the measure reduces revenue) in tax revenue . . . ?

COLO. REV. STAT. § 1-40-106(3)(e). Measures that would reduce local revenues must follow similar requirements. *Id*. § 1-40-106(3)(f).

Relevant here, two measures drafted specifically to challenge this legislation were submitted to the Title Board in 2023.

First, proponents submitted proposed initiative 2023-2024 #21, which would create a 3% annual limit on property tax increases, subject to certain exceptions. App. at 6a. After the Title Board concluded that the measure would reduce local district property tax revenue, it included in the title the mandatory language from COLO. REV. STAT. section 1-40-106(3)(f). App. at 7a. The designated representatives sought rehearing before the Title Board on the grounds that the measure was not a "tax change," so the language need not be required. After the Board denied the motion, no party sought review before the Colorado Supreme Court as to whether the title was inaccurate.

Second, proponents submitted proposed initiative 2023-2024 #22, which would lower the state's sales and use tax rate by .01% for one year from 2024-2025 and create a one-day sales tax holiday. App. at 6a-7a. After the Title Board concluded that the measure would reduce state revenue through a tax change, it included in the title the mandatory language from COLO. REV. STAT. section 1-40-106(3)(e). App. at 7a. The designated representatives sought rehearing before the Title Board on the grounds that the title was inaccurate. The Board denied the motion, and no party sought review by the Colorado Supreme Court.

III. Procedural background.

Although the Title Board's titles for #21 and #22 were final on May 19, 2023, and April 19, 2023, respectively, proponents did not ask the Secretary to approve a proof of those petitions until August 4, 2023. The next business day, Petitioners filed this lawsuit, alleging that HB 21-1321 violated their rights under the First Amendment both facially and as-applied to #21 and #22. Petitioners also included a claim under the Colorado Constitution. Petitioners sought a preliminary injunction, which the district court denied, concluding that the ballot titles were government speech under this Court's decision in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

Plaintiffs appealed the denial of the preliminary injunction to the Tenth Circuit, which also applied *Shurtleff*. The court noted the "robust history of titles being government expression, and the near total control the government asserts over the titling," as well as the disclaimer included on the petitions

informing the reader that they were drafted by the government. For these reasons, the court concluded that the titles were government speech under the *Shurtleff* factors, and thus Plaintiffs had no First Amendment interests in the speech and were unlikely to succeed on the merits of their claims. App. at 14a.

REASONS FOR DENYING THE PETITION

I. Petitioners have waived any argument about government-compelled speech.

A. Petitioners chose not to advance a theory of government-compelled speech in the courts below.

In their Petition, Petitioners paint this case as arising under the doctrine of government-compelled speech. *See, e.g.*, Pet. at 1 (requesting that this Court "merely [] reverse the holding that [Petitioners'] claims challenge pure government speech, and not government-compelled speech"); *see also e.g., id.* at 13, 17, 19, 21, 24. But that is not how Petitioners argued this case in the district court or originally on appeal. Instead, as the court of appeals noted, "Advance Colorado has consistently asserted that the ballot titles are its own private speech and has not argued, in the alternative that they are improperly compulsory government speech." App. at 16a n.6.[4] As

[4] *See also* App. at 181a

> THE [DISTRICT] COURT: . . . Would you agree that in order for me to be in a position of declaring 1321 unconstitutional as applied to these two initiatives, that I would have to conclude that the title was the

a result, neither lower court applied this Court's government-compelled speech precedents.

"It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). And for good reason. As a Court of last resort, it makes little sense for this Court to answer a question on which it "lack[s] guidance from the District Court or the Court of Appeals," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989), particularly where Petitioners were represented by skilled counsel in the courts below, and knowingly chose not to advance a government-compelled speech claim. *See, e.g.*, App. at 181a; *see also United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) ("[A]s a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (quotations and alterations omitted)).

Here, Petitioners consistently argued that the ballot titles were private speech, not government-compelled speech. As a result, the parties developed no record from which this Court can meaningfully evaluate a compelled speech claim.

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speech of plaintiffs' and not the speech of the government?

MR. EID: Yes, sir. . . .[O]ur position is it's not governmental speech.

B. Petitioners are not compelled to express the Government's message.

Even if Petitioners had preserved the argument that HB 21-1321 unlawfully compels them to transmit the government's message, that argument would fail.

The government-compelled speech doctrine prohibits the government from compelling "affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). It applies only in circumstances where the government requires a person to "speak as the State demands or face sanctions for expressing [their] own beliefs." *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023).

Nothing in Colorado law prohibits Petitioners from expressing disagreement with a ballot title. Ballot titles only appear in three places: (1) on signature petitions, (2) on the ballot, and (3) on a government-produced-and-printed ballot information book. On the petition—the only place where that title might allegedly be associated with a private party—the state includes a bold disclaimer that says: "**The ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:**". App. at 3a n.1.

Alongside this bold disclaimer, signature-gatherers remain free to articulate their own message about the operation or effect of a proposed measure, including any disagreement with the Title Board's chosen language. In fact, Petitioners' own witness testified before the district court that signature-gatherers can, and do, argue that the title is inaccurate or unclear. App. at 84a, 97a-98a. And they

can, and do, direct signatories to read the full measure to learn more about the initiative and evaluate the title for themselves. *See* App. at 91a.

Even if Petitioners had developed a record sufficient to enable this Court to meaningfully review a government-compelled speech claim, Petitioners' speech was not compelled under this Court's precedents.

C. Petitioners chose not to pursue a readily available state law remedy for allegedly false ballot titles.

Although the titles set by the Title Board and placed on state-approved petitions and ballots are not subject to First Amendment scrutiny because they reflect the government's speech rather than a private party's, Colorado law provides robust protections to ensure the accuracy of ballot initiative titles. These protections stem from both statute and the Colorado Constitution and protect Colorado voters from being "tricked and manipulated with respect to the citizen initiative process." *See* Pet. at 13.

The Colorado Constitution includes a "clear title" requirement, COLO. CONST. art. V, § 1(5.5), which requires the Title Board to draft titles that "fairly, clearly, and accurately" reflect the proposed initiative, *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999). To ensure the Title Board timely complies with this obligation, Colorado law provides for a mandatory, expedited, direct appeal from the Board to the Colorado Supreme Court. COLO. REV. STAT. § 1-40-107(2). The Supreme Court will invalidate the Board's title if it includes "a material and significant omission,

misstatement, or misrepresentation." *In re 1999-2000 #29*, 972 P.2d at 266; *see also id.* ("Perfection is not the goal; however, the Title Board's chosen language must not mislead voters.").

Because the accuracy obligation flows from the constitutional "clear title" requirement, it supersedes any statutory enactment, including HB 21-1321. *See, e.g.*, *Zaner v. City of Brighton*, 917 P.2d 280, 286 (Colo. 1996) ("[L]egislation which directly or indirectly impairs, limits, or destroys rights granted by self-executing constitutional provisions is not permissible."). Thus, if HB 21-1321 were to require misleading or inaccurate language in a ballot title, the Colorado Supreme Court could—and would—reject that title on state law grounds.

But critically, no one—not even Petitioners—availed themselves of Colorado's mandatory review procedures to allege that the titles for #21 or #22 were false.[5] Instead, they chose to bring this lawsuit.

In Colorado, like in other states that have extended the right to initiate legislation, proponents and opponents alike enjoy robust rights to challenge

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[5] In the court of appeals, Plaintiffs argued that they had "functionally exhausted [their] state court remedies" by appealing a similar measure to the Colorado Supreme Court in 2021, which denied the appeal without an order. App. at 8a n.2. But the Title set for that measure, 2021-2022 #46, included additional language addressing potential surpluses and tax refunds that was not included in the Title for #22. Results for Proposed Initiative #46, *available at* https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/results/2021-2022/46Results.html (adding "or will reduce the amount of the taxpayer refund if a refund is required under TABOR" to the language mandated by HB 21-1321).

titles set by the state. Those protections are more than sufficient to address Petitioners' parade of horribles without invoking First Amendment scrutiny.

II. With respect to the preserved issue of whether the ballot title is government speech, certiorari is not appropriate.

A. The Tenth Circuit faithfully applied this Court's precedents in assessing Petitioners' challenge.

Just two terms ago, this Court surveyed its government speech precedents to enunciate a common set of factors relevant to the analysis. *Shurtleff*, 596 U.S. at 251-52. The Court observed that resolving the question requires a "holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression," and that the ensuing analysis is "not mechanical," but rather "driven by a case's context rather than the rote application of rigid factors." *Id.* at 252; *see also id.* at 262 (Alito, J., concurring) (identifying "the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression"). Nonetheless, the Court reiterated three factors that often bear on the ultimate question: (1) "the history of the expression at issue; [2)] the public's likely perception as to who (the government or a private person) is speaking; and [3)] the extent to which the government has actively shaped or controlled the expression." *Id.*

In assessing Petitioners' likelihood of success on the merits, the court of appeals faithfully applied *Shurtleff*. As to the first and third factors, it found that the Title Board is "solely responsible for setting a

measure's title without the influence of proposal advocates," and that this "substantial control the government asserts of initiative titles" had been the norm since the Title's Board's inception in 1941. App. at 13a. As the court observed, although citizens can draft initiatives, the titles themselves "are fully and exclusively crafted by the government[.]" *Id.* In fact, the initiative's proponents are prohibited by law from even proposing a title. COLO. REV. STAT. § 1-40-105(4).

And as for the second factor, the court found that Petitioners "fail[ed] to address the disclaimer shown immediately above the ballot title indicating the language is 'designated and fixed' by the Title Board" and its significance in alerting the public to the title's governmental source. App. at 14a; *see also id.* at 3a n.1 ("When placed on a petition for signatures, each title is preceded by the following disclaimer: "**The Ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:**").

Given this disclaimer's clarity in signaling the title's governmental source to the public, along with the government's longstanding and complete control over the title's language, the court of appeals determined that a "holistic review clearly demonstrates Colorado's titling process qualifies as government speech." *Id.* at 14a.

In *Shurtleff*, this Court undertook the task of organizing its government speech precedents and enunciating a clear standard to apply in the lower courts. Both the district court and the court of appeals took advantage of that effort here and determined that Colorado's longstanding and robust control over the

ballot titling process clearly indicated Colorado's intention to "speak for itself" rather than to "regulate private expression." *See Shurtleff*, 596 U.S. at 252. Even more important, Colorado made clear—with efforts that included a disclaimer above the actual Ballot Title itself—that the title reflected the government's speech, not that of any private party.

In fact, this case demonstrates the benefits of this Court's holistic approach for determining whether and when speech is the government's. Perhaps, in states where citizens exercise greater control over the content of a ballot title, the government speech doctrine would apply differently to those different facts. For example, in Arkansas, initiative proponents draft their own titles and submit those titles to the attorney general for review and approval. ARK. CODE ANN. § 7-9-107(d)(1). In this way, Arkansas's process more closely resembles the process in *Matal v. Tam*, 582 U.S. 218, 235-36 (2017), in which the government's approval or rejection of marks submitted for trademark registration was held not to convert those marks into government speech.

On the other hand, where Colorado "maintains direct control" over the ballot titles, "actively exercise[s]" its authority to do so, and makes clear to the public their governmental source, ballot titles constitute government speech. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213 (2015) (holding that Texas license plates are government speech because of the state's history of controlling the content of the plates and because of the plates' prominent display of the state's name).

Finally, Petitioners' parade of horribles allegedly flowing from the decision below is unavailing and irrelevant. Pet. at 25-26. In each hypothetical proposed by Petitioners, application of the government speech doctrine reveals that the government is not speaking for itself but has instead created a limited public forum for nongovernmental speakers. In such fora, the government's regulation must be "reasonable and viewpoint neutral," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009)—and the proposed facts in each hypothetical would fail viewpoint neutrality.

But here, the government has not created a public forum. It is speaking for itself. Rather than highlighting the unworkability of the government speech decision issued by the court of appeals, Petitioners' hypotheticals present a red herring by discussing the separate First Amendment public forum doctrine that is irrelevant to this case.

B. *Cook* is easily distinguishable.

To avoid application of this Court's government-speech precedents, Petitioners reach for *Cook v. Gralike*, 531 U.S. 510 (2001). Pet. at 14. But the controlling opinion in that case applied the Elections Clause, not the First Amendment. *Cook*, 531 U.S. at 526. Rather than supporting Petitioners' argument, *Cook* instead reflects this Court's admonition that the appropriate constraints on government speech are often found outside the First Amendment. *See, e.g.*, *Summum*, 555 U.S. at 468. Recognizing this, Petitioners instead invoke a concurrence in *Cook* joined by only two members of the Court. Pet. at 14.

So too with the other case cited by Petitioners, *Anderson v. Martin*, 375 U.S. 399 (1964). There, this Court applied the Equal Protection Clause to strike down a law requiring racial labels next to a candidate's name on printed ballots. *Id.* at 402. Like *Cook*, *Anderson* stands for the principle that government speech is sufficiently restrained by forces outside the First Amendment.

C. There is no meaningful circuit split on the question presented.

Highlighting *Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r*, 422 F.3d 848 (9th Cir. 2005), Petitioners argue that the decision of the court of appeals here creates a circuit split with the Ninth Circuit. Pet. at 21. However, Petitioners are unable to identify a circuit split on the claim actually decided by the court of appeals, much less on the claim Petitioners waived but now want this Court to decide.

A split on the question Petitioners preserved would involve a court holding that ballot titles are purely private expression. But that is not what *Caruso* held. Instead, *Caruso* holds—or at least assumes—that ballot titles are government speech. 422 F.3d at 855. Therefore, on whether ballot titles are government speech, *Caruso* and the decision of the court of appeals here are not in conflict.

Caruso went on to consider whether any of the constitutional limitations on government speech, including the government-compelled speech doctrine, applied to the ballot titles challenged there. *Id.* Here, Petitioners advanced no such theory in either the district court or the court of appeals, and the court of appeals issued no decision relevant to that question.

Instead, Petitioners argued exclusively that the titles are "not government speech." App. at 181a. On this point there is no conflict with *Caruso*, because the court of appeals neither reached, nor needed to reach, the arguments advanced before the Ninth Circuit, as they were not pursued here.

Petitioners' invocations of *Kim v. Hanlon*, 99 F.4th 140 (3d Cir. 2024), and *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708 (4th Cir. 2016), are similarly unavailing. In neither case was the government speech doctrine raised, briefed, or decided; let alone as applied to the distinct question of ballot initiative titles. Both of those cases addressed the location of candidate names on candidate-election ballots, with one concluding that ballot designs which force candidates to "associat[e] with candidates with whom they may not wish to associate or face 'Ballot Siberia,'" infringed on the candidates' First Amendment associational rights. *Kim*, 99 F.4th at 157; *see also Libertarian Party*, 826 F.3d at 712 (addressing law which relegated independent candidates to the "third tier of the ballot"). Petitioners' effort to connect candidate-location to titles for ballot initiatives—where Colorado's initiative titles are specifically set by the government—is inapt.

III. This case is a poor vehicle for addressing the question presented.

A. There are alternative grounds for affirming the denial of the preliminary injunction.

1. Petitioners' claim is moot.

There is no dispute that Petitioners' request for a preliminary injunction—sought to allow the proposed

measures to appear on the 2024 election ballot—is moot. *See* App. at 181a. And although election-related cases are often "capable of repetition, yet evading review," *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008), this particular action is not.

First, the "capable of repetition, yet evading review" exception requires a "reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (quotations omitted). But even if Petitioners are likely to propose future tax cut measures in Colorado, the Petition itself emphasizes specific facts relevant to #21 and #22 that may—or may not—exist in the future. Unlike most tax cuts, #22 was a "*de minimis* . . . tax cut that would be in effect for a single year" which will have concluded by the time any decision issues from this Court. Pet. at 7. Moreover, Petitioners' central argument is that this single year "was projected to have tax revenue high enough to trigger a substantial refund under the Taxpayer's Bill of Rights." *Id.*

To satisfy the "capable of repetition, yet evading review" exception, Petitioners must show not only the likelihood that they will pursue "*de minimis*," "single year" tax cuts in the future, but also that the specific years they choose are likely to have the same economic conditions present in FY 2024-2025. And that the titles set by the Title Board will be substantially similar to those they challenge here. *But see supra* n.5 (noting that the Title Board included different language alongside the language mandated by HB 21-1321 in the title for another, similar, measure).

Theories that depend on "guesswork as to how independent decisionmakers will exercise their

judgment" are insufficient to satisfy Article III's case or controversy requirement. *Murthy v. Missouri*, 603 U.S. 43, 57 (2024). The speculative chain of guesswork required to conclude that Petitioners will face the same injury in the future is insufficient to satisfy the exception to mootness.

Second, this case arises as an interlocutory appeal to the denial of a preliminary injunction. There is no question the specific relief Petitioners seek—an injunction prohibiting the Secretary from including the language drafted by the Title Board on petitions circulated by Petitioners to qualify #21 and #22 to the ballot—is moot. In such cases, it is possible for the interlocutory appeal to be moot even though "the case as a whole remains live because it is capable of repetition." *Fleming v. Gutierrez*, 785 F.3d 442, 446 (10th Cir. 2015); *see also Bierman v. Dayton*, 817 F.3d 1070, 1072 (8th Cir. 2016) ("[T]he appeal of an order denying a preliminary injunction becomes moot if the act sought to be enjoined has occurred.") (quotations omitted); 13C Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 3533.3.1 (3d ed.) ("[I]t may be clear that a particular request for relief has become moot, even though other forms of relief may remain available. Once the opportunity for a preliminary injunction has passed, for example, the preliminary injunction issue may be moot even though the case remains alive on the merits.").

"Federal courts do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). The most Petitioners can hope for is that this challenge will result in a favorable opinion that can be

used to address hypothetical, abstract, future injuries. But "[i]t is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023). Where, as here, a favorable decision would offer Petitioners none of the relief they requested in moving for an injunction, the request is moot. *Id.* (holding that where "petitioners can hope for nothing more than an opinion," they "cannot satisfy Article III").

2. *Pullman* abstention applies to Petitioners' case.

Although the district court and court of appeals both rejected Petitioners' request for an injunction on the grounds that the ballot titles were government speech exempt from First Amendment scrutiny, the Secretary also argued below that abstention was warranted under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). Under *Pullman*, "when the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue." *Overton v. Bazzetta*, 539 U.S. 126, 140-41 (2003) (Thomas, J., concurring).

Here, the question of how the Title Board should address the HB 21-1321 language in situations where Colorado is expected to enjoy a budget surplus is a significant question of state law. And Colorado furnishes "easy and ample means for determining" that question through the Title Board appeal process. *Pullman*, 312 U.S. at 501. Petitioners chose not to avail themselves of that process, depriving the state

courts of the opportunity to answer that question. Under *Pullman*, this Court should give Colorado's courts that chance and abstain from answering the question presented here.

As the Tenth Circuit concluded, Colorado's long history and complete control over the ballot title language—along with the transparently governmental source of that language—render this an easy case of government speech. And facts unique to this case and to Colorado make it a poor vehicle for addressing the general question of whether, and for whom, First Amendment protections attach to state ballot initiative titles.

B. Petitioners' position is unworkable.

The Petition presents this case as a straightforward question of whether the government speech doctrine applies to ballot titles crafted by the government and printed on government-controlled ballots and signature petitions. But answering that question will require the Court to wade into more complicated waters. Most importantly, the Petition raises the specter that individual proponents of a ballot measure can craft their own titles without government involvement.

As this Court has recognized, state regulation of the initiative process is necessary to prevent confusion and ensure consistency. *See, e.g. Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191-92 (1999). As a result, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process[.]" *Id.* But Petitioners' position in this lawsuit would wreak havoc on the initiative process.

If the ballot titles set by the Title Board are not government speech, then it may follow that every individual with an interest in those titles enjoys First Amendment rights as to them; including, perhaps, the right not to include those titles on signature petitions. After all, where persons enjoy First Amendment protections for particular expression, the government cannot force those persons to broadcast a message with which they disagree. *See, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005).

Does this mean that if a proponent disagrees with the title set by the Title Board it may altogether omit that title from the petition it circulates? Or craft its own title? And putting aside the petition, what about the ballot itself? If Advance Colorado enjoys First Amendment rights as to the language of the title, that right presumably applies equally as to the ballot as it does to signature petitions. And if not, then *that* finding would invite the possibility that proponents could qualify a measure for the ballot by collecting signatures on petitions with one title (set by the proponents), but a different title entirely (set by the Title Board) will appear on the ballot. It is hard to fathom a more chaotic outcome. *But see Buckley*, 525 U.S. at 187 ("[T]here must be a substantial regulation of elections if . . . some sort of order, rather than chaos, is to accompany the democratic process." (quotations omitted)).

Moreover, Petitioners' ultimate claim is that Colorado is hijacking their protected speech by making them include language with which they disagree on the petitions they circulate for signatures. *See, e.g.*, Pet. at 13. If Petitioners' theory is correct,

then *any* individual circulating a petition, or paying to circulate a petition, has an individualized First Amendment interest in the ballot title. That interest is not limited to the original proponents of a measure.

This case illustrates the difficulty that would arise in such a regime. The Petition claims that these measures were "brought by Advance Colorado." Pet. at 9. But for state law purposes the measures were submitted by two individual "designated representatives." *See* COLO. REV. STAT. § 1-40-104 (describing role of "designated representatives" "who shall represent the proponents in all matters affecting the petition"). Nonetheless, the Petition argues that Advance Colorado—which for state law purposes is indistinguishable from any other party interested in these measures—has First Amendment protected interests during the signature gathering process. If so, then so too does any signature gatherer. Or even persons opposed to the signature gathering effort.[6]

At minimum, the Petition seems to suggest that the title of a measure is the private speech of whomever is circulating a petition for signatures on that measure, and that those persons cannot be compelled to circulate petitions with titles they contend are false. *See* Pet. at 34 ("Respondent would put Petitioner to a choice: circulate false ballot

[6] Petitions often attract "decline to sign" efforts, which encourage voters not to sign the petitions. *See, e.g.*, Andrew McKean, *Anti-Hunting Groups Are Running a Paid Signature Campaign to Ban Cougar Hunting in Colorado. Conservation Orgs Launch "Decline to Sign" Effort*, Outdoor Life, June 14, 2024. Available at https://www.outdoorlife.com/conservation/signature-campaign-ban-lion-hunting-colorado/.

petitions, or refrain from speaking."). So, if a ballot title is the protected speech of the signature gatherer, there could be as many different titles as there are petition circulators.

Even an attempt to draw a narrow interpretation that the title is the private speech of whomever drafted the proposal and submitted it to the Title Board would raise complications. In 2020, a predecessor to Advance Colorado "approached the proponents" of two measures that had already had titles set and "assumed signature gathering responsibility for both propositions." *Unite for Colo.*, 551 P.3d at 694. In that case, when Advance Colorado's predecessor went to collect signatures to qualify the measure for the ballot, was the ballot title the protected speech of the measure's proponents, or of the person now collecting signatures? What if, as often happens, multiple groups collaborate on a ballot measure and submit it to the Board, but then disagree as to the title?

Today, signature gatherers, supporters, opponents, and any other interested parties may freely speak out in favor of, or against, any proposed measure. But those persons cannot each write and advance their own title. Deciding this case on the grounds Petitioners request would force the Court to address these difficult issues.

Finally, accepting Petitioners' theory would unleash a flood of litigation at the federal level. As noted, Colorado already has an easy state-law process to determine the clarity and accuracy of ballot titles. COLO. REV. STAT. § 1-40-107(2). During the 2023-2024 election cycle, 314 separate ballot measures were

submitted to the Title Board.[7] Of those, 41 separate measures were appealed to the Colorado Supreme Court on either clear title or single subject grounds.[8]

If some private parties enjoy First Amendment rights with regards to these titles, that litigation will inevitably shift to federal court. And that litigation will need to unfold on an expedited timeline. *See* COLO. REV. STAT. § 1-40-107(2) (requiring appeals from the Title Board to be filed within seven days and "disposed of promptly"). In 2026, measures will be titled by the Title Board through late-April. *See id*. § 1-40-107(1)(c). And signatures must be submitted no later than August 3, 2026, just three months later. COLO. CONST. art. V, § 1(2); COLO. REV. STAT. §§ 1-40-108, 1-40-107(5). Thus, any review in Federal court would need to occur quickly enough that signatures could be collected in this short window.

C. The language to which Petitioners object is not false.

Finally, much of the Petition is devoted to arguing that HB 21-1321 requires "false" language in the titles for #21 and #22. Not only is this an important question of state law that Petitioners could have pursued through the state appellate process, but did not, it is also incorrect as a matter of fact.

Unique among the states, Colorado has a Taxpayer's Bill of Rights (TABOR). Added to the Colorado Constitution in 1992, TABOR requires voter approval for certain types of tax increases. COLO. CONST. art. X, § 20(4)(a). It also limits the amount of

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[7] *See supra* n.1.

[8] *See supra* n.2.

money the state or local governments can spend in a given fiscal year. *Id.* § 20(7). If revenues from certain sources exceed a jurisdiction's "cap," the excess must be refunded. *Id.*

This refund provision lies at the heart of Petitioners' challenge related to #22.[9] They assume that Colorado will exceed the TABOR cap in FY 2024-2025 and issue refunds. If so, they claim, any revenue reduction traceable to #22 would not "reduce funding for state expenditures," but would rather only "reduce the refund to Colorado taxpayers." Pet. at 6, 7.

That distinction cuts too finely. First, under Colorado law, a TABOR refund *is* a state expenditure. TABOR defines "fiscal year spending" as "all district expenditures . . . *except*" TABOR refunds, thus defining the broad term, "expenditures" to include refunds. COLO. CONST. art. X § 20(2)(e). Indeed, if TABOR refunds were not expenditures, there would be no need to exempt them from the "fiscal year spending" definition as TABOR does.

Second, even if refunds are not expenditures, #22's title says only that *funding* for expenditures will be cut. *See* Pet. at 6. That is true. A proposal to cut government funding will reduce funding available for government expenditures. Even if those expenditures remain constant.[10]

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[9] Petitioners make no effort to explain why the title set for #21 is false.

[10] An example is helpful. If a household budget anticipates $100 of expenditures per month, and the household's income increases from $100 per month to $200 per month, the funding available

Finally, Petitioners' claims of falsity are based on outdated and uncertain economic projections. The Petition cites a June 2023 forecast when Colorado's FY 2024-2025 revenue was projected to exceed the TABOR cap by $1.97 billion. Pet. at 7 (citing *The Colorado Council of Legislative Staff, Economic and Revenue Forecast,* June 2023). But that same publication is updated quarterly. And as of June 2024, that projected surplus for FY 2024-2025 had fallen by over $1.6 billion to around $300 million. *The Colorado Council of Legislative Staff, Economic and Revenue Forecast*, June 2024, at 3.[11] The most recent update, from December, projects a modest surplus, but warns that Colorado could "fall short of the . . . cap even without an economic downturn." *The Colorado Council of Legislative Staff, Economic and Revenue Forecast*, December 2024, at 5.[12]

In other words, it is uncertain whether the state will issue TABOR refunds in 2025. And if not, then even under Petitioners' cramped interpretation of state "expenditures," the title for #22 is not false.

These facts demonstrate the core problem with Petitioners' focus on falsity. If falsity is relevant to determining whether the ballot title reflects the government's speech or instead that of a private party—which it is not—when is that falsity measured? And what happens if, like here, economic projections

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for satisfying the $100 worth of expenditures has increased, even if those expenditures remain constant.

[11] Available at https://leg.colorado.gov/sites/default/files/images/june2024forecastforposting.pdf

[12] Available at https://leg.colorado.gov/sites/default/files/images/dec2024forecastwithcover_0.pdf

change between when the title is set and the proposed tax cut takes effect?[13]

Petitioners paint this as an easy case about how to handle false language in ballot titles. It is anything but. Even if this Court were inclined to hold that the First Amendment attaches to the titles set by state government for state ballot initiatives and draw a bright-line rule on how to handle alleged falsity in that context, reliance on shifting economic projections unique to Colorado means this case does not present that opportunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

SHANNON WELLS STEVENSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Shannon.Stevenson@coag.gov
(720) 508-6000

RUSSELL D. JOHNSON
Deputy Solicitor General

J. GREGORY WHITEHAIR
Senior Assistant Attorney General

PETER G. BAUMANN
Assistant Solicitor General

LEO T. NGUYEN
Assistant Attorney General
Fellow

Counsel for Respondent

January 3, 2025

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[13] The district court heard testimony at the preliminary injunction hearing about how quickly these projections can change. App. at 155a-57a.