No. 24-216

In the Supreme Court of the United States

ADVANCE COLORADO, ET AL.,
PETITIONERS,
V.
JENA GRISWOLD, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF COLORADO.
RESPONDENT.

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

REPLY BRIEF FOR THE PETITIONERS

William E. Trachman
Counsel of Record
James Kerwin
Grady J. Block
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 202-2021
wtrachman@mslegal.org

Troy A. Eid
Jennifer H. Weddle
Harriet McConnell Retford
GREENBERG TRAURIG, LLP
1144 15th Street, Suite 3300
Denver, Colorado 80202
(303) 572-6500
eidt@gtlaw.com

Kristine L. Brown
ADVANCE COLORADO INSTITUTE
6501 E. Belleview Ave Suite 375
Denver, Colorado 80111
(720) 285-9552
kbb@advancecolorado.org

Attorneys for Petitioners

February 3, 2025

Corporate Disclosure Statement

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

Table of Contents

Table of Authorities

Statutes

Other Authorities

Reply Argument Summary

Advance Colorado asks for something simple: the ability to present a tax-cut measure to the citizens of Colorado, without having it intentionally sandbagged by pejorative and objectively false prefatory language imposed on it by the government. (The initiative's so-called "title").

The State of Colorado, on the other hand, essentially claims the absolute right to "title" the initiative however it likes, subject to no First Amendment scrutiny whatsoever. And worse, the state claims the right to compel Advance Colorado to circulate signature petitions to individual voters containing false and derogatory language, if it wants to run any measure at all.

The Tenth Circuit agreed with Colorado. *See Advance Colorado v. Griswold*, 99 F. 4th 1234, 1241 (10th Cir. 2024) ("Despite the catalytic role played by citizens in the initiative process, ballot titles are fully and exclusively crafted by the government through the Secretary of State's office.").

That Court applied the government-speech doctrine, and held that because the title qualified as government speech, it was entirely immune from First Amendment scrutiny, regardless of its truthfulness, or the intent of the Colorado legislature

to undermine citizen initiatives that reduce state revenue. *See id. at* 1242 ("[W]hether the content of the expression may be misleading does not bear on the underlying question of who owns the speech."); *id.* at 1240 ("[P]urely government speech is generally exempt from First Amendment scrutiny.") (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)).

Colorado's argument, and the Tenth Circuit's holding, have no limiting principle. It's not even clear that under the government's theory, Advance Colorado could object on First Amendment grounds to absurdly derogatory titles, such as "A prominent hate group is asking if you want to cut taxes. Do you agree with that hate group?" Indeed, Advance Colorado could be forced to circulate that exact language to citizens, for the purpose of gathering signatures.

In fact, if left in place, the Tenth Circuit's decision provides an affirmative roadmap for every state with a citizen initiative process—red or blue—to functionally tank those ballot measures that it would rather not see enacted, with false or derogatory language in their so-called titles.

As noted in the Petition, Advance Colorado does not ask this Court to enter affirmative relief. It merely asks this Court to reverse and reject the Tenth Circuit's holding below, and state expressly

that language derived from Advance Colorado's electoral priorities (and which they must circulate to voters) is not purely government speech, immune from judicial review, such that the government-speech doctrine gives Colorado a free pass to tamper with the electoral process in any way it likes when a citizen initiative process is proceeding. *See Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, J., concurring) ("[T]he State itself may not skew the ballot listings in this way without violating the First Amendment.").

Argument

I. The Case is an Appropriate Vehicle.

a. This Case Has Stark Facts Because the Mandatory Title Language was Demonstrably False.

Rarely is the Court presented with such stark facts. The ballot title language required by Colorado's H.B. 21-1321 is unambiguously false when applied to Colorado Proposed Initiative 2023-2024 #22 ("Initiative 22"), and exceedingly misleading, at best, with respect to Colorado Proposed Initiative 2023-2024 #21 ("Initiative 21"). As the Court is aware, "adverse labels handicap candidates at the most crucial stage in the election process—the instant before the vote is cast." *Cook*, 531 U.S. at 525 (internal quotation marks omitted).

As to Initiative #22, it was specifically written to cut taxes at a small enough percentage so that the cut would reduce tax refunds only. The cut was so small that it was impossible, based on the State's own projections, to eat into any other piece of the State budget. Not only would Initiative #22 *not* reduce funding for the specific services mentioned in the ballot title, but it would also provably *not* reduce funding for *any* state expenditure, as tax *refunds* are not genuine state expenditures, by definition. Indeed, based on the State's own Fiscal Summary, combined with its projections as to issuing tax refunds, the State knew with near certainty at the time that it set the ballot title for Initiative #22 that the claims it was forcing Advance Colorado to make were entirely false.

As a reminder, Initiative #22's ballot title claimed: "There shall be a reduction to the state sales and use tax rate by 0.61 percent, thereby reducing state revenue, which **will reduce funding for state expenditures that include but are not limited to education, health care policy and financing, and higher education** by an estimated $101.9 million in tax revenue…"

The State attempts to muddy the waters with two arguments. It argues that technically, tax refunds *are* state expenditures, so the language could be construed as true, in a way. But Colorado's Taxpayer's Bill of Rights (TABOR) is a revenue limit, not a spending limit. Colorado law considers these funds to *never have belonged to the state*. Even the

state's General Assembly's page explains: "Revenue collected in excess of the constitutional revenue limit, or TABOR limit, must be refunded to taxpayers unless voters authorize retention of the excess amount."[1] Thus, since this revenue belongs to voters and must be returned to them by law, it never was, and can never be, a "state expenditure."

But this debate is beside the point. When the false title was attached to Initiative #22, the State had already completed projections on tax revenue for the single year that this tax cut would apply, concluding that tax revenue would be so high that a substantial refund would be given to citizens under TABOR. The refund was thus projected to be more than 100 times greater than the tax cut, entirely eliminating the possibility that Initiative #22's tax cut could eat into the state budget and "reduce funding" for *any* state expenditures whatsoever, much less the specific expenditures of "education, health care policy and financing, and higher education."

The falsehoods are not accidental. They were specifically intended to suppress the individual rights of Petitioners and citizens who share their political viewpoints. Legislators stated openly that they did not like that fiscally conservative initiatives were decreasing state revenue. *See* Pet. at 8 ("Republicans … are increasingly turning their

---

[1] https://leg.colorado.gov/publications/tabor-revenue-limit

attention to the ballot…"). An author of the bill, Scott Wasserman, stated to the press that attaching cumbersome ballot language to tax cuts would help "offset" the impact of TABOR. *See* Paul, *Colorado Democrats want to use one of TABOR's most effective tax-halting mechanisms for themselves* (May 21, 2021) ("Scott Wasserman, who leads the Bell Policy Center, a liberal advocacy organization, called the measure 'a great idea' that seeks to offset what he sees as the manipulative aspects of TABOR.").[2]

The government-speech doctrine is not meant to permit political actors to cannibalize the speech of their adversaries, and falsely label their views in derogatory terms. *See Cook*, 531 U.S. at 525 (Derogatory ballot labels "convey the substantial political risk … impose[d] on current and prospective congressional members who, for one reason or another, fail to comply with the conditions..."); *id.* ("[Petitioner] has acknowledged under oath that the ballot designations would handicap candidates for the United States Congress. To us, that is exactly the intended effect…").

b. Advance Colorado's Challenge is not Moot.

The case is not moot even though the election has passed. The Colorado initiative process represents a textbook case of a situation that is "one

---

[2] https://coloradosun.com/2021/05/21/tabor-pushback-colorado-house-bill-1321/

capable of repetition, yet evading review." *Meyer v. Grant*, 486 U.S. 414, 417 n. 4 (1988). "Colorado grants the proponents of an initiative only six months in which to obtain the necessary signatures[,] [and] [t]he likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best." *Id.*; *see also*, *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) ("We have recognized that the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are as applied challenges as well as in the more typical case involving only facial attacks.") (quotation marks omitted); *Caruso v. Yamhill Cnty. ex rel. Cnty. Com'r*, 422 F.3d 848, 853 (9th Cir. 2005) ("Cases challenging election laws often fall within the capable of repetition, yet evading review exception because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.") (quotations omitted).

Petitioners have already spread their effort to seek judicial review of the challenged state legislation over two election cycles, using a pair of substantially identical petitions. *See* Pet. App. ¶¶ 34a-37a; 42a. During the 2021-2022 cycle, Advance Colorado sponsored Initiative 46, a *de minimis* sales tax reduction structured in a substantially identical manner to the Initiative 22, which forms the basis for the challenge here and worked a legal challenge through the regular administrative and judicial review process for challenging ballot titles under

C.R.S. § 1-40-107. *Id.* The Colorado Supreme Court denied this first round challenge in a single sentence, unreasoned, per curium order dated April 14, 2022. Pet. App. 8a, n. 2; 34a; 39a. At this point there was insufficient time to pursue a second round of litigation before the election, so Advance Colorado abandoned that initiative, and started a new initiative in the subsequent election cycle, to allow more time for federal court review. Thus, this case is unambiguously capable of repetition while evading review, and because HB 21-1321 is a very substantial impairment to any citizen initiative seeking to reduce tax rates in Colorado, this issue is sure to arise every year until finally resolved.

Finally, the present case clearly and squarely presents the key legal issues on a well-developed factual record, and "[t]he only result of our finding the interlocutory appeal moot would be that the complaint would be dismissed and that decision would be successfully appealed to this court." *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978). "[T]o save the parties from further litigation we should therefore proceed to consider and decide the case upon its merits, unless a ruling on the entire complaint, with its requests for declaratory and permanent injunctive class relief, has also become moot." *Id.* (quotation omitted); *see also Frumer v. Cheltenham Twp.*, 709 F.2d 874, 875–76 (3d Cir. 1983); *Consumer Party v. Davis*, 778 F.2d 140, 146 (3d Cir. 1985); *Communist Party of Illinois v. State Bd. of Elections for State of Ill.*, 518 F.2d 517, 520 (7th Cir. 1975).

c. Resolving This Challenge Now Avoids an Emergency Posture Later.

Elections move quickly. In the best cases, they generally last two years. That is why the "capable of repetition, yet evading review" doctrine is "routinely invoke[d] in election cases." *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 738 (2021) (Thomas, J., dissenting from denial of certiorari).

The corollary to this phenomenon is that resolving election law cases under the pressure of time is not one that the Court relishes. *See Purcell v. Gonzalez*, 549 U.S. 1, at 6-7 (2006) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."). Nor in other cases. *Labrador v. Poe*, 144 S. Ct. 921, 934-35 (2024) (Jackson, J., dissenting) ("Even when an applicant establishes that highly unusual line-jumping justification, we still must weigh the serious dangers of making consequential decisions on a short fuse without benefit of full briefing and oral argument.") (internal quotation marks omitted).

This case began with Advance Colorado determining in early 2023 that it wanted to run two

ballot measures in the November 2024 election. *Advance Colorado*, 99 F. 4th at 1238 ("Advance Colorado sponsored two initiatives for the 2024 statewide ballot that proposed tax changes."). To do so, the initiatives went through Colorado's Ballot Title Setting Board (the Title Board) *seventeen months* before the 2024 election. *Id.* ("In April 2023, the Title Board **determined** both measures triggered the language requirements of HB 21-1321 and set titles accordingly.").

After the titles in dispute were established, Advance Colorado filed suit in August 2023 and lost its motion for a preliminary injunction on August 30, 2023. It then appealed to the Tenth Circuit, which held oral argument on March 29, 2024, and affirmed on April 26, 2024. Even by that point, it would not have been practical to gather signatures for a November 2024 initiative, as they must be turned in by August of the election year. And that's to say nothing of this Court's typical process for oral argument and decision-making.

Yet Respondents would ask this Court to deny a writ of certiorari today, so that the Court can perhaps hear a pre-election emergency appeal in the future. That gets it quite backwards. *Ohio v. EPA*, 603 U.S. 279, (2024) ("Our emergency docket requires us to evaluate quickly the merits of applications without the benefit of full briefing and reasoned lower court opinions.").

Here, the Court has a unique opportunity to decide an important issue regarding government speech on the Colorado ballot, without interfering in an impending election, while knowing that Advance Colorado has already confronted the relevant statute multiple times. Petitioners respectfully ask the Court to take this opportunity to decide the issue. *See Degraffenreid*, 141 S. Ct. at 738 ("The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence."); *id.* at 738 (Alito, J., dissenting from denial of certiorari) ("Now, the election is over, and there is no reason for refusing to decide the important question that these cases pose.").

II. This Court Ought to Resolve a Four-Way Circuit Split With Respect to Whether and How Ballot Language Can Be Challenged.

The Eighth Circuit held in *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999), that forcing candidates to run for an office with a pejorative label next to their name—indicating that they declined to adopt a term limits pledge—constituted an impermissible burden on the candidate's speech, even if the label was placed on the ballot by the government. *Id.* at 919 ("An individual's choice to serve the public by seeking congressional office does not grant the state license to restrict or compel his or her speech."). That decision was affirmed by this Court on appeal,

although on Elections Clause grounds. Chief Justice Rehnquist filed a concurring opinion, joined by Justice O'Connor, which would have also held that the ballot label violated the Free Speech Clause. 531 U.S. at 530.

The Third Circuit also held that First Amendment challenges to ballot design may proceed, but located the right in the Free Association Clause, not the Free Speech Clause. *See Kim v. Hanlon*, 99 F.4th 140, 157 (3rd Cir. 2024) ("[T]he county-line system is discriminatory—it picks winners and punishes those who are not endorsed or, because of their political views, want to disassociate from certain endorsed candidates."); *id.* at 159 ("[T]he Plaintiffs' rights not to associate with objectionable candidates … are burdened when they must choose between that and an unwelcome ballot position.").[3]

---

[3] In a footnote, the Third Circuit stated *in dicta* that it would *also* be a free speech problem for the State of New Jersey to structure its ballot so as to give a benefit to viewpoints that it preferred. *Kim*, 99 F.4th at 156, n. 11 ("[T]he American Civil Liberties Union of New Jersey, argues that 'county clerks in New Jersey, through non-neutral primary ballot design procedures, unconstitutionally engage in viewpoint-based discrimination.' … Viewed in that light, the bracketing and ballot placement system would also *clearly be constitutionally problematic*.") (cleaned up).

The Ninth Circuit took yet a different approach, deciding that a government's informational statement on the ballot might be challengeable under the Free Speech Clause, but that strict scrutiny did not apply to such measures. *Caruso,* 422 F.3d at 858 ("We thus find the present appeal distinguishable from both the election law cases and the compelled speech cases in which the Supreme Court has applied strict scrutiny. We accordingly apply the Supreme Court's more flexible balancing standard.").

The Tenth Circuit's ruling below, in favor of blanket immunity for Colorado's sandbagging efforts, actually puts it in the minority of a 1-3 circuit split, which otherwise provides that such challenges may proceed, albeit on varying legal tests. In short, this Court is best positioned to resolve the question of whether the Free Speech Clause precludes the government from engaging in the misconduct here.

III. The Court Has Expressed Clear Concerns About the Potential for Abuse in the Government Speech context.

As this Court has recognized, the government speech doctrine is both essential yet dangerous. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). And the line is blurry where "as here, a government invites the people to participate in a program." *Id.* at 252.

Here, the government claims the right to take Advance Colorado's petition measure, "title" it in a derogatory way, and force it to circulate such titles to voters if it wants to engage in political advocacy at all. In effect, the government has raised the cost of speaking so high that it no longer makes sense to speak.

So while the government itself may speak, even forcefully, in the hopes of persuading others, it may not "use the power of the State to punish or suppress disfavored expression." *National Rifle Assoc. v. Vullo*, 602 U.S. 175, 188 (2024); *id.* at 198 ("[T]he First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech.").

Here, Petitioner asks this Court to step in and once again remedy Colorado's difficulties with free speech.

Conclusion

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

February 3, 2024

William E. Trachman Troy A. Eid

Counsel of Record
James Kerwin
Grady J. Block
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 202-2021
wtrachman@mslegal.org

Kristine L. Brown
ADVANCE COLORADO INSTITUTE
6501 E. Belleview Ave.
Suite 375
Denver, Colorado 80111
(720) 285-9552
kbb@advancecolorado.org

Counsel for Petitioners

Jennifer H. Weddle
Harriet McConnel
Retford
GREENBERG TRAURIG
LLP
1144 15th Street
Suite 3300
Denver, Colorado
80202
(303) 572-6500
eidt@gtlaw.com