No. 24_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Colorado Legislature and the Governor of Colorado are hostile to ballot measures that would reduce state tax revenue. After several tax reduction measures nevertheless received a majority of the vote in Colorado, the Legislature enacted the "Ballot Measure Fiscal Transparency Act of 2021," which is codified at Colo. Rev. Stats. § 1-40-106(e). This legislation targets tax-cut initiatives specifically by compelling that the ballot title "must begin" with language stating that the tax cut "will reduce funding for state expenditures that include but are not limited to" programs like health and human services programs, K-12 education, and corrections and judicial operations. The language must be included in the ballot title and printed on ballot initiative petitions circulated by Petitioners, *even in cases where it is demonstrably false*.

This petition thus presents the following questions:

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

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Advance Colorado is a non-profit organization. It has no stock or parent corporation. As such, no public company owns 10 percent or more of its stock.

Petitioners George Hanks Brown, Steven Ward, Cody Davis, Jerry Sonnenberg, and Carrie Geitner are individuals.

LIST OF ALL PROCEEDINGS

The following proceedings are directly related to this case under Rule 14.1(b)(iii):

U.S. Court of Appeals for the Tenth Circuit, No. 23-CV-01999-PAB-SKC, Order entered on August 30, 2023.

U.S. District Court for the District of Colorado, No. 23-1282, Order entered on April 26, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the United States Court of Appeals for Tenth Circuit's denial of a preliminary injunction. The Tenth Circuit concluded that the Petitioners were not likely to succeed on the merits of their compelled speech claim because the speech at issue is government speech. Petitioners do not ask the Court to affirmatively enter a preliminary injunction—merely to reverse the holding that their claims challenge pure government speech, and not government-compelled speech, and thus that they are not likely to succeed on the merits.

OPINIONS BELOW

The District Court's Courtroom Minutes reflecting the denial of Petitioners' preliminary injunction is reprinted at App. at 22a-25a. The Tenth Circuit's affirmance of the District Court is reported

at 99 F.4th 1234 (2024), and reprinted at App. 1a-17a; 99 F.4th at 1242 ("[T]he Colorado initiative titling system squarely qualifies as government speech… ."); App. at 16a.

JURISDICTION

The Tenth Circuit Court of Appeals' decision affirming the District Court's denial of a preliminary injunction—on the basis that the speech at issue is government speech—was entered on April 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

Relevant portions of the Colorado Ballot Measure Fiscal Transparency Act of 2021 appear start at App. 235a-300a (Colo. Rev. Stats § 1-40-101 et seq.).

STATEMENT

I. Legal Framework

A. The Government-Speech Doctrine

The government-speech doctrine is a powerful one. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) ("[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."). So courts are generally attuned to the need to scrutinize assertions by the government that it is merely engaged in its own speech. *Matal v. Tam*, 582 U.S. 218, 235 (2017) ("But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse.").

And this threshold inquiry is a critical one. Lower courts often treat government speech as entirely "exempt from First Amendment scrutiny." *See* App. at 12a (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he dispositive question [in this case] is whether the generic advertising at issue is the Government's own speech and therefore is *exempt from First Amendment scrutiny*.") (emphasis added); *accord McGriff v. City of Miami Beach*, 84 F.4th 1330, 1333 (11th Cir. 2023) (citing *Johanns* for the same proposition).

For that reason, the threshold determination as to whether certain speech belongs to an individual, or to the government, is not just outcome determinative—it often reverberates throughout the marketplace for ideas, and to fundamental questions of constitutional liberty. *See Shurtleff v. City of Boston, Ma.*, 596 U.S. 243, 262 (2022) (Alito, J., concurring) ("[I]t can be difficult to tell whether the

government is using the doctrine as a subterfuge for favoring certain private speakers over others based on viewpoint, and the government-speech doctrine becomes susceptible to dangerous misuse.").

Here, although Petitioners drafted and proposed a ballot measure that would cut state tax revenue (as Petitioners regularly do), Colorado sandbagged that measure with a ballot title that was indisputably false, and pejorative language that was meant to undermine Petitioners, their signature gatherers, and other supporters of the measure. App. at 9a ("Advance Colorado argued the law's requirements improperly foist oppositional political viewpoints on citizen-led ballot measures and are specifically misleading regarding Initiatives 21 and 22."). Nevertheless, the Tenth Circuit denied a preliminary injunction to Petitioners, holding that their First Amendment rights were not implicated because "the Colorado initiative titling system squarely qualifies as government speech." App. at 16a.

B. The Colorado Ballot Measure Regime

The Colorado Constitution reserves to the people "the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly." Colo. Const. art. V, § 1; App. at 3a ("Colorado law offers citizens the opportunity to propose their own laws or constitutional amendments through citizen-initiated ballot measures."). While Colorado's Office of Legislative Counsel reviews proposed citizen petitions and provides feedback—a valuable service for individuals attempting to write proposed laws—it cannot require any changes to the content or wording

of the initiative itself. App. at 53a (Testimony of Katelyn Roberts); Colo. Const. art. V, § 1.

During the process, the proposed initiative goes to the Colorado Ballot Title Board ("Title Board") for review. "The title for the proposed law or constitutional amendment . . . shall *correctly* and fairly express the true intent and meaning thereof." Colo. Rev. Stats. § 1-40-106(3)(b) (emphasis added).

The purpose of this title is "to capture, in short form, the proposal in plain, understandable, *accurate* language enabling informed voter choice" (emphasis added). In practice, most citizens and groups seeking to place an initiative on the ballot do extensive preparatory work, conducting opinion analysis on different potential concepts and drafting text with the assistance of their own privately retained legal counsel. *Id.* at 25:20-26:14.

The citizen initiative process was designed for citizens, not the government, to speak. The state constitution expressly allows private citizens to choose their desired change of law, draft the language of the law, and take the petition to registered voters in search of signatures. It is only the titling process where the government crafts and assigns language to the petition. Of course, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 192 (1999). But it would be an odd result to say that the government has unfettered discretion to "title" citizen ballot measures however it likes, given that the initiative process is an explicit

c*heck* on the power of the Colorado General Assembly.

II. Factual Background

A. Initiative 21 and 22

Advance Colorado is the sponsor of Colorado Proposed Initiative 2023-2024 #22 ("Initiative 22") and Colorado Proposed Initiative 2023-2024 #21 ("Initiative 21"). After hearing and rehearing, the Title Board set the title for Initiative 22 as follows:

> Shall there 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, by a change to the Colorado Revised Statutes concerning a reduction in state sales and use taxes, and, in connection therewith, reducing the state sales and use tax rate from 2.90 percent to 2.89 percent from July 1, 2024, through June 29, 2025, and eliminating the state sales and use tax for one day on June 30, 2025?

App. at 6a-7a (emphasis added); App. at 2a ("Specifically, if the proposal contains a tax change affecting state or local revenues, the measure's title must incorporate a phrase stating the change's impact on state and district funding priorities."). The bolded language above is mandated by Colorado's Ballot Measure Fiscal Transparency Act of 2021, and is indisputably false.

In truth, Initiative 22 is a *de minimis*, 0.01 percent sales tax cut that would be in effect for a single year, and that year was projected to have tax revenue high enough to trigger a substantial refund under the Taxpayer's Bill of Rights, Colo. Const. art X, § 20. ("TABOR"). App. at 117a. Projections show revenues substantially exceeding the TABOR cap, so that any modest reduction in revenue collected would only serve to reduce the refund to Colorado taxpayers, not the actual general fund revenue available to be spent by the Colorado General Assembly for any legislative purpose. *See The Colorado Council of Legislative Staff, Economic and Revenue Forecast*, June 2023 ("In the current FY 2022-23, revenue is expected to exceed the Referendum C cap by $3.31 billion before exceeding the cap by $2.06 billion in FY 2023-24 and by $1.97 billion in FY 2024-25, even with high 2022 inflation resulting in a doubling of the growth rate used to calculate the FY 2023-24 Referendum C cap.").[1]

The official Fiscal Summary for Initiative 22, also written by a State agency, acknowledges this: "Based on current forecasts, the measure is expected to reduce the amount of revenue required to be refunded to taxpayers under TABOR, with *no net impact on the amount available for the budget."* App. at 205a (emphasis added). Thus, the indisputable fact, acknowledged by the state itself, is that Colorado's mandated title for Initiative 22 is knowingly false. Regardless, the state requires Advance Colorado to attach the false language as a

[1] https://leg.colorado.gov/sites/default/files/images/june2023forecast_1.pdf, at 19 (last visited, August 26, 2024).

"title" of its initiative on its petitions when it gathers signatures, and burdens Petitioners with overcoming that language when voters ultimately cast their ballots.

The fact that Respondent would sandbag Initiative 22's ballot language in this context is no accident. Indeed, that is the point of Colorado's Ballot Measure Fiscal Transparency Act of 2021. One of the House sponsors of the law even said the quiet part out loud, and opened up about his intent to target conservative groups and citizens, like Petitioner Advance Colorado, who attempt to place tax cuts on the ballot. Representative Chris Kennedy explained,

> What we've seen, increasingly, is that Republicans, who have not been successful at winning majorities here at the Capitol in recent years, are increasingly turning their attention to the ballot and using that as a way to try to get government closer to the size that can be drowned in a bathtub. We'd prefer that government not drown in the bathtub. We'd prefer that ballot measures don't continue to chip away at our ability to fund our public schools and the other priorities that the voters of the state care about.

See Jesse Paul, *Colorado Democrats Want to Use One of TABOR's Most Effective Tax-Halting Mechanisms for Themselves*, The Colorado Sun, May 21, 2021.[2]

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

B. The Effect of the Ballot Transparency Act on Petitioner Advance Colorado's Proposed Ballot Initiatives

Initiative 22 is a proposal for a modest 0.01 percent reduction in sales tax for a year. And Initiative 21 limits the increase in property taxes paid on a specific piece of land to 3 percent annually, unless significant physical enhancements have been made to the property. Both of these initiatives were brought by Advance Colorado under Article V. Neither would reduce state financing by any percentage or dollar figure.

Yet under the Ballot Transparency Act, the title for the ballot measures "must begin" with a statement that they would reduce "state expenditures that include but are not limited to (the three largest areas of program expenditure)." *See* Colo. Rev. Stats. § 1-40-106(e). The statute defines program expenditures as follows: "For state expenditures, 'the three largest areas of program expenditure' refers to the three program types listed as receiving the largest general fund operating appropriations in the joint budget committee's annual appropriations report for the most recent fiscal year.". *See* Colo. Rev. Stats. § 1-40-106(i)(I).

Before the trial court, it was undisputed by experts from both Advance Colorado and Respondent Griswold that the ability to gather signatures for the initiative would be substantially harmed by the ballot titles. During the hearing below, the Respondent's financial expert stated that based on the State's current budget estimates, and unless there's an unrelated change in law, Initiative 22

would not lead to a reduction in funding for the programs mentioned in the ballot title. App. at 117a ("Similar to the prior two examples, if the money is above the line reduced, then you still have the money above the line, no, there wouldn't be a reduction."). According to the expert, the recent forecast projects rebates due to TABOR for that year. In their own words, "if it's money that was going to be rebated and there will be less money and you do not go below the line, the tax change would not affect the traditional operating budget."

In Colorado, over half (55 percent) of registered voters who engage with petition circulators in public venues, such as grocery stores, will read the ballot title. Among these voters, about 40 percent will proceed to read the entire ballot language. It's rare for someone casting their signature not to verify that what they are signing is what they have been informed of, as emphasized by the witness. App. at 83a (Testimony of Ms. Roberts). Thus, the ballot title language itself plays a crucial role in communicating with voters.

Blatantly false title language poses a significant barrier to communication with voters. For instance, during Ms. Roberts' testimony, it was mentioned that polling indicated a 20-point difference in favorability among voters between the confusing and technical legal language written by the Legislature and the same concept reframed more simply for a sports-betting petition referred by the Colorado General Assembly. App. at 50a.

Similarly, Ms. Nieland described the challenges she faced when circulating a petition for Proposition 113, a ballot initiative concerning the determination

of Presidential election results in Colorado by the national popular vote instead of the electoral college. This initiative would have caused the recently adopted legislation enacted by the Colorado General Assembly to be abrogated. The difficulties in explaining the intent of the initiative to potential signatories were highlighted during Ms. Nieland's direct testimony. App. 80a-86a.

When there is a discrepancy between how the initiative is explained by the petition circulator and its ballot title, citizens tend to believe that the title itself accurately reflects the petition's intent. Therefore, legislation mandating specific language in Colorado ballot titles that inaccurately characterizes the contents of a petition makes it challenging, if not impossible, for petition proponents to effectively communicate the contents of their initiatives, as voters may read the petition title and leave it at that.

The net of all this is that Initiative 21 and 22 were dead-on-arrival. The Ballot Transparency Act is a kill-shot to tax cut initiatives like the ones that Advance Colorado has run in the past, and the imposition of the false language required by Colorado statute means that it is not worth Advance Colorado's time, resources, or energy to try to gather signatures or put their measures up for a public vote.

III. Procedural history

At the District Court, Petitioners sought a preliminary injunction. The Court held an evidentiary hearing in which both sides presented evidence. At the end of the hearing, the District Court judge offered analysis on the record, and then a holding rejecting the request for a preliminary injunction.

On appeal, the Tenth Circuit affirmed. App. at 16a ("The Free Speech Clause, however, typically does not regulate government speech.") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's generous application of *Shurtleff* to Petitioners' suit incorrectly expands the government-speech doctrine to immunize improper and misleading efforts to undermine legitimate citizen ballot initiatives. Under the Tenth Circuit's logic, any state could intentionally impair the free-speech rights of citizens whose viewpoints they do not agree with by attaching demonstrably false and pejorative language to their proposed policy change. Here, the State of Colorado required very specific ballot language to be included only on petitions for tax-cutting ballot initiatives after several such measures were passed by Petitioners and others, despite the State's objection.

Indeed, the Tenth Circuit's opinion puts the government in an unusually strong position to abuse its power without consequences. App. at 15a ("[W]hether the content of the expression may be misleading does not bear on the underlying question of who owns the speech."). In Colorado, a title is the only statement on the ballot summarizing a citizen measure. If left to stand, the Tenth Circuit's holding will impair democratic governance in several concrete ways:

- Emboldened by the knowledge that the ballot "titling" process is immune from constitutional scrutiny under the First Amendment, the Colorado Legislature would now be *incentivized* to require the

state's Title Board to pejoratively and falsely title every citizen initiative that it dislikes;

- On the flip side, the Colorado Legislature is incentivized to *require* favorable titles for citizen initiatives that it is disposed to, in the hopes that voters ratify those measures;
- The voters of Colorado will suffer the injury of being tricked and manipulated with respect to the citizen initiative process;
- The initiative process itself will suffer, as distrust becomes the ordinary reaction to the idea of direct democracy, which is enshrined in the state constitution.

The Court should grant certiorari and reverse, and at least reject the idea that the government-speech doctrine entirely immunizes the effort to sandbag Petitioners in this context.

I. The Decision Below is in Tension with Supreme Court Precedent.

The Decision below announces that the government is free to hijack the message of a private speaker—Petitioner Advance Colorado—using a state constitutional process to obtain voter approval for a ballot measure. It may do so by "titling" the measure in a false and pejorative way, according to the Tenth Circuit. But that decision conflicts with specific precedents about ballot-related content, and with the Court's more recent precedents on compelled speech.

A. The Tenth Circuit's Decision Conflicts With This Court's Precedents Regarding Ballots.

In *Cook v. Gralike*, 531 U.S. 510 (2001), the Court struck down a Missouri law that would have printed "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" next to the names of certain incumbents who did not embrace term limits. The Court held that "[w]hile the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office." *Id.* at 525.

While the majority opinion in *Cook* relied on the inability of states to place such language on the ballot next to the names of federal candidates pursuant to the Constitution's Elections Clause, Justice Rehnquist, joined by Justice O'Connor, noted in concurrence that it also "violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State." *Id.* at 531. There was no discussion of the government-speech doctrine in either the majority opinion in *Cook*, or in Justice Rehnquist's concurrence.

And even before *Cook*, this Court had little difficulty striking down a state law that would have required that the race of a given candidate be designated on the ballot, based on the prejudice that voters would naturally ascribe to the designations. In *Anderson v. Martin*, 375 U.S. 399, 403 (1964), this Court wrote:

> [B]y placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.[3]

Id. at 402. Notably, the lower court had upheld the law at issue in *Anderson*, stating that it "merely contributes to a more informed electorate." *Anderson v. Martin*, 206 F. Supp. 700, 702 (E.D. La. 1962). But this Court rightly rejected that view, holding that such a law "could only result in that 'repressive effect' which was brought to bear only after the exercise of governmental power." *Id.* at 403 (cleaned up).

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[3] Of course, *Anderson* struck down the law at issue for violating the Equal Protection Clause, not the First Amendment. But many circuits have held that private citizens *also* have no right to bring an equal protection claim against government speech. *See Fields v. Speaker of the Pennsylvania House of Representatives*, 936 F.3d 142, 160-61 (3rd Cir. 2019) (collecting cases from circuit courts) ("[W]e join the authority holding that the Equal Protection Clause does not apply to government speech."). *Anderson* would therefore live in tension with these cases, if the ballot contains purely government speech.

Cook and *Anderson* were about candidates running for a specific office. But in the similar context of citizen-initiated ballot measures, Colorado has enacted its "Ballot Measure Fiscal Transparency Act of 2021," specifically to target and undermine tax-cut initiatives, and has forced Petitioner Advance Colorado to gather signatures from citizens using pejorative and false language regarding their efforts. The language at issue was imposed after repeated prior successful efforts to reduce state income tax through citizen initiatives, contrary to the wishes of the State Legislature—who of course have institutional interests for not cutting revenue.

But ballot measures are specifically designed to *avoid* the normal legislative processes of a state, and their greatest use is in putting questions directly to citizens instead of placing their hopes solely in hostile state legislatures. When a state intentionally interferes with its citizens' right to place a measure—crafted by themselves—on the ballot, the interference also affects voters. As this Court stated in *Bullock v. Carter*, 405 U.S. 134, 143 (1972): "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates [or here, ballot measure sponsors] always have at least some theoretical, correlative effect on voters." *See Cook*, 531 U.S. at 531 (citing *Bullock* in Justice Rehnquist's concurrence). This effect is multiplied when the government's interference utilizes false speech to promote a specific result.

Indeed, the Tenth Circuit's holding that *all* ballot titling language is purely government speech under *Shurtleff* effectively immunizes and *incentivizes* states throughout the country to tamper with and sandbag state ballot measure language with

false claims, so as to ensure (or at least make exceedingly likely) their defeat. The First Amendment does not permit such chicanery. *See Shurtleff*, 596 U.S. at 262 (Alito, J., concurring) ("[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech."); *id.* at 269 ("[G]overnment speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that 'abridges' the freedom of speech, as is the case with compelled speech.").

B. The Decision Below Conflicts With This Court's Compelled Speech Precedents.

The government-speech doctrine allows the government to promote or reject a particular viewpoint to advance its policy interests. *See Shurtleff*, 596 U.S. 243, 251 (2022) ("When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say."). But the boundary between government speech and speech that is protected by the First Amendment—including from both unconstitutional suppression and impermissible compulsion—is often unclear. *Id.* at 252 ("The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program.").

The lack of clarity arises particularly when government and private speech become intertwined, and distinguishing one from the other becomes difficult. Here, the Colorado Constitution does not

just invite the people to participate in a program; it has given them the constitutional right to author, sponsor, and run a ballot initiative. *Cf. Matal*, 582 U.S. at 239 ("[T]rademarks often have an expressive content.").

And so, the Tenth Circuit's decision is difficult to square with this Court's decision in *303 Creative v. Elenis*, which found that "the freedom of thought and speech is indispensable to the discovery and spread of political truth." 600 U.S. 570, 584 (2023). Of critical importance in *303 Creative* was the fact that the government forced upon the Petitioner in that case certain speech that would "affect [her] message." *Id.* at 589-90 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995)). Here, Colorado would do the same thing—by falsely characterizing the ballot measure at issue as one that "will" cause certain other expenditures to be cut, even though it will not.

This is not the kind of vision that *303 Creative* announced for the country. *See id.* at 603 ("[A]s this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong."); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."); *Hurley*, 515 U.S. at 573 ("[A] speaker has the autonomy to choose the content of his own message.").

To its credit, this Court has rejected government efforts to compel speech again and again. *See* Hurley, 515 U.S. at 586 (it violates the First Amendment "to force an individual to include other ideas with his own speech that he would prefer not to include."); *Janus v. American Fed'n of State, Cnty., and Mun. Emp., Council 31*, 585 U.S. 878, 893 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions."). Here, in order to gather signatures from citizens—a prerequisite to putting their tax cut on the ballot—Petitioner must pay to print the petition on which they must distribute the government's false and pejorative speech, anchored to its own message about the value in cutting taxes. Such an arrangement is not constitutionally permissible. *Id.* at 893 ("As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.'") (internal brackets omitted).

The Colorado Legislature referred to "Ballot Transparency" when enacting the law, but that is a misnomer. Forcing Advance Colorado's speech to be anchored down by false speech does not provide "transparency" to any potential signatory or voter. And even if it did, it would likely still constitute unconstitutional compelled speech. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 585 U.S. 755, 776 (2018) ("[A] disclosure requirement cannot be unjustified or unduly burdensome. … Otherwise, they risk 'chilling' protected speech.").

Advance Colorado's speech has been demonstrably chilled—the Respondents would have them approach voters with verifiable lies in order to

get their message out about a tax cut. The Constitution says that that cannot be. *Id.* at 777 ("The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest."); *accord Shurtleff*, 596 U.S. at 269 (Alito, J., concurring) ("Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. *Naked censorship of a speaker based on viewpoint, for example, might well constitute 'expression' in the thin sense that it conveys the government's disapproval of the speaker's message*.") (emphasis added); App. at 8a ("Advance Colorado refused, however, to circulate any petition to gather signatures without a preliminary injunction prohibiting HB 21-1321's application.").

Of course, if the government is worried about the loss of revenue, it is free to campaign against Petitioner's measure, and individual legislators or the Governor are free to point out that state tax revenues may go down. What the government may not do, however, is attach false language to Petitioner's ballot measure in order to make it distasteful to potential signatories or to voters. It may not "title" Petitioner's ballot measures so as to ensure their defeat. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024) ("[T]his Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences.").

II. The Tenth Circuit Creates a Circuit Split With Respect to Ballot Language and the Doctrine of Compelled Speech.

The Tenth Circuit below held that "the Colorado initiative titling system squarely qualifies as government speech." App. at 16a. To reach that conclusion, the court read *Shurtleff* to apply to portions of the ballot that have traditionally been crafted and published by the government, *even where* that speech is closely associated with—indeed, anchored to—private speech whose purpose is to solicit a voter's choice—yea or nay—regarding a ballot measure. App. at 13a ("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.").

By contrast, in the context of an Oregon law that required a "3-percent" warning to voters regarding ballot measures that could impact property taxes, the Ninth Circuit adopted a different approach. Rather than apply the government-speech doctrine, the court opted to apply a balancing standard, under which a reviewing court weighs the "character and magnitude of the burden imposed against the interests advanced to justify that burden." *Caruso v. Yamhill Cnty. Com'r*, 422 F.3d 848, 856 (9th Cir. 2005) (internal quotations omitted); *id.* at 862 ("In sum, we conclude that the First Amendment burden imposed by section 280.070(4)(a) is not severe and further that that burden is justified by the State's important interest in encouraging informed and educated voting.").

To be clear, *Caruso* rejected the free speech challenge at issue and upheld a "3-percent" warning

on the ballot. But critically, it did not immunize government speech altogether. *Id.* at 855 ("[T]he First Amendment may limit government speech that makes private speech difficult or impossible, or that attributes a government message to a private speaker.") (cleaned up); *id.* at 858-59 ("The provision instead provides for the State's message to be transmitted through ballots, documents prepared, printed, and distributed by—and therefore attributed to—State and local governments. … We accordingly apply the Supreme Court's more flexible *balancing standard*.") (emphasis added); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002) ("Courts will strike down state election laws as severe speech restrictions only when they significantly impair access to the ballot, stifle core political speech, or dictate electoral outcomes.").

Is ballot language vulnerable to a legal challenge, or is it not? While the Ninth Circuit in *Caruso* ultimately rejected the challenge before it, it firmly evaluated and balanced various factors before getting to that destination. Not so for the Tenth Circuit.

Separately, in a Third Circuit case, that court struck down a New Jersey ballot design because it forced candidates to associate with certain other candidates, or face, as the court put it, "Ballot Siberia." *Kim v. Hanlon*, 99 F.4th 140, 157 (3rd Cir. 2024) ("[D]isfavored candidates are put in undesirable ballot positions and, by random coupling, can end up paired with potentially objectionable candidates. Those outcomes amount to a severe burden on the Plaintiffs' rights."). The Third Circuit held that the ballot design imposed a "severe burden" on the plaintiff's associational rights under the First

Amendment, which are protected from direct targeting by the government. *Kim* 99 F.4th at 156-157 ("The county-line system discriminates based upon the candidates' associational and policy positions. … It favors candidates whose views most align with the party bosses."); *accord Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1272 (11th Cir. 2020) (Jill Pryor, J., dissenting) ("When a law harms the electoral prospects of a political party's candidates, the party experiences an associational injury.").[4] But if the Tenth Circuit is right that ballot content is essentially government speech, then *Kim* is wrongly decided, because there is no way to raise a First Amendment challenge to the government speech at issue under *Shurtleff*.

A similar result occurred in the Fourth Circuit Court of Appeals, where that court rejected a "ballot order" challenge brought by the state's Libertarian party. *See Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708 (4th Cir. 2016). The court began by recognizing that the First Amendment claim by the plaintiff was viable. *Id.* at 716 ("State election regulations often implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments.") (internal quotation marks omitted). Once again, therefore, although the challenge was to the form and content of the ballot, the court proceeded to a balancing test. And while the court rejected the First Amendment claim after engaging in its balancing test, it did so only after holding that "Virginia's three-tiered ballot

[4] Judge William Pryor wrote the majority opinion rejecting the challenge for lack of standing and lack of judicially manageable standards. Judge Jill Pryor dissented.

ordering law imposes only the most modest burdens on Sarvis's free speech, associational, and equal protection rights." *Id.* at 717*; see also Shakman v. Democratic Org. of Cook Cnty.*, 435 F.2d 267, 270 (7th Cir. 1970) ("The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection.").

Clearly, lower courts struggle with how to apply First Amendment rights to situations where a candidate or group's political speech is being transmitted on the ballot.[5] And only this Court can resolve the tension between these circuits' varying approaches to speech contained in ballots.

III. The Tenth Circuit's Generous Application of *Shurtleff* in this Case Creates a Serious Risk of Compelled Speech.

In *Shurtleff*, this Court articulated that "The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it

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[5] And at least some judges still hold that there is a separate category of "mixed speech," where some protections apply to government speech that engages in viewpoint discrimination. *See, e.g.*, *American Civil Liberty Union of North Carolina v. Tennyson*, 815 F.3d 183, 189 (4th Cir. 2016) (Wynn, J., dissenting) (arguing that even after *Walker*, the government may not systematically allow only those license plates that are "on the government's side of a highly divisive political issue.").

speaks." *Shurtleff*, 596 U.S. at 252. But what if the government itself is manipulating the ballot box?

Shurtleff announced a multi-factor test for distinguishing government speech from private speech. 596 U.S. at 252-53. The factors include: (1) the history of the expression at issue; (2) the public's likely perception as to who is speaking; and (3) the extent to which the government has actively shaped or controlled the expression. *See Shurtleff*, 596 U.S. at 252. The Tenth Circuit relied on these factors to hold that the ballot title of Petitioner's initiative was government speech, and was thus therefore immune from constitutional scrutiny. That logic may appear intuitive at first blush, because obviously the Petitioners themselves object to the title that sandbags their initiative.

But *Shurtleff* also rejected the idea that government speech is safe from constitutional scrutiny in cases where it "regulate[s] private expression." *Id.* at 252. And here, that is exactly what it does.

Consider several hypotheticals where the government could try to force speakers engaged in protected speech to subject their messages to unflattering and untruthful characterizations:

- A school limits students to posting flyers on a designated bulletin board, which is divided into two halves. One half is designated as "true and enlightening," and the other half is designated as "false and dangerous." Any flyer that questions the actions of the school's principal must be posted on the "false and dangerous" side.

- A city invites artists to contribute their work for posting in a public park during a major local festival. One portion of the park is designated for art that is "disgusting." Any art that demeans the mayor's agenda must be located in this part of the park.
- A school board invites public comment before every meeting. Before any public comment which criticizes the school board may occur, the President of the school board must read a statement that the public commenter has recklessly endangered children before—whether true or not.
- In the leadup to a municipal election, a city holds a "meet the candidates night" where candidates are instructed to attend. Incumbents are hosted in a brightly lit and attractive room labeled "dedicated public servants." Challengers are confined to a dim, squalid room labeled "felons."

In each of these hypotheticals, the government undermines a speaker's message by forcibly anchoring that speech with insulting, pejorative, and in many cases false messages. The only way to avoid these items is to not speak altogether.

That is a constitutionally infirm result. *Cf. Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation."); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty …"); *Johanns*, 544 U.S. at 568 (Thomas, J., concurring) ("The government may not, consistent

with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, *and whether or not the message is under the government's control*.") (emphasis added).

But in each of these cases, the Tenth Circuit's logic would entirely immunize such a practice from constitutional challenge, on the basis that the government is the one doing the speaking. Yet it would be a strange result for *Shurtleff*—which expressly concerned itself with the "blur" between private and government speech—to have embraced such a troubling result. *Id.* at 252 ("The boundary between government speech and private expression can blur when, as here, the government invites the people to participate in a program.""); *Fox v. Faison*, 668 F. Supp. 3d 751, 769 (M.D. Tenn. 2023) (the government-speech doctrine applies only if the government's expression does "not hinder[] anyone's right to expression").

This Court has recently condemned efforts by the government to wield its power to selectively target speech. *See Nat'l Rifle Association v. Vullo*, 602 U.S. 175, 198 (2024) ("Yet where, as here, a government official makes coercive threats in a private meeting behind closed doors, the 'ballot box' is an especially poor check on that official's authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries."). While *Vullo* arose in the context of retaliation for protected speech, and not

compelled speech, the Court's pronouncements apply equally here.

Here, the Tenth Circuit held that the government has control over citizen initiative petitions, despite the fact that there would be no citizen initiative petition unless a citizen created a proposed law and chose to bring it to voters for their signatures. The clear purpose of the ballot initiative process in Colorado is for citizens to exercise their state constitutional right to make law that the legislature generally prefers not to enact, highlighting a viewpoint discrimination problem when the government is allowed to control speech and compel specific language tightly, as the Tenth Circuit allows. *See Pleasant Grove City, UT v. Summum*, 555 U.S. 460, 473 (2009) (there is a "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."); *Johanns*, 544 U.S. at 560 ("The message set out in the beef promotions is *from beginning to end* the message established by the Federal Government.") (emphasis added).

IV. This Case Raises Exceptionally Important Issues About Free Speech.

The First Amendment can accommodate the interests of the government without infringing on the rights of citizens. But the government-speech doctrine, viewpoint discrimination, core political speech, and false speech compelled by the government are all implicated here. Indeed, "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core

political speech .... in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 421-22, 425 (1988).

The decision by the Tenth Circuit significantly boosts the government's control over citizen's rights, neglecting the potential impact of stifling the voices of those initiating and signing the petitions, and manipulating voter decisions. The government-speech doctrine is an especially important place for the Court to draw lines clearly; the doctrine is susceptible to misuse by federal, state, and local governments to pick winners and impair the rights of individuals to speak freely when they disagree with the message. The "[Government] may not select which issues are worth discussing or debating." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, (1972).

As this Court is aware, the government-speech doctrine has allowed governments to regulate military recruiter's speech, monuments, license plates, political murals, social media accounts, historic artwork, prayers, and parades. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc*., 547 U.S. 47 (2006); *Summum*, 555 U.S. 460 (2009); *Walker*, 576 U.S. 200 (2015); *Women for America First v. Adams*, No. 21-485-cv, 2022 WL 1714896 (2d Cir. May 27, 2022) (holding that New York City could deny Women for America First from creating a mural after the city commissioned a BLM mural on the streets); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding the county chair Facebook "comments and curated references to other pages, personal profiles and websites amount to governmental speech"); *Gundy v. City of Jacksonville, FL.*, 50 F.4th 60, 80 (11th Cir. 2022) (silencing a pastor's prayer at

beginning of city council meeting); *Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021). While Petitioners certainly understand the need for the government-speech doctrine to play a role in many contexts, it would be unfortunate if the government also had unfettered discretion over how to present a ballot to the voters.

The composition of a ballot title is essential as it is the last thing that a voter sees before marking "yes" or "no." Therefore, it can be the most influential speech on the voter's decision. A measure needs to be presented in a way that is accurate so that the voters can make their own choices. *Cook*, 531 U.S. at 532 (Rehnquist, J., concurring). In Colorado, the right of citizens to participate in direct democracy—without the institutional constraints that come from elected legislators with their parochial interests—begins with the ballot initiative petition that a voter may choose to sign. The Colorado legislature's required inclusion of a false and pejorative ballot title on the petition undermines citizen's rights and diminishes voters' voices, motivated by viewpoint discrimination against citizens. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (holding that engaging in association to advance political beliefs is constitutionally protected as a "liberty" interest by the Constitution). In this political climate, the voters' right and their confidence in electoral processes as "[t]he Constitution [] relies first and foremost on the ballot box..." *Shurtleff*, 596 U.S. at 252.

Furthermore, Petitioners have a "First Amendment right to present their message undiluted by views they [do] not share," *303 Creative*, 600 U.S. at 586, particularly when the government-added views are demonstrably false. Colorado passed its

"Ballot Transparency" measure into law in order to forcibly insert specific language into the ballot title for any tax cut proposed by citizens, no matter the language's inaccuracy for that particular measure. An essential question in this case is whether government may target a group of citizens whose viewpoint the state does not share, and compel them to include false language on their petition (forcing them to be a vehicle of false language they do not agree with) as well as placing the same false language on the ballot. The fact that Advance Colorado's speech is displayed on a ballot with messages from other entities is of no moment. *See Hurley*, 515 U.S. at 569-70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

The fact that the Colorado legislature has intended the very result that has been achieved in this case—that Advance Colorado likely cannot succeed in obtaining petition signatures and a favorable vote, given the mandatory language—should only heighten the Court's interest in this case. As then-professor Kagan wrote in a 1996 law review piece, the government's motives matter in the First Amendment context. *See* Elena Kagan, PRIVATE SPEECH, PUBLIC PURPOSE: THE ROLE OF GOVERNMENTAL MOTIVE IN FIRST AMENDMENT DOCTRINE, 63 U. CHI. L. REV. 413, 431-33 (1996) ("This contrast, I think, is what Holmes meant to highlight when he distinguished between stumbling over and kicking a dog."); *Smith v. Cherry*, 489 F.2d 1098, 1102 (7th Cir. 1973) ("This deception on the face of the ballot clearly debased the rights of all voters in the election.").

V. Compelling False Speech is Especially Pernicious.

It is troubling enough that Respondent would force Advance Colorado to be sandbagged in its direct democracy efforts by intentionally pejorative language. But it is even worse in this context, where there is no dispute that the language at issue is provably false. Approval of the ballot measure will not result in cutting any of the programs or services identified in the titles for Initiatives 21 or 22, and the government does not contest this.[6]

For the government to engage in this type of conduct raises fundamental questions about the Republic. Can the government saddle its political opponents with lies? Case law indicates, unsurprisingly, that it cannot. *See Trudeau v. Fed. Trade Com'n*, 456 F.3d 178, 191 (D.C. Cir. 2006) (recognizing that the Federal Trade Commission could be liable under a theory of First Amendment retaliation if it knowingly published a false or misleading press release about an individual); *Penthouse Intern. V. Meese*, 939 F.2d 1011, 1020 (D.C. Cir. 1991 (Randolph, J., concurring) ("I believe the First Amendment may well prohibit government officials from spreading false, derogatory information

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[6] Notably, the statute itself forswears its own truthfulness! It carefully explains that the title of the ballot measure is actually not binding at all on the state legislature. Colo. Rev. Stats. § 1-40-106(e) ("The estimates reflected in the ballot title shall not be interpreted as restrictions of the state's budgeting process.").

in order to interfere with a publisher's distribution of protected material.").

Indeed, several cases specifically involve ballot measures or elections where the government has knowingly made false statements in the context of trying to deceive voters. Some lower courts have found that deceit can be sufficiently problematic to either force corrective notices to voters to be published, or to invalidate an entire election. *See also Chicago Bar Ass'n v. White*, 898 N.E.2d 1101, 1104 (Ill. App. Ct. 2008) (ordering the Secretary of State to issue a corrective notice about a measure to address falsehoods that "would misinform voters"); *Ex parte Tipton*, 229 S.C. 471, 480 (S.C. 1956) (invalidating election where voters were deceived).

Scholars, too, agree that government deceit is especially troubling because it is often so effective. *See* Helen Norton, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION, at 11 (University of Colorado Boulder, April 2020) (government deceit can be especially damaging because "of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles..."). So while candidates and ballot measure proponents may frequently spar over ballot titles, one defining element of the Colorado Ballot Transparency Act is that it uniquely burdens speech by sandbagging it with demonstrable falsehoods. And courts are more than capable of determining truth or falsity in contexts like these. *See Trudeau*, 456 F.3d at 193 ("We do not agree that the truth or falsity of a statement can never be decided as a matter of law.").

Here, the government doesn't just foist falsehoods onto the ballot; it also forces Advance

Colorado to present those falsehoods to voters who might sign their petitions. Respondent would put Petitioner to a choice: circulate false ballot petitions, or refrain from speaking. That cannot be a constitutional result. *Cf. Wooley*, 430 U.S. at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *Brown v. Office of State Comptroller*, 211 F. Supp. 3d 455, 469 (D. Conn. 2016) ("[T]he refusal to make false statements is protected by the First Amendment.").

VI. This Case is an Ideal Vehicle to Resolve the Questions Presented.

A. The issue is clearly presented because there is no dispute of fact.

This case offers an ideal vehicle to answer the critical free-speech questions surrounding whether the government-speech doctrine is to be read as far as the Tenth Circuit would read it. May the government truly use the government-speech doctrine to immunize its intentional sandbagging of citizens who wish to place initiatives on the ballot for voter approval?

Further, the Tenth Circuit's conclusion that the government may force Advance Colorado's speech to be associated with a false and intentionally pejorative title works a harm to both Petitioners and

the public.[7] The Tenth Circuit's use of the *Shurtleff* factors has allowed the government to interfere with citizens' rights to engage in the democratic process without undue trickery by the government. *Cf. Moody*, 144 S. Ct. at 2403 ("The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."); *Masterpiece Cakeshop v. Colorado Civil Rights Comm.*, 584 U.S. 617, 661-62 (2018) (Thomas, J., concurring) ("*Hurley*, for example, held that the application of Massachusetts' public-accommodations law "required the organizers to alter the expressive content of their parade." It did not hold that

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[7] *See* Brian C. Castello, THE VOICE OF GOVERNMENT AS AN ABRIDGEMENT OF FIRST AMENDMENT RIGHTS OF SPEAKERS: RETHINKING MEESE V. KEENE, 1989 DUKE L.J. 654, 676-81 (1989) (discussing the adverse impacts of government expression, such as the government compelling consent, stifling minority perspectives, and enabling the government to engage in the exchange of ideas with a disproportionate amount of bargaining power); Steven G. Gey, WHY SHOULD THE FIRST AMENDMENT PROTECT GOVERNMENT SPEECH WHEN THE GOVERNMENT HAS NOTHING TO SAY?, 95 IOWA L. REV. 1259, 1263-64 (2010) (arguing that a government speech doctrine should not exist, as the primary function of the First Amendment is to curtail government authority); Steven H. Goldberg, THE GOVERNMENT-SPEECH DOCTRINE: "RECENTLY MINTED;" BUT COUNTERFEIT, 49 U. LOUISVILLE L. REV. 21, 23-24 (2010) (Contending that the government speech doctrine may degrade First Amendment jurisprudence).

reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.") (internal citations and brackets omitted).

The Constitutional issues of *Shurtleff* have been analyzed by lawyers, Justices, and scholars, because the doctrine can be used as cover for violations of the First Amendment. By providing further guideposts on what speech falls within the government speech doctrine, this Court can continue to protect First Amendment rights.

B. This case presents a question that is capable of repetition, yet evading review.

Initiative 21 and Initiative 22 should have been on the ballot for 2024. But a preliminary injunction below was not entered because the District Court and the Tenth Circuit held that the speech at issue was government speech and consequently exempt from First Amendment scrutiny.

The life of a ballot measure is short. But Advance Colorado regularly attempts to run ballot measures that affect state tax rates within Colorado. So this problem will recur again and again if the Court does not address it here. *See Kingdomware Technologies, Inc. v. U.S.*, 579 U.S. 162, 170 (2016) ("Although a case would generally be moot in such circumstances, this Court's precedents recognize an exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review."); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (a 12-month period was ordinarily too short for a case to

reach the Supreme Court through the normal course).

Thus, resolving this case on a preliminary posture is appropriate for the Court. *See Moody*, 144 S. Ct. at 2393 ("[A]lthough these cases are here in a preliminary posture, the current record suggests that some platforms, in at least some functions, are indeed engaged in expression."). In the same vein, Advance Colorado is not requesting that the Court here affirmatively enter a preliminary injunction—rather, Advance Colorado requests that the opinions below be reversed and remanded on the basis that the ballot titles at issue are not immunized as pure government speech. The District Court below would still have the authority to weigh the other relevant factors, in its equitable discretion. *See Starbucks Corporation v. McKinney*, 144 S. Ct. 1570, 1576 (2024) ("For preliminary injunctions, the four criteria identified in *Winter* encompass the relevant equitable principles.").

And it should not be lost on the Court that the State of Colorado has had its fair share of struggles avoiding First Amendment issues as of late. *303 Creative*, 600 U.S. at 581-82 ("Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago."); *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, ¶82-83 (Colo. Ct. App. 2023) (holding that a baker may not refuse to make a cake for a transgender transition celebration because "creating a pink cake with blue frosting is not inherently expressive"), *cert. granted in part by Masterpiece Cakeshop, Inc. v. Scardina*, No. 23SC116, 2023 WL 6542667 (Oct. 3, 2023).

True to form for Colorado, Petitioner Advance Colorado will face repeated roadblocks to running its ballot measures in the future, hitting the brick wall of the Ballot Transparency Act again and again. That should be enough for the Court to accept this case as a vehicle to address the holdings below. *303 Creative*, 600 U.S. at 580 ("She worries that, if she does so, Colorado will force her to express views with which she disagrees.").

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant this Petition.

DATED: August 26, 2024.

Respectfully submitted,

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No. 24_____

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

APPENDIX TO THE PETITION FOR A WRITT OF CERTIORARI

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August 26, 2024

Attorneys for Petitioners

Appendix

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23-1282

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs - Appellants,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant Appellee.

[Filed: April 26, 2024]

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:23-CV-01999-PAB-SKC)

Jennifer H. Weddle (Troy A. Eid and Harriett McConnell Retford with her on the briefs), Greenberg Traurig, LLP, Denver, Colorado, for Plaintiffs – Appellants.

Michael Kotlarczyk, Senior Assistant Attorney General (Philip J. Weiser, Attorney General, and J. Greg Whitehair, Assistant Attorney General, with

him on the brief), Colorado Department of Labor, Denver, Colorado, for Defendant – Appellee.

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges

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MURPHY, Circuit Judge.

I. Introduction

In 2021, the Colorado state legislature passed The Ballot Measure Fiscal Transparency Act ("HB 21-1321"), which requires certain language be included in state-imposed titles of citizen-initiated ballot measures. Specifically, if the proposal contains a tax change affecting state or local revenues, the measure's title must incorporate a phrase stating the change's impact on state and district funding priorities. In 2023, Appellants (collectively, "Advance Colorado") proposed two tax reduction measures subject to the provisions of HB 21-1321. After Colorado's Ballot Title Setting Board (the "Title Board") included the mandated transparency language in each initiative's title, Advance Colorado filed suit challenging HB 21-1321 as unconstitutionally compelling its political speech. The district court denied the corresponding request for a preliminary injunction, concluding the titling process qualified as government speech and, therefore, Advance Colorado was not likely to succeed on the merits of its claims. We agree that HB 21-1321's requirements do not result in improperly compelled speech under the First Amendment of the United States Constitution. Thus, exercising

jurisdiction pursuant to 28 U.S.C. § 1292, this court **affirms** the district court's order denying a preliminary injunction.

II. Background

a. Factual History

Colorado law offers citizens the opportunity to propose their own laws or constitutional amendments through citizen-initiated ballot measures. Colo. Const. art. V, § 1(1). Qualifying proposals under this process must complete a comment and review period before being delivered to the Secretary of State's office for titling. Colo. Rev. Stat. §§ 1-40-105(1), 106(1). Colorado's Title Board is responsible for ensuring each proposal receives a clear and direct title. *Id.* § 1-40-106(3)(b). Ballot titles are entirely crafted by the Title Board and proposal sponsors do not submit any title language for consideration. *Id.* §§ 1-40-105(4), 106(1). Once set, titles may appear in three places: (a) the petition form used by advocates to gather signatures;[1] (b) an official non-partisan voter information booklet; and (c) the ballot itself. Id. at § 1-40-102(2), 110(2); Colo. Const. art. V, § 1(7.5).

After the Title Board deliberates and sets a title, dissatisfied proponents may file a motion for rehearing with the Secretary of State. Colo. Rev. Stat. § 1-40-107(1)(a)(I). If advocates disagree with the Title Board's rehearing outcome, they may further petition

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[1] When placed on the 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: . . .".

the Colorado Supreme Court for review. *Id*. § 1-40-107(2). Generally, however, "[t]he Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause." *Cordero v. Leahy (In re Title, Ballot Title & Submission Clause for 2013-2014 #90)*, 328 P.3d 155, 159 (Colo. 2014).

HB 21-1321 implemented several rules regarding the contents of citizen-initiated ballot titles involving "tax change[s]." Colo. Rev. Stat. § 1-40-106. HB 21-1321 includes two language requirements for initiatives implicating reductions in tax revenue:

> (e) For measures that reduce state tax revenue through a tax change, the ballot 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 . . .?"***. If the ballot measure specifies the public services or programs that are to be reduced by the tax change, those public services or programs must be stated in the ballot title. If the public services or programs identified in the measure are insufficient to account for the full dollar value of the tax change in the first full fiscal year that the measure reduces revenue, then the three

> largest areas of program expenditure must be stated in the bill title along with the public services or programs identified in the measure. The estimates reflected in the ballot title shall not be interpreted as restrictions of the state's budgeting process.
>
> (f) For measures that reduce local district property tax revenue through a tax change, the ballot title must begin ***"Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue . . .?"***. The title board shall exclude any districts whose property tax revenue would not be reduced by the measure from the measure's ballot title. The estimates reflected in the ballot title shall not be interpreted as restrictions of a local district's budgeting process.

Id. § 1-40-106(3)(e)–(f) (emphasis added).

Advance Colorado sponsored two initiatives for the 2024 statewide ballot that proposed tax changes: Colorado Proposed Initiative 2023–2024 #21 ("Initiative 21"), which includes a limit on property tax increases; and Colorado Proposed Initiative 2023–2024 #22 ("Initiative 22"), which includes a reduction in sales and use tax rates. In April 2023, the Title Board determined both measures triggered the language requirements of HB 21-1321 and set titles

accordingly. Initiative 21's title was stated as follows:

> Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes shall be impacted by a reduction of $2.2 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a 3% annual limit on property tax increases, and, in connection therewith, creating an exception to the limit if a property's use changes or its square footage increases by more than 10%, in which case, the property is reappraised, and, beginning in fiscal year 2024–2025, allowing the state to annually retain and spend up to $100 million of excess state revenue, if any, as a voter-approved revenue change to offset reduced property tax revenue and to reimburse local governments for fire protection?

Likewise, the Title Board set Initiative 22's title as the following:

> Shall there 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, by a change to the Colorado Revised Statutes concerning a reduction in state sales and use taxes, and, in connection

> therewith, reducing the state sales and use tax rate from 2.90 percent to 2.89 percent from July 1, 2024, through June 29, 2025, and eliminating the state sales and use tax for one day on June 30, 2025?

In accordance with policy, the Colorado Legislature Council Staff released fiscal summaries analyzing the respective economic impact of each proposal. Importantly, both measures implicate the Colorado Taxpayer's Bill of Rights ("TABOR"). Colo. Const. art. X, § 20. Among its many mandates, TABOR requires state and local governments to refund taxpayers any revenues appropriated in excess of the prior year's spending. *Id*. art. X, § 20(7). Based on then-current forecasts, the Legislature Council's fiscal summary for Initiative 22 concluded the measure would not likely impact the state's overall budget. Rather, given the probability of a state revenue surplus, the measure was projected only to reduce the amount available for taxpayer refunds under TABOR. The fiscal summary for Initiative 21 identified that the measure would decrease local property tax revenue and influence school financing. It further determined the measure would increase the amount of revenue the state could retain and, in turn, decrease the amount used for TABOR refunds.

b. Procedural History

Following the Title Board's determinations, Advance Colorado filed motions for rehearing on both Initiative 21 and 22. The Title Board denied the motions, and Advance Colorado elected not to

appeal either decision to the Colorado Supreme Court.[2] Initiative 22 became final on April 19, 2023, and after an unrelated challenge, Initiative 21 became final on May 19, 2023. Advance Colorado refused, however, to circulate any petition to gather signatures without a preliminary injunction prohibiting HB 21-1321's application.

In August 2023, Advance Colorado commenced this action, alleging HB 21-1321 unconstitutionally compelled its political speech in violation of the First Amendment.[3] One week later, it filed a motion for preliminary injunctive relief, requesting that the Secretary of State convene the

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[2] Advance Colorado argues it already appealed a substantively similar proposal to Initiative 22 to the Colorado Supreme Court during the 2021–2022 ballot cycle. The court summarily affirmed the Title Board's determination without discussion of HB 21-1321's language requirements. As a result, Advance Colorado asserts it has functionally exhausted its state court remedies.

[3] In addition to facial and as-applied challenges under the U.S. Constitution, Advance Colorado's complaint included a third claim arising under Article V of the Colorado Constitution. It alleged HB 21-1321 violated the state's requirement that ballot titles be clear and direct. Advance Colorado failed to raise this claim in its appellate briefing, thereby rendering the issue waived. SCO Grp., Inc. v. Novell, Inc., 578 F.3d 1201, 1226 (10th Cir. 2009) ("An issue or argument insufficiently raised in a party's opening brief is deemed waived.").

Title Board to reauthorize the initiatives' titles without the language mandated by HB 21-1321. Advance Colorado argued the law's requirements improperly foist oppositional political viewpoints on citizen-led ballot measures and are specifically misleading regarding Initiatives 21 and 22. Contrary to their assigned titles, Advance Colorado asserted that Initiative 21 proposes only a property tax cap, not a tax reduction; and Initiative 22 would only result in smaller TABOR refunds, not funding decreases to popular healthcare and education programming.

Following a hearing on the preliminary injunction motion, the district court concluded Advance Colorado could not show the requisite likelihood of success on the merits to grant the motion. In its analysis, the court considered the factors used for determining the boundary between government and private speech as outlined in *Shurtleff v. City of Bos.*, 596 U.S. 243, 252 (2022). Namely, it concluded the history of the expression; the public's likely perception as to who is speaking; and the extent to which the government has shaped the expression all indicated Colorado's titling system was government speech not subject to a First Amendment compelled speech claim. In making this determination, the court particularly pointed to the decadeslong history of the Title Board's practices in Colorado; the heavy regulation of the initiative process by the state government; and limited evidence voters perceive ballot title language to be the Appellants' own, particularly in light of the disclaimer stating otherwise on petition forms. *See supra* n. 1.

III. Analysis

a. Standard of Review

This court reviews the denial of a preliminary injunction for abuse of discretion. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). "An abuse of discretion occurs when the district court commits an error of law or makes clearly erroneous factual findings." *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009) (quotations omitted). In conducting this analysis, "we examine the district court's legal determinations de novo, and its underlying factual findings for clear error." *Id.* at 776.

To succeed on a motion for preliminary injunction, the moving party must establish "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest." *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) (quotation omitted), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). Preliminary injunctive relief is considered an "extraordinary remedy" that requires the moving party make a "clear and unequivocal showing it is entitled to such relief." *Colorado v. U.S. Env't Prot. Agency*, 989 F.3d 874,

883 (10th Cir. 2021) (quotations omitted).[4]

b. First Amendment Framework

To state a compelled-speech claim under the First Amendment, "a party must establish (1) speech; (2) to which [it] objects; that is (3) compelled by some governmental action." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). The First Amendment, therefore, works to "restrict[] government regulation of private speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Similar to citizens, however, the government has a right to "speak for itself." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). In

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[4] Certain requests for preliminary injunctions are disfavored, including those that are mandatory, "alter the status quo," or "afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *U.S. Env't Prot. Agency*, 989 F.3d at 883–84. When reviewing a disfavored preliminary injunction request, this court requires the moving party to "make a heightened showing of the four factors." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009). Given that Advance Colorado's request aims to alter the status quo by affirmatively requiring the Secretary of State to reconvene the Title Board, the district court determined the motion was disfavored. We conclude Advance Colorado fails to show a substantial likelihood of success on the merits under the normal standard, see infra § III.b, and therefore need not determine whether the specific injunction requested was disfavored. *See U.S. Env't Prot. Agency*, 989 F.3d at 884.

turn, purely government speech is generally "exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).

"The boundary between government speech and private expression can blur when . . . a government invites the people to participate in a program." *Shurtleff*, 596 U.S. at 252. Under such circumstances, it becomes difficult to discern when "government-public engagement" transmits the government's own message or the message of its citizen-participants. *Id.* In analyzing which side of the watershed government engagement falls, "we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id.* This analysis is not a mechanical "application of rigid factors," but rather looks to "a case's context." *Id.* Evidence typically used in drawing such conclusions includes "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.*: *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208–14 (2015) (holding specialty license plate designs constitute government speech); *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1170 (10th Cir. 2021) (holding public mayoral announcement to be government speech).

c. Government Speech Analysis

To receive a preliminary injunction, the moving party must first demonstrate a substantial likelihood of success on the merits of its claims. *U.S.*

Env't Prot. Agency, 989 F.3d at 883. Considering the evidence presented and the First Amendment framework set out in *Shurtleff*, Advance Colorado has failed to meet this standard. 596 U.S. at 252. The first and third *Shurtleff* factors—history and government control of expression—work in tandem to underscore Colorado's ballot titling qualifies as government speech. The Colorado Title Board has existed and set ballot titles in a similar manner for over eighty years. *See* An Act Relating to the Initiative and Referendum, ch. 147, § 1, 1941 Colo. Sess. Laws 480, 480. As is the case today, when it was first formed the Title Board was solely responsible for setting a measure's title without the influence of proposal advocates. *Compare id.* with Colo. Rev. Stat. § 1-40-105(4). The long history of the Title Board's practices reflects the substantial control the government asserts over initiative titles and its legitimate interest in providing a standardized process for presenting measures to voters. Titling is statutorily separated and preserved as an express function of the government under Colorado law. *See id.* § 1-40-106. 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. Indeed, "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider." *Walker*, 576 U.S. at 217. Advance Colorado has failed to offer any evidence refuting this history of substantial government control.

Advance Colorado is also unable to demonstrate that, under the second *Shurtleff* factor, the general public perceives initiative titles to be the speech of private citizen-advocates. Appellants focused their argument regarding voter confusion on signature petitions and offered limited testimonial evidence indicating citizens do not always understand the origin of title language. As the district court noted, however, Advance Colorado fails to address the disclaimer shown immediately above the ballot title indicating the language is "designated and fixed" by the Title Board. *See supra* n.1. This statement plainly communicates to voters that the title is drafted by the government and does not represent the proponents' expression. Advance Colorado provides no additional evidence calling into question the public's perception of who writes the title. Given this minimal support, the robust history of titles being government expression, and the near total control the government asserts over titling, our holistic review clearly demonstrates Colorado's titling process qualifies as government speech.

Shurtleff, 596 U.S. at 252.[5]

Advance Colorado urges this court to conclude the mandatory and misleading effect of HB 21-1321 renders the law unconstitutional under the First Amendment. HB 21-1321's requirements, it argues, inevitably mischaracterize an initiative's purpose and, as a result, compel the speech of advocates by association. Nonetheless, whether the content of the expression may be misleading does not bear on the underlying question of who owns the speech. Colorado law provides a separate, statutorily protected appeal process for proponents who believe

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[5] Instead of using *Shurtleff* to analyze whether Colorado ballot titles are private speech or government speech, Advance Colorado urges this court to analogize the issue to government regulations on political speech or limitations on commercial disclosures. The authority it provides, however, is of limited use because these cases contemplate clearly private or commercial speech. *See, e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (considering government regulation of political association on ballots); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (analyzing distribution of anonymous political literature); *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct.*, 471 U.S. 626, 651 (1985) (reviewing government disclosure requirements imposed on commercial entities). Here, we confront purely government speech, not government regulation of private speech. Thus, this court finds Advance Colorado's private political speech and commercial disclosure authority unavailing.

the Title Board has provided a substantively unfair title. *See, e.g., Bruce v. Hedges (In re Ballot Title & Submission Clause for 2019-2020 #3 "State Fiscal Policy")*, 454 P.3d 1056, 1060 (Colo. 2019) (considering whether a ballot measure aiming to repeal TABOR was clear). The Free Speech Clause, however, typically "does not regulate government speech." *Summum*, 555 U.S. at 467. Under *Shurtleff*, the Colorado initiative titling system squarely qualifies as government speech and Advance Colorado has not otherwise shown its own speech was improperly compelled by the government speech.[6] Accordingly, it cannot demonstrate a substantial likelihood of success on the merits of its

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[6] Indeed, even if speech is the government's own, it may still violate the First Amendment if it "compel[s] private persons to convey the government's speech." *Cressman*, 798 F.3d at 949 (quotation omitted); *see also Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019) (holding government measures are improperly compulsory when they punish or threaten to punish protected speech through regulatory or proscriptive acts). With the exception of limited discussion in its reply briefing, 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. Given this lack of argument, this court treats the issue as waived. *See SCO Grp., Inc.*, 578 F.3d at 1226; *Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 647 (10th Cir. 2004) ("Generally, arguments raised for the first time on appeal in an appellant's reply brief are waived.").

claims and, therefore, the district court did not abuse its discretion in denying the preliminary injunction.

IV. Conclusion

The order denying Advance Colorado's request for a preliminary injunction by the United States District Court for the District of Colorado is hereby **affirmed**.[7]

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[7] Given the disposition of this appeal, Advance Colorado's Motion to Expedite Review of this case is denied as moot.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23-1282

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs - Appellants,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant Appellee.

[Filed: April 26, 2024]

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:23-CV-01999-PAB-SKC)

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges

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This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23-1282

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs - Appellants,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant Appellee.

[Filed: April 26, 2024]

ORDER

This matter is before the court on the parties' *Joint Motion to Dismiss Governor Polis from This Appeal*. Upon consideration, the court:

A. Grants the motion to dismiss Governor Polis as an appellee in this appeal, *see* 10th Cir. R. 27.5(A)(9); Fed. R. App. P. 42(b);

B. Dismisses Governor Polis as an appellee and directs its Clerk to update the court's caption accordingly;

C. Relieves Governor Polis and his counsel of any future obligations with respect to this appeal; and

D. Directs the remaining parties to use the caption set forth above on all future filings.

The remainder of this appeal will continue. Appellee Jena Griswold's response brief remains due on January 3, 2024.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

by: Lisa A. Lee Counsel to the Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Chief Judge Philip A. Brimmer

Civil Action No.: 23-cv-01999-PAB-SKC

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant.

[Filed: August 30, 2023]

Courtroom Deputy: Sabrina Grimm

Court Reporter: Janet Coppock

Courtroom Minutes

PRELIMINARY INJUNCTION HEARING

9:02 a.m. Court in session.

Appearances of counsel.

Also present and seated at Defendants' counsel table is Colorado Secretary of State client representative, Erika Friedlander.

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 are admitted.

Plaintiffs' witness, Michael Fields, sworn.

9:06 a.m. Direct examination of Mr. Fields by Mr. Eid.

9:17 a.m. Cross examination of Mr. Fields by Mr. Kotlarczyk.

9:24 a.m. Redirect examination of Mr. Fields by Mr. Eid.

Comments by Mr. Field's in response to the court's questions.

Plaintiffs' witness, Katelyn Roberts, sworn.

9:30 a.m. Direct examination of Ms. Roberts by Ms. Retford.

9:43 a.m. Cross examination of Ms. Roberts by Mr. Whitehair.

Comments by Ms. Roberts in response to the court's questions.

10:21 a.m. Court in recess.

10:35 a.m. Court in session

Plaintiffs' witness, Dawn Nieland, sworn.

10:36 a.m. Direct examination of Ms. Nieland by

Ms. Retford.

10:45 a.m. Cross examination of Ms. Nieland by Mr. Whitehair.

Defendants' witness, Henry Sobanet, sworn.

11:04 a.m. Direct examination of Mr. Sobanet by Mr. Whitehair.

11:23 a.m. Cross examination of Mr. Sobanet by Mr. Eid.

Defendants' witness, Scott Wasserman, sworn.

11:43 a.m. Direct examination of Mr. Wasserman by Mr. Kotlarczyk.

11:58 a.m. Court in recess.

1:15 p.m. Court in session.

Defendants' witness, Lewis Granofsky by VTC, sworn.

1:16 p.m. Direct examination of Mr. Granofsky by Mr. Whitehair.

Defendants' witness, Scott Wasserman, resumes.

1:41 p.m. Cross examination of Mr. Wasserman by Ms. Weddle.

Plaintiffs' rebuttal witness, Senator Barbara Kirkmeyer, sworn.

2:09 p.m. Direct examination of Senator Kirkmeyer by Ms. Weddle.

2:16 p.m. Cross examination of Senator Kirkmeyer by Mr. Whitehair.

2:36 p.m. Redirect examination of Senator Kirkmeyer by Ms. Weddle.

2:41 p.m. Evidence is closed.

2:42 p.m. Court in recess.

2:58 p.m. Court in session.

Argument by counsel.

Court states its findings of fact and conclusions of law.

ORDERED: Plaintiffs' Motion for Preliminary Injunction [12] is DENIED, for reasons stated on the record.

4:10 p.m. Court in recess.

Hearing concluded.

Total time in court: 5:21

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 23-cv-01999-PAB-SKC

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant.

[Filed: August 30, 2023]

REPORTER'S TRANSCRIPT

Hearing on Motion for Preliminary Injunction

Proceedings before the HONORABLE PHILIP A. BRIMMER, Chief Judge, United States District Court for the District of Colorado, commencing at 9:02 a.m., on the 30th day of August, 2023, in Courtroom A-701, United States Courthouse, Denver, Colorado.

APPEARANCES

Jennifer H. Weddle, Harriet McConnell Retford and Troy A. Eid of Greenberg Traurig, LLP, 1144 15th Street, Suite 3300, Denver, CO 80202, appearing for the Plaintiff.

James Whitehair and Michael T. Kotlarczyk, Colorado Attorney General's Office, Civil Litigation and Employment Law Section, Ralph L. Carr Colorado Judicial Center, 1300 Broadway, 6th Floor, Denver, CO 80203, appearing for the Defendant.

* * * * *

PROCEEDINGS

THE COURT: The matter before the Court is Advance Colorado and others versus Jenna Griswold in her official capacity as the Colorado Secretary of State and Jared Polis in his official capacity as the Governor of the State of Colorado. This is civil matter 23-CV-1999.

I will take entries of appearances, first of all, on behalf of plaintiffs.

MS. WEDDLE: Good morning, Your Honor. Jennifer Weddle for plaintiffs along with my colleagues Mr. Troy Eid and Ms. Harriet Retford.

THE COURT: Good morning to each of you. And on behalf of defendants?

MR. KOTLARCZYK: Good morning, Your Honor. Mike Kotlarczyk and Greg Whitehair on behalf of the defendants. And we are joined at counsel table by Erika Friedlander from the Secretary of State's office.

THE COURT: And good morning to each of you as well. We are here today on Docket No. 12, which is

the Motion for Preliminary Injunction. So as I have indicated in the minute order that I sent out, each side will have two hours and 15 minutes, so I will keep the time. If you want at the break to have me give you an update on where you stand timewise, I will be happy to do that, although it may be at the very beginning when we resume so I can add up the numbers.

But make sure that you keep the time in mind because if you run out of time, even though the other side may call a witness, you won't have any opportunity to cross-examine that person. So once we are done with the evidence, then we will have argument as I indicated.

Any request for sequestration of witnesses?

MS. WEDDLE: None for plaintiffs, Your Honor.

MR. KOTLARCZYK: Not on behalf of defendants either, Your Honor.

THE COURT: That's fine. Then anything as a preliminary matter? I am not going to have preliminary argument, but anything as a preliminary matter before we begin?

MS. WEDDLE: On behalf of plaintiffs, Your Honor, taking the feedback in the Court's orders to heart, Senator Hank Brown and Professor Masket are no longer going to be called by plaintiffs as witnesses, and we will just have three witnesses.

THE COURT: Yeah, no problem. Anything on behalf of the defendants?

MR. KOTLARCZYK: We've culled our witness list a little bit as well, Your Honor, and will not be calling Representative deGruy Kennedy. Also we were

able to confer with plaintiffs yesterday about stipulating to a joint exhibit list.

THE COURT: That's great.

MR. KOTLARCZYK: So all the exhibits that were handed in today and submitted last night are agreed to and stipulated to by the parties.

THE COURT: Right. So as I tell people in trial all the time, agreeing and stipulating to something overnight doesn't magically move them into evidence, but you can without the magic move them into evidence at this time or anyone can at the outset, whatever you want to do.

MR. KOTLARCZYK: To make the record clear, Your Honor, we would move Exhibits 1 through 12 into evidence at this time.

THE COURT: All right. Any objection to the admission of Exhibits 1 through 12 for purposes of this hearing?

MS. WEDDLE: No, Your Honor.

THE COURT: Each of those will be admitted for purposes of this hearing. All right. Then plaintiffs may call their first witness.

MS. WEDDLE: Your Honor, the plaintiffs call Michael Fields.

THE COURT: All right.

(**Michael Fields** was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: Michael Fields, M-I-C-H-A-E-L,F-I-E-L-D-S.

THE COURT: Go ahead.

BY MR. EID:

Q. Good morning, Mr. Fields. You know me as Troy Eid, but you don't know my voice very well. You understand that I am not contagious anymore, correct?

A. I do.

Q. All right. What's your title, Mr. Fields?

A. I am the president of Advance Colorado.

Q. And what is Advance Colorado?

A. Advance Colorado is a nonprofit policy organization that believes in limited government, free markets, public safety.

Q. And does Advance Colorado sponsor statewide ballot initiatives in Colorado?

A. Yes.

Q. Is Advance Colorado sponsoring the proposed Initiatives 21 and 22 for the 2023, 2024 ballot?

A. Yes.

Q. And what does Initiative 22 do?

A. So Initiative 22 is a sales tax cut 2.9 to 2.89 percent for one year.

Q. And how about Initiative 21, what does it do?

A. Initiative 21 is a 3 percent property tax cap. It's a cap on each property, and it would also retain $100 million for fire annually.

Q. And can you just describe very briefly the process for getting a proposed petition on the statewide ballot in Colorado?

A. Yes. You first submit the statutory or constitutional change to Legislative Council, and they do a review and comment session where they provide feedback, ask questions. Then you submit that to the Title Board. Title Board typically meets every other week. And Title Board determines if something abides by single subject and approves ballot language. And then you can potentially have a rehearing and it could also go to the Supreme Court after that.

Q. So what is the State Title Board?

A. So the State Title Board is a representative of the AG's Office, Secretary of State's Office, and then the Office of Legislative Legal Services. And to have anything approved you have to have two out of the three votes at least. And then the Title Board basically again determines does something have a single subject and does it -- and they approve the ballot language.

Q. Is it part of the legislature?

A. No.

Q. So when Advance Colorado met with the Title Board seeking approval of these two initiatives, 21 and 22, did the board ask you to describe and explain your intentions regarding each of these two ballot measures?

A. The first question that they ask when you go to Title Board is what is the purpose of your ballot initiative. So in both cases we told them that it was about lowering the sales tax rate in the one case. And

in the other case it was to cap property taxes and retain that revenue for fire.

Q. And were there other factors that the Title Board was required to consider besides Advance Colorado's intentions with respect to the two initiatives that you brought forward?

A. Yes. The bill that passed, the 1321 also had to be considered.

Q. And just for clarity, House Bill 21-1321, is that what you are referring to?

A. Yeah, 1321, House Bill.

Q. And what is it in the statute? Is that at 1-40-106?

A. 106, yes.

Q. (a) through (e)?

A. Yes.

Q. So I'll just call it 106. We'll just call it 106. Did the Title Board say that there was certain legislative required language that was required because of 106 to be part of these two initiatives that you brought forward, 21 and 22?

A. Yes, they said for both of those measures.

Q. And did that language, the 106, Section 106 language, did it provide that each of these two initiatives "will reduce funding for," they will reduce funding for three specific budget categories, specifically K through 12 education, health care -- health care policy and finance, or what we call HCPF, unfortunate acronym, and higher education?

A. Yes.

Q. Is it true that the sales tax cut that's in 22, Initiative 22, will reduce funding for those three budget categories?

A. No. So also in this process is a fiscal summary that Legislative Council drafts and they send that to the proponent. They have that for Title Board, so it's up on the website. It is something that the public sees.

And in that fiscal summary, it clearly says that Initiative 22 would not impact the state budget. And that is because TABOR refunds, the TABOR cap is supposed to be -- it's supposed to be $1.97 billion over the TABOR cap for that year, '24, '25. And therefore this measure would have had to have been 20 times bigger to impact anything in the state budget, let alone those three different programs.

Q. And what is TABOR?

A. So TABOR is a constitutional amendment that we have had since 1992, and it sets the revenue limit. So that revenue limit makes it so that if you go above it, that money gets refunded to taxpayers. It's not a state expenditure. It's a refund that has to happen. So again, it would have had to have been 20 times bigger to impact anything in the state budget because of the TABOR refunds.

Q. You said that Legislative Council has a fiscal summary. Whats Legislative Council?

A. Legislative Council is the research arm of the General Assembly, so they come up with fiscal notes for bills and fiscal summaries for ballot initiatives.

Q. And that summary said that, if I understood you correctly, that Initiative 22 would have no impact on the state budget?

A. Yeah, no net impact.

MR. KOTLARCZYK: Objection, calls for hearsay.

THE COURT: Overruled.

BY MR. EID:

Q. Mr. Fields, is it true that the property tax cut -- I will shift over to that -- Initiative 21 "will reduce funding for "the Section 106 language for the three budget categories as the Section 106 requires?

A. So no, this measure would create a 3 percent increase to -- potential increase to property taxes and therefore the budgets would be going up, not being cut if Measure 21 would pass.

Q. Did you ask the Title Board to correct these factual errors that Section 106 imposed on the language of these two initiatives you brought forward?

A. Yes.

Q. What did they do?

A. They said that this is mandated language, that the statute said they had to do it whether they thought it was correct or not.

Q. And was your decision not to appeal the Title Board's ruling to Colorado Supreme Court on these two measures, Initiatives 21 and 22, was it based on Advance Colorado's recent experience in appealing the inclusion of Section 106 language in a proposed initiative, Initiative 46 that was virtually identical to Initiative 22 in which the Colorado Supreme Court had upheld the same statutory language?

A. Yes.

MR. KOTLARCZYK: Objection, leading.

THE COURT: Sustained. That was very leading. Some leading may be okay, but that was a paragraph of leading.

BY MR. EID:

Q. So what's Initiative 46?

A. Initiative 46 was almost an identical measure to Initiative 22. And that measure, the only difference was the years that we were talking about, the sales tax cut.

Q. And did you appeal that to the Colorado Supreme Court?

A. Yes.

Q. And how was it different than the initiative you brought forward this time?

A. Just the years are different.

Q. Everything else was the same?

A. There was one day that was different where there was a larger, you know, a day off of sales tax in 21 -- or 22, but not in 46, but otherwise it was identical.

Q. So in Advance Colorado's experience, how long does the ballot initiative process take from when you first submit your proposed language to the Title Board to when you're legally allowed to start circulating petitions and gathering signatures from registered voters?

A. So that can take anywhere from a month to seven months. For example, No. 46, it took seven months to

get through that whole process and have the Supreme Court weigh in on it.

Q. So once Advance Colorado's been approved to start circulating petitions, how many months does it have to gather signatures?

A. You have six months to gather signatures, so that whole process could take anywhere from eight to 13 months.

Q. Does Colorado law allow ballot initiatives which propose tax cuts or property tax cuts to appear in statewide ballots in off years or what we call odd numbered years?

A. Not unless there is a TABOR hook, you're retaining revenue. So a straight tax cut could only go on in an even year. So if you missed, for example, the '24 deadline, you would have to wait until '26 in order to put it on the ballot.

Q. So what's the latest that Advance Colorado may submit signatures to the Colorado Secretary of State's Office in order for one or both of its proposed initiatives to be on the ballot in November of next year?

A. So for 21 the date is November 20th. For 22 it is October 23rd, but no measure can put in signatures after August 5th of next year to get on the ballot.

Q. So did you pull your petitions from the Secretary of State's Office the day before you filed this lawsuit?

A. Yes.

Q. And why did you do that?

A. That's the last step in the process. Up and to that point Title Board is the one that has approved this language, but the Secretary of State is the one who decides what the petition language will -- they approve the petition language and what will be on the ballot. So that certification happens at that last step. And Secretary of State is the defendant in this case, and so once she certified that is when we filed the lawsuit.

Q. Mr. Fields, if you don't prevail today in obtaining a preliminary injunction from this Court, will you proceed with Initiatives 21 and 22?

A. No. We don't believe that asking people for their signature when there is false compelled speech on that petition is something that we should do, so we would not move forward.

Q. In your experience, will the inclusion of the mandatory Section 106 language affect the behavior of registered voters who are asked to sign petitions?

MR. KOTLARCZYK: Objection, foundation.

THE COURT: Sustained.

BY MR. EID:

Q. Let me ask you, Mr. Fields, will the inclusion of the language in any way influence their votes?

MR. KOTLARCZYK: Objection, foundation.

THE COURT: Sustained.

BY MR. EID:

Q. Mr. Fields, let me ask you about people who vote on tax cuts. Are they interested in considering tax cuts as tax cuts?

MR. KOTLARCZYK: Objection, foundation.

THE COURT: Sustained.

BY MR. EID:

Q. Well, Mr. Fields, I guess I would just ask you, if you don't prevail here, will the voters have an opportunity to vote on either one of these measures?

A. No.

MR. EID: I have no further questions. Thanks, Your Honor.

THE COURT: Thank you. Cross-examination?

CROSS-EXAMINATION

BY MR. KOTLARCZYK:

Q. Good morning, Mr. Fields.

A. Good morning.

Q. You testified that you did not file a motion for rehearing on proposed Initiative No. 21, correct?

A. Correct.

Q. And by you, I mean you personally. You personally did not file such a motion, right?

A. Correct.

Q. And Advance Colorado as an organization did not file a motion for rehearing on No. 21.

A. Correct.

Q. And same with No. 22. You personally did not file a motion for rehearing on No. 22?

A. No.

Q. And Advance Colorado as an organization did not file a motion for rehearing on No. 22 before the Title Board.

A. No.

Q. You personally are not a designated representative for either No. 21 nor 22, correct?

A. Correct.

Q. But you're aware that you still could have filed a motion for rehearing even though you are not one of the designated representatives of either measure, right?

A. Yes.

Q. And since you didn't file a motion for rehearing, you also didn't ask the Colorado Supreme Court to review the titles for 21 or 22, correct?

A. Correct.

Q. You talked a little bit on direct examination about proposed Initiative 2021, 2022, No. 46. Do you recall that?

A. Yes.

Q. And that measure was similar you testified to No. 22 for this cycle, correct?

A. Correct.

Q. You're not testifying that No. 46 was similar to No. 21 from this cycle, right?

A. No. It was similar to 22.

Q. And for No. 46 you were one of the designated representatives for that measure?

A. Correct.

Q. And the Title Board there used the language from HB 21-1321, right?

A. Correct.

Q. In that instance you did move for rehearing before the Title Board saying that they shouldn't have included that language, right?

A. Correct.

Q. And when the Board denied that motion for rehearing, you asked the Colorado Supreme Court to review it and remove that language, correct?

A. Correct.

Q. In fact, you argued that the use of HB 21-1321's language violates the clear title requirement of the Colorado Constitution, right?

A. Correct.

Q. Which is the same claim that you've made here in this lawsuit with respect to No. 21 and No. 22, right?

A. I believe those are different claims. One is a First Amendment claim and one is a clear title claim.

Q. Are you aware that you've -- the complaint Advance Colorado has filed in this case includes a claim under the Colorado Constitution for violating the clear title requirement?

A. I am not aware.

Q. Okay. With respect to No. 46, the Supreme Court denied your petition there, right?

A. Yeah. They upheld the language from 1321.

Q. Right. And the Court affirmed the titles that were set by the Board in that instance?

A. Yes.

Q. And the Court there did not provide its reasoning in its order, did it?

A. No. I think it was just affirmed what the Title Board had found.

Q. And you're a pretty frequent filer with the Title Board. Is that fair to say?

A. Very often.

Q. It's not unusual for the Colorado Supreme Court to not explain its reasoning in a Title Board appeal, is it?

MR. EID: Objection, Your Honor. He is speculating. He is also drawing a legal conclusion.

THE COURT: I will sustain on the basis of foundation.

BY MR. KOTLARCZYK:

Q. In your capacity as being a frequent filer or frequent -- someone who makes frequent appearances before the Title Board, is it fair to say you also frequently file petitions with the Supreme Court to review the Title Board's decisions?

A. Not very often. Maybe a couple times.

Q. So you have done it more than once.

A. I believe so.

Q. In your experience with those, is it uncommon for the Supreme Court to affirm the Title Board's actions without opinion?

A. To affirm them? Typically, yes.

Q. Yes, it is not uncommon?

A. Yes, it is -- yes, they normally affirm them without a --

Q. Thank you. That's not a good question.

So with No. 46 the Supreme Court did not provide its reasoning in that instance, right?

A. They did not.

Q. So you don't know why the Supreme Court denied your petition for review with respect to No. 46.

MR. EID: Your Honor, this is asked and answered. He is just badgering the witness.

THE COURT: Sustained.

BY MR. KOTLARCZYK:

Q. You don't know what the Supreme Court would have done with respect to No. 21 if you had filed a petition for review with the Supreme Court, do you?

A. I mean, I guess I don't know what the Supreme Court would do in any case.

Q. So you mentioned before Advance Colorado was a sponsor of No. 21 and 22; is that right?

A. That's right.

Q. What do you mean by sponsor?

A. Yes. So our lawyers, our lawyer and our paralegal were the proponents. And we do that basically because typically in Title Board you have a lawyer that represents you and it's more efficient to just have

those people be the sponsors, and so we did so in that case, in this case.

Q. Just so I am clear, Advance Colorado's name doesn't appear on the -- any of the papers that appear before Title Board; is that right?

A. Just the proponents would be on there.

Q. And that would be the two designated representatives you just mentioned.

A. Exactly.

Q. And the Title Board process that you described, that's a public hearing, correct?

A. Yes.

Q. Notice is provided ahead of time for any member of the public to attend to?

A. Yes.

Q. Now, you are a designated representative for another initiative petition this cycle, correct?

A. Correct.

Q. And that's proposed Initiative 2023, 2024, No. 50?

A. Correct.

Q. The Title Board set a title for that measure in June of 2023, correct?

A. Correct.

Q. And you got the petition format approved about two weeks later in that instance, correct?

A. That's correct.

MR. KOTLARCZYK: If I may have just a moment, Your Honor.

THE COURT: You may.

MR. KOTLARCZYK: Nothing further.

THE COURT: Thank you. Any redirect?

MR. EID: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. EID:

Q. Mr. Fields, in your experience how long does it take for the Title Board to rehear when they are asked to rehear something?

A. So it typically happens two weeks later.

Q. And how long does a ballot title appeal to the Colorado Supreme Court take?

MR. KOTLARCZYK: Objection, foundation, for the same reasons my question on cross was objected to.

THE COURT: Overruled.

A. It can take anywhere from a few weeks to, as I mentioned, four-plus months in the one case.

BY MR. EID:

Q. And Mr. Fields, if you pursued those avenues, would it be possible to meet the October and November 2023 deadlines that you talked about earlier?

A. If it was to start over, I guess?

Q. If you filed an appeal to the Colorado Supreme Court, done a rehearing with the Title Board and then filed an appeal with the Colorado Supreme Court.

A. The clock would start once the Supreme Court weighs in on that if we would have gone through that process.

Q. And Mr. Fields, you are not an expert in the -- I will rephrase that. How many cases does the Colorado Supreme Court hear every year, Mr. Fields? How many?

A. I think last year over 20 cases that they looked at.

Q. And do you anticipate based on your experience a different result if this thing were appealed?

A. No.

MR. KOTLARCZYK: Objection.

MR. EID: I have nothing further, Your Honor.

THE COURT: Let me ask Mr. Fields a question.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. So Mr. Fields, let's assume that the Court grants the injunction. What's the probability of being able to gather enough signatures on either initiative by the deadlines?

A. So we have the six-month period, but it depends on the measure. We have gotten one in less than two months. Other ones have taken the full six months.

Q. What do you mean, get one?

A. Gotten enough signatures to submit the 125,000 signatures in two months or it's taken six months. So

a lot of it just depends on how willing people are to sign.

Q. Two months from the beginning of signature gathering to the end?

A. Yes.

Q. Okay. How many signatures have been gathered on these petitions so far?

A. We have not gathered on these so far.

Q. So none. And there is a cost associated with signature gathering in a short amount of time, correct?

A. Yes.

Q. What is your -- do you have an estimate on what the cost would be to gather a significant number, the requisite number of signatures from the point -- once again, assuming that the Court granted the preliminary injunction and assuming that it was as requested sent to the Title Board, how long -- well, let me back up. Let's assume that the Court issued an injunction and then ordered the Title Board or the Secretary of State to convene the Title Board. How long do you think that that process would take to convene the Title Board and then come up with the new title?

A. I mean, they meet every two weeks, so they are already convening, so they could come up with it that day.

Q. And then do you have an estimate of what the cost would be to gather the requisite number of signatures between that time and the deadlines for each initiative?

A. Yeah, I would say between 1.5 and $2 million.

Q. And as far as you know, do plaintiffs have the necessary funds to be able to gather that many signatures in that short of a period of time?

A. Yes.

Q. And does your estimate take into account signature gatherers who are maybe up in Oregon or Washington state or Minnesota or California?

A. Yes. Typically they do come in from other states. We have another measure that we are circulating right now that's costing about that amount and we did it within two months.

Q. And the fact that those, the kind of roving bands of signature gatherers maybe in other states has already been factored into what your cost estimate is?

A. Yeah. I think it would closer -- it would be closer to $2 million to do something like this.

Q. But that would not be an impediment to plaintiffs being able to provide the money necessary to gather those signatures?

A. No.

THE COURT: Mr. Eid, any questions based upon the Court's questions?

MR. EID: No, Your Honor.

THE COURT: Thank you.

Mr. Kotlarczyk, any questions based upon the Court's questions?

MR. KOTLARCZYK: No, Your Honor. Thank you.

THE COURT: Thank you, Mr. Fields. You are excused. I won't charge, obviously, the parties for the Court questioning time.

Plaintiffs may call their next witness.

MS. WEDDLE: Plaintiffs call Ms. Katelyn Roberts, Your Honor.

THE COURT: Ms. Roberts, if you will please come and stand next to the witness stand, Ms. Grimm will administer an oath to you.

(**Katelyn Roberts** was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: Katelyn Roberts, K-A-T-E-L-Y-N, R-O-B-E-R-T-S.

DIRECT EXAMINATION

BY MS. RETFORD:

Q. Good morning, Ms. Roberts. Could you start by telling us a little bit about your background and education?

A. Yeah. So for the better part of the past 10 years I have worked on several ballot initiatives in the state of Colorado managing campaigns going back to about 2016. I provide my clients a full scope of services all the way from polling, Title Board strategy, all the way through execution of the campaign through election day.

I have an MBA from the -- from University of Denver and an undergraduate degree from Ithaca College in upstate New York.

Q. What's your current position and title?

A. I am currently a principal at 76 Group. We are a public affairs consulting firm based in Denver with offices around the country.

Q. And what are some Colorado petitions you have worked on over the years?

A. So I've advised on over a dozen over the years. In particular, I managed the campaigns of Amendment 71 in 2016, Amendments Y and Amendment C in 2018, Amendment B in 2020, Amendment 77 in 2020, and I have advised on several others. Our firm does work on ballot initiatives on both sides of the aisle with the hope to pass good public policy for the state of Colorado.

Q. And what do you do when someone brings to you an idea that they think they would like to get on the ballot?

A. So when a potential client approaches us with an idea to get on the ballot, we will first assess the feasibility of the measure. We will poll the concept. We will do an estimate of how much of a cost and how much time it would take and ultimately like what are the possible paths to success.

Q. And why is it important to poll specific words and phrases?

A. So in our company we kind of talk about how when it comes to phrases in your measure and specifically phrases in the title, you know, your ballot title is

really your destiny. I think both sides of either proponents or opponents of measures understand that the title that you receive can absolutely impact the likelihood of success for the measure because ultimately it's, what, at the end of the day the voter is left with their ballot and their language as the last thing they see before they make their decision.

So we put a lot of emphasis into polling and research early on because the specific words that the voter will read will have an impact on the outcome.

Q. And what's the sort of gap between good language and bad language in your polls in your experience?

A. So I have -- I had a couple examples come to mind, but I will talk most specifically about the measure in 2019, Proposition DD. We managed that campaign. It was actually referred through the legislature. In doing that, the legislature didn't -- you know, kind of just went their normal referral process and didn't spend as much time looking at the title. They adjourned for the summer. We received the ballot title and took it into a research and polling phase.

We found that the title, first it scored -- you basically needed a college degree to be able to understand and comprehend the language that was assigned to Proposition DD. We polled the language that was written in the title and then we polled the concept of sports betting in the state of Colorado, and we found a 20-point differential between the written word that was assigned in that title process and the concept for voters.

Q. Can you give another example of a place where the title was set that you found as confusing or unhelpful to voters?

A. Yes. So there is a couple other examples that come to mind. You know, oftentimes these ballot title hearings, they are really treated as like the first phase of the campaign. Each side will bring their polling, their attorneys. They know specific phrases, specific words that make the most sense.

In 2019 there was a proposed measure, Measure 25 ended up being I believe Proposition 119. And the discussion of the title was around expanded learning opportunities for students. We came into that hearing talking about the words expanded learning opportunities and how that was confusing and ambiguous for voters.

We pushed really hard to really define the true intent of the measure, which is what the Title Board is tasked with doing, looking at the proponent's intent. And we pushed them to consider words like tutoring. And ultimately they decided on framing it as an out-of-school learning opportunity because we had to distinguish for the voter that this was not in-classroom instruction we were talking about. We had to distinguish that, you know, these were out-of-school opportunities like tutoring and other out-of-school examples.

So the impact can be very profound when you think about the mandate of the Title Board and how it should be clear for voters and also represent the proponent's intent.

Q. Have you ever seen the Title Board establish a title that was genuinely and actively inaccurate leaving aside this litigation?

A. Yeah. I would say I've sat through for my clients at this point probably hundreds of hours of Title Board meetings. And I would say the Title Board for the most part is a fair and professional three-member board. And even on the off chance that politics is injected into the discussion, I have never seen the Title Board misstate the proponent's intent in the title. Their mandate is to really try to make it clear for the voters and to honor the proponent's intent, but I have never in all my experiences seen them misstate the intent.

Q. So assuming -- now walking back to the steps of your process, you have your package put together. What would you do to get official approval for it?

A. Yes. So if a client comes to us with a concept, we will first go to the legislative legal council review-and-comment hearing. That's the first step. The review-and-comment hearing as mentioned previously is a process that's primarily for proponents that don't have legal counsel to make sure that, you know, the proponents have worded their measures in a way that defines a clear intent.

Once you go through that review-and-comment hearing provided you don't make any substantial changes to the measure, you can file them with the Title Board. The Title Board will then meet the first and third Wednesday of every month to have your title set. Provided there are no motions for rehearing on that title, you can then prepare for the signature collection phase of the campaign.

Q. Are you required to follow the recommendations of the Legislative Council regarding --

A. You are not required to do that. Like I said, it's primarily a service that is for proponents who do not already have legal counsel. The only requirement is that if you do make substantial changes to the measure, you do have to start over, but you don't have to take their ...

Q. Can you very briefly describe how the process before the Title Board in a hearing goes forward?

A. Like I mentioned, it's oftentimes the first step of the campaign. It can be -- it honestly can be even contentious at times because what will happen is the proponents will go in front of the three Title Board members. They will be asked to state the intent of the measure. They will be asked to state what they believe their single subject of the measure to be.

And then the Title Board staff will provide a draft title to start reviewing. At that time the proponents, the designated representatives and their attorneys will suggest different full tested word, phrases. The order of certain words oftentimes become very important. And it becomes almost like a game theory in front of the three-member board to try to make sure that you are influencing the language in a manner that is clear and concise and, you know, has the intent that you set upon.

Q. Is truthfulness ever an issue or is it generally just precision?

A. Yeah, truthfulness is absolutely a part of it because oftentimes the Title Board will refer back to the text in the measure. It's not like you can go in front of the

Title Board and just bring any word and say we want this word to describe it. It must be accurately reflected in the text of your measure, so it has to be truthful. You can't just bring any adjective or description of the process that you would like to see and inject it into the Title Board process.

Q. And what happens if you aren't happy with the title you receive?

A. If you aren't happy with the title you receive, there are a couple options. You can file a motion for rehearing and go in front of the Title Board. You must file it within seven days. And you are normally heard two weeks after. If you don't like that outcome, you can file with the Supreme Court and have them weigh in. If ultimately you don't like the outcome of the title, then it really is -- you go back to that kind of feasibility discussion and, you know, would you like to pursue something that you don't feel like has the title you would like or would you instead withdraw that measure and restart the process all over again.

Q. Is that a common thing to do?

A. It is very common. You can even see on the Secretary of State's website every cycle there are dozens of titles that are withdrawn and not moved forward with.

Q. And how much money do you usually budget for collection of signatures?

A. Yeah, so for collection of signatures, that has increasingly become a more expensive proposition. Really for constitutional measures I would say that you're looking at probably no less than $2 million because of the district requirements. And then

depending on the time of year, the length of time that you have to collect signatures and also the supply and demand of signature collectors around the country and what other measures are happening in other states, even statutory measures can cost that much.

Q. And can you collect signatures for your petition without using the full petition language in the ballot title?

A. No. You have to -- the Secretary of State prescribes a very specific format for the petition packets. In fact, you must, as a proponent of the measure, you must submit a proof to be approved by the Secretary of State before you can print and collect your signatures. It must include the full title of the measure on it.

Q. And do you train -- make sure that circulators are trained on how to use these tools and to explain things in their own words as well?

A. Yes. The Secretary of State requires a very specific training on all of the state rules on how to collect signatures. In addition, we also train our signature collectors on what the measure does, how to describe it and how to talk to voters about what it will do.

MS. RETFORD: Thank you. I have no further questions.

THE COURT: Thank you. Cross-examination?

MR. WHITEHAIR: Yes. Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WHITEHAIR:

Q. Good morning, Ms. Roberts. My name is Greg Whitehair. I am an attorney appearing here on behalf of state officials. We haven't had a chance to have a deposition or any prior hearing; is that right?

A. Yeah. It's good to meet you.

Q. We have never met before or had a deposition or a meeting before today?

A. That's correct.

Q. You have been at 76 Group for how long?

A. Since 2011.

Q. Was it also at one time known as EIS?

A. It was.

Q. And is it sometimes now known as GP3?

A. No. We have our own brand, but we are part of a -- we are part of a national roll-up company, so we have shared back-end services, but we are still the 76 Group brand.

Q. Have you been retained by Advance Colorado to do the work you've described earlier?

A. We have clients on both sides of the aisles. Advance Colorado has been a client, yes.

Q. Are you presently retained by Advance Colorado to do the balloting strategy that you described?

A. So no, we are not presently retained by Advance Colorado to do the ballot strategy that is described.

Q. How are you retained by Advance Colorado? What tasks are they asking you to do?

A. Our firm is tasked with collecting signatures for another Advance Colorado sponsored measure.

Q. These two measures, 21 and 22?

A. I honestly don't work on that account, so I don't know which number is which one, so I'm sorry.

Q. But the initiatives that bring us to court today, are you working to gather -- on setting up how to gather signatures and train circulators?

A. No, because they are not collecting on those two, on the two measures being talked about today.

Q. So if the Court were to grant the injunction and send it all back, are you retained to help them put together a strategy?

A. They would have to put together another bid and they would have to consider that.

Q. All right. Are you related in any way to Blitz Canvassing?

A. Yes.

Q. How are you related?

A. I am a minority owner.

Q. And what is Blitz Canvassing?

A. We are a signature collection and canvassing, door-to-door canvassing firm.

Q. Do you provide advisory services to Blitz Canvassing?

A. As a minority owner, yes.

Q. Do you work with them with regard to their circulator training?

A. Yes.

Q. Do you work with them with regard to the script that circulators are asked to apply?

A. Yeah. That's oftentimes one of the key intersections between advising a campaign and advising the entity that will ultimately represent the petition packet to voters, yes.

Q. I've used the term script, and I will admit I am fairly new to the term in this context. What is a script as it's normally or colloquially applied in the context of signature gathering?

A. Yes. So what we often do when we do our signature collector training is we will have them come in and do the required Secretary of State training and certify that they've met all those requirements. After that we oftentimes put together what could probably be best described instead of the word script is like a frequently asked questions document. So then if voters are asking the signature collectors about specific aspects of the measure, then they know exactly what's in it, how to answer it.

Q. Who decides what questions go into the FAQ or the frequently asked questions document?

A. The campaign team normally does. It's based on the language in the measure.

Q. Is it based on polling?

A. So it can be based on polling too.

Q. One way to do an FAQ would be to simply provide the title and simply turn people back whenever they have questions and say read the title. Is that how it's done?

A. I don't know that I would characterize it as that's how it's often done. I think voters often have questions that are specific about the measure. And you think about the interaction with a voter like in front of a grocery store or in front of, you know, a different place, they're going on with their busy lives. They have things to do and places to be. And so referring someone back to just, you know, please read the title would not be an adequate answer. We would want to describe the measure and show them the title because we want to make sure that they truly knew exactly what they were signing.

Q. And is it part of your marketing campaign to ensure that your client's initiative is seen in its best light?

MS. RETFORD: Objection, relevance.

THE COURT: Overruled.

A. Sorry, can you restate that?

BY MR. WHITEHAIR:

Q. Isn't it true that one of the tasks that you undertake in advising clients is to provide best light feedback to people asking questions in the field, citizens asking questions in the field?

A. Well, I think with any political campaign you, of course, want to present your best arguments, but never at the expense of being truthful.

Q. Sure, but there is a lot of different ways to share the truth with a citizen on the fly at a grocery store; isn't that right?

MS. RETFORD: Objection.

THE COURT: Overruled.

A. In the sense that you're describing that human interactions can take different forms, yes; but in the sense that you would be implying that anything described about the measure would be untruthful, no.

BY MR. WHITEHAIR:

Q. In fact --

A. Maybe I don't understand your question.

Q. Perhaps that's right. In fact, in the field people are not allowed to fraudulently communicate; isn't that right? There is like laws?

A. Yes, absolutely. There is laws on that. There is laws on, you know, specifically how their signature has to be filled out. There is all sorts of rules and regulations over the process.

Q. But there is no regulation on the circulator's communication to the citizen, is there, other than the fraud limit?

A. Correct.

Q. They can say whatever they wish; is that right?

A. They can say whatever they wish which is why the ballot title is also printed on the physical paper that they sign right at the top on every single signature page because, you know, if a signature collector said the sky is blue and then the voter went to sign and saw at the top that it says the sky is green, then, you know, the voter ultimately gets to see what the measure is.

Q. We are going to come to the sample petition or circulator's petition in a moment. I am not trying to be tricky about it. A. That's fine.

Q. Have you seen the circulator petition for either Initiative No. 21 or Initiative No. 22?

A. I have not, but I am familiar with the general template. Q. Before we get to that and go into the details of what actually happens in the field, let me ask you, let's circle back to the Title Board. Now, I understand from your testimony that you have been before the Title Board perhaps over a hundred times. And if I understood, you said you find them fair and professional.

A. Yes. To clarify, I said hundreds of hours. And I do find the process to generally be fair and professional, correct.

Q. And would you agree with me that their job is to take all of the inputs they get from the initiator, as well as the public, to create a neutral communication?

MS. RETFORD: Objection, calls for a legal conclusion.

THE COURT: Overruled.

A. They are public hearings and there is a process for input, if that's what you're asking.

BY MR. WHITEHAIR:

Q. Not quite, but thank you. What I am asking specifically is in the time that you have been the hundred hours before the Title Board, have you found that they take not just initiator input, but also public input as they attempt to create a title?

A. Yes. I have seen them do that.

Q. Have you, in fact, testified in front of that Title Board with concerns about a title that is being considered by another initiator?

A. Yes, on behalf of clients, correct.

Q. Because you're concerned about what?

A. I am concerned about the ultimate outcome of the title and therefore the measure.

Q. What are you concerned about? Why are you participating? It's their initiative. They get to give their purpose, right?

A. Yeah. I am concerned in the -- you know, I am concerned in those capacities for a couple things on behalf of my clients. I am concerned on the feasibility of their success, and I am also concerned generally just on the concise and clear nature of the description for a voter.

Q. I am hearing it on behalf of your clients, and I think that's consistent with your earlier testimony.

A. Yeah.

Q. I am asking something slightly different which is when you are there on behalf of other than the initiator, and if I understand correctly, you have, in fact, testified in front of the Title Board and had concerns about the direction they were heading with words they were using; is that right?

A. Only on behalf of clients, not on behalf of myself as an individual.

Q. Sure. So on behalf of clients at these public hearings, you have contributed to feedback to the Title

Board to ensure that the outcome is from your client's perspective more appropriate; is that right?

A. Yes, and ultimately a clear description for the voter.

Q. So when the Title Board is working full-time to create a neutral title, are you okay with that or do you think that that's a mistake?

MS. RETFORD: Objection, vagueness.

THE COURT: Overruled.

A. I'm struggling with your description of a neutral title because the role of the Title Board is to create a title that best describes the proponent's intent. So in that sense it seems to me like, you know, the proponent should have and maybe we call it -- maybe that's -- in trying to describe the proponent's intent, I am not sure that it would be fair to have a neutral title because the ultimate goal of the measures that are brought forward is to describe what the proponents would like to see changed in state law.

BY MR. WHITEHAIR:

Q. But wouldn't you agree with me it needs to be accurate to the thing that the proponents are asking to change, not just what they want to say on their –

A. Yes, accuracy and truthfulness, absolutely, but I am struggling with your description of a neutral title.

Q. Well, the Title Board is not set up to try to create a best light description for your client's interest, right? I mean, listening to your purpose is different from attempting to create a best light title for your client's marketing campaign.

A. That's true, but their mandate is to create clear, concise, truthful language that best describes the proponent's intent.

Q. And people from across the aisle from the proponent may, in fact, have a different view of what would be a fair reflection or statement about that title, correct?

A. Yeah. And that's often the debate in front of them.

Q. Now, you don't present evidence of polling to the Title Board, do you?

A. We do not in the sense provide them like here's a packet of polling, but we do in our testimony talk about, you know, how certain words are more clear than others.

Q. Is there a protocol to submit polling data to the Title Board?

A. No, there is not.

Q. Do you portray yourself as an expert in state budgeting?

A. Absolutely not.

Q. Or what is a state expenditure?

A. No, sir.

Q. Let me just establish one more level of your involvement with circulators. Do you do any circulator training?

A. I have in the past been present at the circulator trainings, yes.

Q. Have you yourself been a circulator?

A. I have.

Q. How many times?

A. Oh, probably -- probably half a dozen times.

Q. And just quickly, what's the range of times that you have been personally been a circulator? What kind of topics?

A. In 2016, I circulated for the -- for Amendment 71, for example.

Q. And what's the most recent that you have been involved in as a circulator?

A. Probably a candidate campaign four or five years back, so nothing else on the ballot side recently.

Q. Let's look at the circulator packet. Do you have the exhibit book in front of you?

A. I assume it's this?

Q. Yes. If you will turn to Tab No. 2. I believe you'll find there -- let me get it so we are on the same page. Under Tab 2 it's marked as Exhibit C in the upper right-hand corner. That's because the parties each had their own version of this. And now we are agreeing that it is known as 2 for all purposes. Take a minute, if you will, to look through what appears to be about a nine-page document.

Let me ask you a general question. Does this appear to be the circulator petition packet for Initiative 22? If you look on the second page, I believe you will Initiative 22, middle lower.

A. Correct, yes.

Q. And this is the form that the Secretary of State provides to you to say you are now empowered to go forth and collect signatures; is that right?

A. Yeah. The process is such that they provide the template, the Secretary of State staff, and then the proponent will prepare a proof. They will print and bring a physical copy of the proof back to the Secretary of State's Office to sign off. And then once that physical proof is approved, then you are allowed to use it to collect signatures.

Q. Now, if we look correctly at Page 2 -- just for background, Page 1 is a standard advisory from the Secretary of State alerting signers, here is your obligations and risks and alerting circulators, here is your obligations and risks; is that right?

A. Correct.

Q. And then there is the merits of the material. If we go to the next page at the top, it's on the top of every one of these pages, there is a warning. Do you see that?

A. Correct.

Q. And that comes with every single ballot initiative that goes out for public signature; is that correct?

A. Correct.

Q. And what's the purpose of this? What law are they alerting you to please don't violate?

A. You must be a registered elector in the state of Colorado to sign.

Q. And what is the line, if you can read it into the record, immediately below the box? Would you just read that into the record for us, please.

A. The ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows.

Q. So the citizens before they even get to the initiative are told this is the Title Board's title, yeah?

A. Correct.

Q. Now, just for clarity on the rest, that section, the warning, the advisory and the title get to be redisplayed every single petition page, correct?

A. Yes.

Q. Indeed if we go to page -- pardon me. The fifth page of the document, it is the first page with signature blocks. Do you see that?

A. Yes.

Q. And on that page we have the warning, correct?

A. Yes.

Q. We have the advisory that this is the Title Board's title?

A. Correct.

Q. And then we have the title itself?

A. Correct.

Q. Circling back, if we go to Page 2, are you familiar with the Legislative Council?

A. Yes.

Q. And what is their job with respect to inserts such as appear here in Initiative 22? And we can show it's parallel in 21. But what is the Legislative Council's task?

A. They are tasked with a couple things. First is the review-and-comment hearing prior to Title Board and also preparing the fiscal summary.

Q. And what is a fiscal summary?

MS. RETFORD: Objection foundation.

THE COURT: Overruled.

A. So the fiscal summary is an impact statement on the measure's impact on the state budget.

BY MR. WHITEHAIR:

Q. And if you go down on Page 2 below the Petition to Initiate which recites the name of the designated persons or the initiators, there is this statement: This fiscal summary, prepared by the nonpartisan Director of Research of the Legislative Council as of a date certain in this case, April 3rd, identifies the following impacts. Did I read that correctly?

A. Yes.

Q. So this is also something from the state that gets to be put in every petition.

A. Correct.

Q. And then it goes on to describe in some detail the so-called fiscal summary; is that right?

A. Yes.

Q. I am going to ask you to move to Exhibit 3 just to see that this is parallel and just to confirm that it's, although it's different words, it's the same format.

A. Yes. The format is set by law. It's the same format.

Q. And this is a document made by the Secretary of State essentially. You fill it in, but they approve it.

A. Correct.

Q. And if somebody is interested in the details of the fiscal impact of the title or the fiscal impact based on the circulator's comment, this is right there in every petition, correct?

A. Correct.

Q. And it has to be. You can't unstaple it, can you?

A. Yes. Like I said, there is a lot of rules around these packets. You cannot separate the packets.

Q. But no rules about what the circulator can say.

A. Correct, outside of, as we have already established, fraudulent activity.

Q. Have you ever in the course of your representing clients pointed to the fiscal summary as a fair and reasoned or balanced review of the fiscal impacts of an initiative?

A. I can't recall that I have ever referred to it as such. I actually have referred to it in the past as unfair.

Q. The fiscal summary?

A. Yes.

Q. Do you share that -- when is the fiscal summary available for your comment as a client?

A. I believe it's available around the same time as the title is released to the proponents.

Q. Are you aware, is Advance Colorado attempting to strike beyond the fiscal summary for either of these issues?

A. I am not aware.

Q. Does your client in any of these cases get to insert their own language anywhere in the packet?

A. The language -- no. The language that is provided in the petition packet approved by the Secretary of State must follow the established rules and must be either from the Title Board or from the Legislative Council fiscal summary.

Q. We can set that aside. I just have a few more questions before we're complete. I want to make sure I understood. Do you get involved in helping clients develop the scripts for their circulators?

A. Yes. We advise the circulators on how to describe the measures.

Q. Do you ever provide to the client that there is really nothing more to say but provide the title?

A. We would -- I would not advise that.

Q. What would you advise in the case where the title is --well, let's just turn to Prop DD. You said that that title was really difficult.

A. It was difficult. That one was as stated difficult. But what we always advise is that you describe the measure and then you also allow the voter to read it for themselves.

Q. You don't provide any script or guidance on ways that it can be, for instance, the contact language, "Ma'am, would you like today to sign a petition for," and then fill in the blank?

A. Yes. We participate in the circulator training so the circulators have the ability to describe the measure along with the material that they can show the voter.

Q. And they can have a Lincoln-Douglas debate with a citizen, correct?

A. If they choose, although the citizens don't often spend that much time with them.

Q. But they are primed to have that communication?

A. They are, yes.

Q. And they are trained to be clear on what it is your client wants people to believe about an initiative, right, their purpose?

A. Believe and also be a truthful representation of the matter.

Q. On -- just to go back, and forgive me if I am mixing them up, I believe Proposition DD was an initiative from the legislature. And they don't have the same restrictions on title creation, do they?

A. Correct, they don't.

Q. They can do essentially whatever the legislators want to say in the title without --

A. Well, they still are bound by single subject, but yes, they have more leeway.

Q. I am sorry I interrupted.

A. They are still bound to make sure that they have a single subject for their measure and so there is some structure to it when forming the measure, but you are correct, they have more leeway.

Q. So that wasn't really a Title Board problem in that case. They basically had --

A. In my example, I was asked to describe how the ballot measure can impact the voter's understanding. And in that sense we saw a 20-point difference between what was written and the conceptual approval.

Q. Have you heard it said in your business that typically the busy citizen is looking at the beginning and the end of phrases of the title?

A. I have heard it said in the business, but it's only one of the many factors that I think a voter goes through when reading the title.

Q. But it's something that you take into account when you are putting together FAQs and training circulators on how to respond to citizen inquiries, right?

A. I would say it's the beginning and the end of the measure is something we emphasize more during the Title Board process than we do the circulator training process. In the circulator training process, we do use the title. It's provided to each circulator. And we do show them the full context of the measure, not just pointing out the beginning or the end.

Q. Do the circulators that you work with through Blitz Canvassing get any written materials concerning the FAQs?

A. In their training they do receive a written packet from the Secretary of State's Office. It's found on their website. And yes, we also do provide written copies of the measure and helpful handouts that they can use while they prepare during their training.

Q. And the helpful handouts also contain a narrow description of the initiative, correct?

A. As I described before, it's normally a frequently asked question document and it does include descriptions.

Q. So if we were to get to discovery in this case, we would be able to find, for instance, historical experiences where you've, in fact, provided scripts to your circulators so that they know kind of the boundaries of the communications that make sense to your client?

A. A frequently asked question document, yes, as one of the tools that they show the voter.

Q. Indeed in Amendment 77, that was local gaming control?

A. Yes.

Q. You were involved in that?

A. Yes.

Q. And you had the end line on community college funding.

A. Yes.

Q. But it was a tax raise initiative, wasn't it?

A. Amendment 77?

Q. It was to create new taxes based on –

MS. RETFORD: Objection, relevance.

THE COURT: Overruled.

A. Amendment 77 was local control for betting limits. And so the cities of Black Hawk, Central City and

Cripple Creek were ultimately given the power by voters to decide what the betting limit would be in their towns. t had previously been $100.

BY MR. WHITEHAIR:

Q. And how was it expected to generate revenue to support community college funding?

A. Because many years ago, I believe it was in the eighties, the citizens of Colorado passed the Gaming Act, and that is where they decided that gaming tax revenue would go.

Q. So indeed if they were able to lift the limits on betting, they would lift the limits on the taxes collected.

MS. RETFORD: Objection, calls for a legal conclusion.

THE COURT: Overruled.

A. So if you're asking -- maybe I need you to restate that for me, but if you're asking if the increased betting limits could possibly result in more gaming and therefore more revenue, tax revenue, then yes, that correlation is true.

BY MR. WHITEHAIR:

Q. And that revenue was going to go to community college funding.

A. Yes. Revenue under the Colorado Gaming Act goes to community college funding.

Q. And wasn't the primary initiative of your marketing campaign both on television and in media throughout the state that this was a community college funding opportunity that shouldn't be missed?

A. It was called Local Choice Colorado, so we talked about the impact of the local citizens of those towns being able to decide what's best for their towns. And we also did in our advertising mention the beneficiary of the revenue.

Q. Let me turn to the particular packets that are in front of us now, 21 and 22. As I understand it, no steps have been taken to attempt to get any citizen signatures on these initiatives; is that correct?

A. That's my understanding.

Q. And thus we don't have any idea whether the citizens are, in fact, having any problems or concerns with the language in the field, are we?

A. No.

MR. WHITEHAIR: One minute, Your Honor.

THE COURT: Sure.

BY MR. WHITEHAIR:

Q. And to carry that one step further, you have not circulated a petition that includes the language from HB 21-1321 into the public space, have you?

A. Given the -- how new that lies, no.

Q. Or advised the client that has done so yet.

A. Again given how new that lies, no.

MR. WHITEHAIR: I have no other questions, Your Honor.

THE COURT: Thank you. Redirect?

MS. RETFORD: We have no further questions, Your Honor.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. All right. Ms. Roberts, let me ask you a few questions as well. Now, going back to when you just have been working as a circulator when you have been gathering signatures. And then focusing just on those people who signed, okay, can you estimate what the total length of your interaction with those signators was or did it vary by petition? I don't know.

A. It does vary by petition, but I would say that normally the entirety of the interaction is several minutes long because you have to describe what the measure is, and for those who sign, they often do want to verify that what you said to them is what is on the paper.

Q. And what do you observe when they are doing what you described as a verification process?

A. Normally the process is done on a clipboard or a table. And so they will walk over and they will receive the packet. They will review the title at the top. If they ask for a reference to the full measure, we will show them where that is. And then we normally guide them down to the signature line and they will start filling out their information. If there is any information that, you know, let's say they forget to put their county are or, et cetera, et cetera, we will advise them on how to best fill out the signature line, and then they will be on their way.

Q. And total interaction for someone who signed, what do you estimate as?

A. Someone who signs is normally spending several minutes with the circulator talking about the proposal and actually physically --

Q. What do you mean by several minutes, like three minutes, four minutes, five minutes?

A. Probably three to four by the time the whole process is done.

Q. And what percent of that total time is taken up by just filling out the signature and the address and all that stuff?

A. That can vary by voter. Sometimes folks, you know, are a little faster than others, but I would say that's probably, you know, 45 seconds or so of the time, maybe a minute if you have someone who -- I know many examples of folks that need to get their reading glasses or take a little longer to fill it out.

Q. And what percentage of the time would you say is spent, as far as you can tell in your own personal experience, looking at that portion of the petition where the title is? They seem to be what you call verification.

A. That depends on the measure, too, because some measures are longer to read than others in my own experience. And so what I will say definitively is that it is very rare for someone casting their signature not to verify that what they are signing is what you have told them they're signing.

Q. And what percent of the total time spent do you think that would take up since it seems to be a common thing that people do.

A. Let's say it's, you know, about a minute or less describing the proposal in a three-minute time period, so maybe it's like a third, a third and about a third in a three-minute time period.

Q. Okay. Now, let's focus on people who don't sign. I would imagine that we can't count those people who just say, you know, no thanks. But for -- is it possible for you to estimate for those people that you engaged with, you know, they stop, they look down at the clipboard or something, and that you have a chance to, you know, give your initial spiel to, but they don't sign. How long if it's possible to estimate what the total length of that interaction is?

A. That can vary too, but I would say that probably, the folks that turn you down takes less time than the folks that are signing, so let's say --

Q. Because they are not signing for one thing, right?

A. Yeah, because they are not signing and they are not taking that time to do it. And normally they ask you one or two questions and then just say, "No, I am not for that," and then walk away.

Q. And what percent of the people who have that much of an interaction stop and read it?

A. The folks that don't sign, well, it's hard for a percentage to assign, but in my experience, I would say probably at least half of the people are again trying to verify that what you were describing to them is what's in front of them, so maybe 0 percent.

Q. Okay. Now changing topics completely. For a signature gatherer who is -- I don't know if you really call them professionals. I don't know if they do this all year long. I don't think so -- but a person who is

traveling to different states who during the season is doing it full-time, how many signatures can one of those people gather per hour?

A. Oh, per hour?

Q. Because isn't that a calculation that you kind of assume because you have to figure out what time you have to gather signatures, and you want good people who can gather lots of signatures per hour. So do you have an estimate for those people to kind of -- let's call them professionals?

A. It can vary on the complexity of the measure again, but, you know, I would say someone who is doing really well, the last time I was personally circulating was getting maybe, you know, 10 an hour, 15 an hour.

Q. Okay.

A. But again, the interaction does come into play with that, other factors like where you are stationed that day, is there a lot of foot traffic, is there not.

Q. Whether you are at the good grocery store or not.

A. Yeah, so it can vary.

THE COURT: Okay. Any questions based upon the Court's questions?

MS. RETFORD: No further questions, Your Honor.

THE COURT: Mr. Whitehair, any questions based upon the Court's questions?

MR. WHITEHAIR: Thank you, Your Honor, none.

THE COURT: Thank you very much, Ms. Roberts. You can step down.

MS. WEDDLE: Thank you, Your Honor. The plaintiffs call --

THE COURT: Why don't we take a break since we were going to take one at 10:30, but why don't we go ahead and take one now since we are between witnesses. And why don't we plan on reconvening at 25 of 11:00, all right? We will be in recess. Thank you.

(Recess at 10:22 a.m. until 10:36 a.m.)

THE COURT: Let me give you your time totals. Plaintiffs have used up 27 minutes. Defendants have used up 37 minutes.

Ms. Weddle, the plaintiffs may call their next witness.

MS. WEDDLE: Thank you, Your Honor. We call Ms. Dawn Nieland.

(**Dawn Nieland** was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE DEFENDANT: Dawn Nieland, D-A-W-N, N-I-E-L-A-N-D.

DIRECT EXAMINATION

BY MS. RETFORD:

Q. Good morning, Ms. Nieland. Can you tell me a little bit about your background and education?

A. Yes. I started in politics in 2016 while I was going to school to be an elementary educator. I really fell in

love with it. I have been in politics ever since. I have worked on countless petitions. I have done canvassing projects. I am even a certified notary public to help with the affidavit completion process on every petition packet.

I now am a senior project manager with Blitz Canvassing. I help to organize petitions in canvassing projects in the state of Colorado and across the country. And I organize, we will help validate and turn petitions in to the Secretary of State.

Q. What services does Blitz Canvassing offer?

A. So we plan the signature collection process from the beginning to the end. So we will train our teams. We will deploy them to the field. We will hold weekly turn-ins or biweekly turn-ins where we will do the affidavits in the petition packets. We will organize them, validate them, package them, securely store them in our offices, and then turn them in to the Secretary of State.

Q. What are some petitions you've personally worked on over the last few years?

A. I have worked on 257, which is local voter approval of gaming limits for Black Hawk, Central City and Cripple Creek. I have worked on No. 306, which is a state income tax reduction. I have done Proposition 113, which was the national popular vote petition; No. 76, citizen qualification of electors. I have done ones to fund public education. I have done LEAP, which is for expanded learning activities, many.

Q. Thank you. And how were you trained as a petition circulator?

A. So I was originally trained by still using the Secretary of State's packet that is required, and I continue to do that training every year as part of the process. Anytime that we are going to circulate petitions, we have to go through that training. It's a packet that is available in the Secretary of State's website. And if goes through all of the rules and regulations for circulating petitions and all of the laws that you have to follow. And then for each independent petition we will also do a session where we go through the talking points so that we understand the petition. We will read the ballot language, the ballot title.

Q. Do you have any responsibility for doing this training these days?

A. I do. I am now a senior project manager, so I help to coordinate the trainings. We will hold them in our office, have 10 to 15 circulators there. We go through that training packet with them and explain the process in Colorado.

Q. Will your circulators read the petition really carefully before they start circulating?

A. Yup. It is a requirement. And we have them go through the petition. They read the ballot title, the ballot question, the ballot language so that they understand it. We also receive talking points and we go through the talking points with them. They frequently ask questions for anything that they may encounter in the field.

Q. And how would you initiate a conversation with a member of the public about a petition?

A. So typically I like to start off very warm and welcoming telling them, "Hi. How are you today? Are

you a Colorado voter?" If I am able to connect with them and have eye contact, then I will just say like something catchy like, "There is my Colorado voter." And it really grabs their attention and gets them to come and talk to me.

Q. And do you use the ballot petition language and document in your communications with voters?

A. Yup. So we typically -- I like to typically set up an event. I use a table or at the grocery store. A lot of times we'll do it at the DMV. So I will have the petitions laid out. I will -- like let's just say it's to lower state income tax. I will say, "Hey, there is my Colorado voter. Are you interested in lowering your state income tax? We are trying to petition to get it on the ballot." That usually catches their attention and gets them to come over. I allow them to read the ballot language. They go through the title. They ask additional questions if they have them.

Q. In your experience, do citizens typically read the ballot title?

A. They do. I would say probably 55 percent will read the ballot title. Higher than that, probably close to 75 percent read the question. And then of the 55 percent that will read the title, they will go on to read the ballot language. I would say probably about 40 percent of those.

Q. And those are people who are engaging with you, not the people who avoid eye contact.

A. Correct.

Q. And do the citizens ask questions about what they read?

A. They do.

Q. And could you give an example of where you've had to work with a ballot title that you found makes -- that you found difficult or confusing for citizens.

A. Yeah. So in 20 -- I believe it was 2019 we worked on a petition for the national popular vote. The intent of the petition was to essentially save our electoral college votes and allow them to be used as they were intended. So in the actual petition the question was to place the national popular vote onto the ballot.

So when we are engaging with the public and we are speaking about how we want to save our electoral college votes and use them as they were intended, many people were confused on why we were trying to get that actual question onto the ballot. We had to further explain that we needed to get it on the ballot in order to have a novo essentially saving the way that our electoral college votes are allocated. So that caused a lot of confusion.

I had numerous people that told me that that was not the intent of what we were doing, that they did not believe me. And I had to actually tell them, like please read the ballot language. Please look up some and do some research on it so that you can understand our true intent and what the proponents were trying to do with the initiative.

Q. And how long in your experience does a typical circulation of a petition take between sort of eye contact and signature?

A. It's a couple minutes. So it kind of depends on -- the public generally is very busy. We all lead very busy lives. You have a split second to catch their attention

before they are able to come over and speak with you. Many people ignore you. But when someone is actually engaged with you depending on how complicated the ballot question is, it's anywhere between two and five minutes. If it is more complicated and it has to do with revenue, it can go into the six- or seven-minute mark.

Q. In your experience in addressing those citizens, do they understand where the ballot title comes from and who writes it?

A. They do not.

Q. What are some comments you have heard?

A. Why does this have to be so complicated? Who writes this? Why would you phrase it that way? Why is everything with government so complicated? I don't understand why it can't just be simple for everyone to understand.

Q. And so do citizens prefer simple, clear, accurate titles?

A. They do.

Q. And do simple, clear, accurate titles help you communicate your message to citizens?

A. They do.

Q. And do citizens believe you when you have to explain the title of the measure doesn't fully express the intent of the measure?

A. They do not.

Q. Are you familiar with the new language that has been mandated for measures involving revenue?

A. I am.

Q. How do you plan to train your circulators to approach this language and to explain it to citizens and to answer questions about it.

A. We will have to explain and encourage for them to let the voters read the full ballot language. We will have to have them have full knowledge of, for instance, with 21 and 22 what TABOR is and the complications with our revenues in Colorado. Even with doing that, I do not believe that it will work.

Q. My next question. Do you think you will be able to explain how these measures work with the proposed language?

A. Not effectively.

MS. RETFORD: Thank you. No further questions.

THE COURT: All right. Thank you. Cross-examination?

MR. WHITEHAIR: Yes. Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WHITEHAIR:

Q. Good morning, Ms. Nieland.

A. Hi.

Q. Am I pronouncing that correctly?

A. Yes.

Q. You and I have not met before today. No deposition or meetings, right?

A. We have not.

Q. Are you presently retained by Advance Colorado to appear here today?

A. I am not. I work for Blitz Canvassing.

Q. For?

A. I work for Blitz Canvassing.

Q. Has Blitz Canvassing been retained by Advance Colorado to appear today?

A. We have been a client with them previously, yes.

Q. And were you here earlier in the testimony of Ms. Roberts regarding the relationship between Blitz Canvassing and at least her?

A. Yes.

Q. Is there a formal relationship between Blitz Canvassing and Advance Colorado itself? I am sorry, GP3 or EIS or 76 project?

MS. RETFORD: Objection, foundation.

THE COURT: Overruled. She can answer if she knows.

A. I do not know. I know that the principals of 76 Group are minority and majority owners of Blitz Canvassing.

BY MR. WHITEHAIR:

Q. Just to be clear, I know we are focusing on circulation and training around circulation. Do you help create initiatives? Is that part of any work you do as a circulator or circulator supervisor?

A. I do not.

Q. Now, with regard to the way that Blitz Canvassing engages circulators, do you use -- as I understand it, you use exclusively independent contractors?

A. We do.

Q. And are you an independent contractor?

A. I am not.

Q. And how are these independent contractors compensated?

MS. RETFORD: Objection, relevance.

THE COURT: Overruled.

A. In Colorado pay per signature is allowed.

BY MR. WHITEHAIR:

Q. Say that again?

A. In Colorado pay per signature is allowed.

Q. And do you use pay per signature?

A. We do.

Q. Are there other ways to compensate circulators?

A. There is not. Well, there is in other states. In other states they can be paid by the hour, but we do not do that here in Colorado.

Q. But we could, right?

A. We could.

Q. With regard to state rules that apply to circulators, you heard earlier testimony that there are rules that prohibit fraudulent communications, right?

A. Correct.

Q. And they are not supposed to tell any lies.

A. Correct.

Q. Beyond that, as I understand it, circulators can be nonvoters; is that right?

A. That is correct.

Q. They can be noncitizens; is that correct?

A. That is not correct. I do believe they have to be a citizen.

Q. Do they have to be --

A. And 18.

Q. They don't have to be a resident of Colorado?

A. Correct.

Q. So you are familiar with the circulator packet that is approved in this case for both 21 and 22?

A. That packet I am not familiar with specifically.

Q. I am going to have you just look at it to confirm the packet you are used to. We are not going to go into a little of details of it.

A. Absolutely.

Q. If you will turn to Exhibit 2. And then I will work on finishing my question if you will work on holding off your answer so the court reporter can get all of us in. That's on me as much as you.

I am looking at Exhibit 2 which has already been discussed and introduced into evidence. Do you see the first page, Instructions for Initiative Petitions?

A. Yes.

Q. Are you familiar with that in Colorado as a Secretary of State form?

A. Yup.

Q. If I turn, then, to the second page, do you see the Warning box at the top?

A. I do.

Q. And the reference to the Title Board providing the following title?

A. Yes.

Q. And then there is a petition that puts the names of the people who have brought this to the Title Board, right?

A. Yes.

Q. And then some fiscal summary on that page?

A. Yes.

Q. In addition, on the next page there is the actual unpacking in Exhibit 2 of the literal changes that will be made in the statute, right?

A. Yes.

Q. And that goes on for two pages single-spaced?

A. Correct.

Q. And then you get to the signature page.

A. Yes.

Q. And on the signature page none of those materials about the fiscal summary or the statute itself are in front of the signer?

A. Correct.

Q. Now, there is nowhere in here that your clients – that your client has an insert; is that right?

A. That's correct.

Q. So you talked before -- I want to get the language right --I think you said they can read the question or they can read the title or they can discuss with you.

A. Yes, or they can read the full language.

Q. Or all of this that we just went through.

A. Yes.

Q. Do you have occasion to see people go all the way through?

A. Yes.

Q. Is that frustrating because then you have fewer signatures per hour?

A. It is not. The reason I say it is not is because I always want to make sure that I fully represent the petition correctly, so I have no issue letting anybody read it. I also when working with a table will usually have two petitions. And so I will let whoever wants to read the full ballot language go through that entire petition standing there and reading it as long as they would like, and they can ask me questions. And then if somebody else would like to sign, they can sign the other board.

Q. And just in a typical case, is the answer to your question, "I just need you to read the title, sir"?

A. No. So I will present it to them. I will say -- like normally the question is at the top, so I tell them, "If you would like to read more, the question is right here at the top. If you would like to read the ballot language, the entire ballot language is at the front of the packet." If a fiscal summary statement is included,

I will tell them that is where it is at as well. I will tell them to please flip through the pages and read whatever portions you would like.

Q. And this question, is that like a title of the title?

A. The question at the top of the page here?

Q. Yeah.

A. So this is from my understanding and from my experience, that this question is the question that will actually be placed on the ballot.

Q. So you talk about the shall there be.

A. Yes.

Q. Got it. Thank you.

A. I also like to teach voters, too, that the initiative number and the year that will be placed on that ballot is always at the bottom of the page too. So if they want to do some additional research, they can look on the Secretary of State's website.

Q. Great. Thank you. Give me a second. Do you get involved in helping your clients create the FAQs or the script?

A. I do not.

Q. So somebody hands you the FAQs or the script?

A. Yup. Typically it will be the managing owners of Blitz Canvassing or members of 76 that are working with the client that will provide the talking points and FAQs to me. We typically have a meeting. We go through them. I ask additional questions to make sure I have full clarification. And then I will take that on to the trainings that I hold.

Q. I take it that there is something more than the title that they provide in this packet.

A. The title of the ballot language talking points.

Q. Talking points. Tell us about talking points.

A. So they typically will just break down the ballot language. So it will say, you know, let's say do something like property tax. We'll explain that this is to lower property tax, what percentage is to lower it, what the revenue implications could possibly be, if any TABOR information is involved, any of that. Q. So do you get some guidance in this packet about how TABOR works with respect to any particular -- if it's a TABOR-related event, do you get some materials that describe impact of TABOR, how TABOR works?

A. There is some language in there about it. I think it's especially important, too, because some circulators come from outside of Colorado, and not many of them understand how TABOR works or how important it can be. So we want to make sure that they are fully aware of that information.

Q. Do you ever provide feedback to the folks that -- in this case is it GP3 or more like 76 project?

A. 76.

Q. So 76 project people give you these materials in addition to the Secretary of State's standard form, right?

A. Yup.

Q. And in that packet do you ever give them feedback as to what -- how it's working in the field?

A. So typically after our first week of circulating when we have our circulators come in to turn in, we always like to ask them how it's going or what they are hearing, what questions they may have, you know, what things that they need help answering, and we will then discuss that with the partners at 76.

Q. Have you had occasion to see that that causes them to either provide additional materials or modify the materials that they had sent you?

A. Not typically. Normally everything, we have a lot of information. I can think of one example. So when we worked on the LEAP petition, it was to expand learning opportunities. One of the questions that came up sometimes was about the public funding and where it would come from. And so I had actually talked to another gentleman that worked at Blitz Canvassing, and we got some additional information on where that public funding comes from.

Q. These materials that you get from 76 project, they are designed to support the client of 76 project to get as many signatures as possible, correct?

A. They are supportive, but it's also factual, so we want to make sure that we are representing the petition accurately.

Q. Sure. No one is -- strike that. But the goal of the materials is to ensure maximum number of signatures for the proposition, correct?

A. Yes, while representing the truth.

Q. Do you know what I am referring to when I say the hook, the hook of the talking points?

A. Like an intention grabber I guess you could say?

Q. An intention grabber works as well. Do you typically have a hook in these talking points?

A. Normally there is not anything specific. I mean, when you are talking to the public and you're engaging with them, voters of Colorado, they want to be engaged. They want to know what's going on. They pay attention. So something as simple as, you know, help us fund schooling or help us lower taxes, all of that works really well.

Q. So that's how you get them to slow down, right?

A. Yeah.

Q. And at least them listen more to what you have to share. A. Yeah.

Q. With regard to No. 77, and I apologize for not knowing exactly the proposition or referendum or what exactly it was, but I know 77 is the local vote approval. You indicated in your earlier testimony you were very active in that campaign.

A. I was.

Q. You were actually an on-the-ground circulator?

A. I was.

Q. And help us reset the stage. And if you need to refresh your recollection, I can try and find a copy, but what was 77 about?

A. So I believe that was the petition to allow local voting control for Cripple Creek, Black Hawk and Central City to increase their gaming limits.

Q. Any other components of that initiative?

A. It did give more funding to community colleges, which is what the tax revenue from gambling already does.

Q. And what was your hook when you were at the grocery store for that?

A. Local control, to give local control to the three mountain towns so that they get to choose what they want.

Q. Did you explain to them that taxes may increase in Colorado because -- let me say it differently. That there may be an increase in collected tax revenues in the local towns?

A. Most people understand that that's what happens with gambling.

Q. How do you know that?

A. From my conversations I have had with voters.

Q. So when you are saying local control, they know that means tax increase for the local area or tax revenue -- excuse me, tax revenue increase to the local area?

A. When I say local control for Cripple Creek, Black Hawk and Central City to increase their gaming limits, most people understand that that is what follows.

Q. And the out-of-state circulators, they understand how this works?

A. I can't speak to exactly what they would know and what their knowledge is, but I would assume so.

Q. And you made some comment about national -- what did you call it?

A. National popular vote?

Q. Yeah. Unpack that just real briefly. Remind us what that was about.

A. So that was a petition to put the national popular vote interstate compact question onto the ballot so that the citizens of Colorado or the voters of Colorado could decide if we wanted to keep our electoral college votes and allocate them as is intended or if they could go towards the national popular vote during a presidential election.

Q. And when you say as intended, where was that as intended? Who intended that?

A. So the way that the electoral college votes work in each state is a little different. Some states are winner take all. But in Colorado, whatever the popular vote is in Colorado, then the presidential candidate gets those electoral college votes for nomination. The national popular vote interstate compact would take the popular vote from the entire nation and give our electoral college votes to whichever candidate has the most votes throughout the country.

Q. So what was your client's intention or purpose for putting this on the ballot?

A. To -- for the voters to vote no so that our electoral college votes would go towards the popular vote of Colorado, not the nation.

Q. And did you sometimes say used as intended? That was part of the conversation in the FAQs?

A. And I would say to help save our electoral college votes so that they can go towards the candidate that gets the most popular votes in Colorado, not the

nation, use as intended. I would have used a lot of that language.

Q. And was used as intended in the title?

A. It was not I don't believe. I am not a hundred percent certain.

Q. And focusing on the case that brings us all together today, have you, in fact, received directions from 76 project and materials to begin collecting signatures for the initiative?

A. No.

Q. And so we don't have any feedback from the citizens as to how they would respond or react.

A. Correct.

MR. WHITEHAIR: That's all the questions I have, Your Honor.

THE COURT: Thank you. Redirect?

MS. RETFORD: We have no further questions.

THE COURT: All right. Then let me ask you just a couple of questions, Ms. Nieland.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. There was a reference to the term a script when it came regarding circulator training.

A. Um-hum.

Q. Is that a yes? I am just saying you said um-hum, but –

A. No, I am following what you are saying. So we do provide in the talking materials --

Q. Yeah, but the talking points aren't a script. I mean, you don't require the circulators to use a script, correct?

A. Not a specific script.

Q. Each circulator uses his or her own judgment as to what the best way to interact with the prospective signator, correct?

A. Correct.

Q. And the talking points are just background information to help inform the circulator so that he or she can be more effective.

A. Correct.

THE COURT: Any questions on behalf of the plaintiffs based upon the Court's questions?

MS. RETFORD: No further questions, Your Honor.

THE COURT: Mr. Whitehair, any further questions?

MR. WHITEHAIR: Nothing, Your Honor. Thank you.

THE COURT: Then, Ms. Nieland, you may be excused. Thank you very much.

THE WITNESS: Thank you.

MS. WEDDLE: our Honor, the plaintiffs have no further witnesses at this time.

THE COURT: Thank you.

Witnesses on behalf of the defendants?

MR. WHITEHAIR: Yes, Your Honor. We would call Henry Sobanet.

THE COURT: Mr. Sobanet, if you will please come forward and stand next to the witness stand, Ms. Grimm will administer an oath to you.

(**Henry Sobanet** was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: Good morning. My name is Henry Sobanet, H-E-N-R-Y, S-O-B-A-N-E-T.

DIRECT EXAMINATION

BY MR. WHITEHAIR:

Q. Good morning, Mr. Sobanet.

A. Good morning.

Q. Thank you for joining us. Let's get to it. What is your present employment position?

A. I am employed by the Colorado State University system office. I am the chief financial officer and senior vice-chancellor for government affairs and administration.

Q. Does that also include the treasury function at CSU?

A. I am the lead of our treasury team, but it takes a village to run the treasury, so I am the nominal leader of that.

Q. How long have you held that position, sir?

A. Just over five years.

Q. I would like to take you back to your earlier years in state government. First, where did you get your education?

A. So I have a bachelor's degree in economics from the University of Colorado at Boulder, a master's degree in the same subject from University of Colorado, Denver campus.

Q. Was there a time when you were working for the Colorado Legislative Council?

A. I worked for the Colorado Legislative Council for approximately five years starting in 1994.

Q. What was your -- first tell us the role of the Legislative Council.

A. The Legislative Council is the nonpartisan research office for the Colorado General Assembly. An analogous office for the Federal Government would be called the Congressional Budget Office.

Q. What was your particular assignment at the Legislative Council when you began there in 1994?

A. I was hired as an economist. The first assignment was to start forecasting revenues that hadn't been systematically forecasted under the new TABOR law at the time. They are called the cash funds which is money collected outside of the general fund, so I was part of a group that systematized and started that forecasting process.

Q. Are you familiar with the concept of fiscal forecasting as it relates to an initiative?

A. Generally, yes.

Q. Were you involved in that back in the day? You may not have been.

A. During my tenure there, I did assist at times on fiscal notes and also on some Blue Book language.

Q. You then -- what was your next stake on that post?

A. Long story short, I was the deputy budget director at the Office of State Planning and Budgeting during the Owens administration.

Q. Sometimes called OSPB?

A. Correct.

Q. I believe you then had a private stint outside of state government?

A. I became director during that time at OSPB under Governor Owens for a little over two years, and then yes, I was a private consultant from 2007 to 2011.

Q. Did you get involved in ballot issues in that work?

A. During that tenure I did consult on two or three ballot initiatives. I believe two were formally on the ballot. One of them didn't make it.

Q. I am going to ask you when you returned to that post, but tell us what the director of the OSPB did when you were doing it and whether you have any reason to think it's a different job now.

A. The job was very similar now. A lot of the duties are described in the statute that establish the office. The director is an appointee of the governor. The director is in charge of hiring a staff. The nominal duties are prepare the annual budget request, prepare four quarterly forecasts. Over the years there has been a role related to ballot issues. It's morphed over the

years. I believe it's less than it is now. I think more of the infrastructure is through the Legislative Council and the Secretary of State.

The director and the governor's office engaged the legislature on policy and legislative matters throughout the session. So there is a team of budget analysts, economists, policy analysts that execute all those roles and responsibilities.

Q. For what purpose? You work for the governor? Why does he have you and what does he get out of it?

A. All kinds of value. The governor gets a team of fiscal policy analysts to advise him either on proactive members or reacting to issues in the world. The governor has a professional staff to prepare the annual budget request, which is a requirement in law, so that process is several months long and pretty much never ends.

The statute requires economic forecasting, so that's four times a year but requires full-time employment. So I think at large the governor has a professional staff to advise on fiscal matters, economic conditions and policy advice either outside the legislative session or during the legislative session.

Q. After you concluded your private practice, what was -- you went back into state government. What was that role and how long?

A. I returned to state government in 2011 as the director of OSPB for Governor Elect and then Governor Hickenlooper.

Q. For both terms?

A. For almost the full two terms, just shy, six months shy.

Q. Did you have a hand in forecasting?

A. As the director, I supervised our economists and I evaluated their draft forecasts. So I didn't produce them directly but I supervised them, you know, quality control, you know, why do we agree, why do we not agree, things like that.

Q. Did you have a role whenever there was a TABOR-related inquiry?

A. Depending on the inquiry. If it was just numeric, yes. If it involved the legalities of TABOR, sometimes that would take a multi-disciplinary team. Internally we have legal counsel for the Governor's Office. So depending on the intricacy of the question, it might involve other people, but yes, I would answer TABOR questions.

Q. And you became pretty familiar with TABOR.

A. I became very familiar with TABOR through the on-the-job training that started at the Legislative Council.

MR. WHITEHAIR: Your Honor, at this time we would like to proffer Mr. Henry Sobanet as an expert in state budgeting.

THE COURT: Actually, I don't read Rule 702 to require the tendering of experts because I think that after the amendments to 702 it's about opinions, not people. So I don't ever touch people with a magic wand and say presto, you are an expert. But rather, you can ask any questions that you want to, Mr. Whitehair, to establish his qualifications, but otherwise you can just

pose the questions to him. And if there is an objection, of course, it can be made.

MR. WHITEHAIR: Thank you, Your Honor. I appreciate the guidance.

BY MR. WHITEHAIR:

Q. Mr. Sobanet, are you familiar with TABOR limits or what are known as TABOR limits?

A. I am familiar with TABOR limits.

Q. Would you like to take a second and get yourself situated with a glass of water?

A. Thank you.

Q. Many people in the room are familiar and perhaps were familiar with TABOR, but for the record I would like you to unpack briefly what are TABOR limits and where do they come from?

A. The TABOR limit for the state, which I think is the bulk of today's discussion, but I think there is a local issue as well, is effectively the revenue collected by the state from both general fund and cash fund sources. The general fund is the income tax and sales tax mostly. Cash funds are fees for discrete programs. And the definition within TABOR is basically the amount of revenue that you collect.

Original TABOR had one definition and then the voters adopted Referendum C which created a cap, the new Referendum C cap that's calculated population plus inflation off of a base here. So the base here for the TABOR limit for the state is 2007, 2008. It gets adjusted annually by population plus inflation. And that number is the revenue limit under TABOR for the state of Colorado.

At the local level two examples would be county TABOR limits. Their limits are different if they still have one. Many counties have fully removed themselves from the definition of the limit. There is a casual term that gets thrown out called "de-Brucing" because of the author of TABOR. I know that's not particularly favored in some quarters, but that's a shorthand word for that when you get out of the TABOR restriction on revenue.

That limit is inflation is measured by CPI and assessed value growth. School districts have a TABOR limit that's inflation as measured by CPI and enrollment of students. Q. Do you have an understanding of the degree to which school districts, for instance, have stepped out of the coverage?

A. Mr. Whitehair, I haven't done research recently on it, but my recollection is all but four of our school districts have "de-Bruced."

Q. And how about the counties, is it widely "de-Bruced" or is it speckled?

A. I think it's more widely than speckled, but it's not all of them.

Q. Did the TABOR amendment also provide for explicit insertions to be placed in certain ballot initiatives?

A. Yes.

Q. And tell me, there is a phrase I've heard called above the line. What is above the line as it relates to TABOR?

A. So I might offer a little background so that makes sense.

Q. Would you, please? Thank you.

A. An analogy we use for TABOR is similar to the little pitcher here, a bucket with a spigot on the side of the bucket. The spigot could represent where the limit is, and so water that comes in above the spigot on the bucket spills out through the spigot. So you would call where the spigot is the line. And money above the line has to be rebated or has to be retained. Money below the line is allowed to be used by either the legislature or county commissioner, whatever governing body is in charge of it.

Q. You mentioned asked to be retained. What's the process by which someone asks to retain these higher above-the-line limits?

A. So TABOR has a word called districts and different levels of governments are districts. So the state is a district. In the state example the legislature could refer a measure to the voters to ask to keep the money above the line or the limit. Citizen initiatives are also an option there. But the main rule is it needs to be voter approved.

Q. Are there variations in how the refunds are returned to the public?

A. Over the years of refunds at the state level, they have varied from temporary income tax reductions to flat dollar amounts to sales tax rebates to senior home set exemption, sufficiency. They've bounced around in different ways.

Q. Are you familiar with the new law that's at issue here, 1321, and its insertion of language into tax -- what are called tax changes decrease?

A. I have the basics of the new law.

Q. Are you aware that the references there are to state expenditures?

A. Could you repeat your question? I'm sorry.

Q. Are you aware that the reference involved includes state expenditures?

A. Yes.

Q. What is your understanding based on your experience and how it's used in the state of Colorado of where TABOR above-the-line limits fit in state expenditures?

A. So the word expenditures in the tax world is sometimes a term of art. And expenditures in an everyday situation, you know, might mean the regular budget, but in tax policy land tax expenditures, which is money you don't collect or money that gets allocated back and not retained in the government, are also called expenditures.

Q. There is a reference to something called backfilling. When does backfilling happen? Do you know what I am talking about?

A. I think so, sir. We can see if my answer is sufficient.
Q. Tell me what you think I mean.

A. So if there is a situation where revenue falls short of a prior expectation, I think would be the way to phrase it, replacement of that revenue from an exogenous place could be called backfill. So a recent example would be property tax reductions that are then replaced with money from the state. That happened in the fiscal -- or the calendar 2022 legislative session, for example.

Q. What are other components that go into the issue of whether there will be a TABOR refund, for instance, available to return to taxpayers?

A. So the variables involved are how -- what is the limit? The limit is a number. Then what level of economic activity that generates money in the general fund, what level of fee paying in the cash funds. And you add up all of those variables and assess it against the limit, and you can be over or you can be under.

Q. It's based on -- how do we fix a number?

A. So the limit grows by population plus inflation. Rebate situations are more correlated or connected to economic growth periods. Periods when you don't have money above the line over the limit are correlated with economic contractions or recessions or slow-downs.

Q. Can we state with any certainty what will be true about these numbers one and a half years from now?

A. No.

Q. If there is a limit on revenue or rates are cut, what's the impact on this analysis that you are describing?

A. If there is a limit on revenue. Sorry, say that again.

Q. Limit on revenue or rates are cut, what's the impact?

A. So if there is a limit on revenue, if there is a new limit on revenue, there would be more money above the line, for example. If rates are cut, all things equal, there is money --less money above the line.

Q. Will there be impacts regardless of -- well, let me ask it a different way. Focusing on the revenue base,

what is the impact of, for instance, a proposed limit on the percent increase of a particular item that in historical fashion has often risen and maybe even risen above that percent?

A. So --

Q. What's going to happen here.

A. So if you have a before limit and then there is a new limit that's more restrictive, all things equal, there would be more money above the lower line.

Q. And the same is true if you cut the rate for any portion of time?

A. If you reduce a tax rate?

Q. Yes.

A. All things equal, if the limit is fixed and you cut the rate, all things equal, there is less money than would have been collected or less money collected.

MR. WHITEHAIR: That's all I have, Your Honor.

THE COURT: Thank you. Cross-examination, Mr. Eid?

CROSS-EXAMINATION

BY MR. EID:

Q. We know each other, right, Dr. Sobanet?

A. I'm not a doctor, but yes, Mr. Eid. Nice to see you again, sir.

Q. It was a nickname. And how do we even know each other, Mr. Sobanet?

A. You and I -- thank you. You and I were colleagues in the Owens administration.

Q. So you are familiar with -- well, let me just ask you. Are you representing CSU? Is that why you are here?

A. No, sir. I am here as an expert asked for volunteer time by the State of Colorado.

Q. But your employer is part of higher education, right?

A. Correct.

Q. So let me just ask you about this Section 106. And by that, Mr. Sobanet, I am talking about the House Bill 21-1321. Are you familiar with this language?

A. As I said, I am basically familiar. I would love to look at it.

Q. Well, you can. It's Exhibit 1 in the book in front of you, so you can take a look. I won't read it to you. I can if you want, but I want to talk to you about the part that says "thereby reducing state revenue which will reduce funding." That's the phrase, especially this part about will reduce funding. Just take a -- you are familiar with it? You have seen this before?

A. Yes. I know what you are referring to now.

Q. And just for this book, we are going to talk about Initiatives 21 and 22. And you've got language and Tabs 2 and 3 have those measures. And then you've got Legislative Council's analysis at Tabs 4 and 5. So you can just take a look when we get to that part.

But your understanding going back to Section 106, it's required to be added to all citizen initiative ballot measures making tax changes; is that right?

A. That's my understanding of the law.

Q. And have you had a chance, sir -- you are familiar with these, Initiatives 21 and 22, that are the subject of this case, the ones that are at Tabs 2 and 3? Because I would like to ask you about those.

A. I have learned about them in the last couple of days. This has been a pretty short time, turnaround time for this process, so I have read them.

Q. And maybe take a look at exhibit, please, No. 2. That's Initiative 22, I believe. Initiative 22 proposes a one-year reduction in the state sales and use tax rate by 0.34 percent. Is that what it says? Just take your time, please.

A. So Mr. Eid, I don't see the 0.34 percent. I see --

Q. And that's fair enough. You can take a look at Exhibit 4.

A. Four?

Q. Which is the Legislative Council analysis. Sorry that they are kind of split up.

A. Could you just clarify what you want me to read, please?

Q. Yeah. I just want to make sure that you understand what Initiative 22 does because I don't want to read it to you and then you don't know what I'm talking about because that's what this case is about. We are actually talking about Initiative 21 and 22.

A. So 21 -- excuse me, 22 is the one that reduces the income tax by .01.

Q. Sales and use tax.

A. Sales and use tax. And then there is a sales tax holiday on June 30th of 2025?

Q. Yeah. And the other one is 22, right, which we'll get to, and that's a cap on -- a 3 percent cap in property tax revenues.

A. I just want to be clear. I am in Tab 4. It says Initiative 22.

Q. And if you leaf through it, you get towards the end and it has the Legislative Council and the budget analysis.

A. Okay. I see the .34 there now.

Q. So going back to -- and I appreciate your patience. So going back to Initiative 22, it's a one-year reduction in state sales and use tax, correct?

A. Yes.

Q. What it purports to be?

A. Yes, with a holiday on one particular day at the end of that fiscal year, I think, as I read it.

Q. Yes. And in the actual title language for 22, it states that the initiative quote 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 $17.7 million in tax revenue. Is that what it says?

A. It says that.

Q. The approved title for Initiative 22 states that the proposal "temporarily reduces the state sales and use tax rate from 2.90 percent to 2.89 percent from July 1st, 2024 through June 30th, 2025;" is that correct?

A. So can you tell me what page that's on?

Q. You can look at the fiscal summary on Tab 4 in the state revenue, second paragraph. That will do it. And then also the Title Board packet is three -- I am sorry, four -- I am sorry, two. I apologize. It's hard because we don't have page numbers on these documents is part of the problem.

A. Mr. Eid, I think I am on the right page. The issue is where the .34 is different than the page where the ballot title setting board is.

Q. Yeah. If you look at Tab 2 at the very top, it says Page 6. It's not really Page 6, but I just want to make sure you understand.

A. I am in Tab 4. There is a 6 at the top of it.

Q. That's right. I think we are on the same document.

A. All right.

Q. So isn't it true that during this same time frame refunds of governmental revenues based on what you just were talking about, the line you described it, refunds of government revenues to Colorado voters mandated by TABOR are currently projected to be about $2 billion during that same time frame?

A. My understanding is the recent forecast is currently projecting rebates for that year, yes.

Q. So TABOR means that state government is legally required, if I understood you before, to refund those projected funds that surplus above the line, as you described it, to Coloradans during the same time frame when this Initiative 22 would temporarily reduce the sales and use tax by an estimated $17.7 million.

A. The options available to the state for a year where you are above the limit are to rebate the money in a manner adopted by the legislature or ask the voters to retain it.

Q. And to your knowledge, have the voters been asked to retain it? Are you aware of anything like that?

A. There is a ballot issue this year that would affect '24, '25 rebates if it passes.

Q. And what is that measure just for the record?

A. Proposition HH.

Q. Proposition HH. And setting aside for a moment Proposition HH, because TABOR requires that nearly -- absent Proposition HH TABOR requires that nearly, based on this forecast, $2 billion is expected to be refunded otherwise to citizens. State K through 12 public education funding will not be reduced at all in terms of what the government can actually spend, is that right, because what you talked about, it's above the line and you've got to give it back.

A. So if it's money that was going to be rebated and there will be less money and you don't go below the line, it wouldn't affect the traditional operating budget.ce c

Q. So what about doesn't Amendment 23 already prevent K through 12 funding from the state from reduced despite this Initiative 22? That is to say -- maybe tell us just to lay a foundation what is Amendment 23? What does it require?

A. Amendment 23 was adopted by the voters in the year 2000. At the present time it requires per-pupil

funding in a very specific formula to grow by enrollment plus inflation.

Q. So doesn't Amendment 23 given what you just said already prevent K through 12 funding from the state from being reduced if this Initiative 22 were to pass?

A. Part of the law around Amendment 23 is there is the availability of an option to the state. It's called the budget stabilization factor now. It used to be called the negative factor. And there is an availability to the state to not grow the formulaic funding by enrollment plus inflation up to a certain cap which I don't remember at the discretion of the legislature.

Q. And also in view of the expected TABOR refunds, what about funding to HCPF, to Health Care, Policy and Financing? It won't be reduced either in terms of what the government actually spends if 22 passes?

A. So if the forecast is correct and the money would have been rebated, it would not have been available for the regular budget.

Q. We don't have anything else other than the forecast, though, do we? I mean, that's what the law requires us to use.

A. I am just trying to be complete in my answer. So in the case where the money is above the line and would remain above the line notwithstanding the measure, you wouldn't expect an impact to the Health Care Policy and Financing budget.

Q. But those are HCPF funds. They are mostly federal funds anyway, aren't they?

A. Most of the -- well, no. They are roughly 50/50, state/federal.

Q. But the state -- I am sorry, the federal component of the health care policy financing funds wouldn't be affected at all by state sales tax changes.

A. No. That formula is based on the other factors.

Q. And given again these forecasted TABOR refunds by the Legislative Council that are in the document that you just reviewed, state funding for higher education will not actually be reduced at all in terms of what state government can spend if Initiative 22 passes; is that right?

A. Similar to the prior two examples, if the money is above the line reduced, then you still have the money above the line, no, there wouldn't be a reduction.

Q. And your testimony is that the forecast is what we rely on in state government to determine -- I understand you're not saying you can predict or guarantee the future, but that's what we rely on. That's the official source of information that we rely on to make budget decisions in Colorado state government.

A. Yes. Budgets are adopted with forecasts. How they play out, though, is subject to the actual manifestation or not. That's all.

Q. And when state government issues TABOR refunds, it's not making any expenditures, is it?

A. So when you look at the overview for the state budget, the liability of the TABOR rebate is accounted for. And when there are summary documents prepared by the Department of Revenue, TABOR rebates are categorized as a category of tax expenditures. So the word expenditure relative to your question either stays in the more common

everyday use of it or in the full tax policy definition of it. And because some of the TABOR liability is generated by money outside of the general fund, it's accounted for as an expenditure.

Q. So in this Section 106, it talks again when you read it about reducing expenditures. Then it says, comma, "which will reduce funding for." Are funding and expenditures synonymous?Is that what you're saying? Why do they use different words do you think?

A. So because the TABOR rebate is technically a tax expenditure, if you reduce taxes, you are reducing what would have been a tax expenditure. So it's not the same as a budget expenditure reduction, but in the definition of tax expenditure, which is the wide use in the tax policy world, reducing expenditures would be the technical impact of a tax reduction.

Q. So "reducing funding for" means budget. That's budget language, correct? That's what you're saying?

A. So reducing funding, you know, can mean the level of money that you get in a year. It could have the implication of available, but it's not written down that way. But when you look at the sentence where it says, "reducing state revenue, which will reduce funding for state expenditures," that captures -- the word expenditures extends to reducing tax expenditures too.

Q. So the other initiative in this case is Initiative 21. It's the property tax cap.

A. Could you tell me the tab number, please?

Q. Yeah. You can see it at -- really the full packet is Exhibit 5, which has the Legislative Council analysis.

I guess my question for you is it doesn't reduce taxes at all, does it?

A. So as I understand this one, this places a new growth limit on the amount collected, so reduction of taxes is not the mechanics of this one.

Q. So the Title Board approved Title 21, describes it as, "a reduction of 2.2 billion in property tax revenue," when, in fact, 21 decreases the growth in property tax revenue; isn't that right?

A. So I think the language means a reduction of what would have been collected. And depending on the district, you would have to go district by district to know if they had an increase or decrease.

Q. A reduction of what would have been collected, but not what the government would have spent, correct? Will reduce funding meaning what the government will spend on those programs.

A. I think what it gets into there is similar to the state, which I don't have a comprehensive knowledge of how local districts rebate their TABOR overages. So similarly, money that wouldn't have been allowed to be retained will go someplace else.

Q. Meaning also TABOR goes back to the voters?

A. Yeah, unless they ask for their own retention measure, I think.

Q. So how does the government spend on programs what it has to give back to the voters? I don't understand that. Help me understand that. You just testified, if I understand you, that the government has to give this back above the line in the water that you are drinking from. But how does government spend it

when by law it has to give it back to the people? How does it even affect the budget?

A. The technical categorization of a rebate is a tax expenditure. It's not a budget expenditure in the sense of program budget.

MR. EID: I appreciate your time. Thanks, Mr. Sobanet. No further questions, Your Honor.

THE COURT: Thank you. Redirect?

MR. WHITEHAIR: A minute, Your Honor. No further questions, Your Honor.

THE COURT: All right. Mr. Sobanet, you are excused. Thank you very much.

THE WITNESS: Thank you.

MR. KOTLARCZYK: Do you want me to call another witness, Your Honor?

THE COURT: Why don't we let Mr. Sobanet resume his seat first. We would hate for there to be a traffic jam. Defendants may call their next witness.

MR. KOTLARCZYK: Thank you, Your Honor. The defendants call Scott Wasserman.

(**Scott Wasserman** was sworn.)

THE WITNESS: I do.

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: Yes, thank you. My name is Scott Wasserman. That's spelled S-C-O-T-T, W-A-S-S-E-R-M-A-N.

DIRECT EXAMINATION

BY MR. KOTLARCZYK:

Q. Good morning, Mr. Wasserman. Could you tell the Court what your current job is?

A. Sure. I am the president of an organization called the Bell Policy Center.

Q. And what does the Bell Policy Center do?

A. Sure. We have been around for 23 years. We work on -- our mission is it economic mobility for every Coloradan. We do research, analysis, as well as advocacy focused on issues around public funding, the caring economy, predatory lending, anything that would impact economic mobility in our state.

Q. How long have you worked at the Bell Policy Center?

A. This is my seventh year.

Q. What did you do before coming to the Bell Policy Center?

A. Prior to that I worked in the Hickenlooper administration. I was chief of staff to the lieutenant governor as well as deputy chief of staff to the governor.

Q. Does the Bell Policy Center play any role with respect to the initiatives process in Colorado?

A. Sure, we do. I think we play a number of roles. First of all, we are always monitoring activity at the Title Board. You know, we understand very clearly the impact that the initiative process has on resources available for public investment. At times we have drafted our own measures and we've participated in

campaigns to initiative ballot measures over the years.

Q. Have you personally been a designated representative of proposals that have come before the Title Board?

A. Yes. I have been a designated representative. Over the last two years especially I have been involved in drafting ballot measures and have been a proponent for a number over the last couple of years.

Q. Have you also appeared before the Title Board as an objector on a motion for rehearing?

A. Yes, while I have been represented by our counsel, Ed Ramey, who has from time to time objected to various titles.

Q. And in that capacity as an objector, in general, without going into specifics of a particular measure, what are you trying to get the Title Board to do when you object?

A. I think more often than not our objections are usually single subject objections. Once you go beyond single subject objections, it get a lot more difficult to make a plausible argument when you are objecting to a title. I am trying to think of an instance in which we went beyond that.

I can recall an instance where, for instance, there was some TABOR hook language. And we contested whether or not -- and I am happy to get into this -- whether or not it was appropriate for there to be this sort of linkage to TABOR in order to run in an off-year election.

Q. We will come back to that a little bit later.

What is your understanding in the times you have been before the Title Board, what is your understanding of the role that the Title Board serves?

A. I think the Title Board is an amazing institution. I think its purpose is to try to standardize, simplify language in the title. You know, I've been impressed with conversations that are often held about, you know, will the average voter understand what this means and are we being consistent with the laws that we have to apply to titles.

Q. When you've appeared before the Title Board either as a proponent of a measure or as an objector, have you understood that the primary role of the Title Board is to set a title that best describes the proponent's intent?

A. Well, I don't -- I think intent is always hard to -- to assign. =I think more often than not what the Title Board is trying to say is we want to make sure that what is in this measure is accurately reflected in front of the voters. While intent may come up from time to time, I don't see their job as trying to reflect the intent of the proponents; rather, trying to interpret and simplify concise and statutory language that explains what is in the measure.

Q. Could you provide a few examples of initiatives that you personally have been involved with?

A. Yes. There are so many. I mean, one that really comes to mind is in 2020. I was involved in a coalition, Fair Tax Colorado. At that time I was not a proponent on the ballot measure but certainly working on a team, and we were proposing a progressive tax increase. In fact, that measure would have actually

cut taxes for 85 percent of Colorado taxpayers and raised them through various steps on the top 15 percent of owners. So that is a very memorable measure for me.

There have been other measures that we have proposed, you know, trying to affect property tax policy. For instance, we ran a measure two years ago proposing a form of luxury tax creating a statewide property tax and then using those revenues to make housing more affordable and help communities deal with various population issues.

Q. Have you proposed any measures before the Title Board or supported any measures before the Title Board that use certain language in the ballot title that's required by TABOR?

A. Yes, most certainly. I mean, I think for me the clearest example is that measure of Fair Tax Colorado, Initiative 271. You know, TABOR has within it what I would like to call the sticker shock provision. That provision says that if you are raising revenue in any way, that the first sentence in all caps should say that this raises, you know, that this measure --shall taxes be increased by, insert number, which tends to be very large, and then the rest of the measure follows.

The challenge with that, and this has been dealt with on other measures, is that not everyone is experiencing a tax increase. And so once we receive that title, you know, the immediate critique from the opposition is look at this $2 billion tax increase.

It's frustrating because in this instance not everyone is going to be paying this tax increase.

People see that and say, well, you lost me at tax increase. And the entire point of the measure is that this would not be a tax increase for 85 percent of Coloradans. And there had been a number of measures that I have either been a proponent on or supported where that has been a challenge.

Q. Let's take a look at this language a bit more concretely. You have a binder of exhibits in front of you.

Could you turn to Exhibit 11, please?

A. I'm there.

Q. Okay. Exhibit 11, which is already in evidence, do you recognize this as a simple ballot from 2020?

A. I do.

Q. Okay. If you could turn to the second page of Exhibit 11. I want to direct your attention to about midway down the page, Proposition EE. Do you see that?

A. I do.

Q. Does that measure contain that mandatory TABOR language you were just describing?

A. Yes, it does.

Q. And could you just read that first clause that's required by TABOR there?

A. "Shall state taxes be increased by $294 million annually by imposing a tax on nicotine liquids used in E-cigarettes and other vaping products that is equal to the total state tax on tobacco products when fully phased in, incrementally increasing the tobacco

products tax by up to 22 percent of the manufacturer's list price."

Q. I will stop you there. We got the gist of what we were after there.

Are you aware of whether any measures that have used this mandatory language from TABOR have gathered enough signatures to make the ballot?

A. Yeah, yeah. I mean, I think in this case -- well, Proposition EE I believe was a referred measure. I could be incorrect about that. One that does come to mind is Initiative 73 from 2018. This was a measure advanced by Great Education Colorado proposing a progressive tax change. And I do believe the first sentence was, Shall taxes be increased by, insert number. It actually qualified, got signatures for the ballot and got 47 percent of the vote that year, the closest that any tax measure of that kind has gotten.

Q. Are you aware of whether any measures -- and thank you for pointing out Proposition EE was not circulated among the petitions. It was referred by the legislature. But are you aware of any measure whether circulated by a petition or referred by the legislature, that used this mandatory language, uses this mandatory language from TABOR, whether the voters have approved any of those measures?

A. Well, they have. There have been a number of tax measures, FF most recently. EE, which you referred to here, did pass. There have been measures that say "shall taxes be increased by" that have passed.

Q. Well, let me ask you this. When you have had to include the TABOR ballot language in measures you've proposed, have you been satisfied with the

decision that you have to include that language in your title?

A. I've been unsatisfied, but I understand that these are the laws within which we operate. TABOR sets the rules and those are the rules within which we operate. And certainly while I've been frustrated by it, it is what it is.

Q. And has the TABOR ballot title language ever prevented you from getting a measure that you supported qualified onto the ballot?

A. No, it has not. I mentioned Initiative 271 in 2020. And unfortunately what stopped us from getting signatures was a global pandemic and an injunction against getting electronic signatures.

Q. Were you involved with the passage of HB 21-1321?

A. Sure. I had worked with legislators batting around concepts, reviewing legislation, and then ultimately supported it in the legislative process.

Q. Did your experience with the mandatory language from TABOR impact your involvement with HB 21-1321?

A. You know, I think for me, if anything, it was an interesting year. You know, I think we had tried to qualify Initiative 271, had experienced the challenges we referred to earlier, and then we immediately switched to defense to work against Proposition 116, which was a tax cutting measure. And it really dawned on me at that time, as well as others, that, you know, there was -- there is something a little asymmetrical here, right?

On the one hand, there are all these requirements for a tax increase, but a tax decrease just has these very simple words, do you want a tax cut. And I think it was at that time inspired by TABOR that we started to say, well, don't voters kind of deserve to understand the implications of what may occur if this passes? And so I think that is when this idea came about that perhaps there ought to be a little bit more information available for voters when they are looking at tax reductions.

Q. Since 1321 has passed, have you proposed any initiatives to the Title Board where the Title Board included the language from 1321?

A. Yes. And right now I am kind of blanking on the specific measures, but I believe it was last year we had actually proposed a number of measures around property taxes, and yeah, were ourselves impacted by the 1321 language.

Q. Did you end up running any of those initiatives? And by running I should say did you try to gather signatures for any of those measures?

A. No, we did not poll petitions for those measures.

Q. Did your decision not to do so have anything to do with the mandatory language in 1321?

A. No, it had nothing to do with that language. It had to do with the political environment surrounding the property tax issue, Proposition HH, and just the decision to not move forward with those measures.

MR. KOTLARCZYK: Nothing further, Your Honor.

THE COURT: Ms. Weddle, it's almost noon. So unless you really had three minutes that you wanted to use, maybe we should go ahead and take our lunch break now.

MS. WEDDLE: I will have more than three minutes, Your Honor, so I will cede to the lunch break.

THE COURT: Okay. One thing that we should think about is that Mr. Granofsky is going to be testifying remotely. It may make sense for efficiency, because we need to kind of stop and let him get hooked up, it may be a good idea to take him out of order and have his testimony start at 1:15, assuming that's acceptable to the plaintiffs. And then after his testimony is wrapped up, we can resume with Mr. Wasserman. Any objection to that, Ms. Weddle?

MS. WEDDLE: No, Your Honor.

THE COURT: Why don't we plan on that, then. We will plan on reconvening at 1:15. Anything from plaintiffs before we break?

MS. WEDDLE: No, Your Honor.

THE COURT: All right. Thank you. Anything from defendants before we break?

MR. KOTLARCZYK: No, Your Honor. Thank you.

THE COURT: So we will be in recess until 1:15. Thank you.

(Recess at 11:58 a.m. until 1:15 a.m.)

THE COURT: We are back on the record on the Advance Colorado case, and I believe that Mr.

Granofsky is on VTC. I can see someone on the screen. So at this time defendants may call him.

MR. WHITEHAIR: Your Honor, at this time we call Mr. Lewis Granofsky.

THE COURT: And Mr. Granofsky, this is Judge Brimmer. I am going to have you take an oath at this time that my courtroom deputy, Ms. Grimm, will administer to you. So if you could please raise your right hand.

(**Lewis Granofsky** was sworn.)

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

MR. WHITEHAIR: Thank you. I am going to establish a couple parameters so that we know we are compliance with the Court's order regarding the remote.

DIRECT EXAMINATION

BY MR. WHITEHAIR:

Q. Mr. Granofsky, are you presently in Portland, Oregon?

A. I am.

Q. Are you able to see us and hear us?

A. I see you and Your Honor and that's it.

Q. That's fine. Are there any third parties present with you in the room?

A. There are not.

Q. Are the exhibits that you have from the case available to you for review?

A. They are available. I do not have them open, though, but I can if I need to.

Q. Let's just be ready for that.

A. Yup. You got it. I am doing that right now.

Q. Is it your opinion you have sufficient bandwidth and privacy for us to proceed this afternoon?

A. Yes.

MR. WHITEHAIR: I guess I will just look forward. Can I ask where is the camera pointing to me?

THE COURT: The camera is coming from an angle up here.

MR. WHITEHAIR: All right. I will stay focused on my script and we will understand the process here.

BY MR. WHITEHAIR:

Q. Mr. Granofsky, would you tell us your present position at -- tell us the company you work for or are a part of and what your present position is.

A. Sure. I am a partner at FieldWorks, LLC. We're a paid field firm that specializes in signature gathering for initiatives.

Q. How long have you been there, sir?

A. I have been at the firm for just about 18 years now.

Q. And just briefly, what kind of roles have you played with FieldWorks?

A. When I first started, I came as a vice-president for a few years and specifically to build a ballot initiative signature gathering model for FieldWorks was my mission. And once that was up and running, about six

years later we -- my business partner and I took over the firm and became partners.

Q. Thank you. What is FieldWorks?

A. We are a paid field firm, and that means we hire a lot of staff to go out and knock on doors, gather signatures, collect voter registration forms, really anything that's like human-to-human contact. Primarily we do that within the campaign elections and, you know, advocacy environment, but we also have done a little bit of corporate work from time to time.

Q. And where are you in the world? Is this a small operation, a big operation in this field?

A. We believe that we're one of the, if not the largest, field firm and signature gathering firm in the country. We last few cycles employed approximately 10,000 staff.

Q. Have you qualified statewide ballots over the years?

A. Yes, many statewide ballots. Again, I think based on the last time we checked, although I am not positive, I don't know what everybody does, but we've qualified more in the last, you know, 10 years than any other firm in the country, approximately 45, 47 statewide ballot initiatives just over the last 10 years.

Q. Have you been involved in any Colorado campaigns?

A. Yes. Actually, my first one ever before I was with FieldWorks was in Colorado which was for the Renewable Portfolio Standard setting. But we have done as a firm about six drives in Colorado over the

last, you know, 15 years or so and have done some recent drives as well, so six total drives as a firm, seven as an individual.

Q. And you're using the term drives, D-R-I-V-E-S?

A. Yeah, petition drive, initiative qualification. But we've also done other work in Colorado, lots of canvassing, voter registration programs and other field work and some municipal signature gathering as well.

Q. Is your -- you mentioned that you helped establish this practice back in the day with FieldWorks. What is your --what's your marketing piece? What's your differentiator in the market?

A. Well, we do -- we are a unique firm in that we pay people per hour instead of per signature, and we do that everywhere. Some states actually require that by law, but we do it everywhere we go. We don't believe in the independent contractor model for a variety of different reasons.

Like I said, I got my start in Colorado working for a nonprofit at the time on Renewable Portfolio Standards. What I saw because I had never experienced the industry before was a lot of problems there in Colorado. I couldn't believe how the work was done, how people were paid, what the standards were, and so I sort of had this idea that this could be done differently. That's not how we do any kind of field work in the nonprofit world, and so I put together a proposal and went to FieldWorks at the time. I knew the owner and proposed a different kind of signature gathering program that, you know, was more managed, controlled, paid people a living wage.

And really the concept there was to start winning the campaign during the signature gathering phase, not thinking about it as a separate, you know, sort of entity. We also saw a lot of out-of-state people that would come in and say whatever they wanted to say and get the signatures sometimes in unethical ways, and that's just not how I thought it should be done.

Q. How do you maintain quality control, Mr. Granofsky?

A. Oh, well, nowadays the technology is a lot different than when we first started, so there is lots of ways we do that. But the biggest change we made in the industry was moving the W-2 employees, hourly employees, to check in and check out every single day, that get trained every single day. And we look at their signatures every single day, and we are managing their performance every single day.

And performance matters a lot more on the drives that we run because we pay people an hourly wage no matter what they do, no matter how many signatures they get, whereas an independent contractor model usually only gets paid per signature so they don't have to manage their people quite as closely. Nowadays that quality control is, you know, the same pieces, but also we have lots of technology to manage where people are, GPS tracking, validity controls on data and things like that.

Q. Do you have any independent or other employees who work to assess in real-time in the field whether you're in compliance or your circulators are in compliance?

A. Yeah. We have lots of tools for that both in compliance with state law and in compliance with our own policies, you know. In terms of a management team, every team goes out with a team leader. We have directors that go out in the field. Our office directors check in on folks. We also often will have secret shoppers go out and approach petitioners. And then we're are managing our staff in real-time minute by minute through GPS tracking. We actually have our staff scan every time they get a signature on a device so we know how folks are doing minute by minute back at the office.

Q. What is your personal experience with regard to either circulating or training circulators?

A. Well, a lot throughout the years. We -- I would say, though, since COVID because of my risk I haven't been in the office and in the field as frequently. But prior to COVID I was in all of our drives, in our offices, managing canvassers, getting in the field with canvassers, checking with them, training them, you know, all around the country.

Q. What do you call the effort to create a training package for your circulators? How do you -- what's the nomenclature you use at FieldWorks in terms of putting together -- is it a campaign? Is it an FAQ? Just help me understand your vernacular for getting information into the hands of where the rubber meets the road, where the circulators meet the electors. A. Sure. We generally, we develop several different documents. Some of them are a little bit more oriented toward staff policies and things like that, employee guidelines, but we also always have what we call a day-one training, and that's the thing that we have

our clients vet and their counsel vet. And that is an in-person training that we do usually about an hour and a half before folks go out.

And then we also have a script again approved by our clients that we give folks with an FAQ attached. And we train people to memorize the script and stick with the script and to make sure that they are familiar with how to fill out the petition form correctly through the training. And we have lots of those materials that get vetted by our clients.

We then go in the field with staff. Our team leaders will train someone for at least an hour, if not longer, before they are sort of off on their own to circulate.

Q. Talk to me a little bit more about how you prepare a day-one training package and the script and FAQs you mentioned. Who are you working with? How long is it taking? Just give us an idea. I am a new client. Tell me what I am going to get to do and how we are going to work this together.

A. Sure. We would -- we are often going back to states that we sort of already know. So the legal guidelines on how to circulate, which is the day-one training, is, you know, usually mostly already developed, but we make some updates based on any, you know, laws that have been updated or any tweaks from last time. We then send that document to our clients and recommend they get it reviewed by their counsel.

The script is driven by, you know, campaign messaging really. Usually almost every time we get to this point in the process the campaign has already done polling and research on their issue with the voters. We then ask them to provide either the poll,

the top line poll, or the message of the document that they have already created. And sometimes they will even have just a website already created with their talking points.

We then go there. We develop our script which is --we have the same, you know, format for scripts almost everywhere in the country, which is a grab line and then a very short first sentence and then some sort of how -- we sort of tweak it for the state. How do you physically fill out the petition? We walk them through that in the script. And then there is an FAQ that we work with the clients to develop.

Q. Now, you mentioned something about winning the campaign during the signature gathering. How is that being manifested, Mr. Granofsky?

A. That is -- our concept there is, you know, a lot of times people need to be educated about an issue and getting the message out. I mean, you win campaigns in our world through messaging, and a lot of times, you know -- and to get out the vote effort. Those are the two categories. So often in a campaign you are going to have folks who are undecided and folks who are already with you. So we are not -- the messaging piece is almost always about the undecided votes. The already with you votes is the really easy, like we are going to get them. We just have to make sure they vote. And the undecided folks are folks who need education and to be persuaded.

And so our concept is we are talking to tens of thousands or even more in some states, hundreds of thousands of people, before the issue is even on the ballot. And it would be silly not to start doing the campaign messaging on day one. And so that's, you

know, how we -- and that we be educating and talking to and mobilizing voters very early in the process. A lot of folks ignore that and we think that's a mistake.

Q. How would you describe an ideal script, just quickly?

A. Short and sweet.

Q. That's a complete sentence. Thank you. Are you familiar with the state rules regarding circulators in Colorado?

A. Yes, I am familiar with them. I would have to pull up notes to recall. I've worked in a lot of states, but I am familiar with them, yes.

Q. Are you aware of whether there is a script that is allowed to the initiators to place in the petition materials shown to the signators or people that were being solicited for signature? That is, does the client get to add something inside of that packet?

A. I don't believe you can -- I am not aware of that. I don't think you can change the -- anything on the actual document, but you can certainly show a voter something, right? Is that -- if I am understanding the question?

Q. Yeah. Just for confirmation because I may have created a confusion, can you turn to Exhibit 2 in your packet?

A. Okay, great. Exhibit 2, approved form, got it.

Q. It should say in the upper -- Instructions for Initiative Petitions?

A. Uh-huh.

Q. And it has a residual Exhibit C because that was how we named it in a first round of review.

A. I see that, yes.

Q. Could you take a look through I believe the nine pages that are on that?

A. Yeah.

Q. And is this your understanding of how a typical packet in Colorado is assembled?

A. Yes. I have seen these packets given to circulators, yes.

Q. Now, on the front page it looks like it's a standard Secretary of State advisory indicating that there is some warnings for petition signers and some instructions and some warning instructions for circulators; is that right?

A. Yes.

Q. On the next page at the top there is a warning. What is your experience of these warnings both in Colorado and maybe, I don't know, is this natural around the country? Is this typical?

A. This is fairly unique to Colorado. I mean, every state has got it's own responses to, you know, challenges and problems they've had with circulation. And Colorado is not immune to those, so this is fairly unique, but I am familiar with it.

Q. And right below the warning to the potential signatory is an insert from the Title Board. Do you see that on your copy?

A. I do.

Q. And then there is the literal petition to initiate by in this case two initiators which is required by statute.

A. Yeah.

Q. And then there is below that a fiscal summary from the Legislative Council. Do you see that?

A. I do, yeah. These are pretty standard.

Q. Thank you. And the next two pages are in essence the statute in full with caps and red lines that show what would literally physically happen to the statute. Is that your experience of this?

A. Many states are similar that way, yes.

Q. You are breaking up just a bit.

MR. WHITEHAIR: Are we okay, Your Honor? If there is something you can do. I don't think I am going to have you go off screen, but we will go just slightly slow.

THE COURT: Yeah, I am not sure it has anything to do with speed. It has to do with bandwidth connection.

MR. WHITEHAIR: I feared so. Thank you, Your Honor?

THE WITNESS: Are we getting delayed from my side?

THE COURT: It's a little bit hard to say, Mr. Granofsky, but we will keep going, unless there may be someone else in your office or where you are using bandwidth that you could somehow persuade to cease and desist, but it's a little bit hard to always diagnose these problems.

THE WITNESS: Let me -- can I just take one minute to make sure no one else is on?

THE COURT: Absolutely.

THE WITNESS: Give me one second. Sorry about that. Let me -- I am just going to make sure there is nothing on my -- that's open in my background.

THE COURT: Once again, Mr. Granofsky, this is Judge Brimmer. It's hard to say what may be the cause. The screen is tiling a bit and your voice sometimes breaks up just a tiny bit, but so far I think people can understand, so why don't we just go ahead.

THE WITNESS: Thank you.

BY MR. WHITEHAIR:

Q. Mr. Granofsky, let me have you circle back. And you had a project here in Colorado, I believe, in 2015. Is it called Connect To Kids?

A. Sorry, in 2015? That is Connect to Colorado. Is that the --

Q. Okay. I had Commit to Kids, but I could have written it down wrong.

A. I think it was Commit to Kids, Commit to Kids Colorado I think was the name of the campaign, yeah. That was a property tax increase.

Q. And were you involved in that drive?

A. Yes. I was involved in the drive and the campaign.

Q. Were you able to get the items qualified?

A. We were. We qualified the drive.

Q. Was that a tax increase request?

A. Yes. It was a property tax increase for -- a fairly significant one.

Q. So could you just briefly for the record share with us what you understood had to be in your title from Colorado law?

A. Well, yeah. I think any -- everything is pretty explicit in the ballot. The ballot titles that come out of the ballot board, you know, tax increase or not in Colorado, but if I remember -- I would have to go back and look. I haven't looked at the petition in a long time -- but I think it explicitly included in the title how much overall revenue was going to be generated and what percentage the property tax increase was going to be. And there were two different levels. There was some folks who made 75,000 or something, something like that and above 75,000, and so that was also explicitly laid out in the title.

Q. Were you --

A. It was a 5 percent increase, I believe.

Q. Were you able to fashion a drive with the client in the face of those advisories and materials?

A. Yeah. The whole -- the entire revenue increase and the property tax increase was to fund education almost entirely was how it was set up. And it was linked back to something that the legislature had passed. And so we really -- yeah, so we talked about education. That's really what the campaign was all about, education.

Q. Do you recall what the grab line was?

A. Well, in our script we give two or three different grab lines to our petitioners to use. Usually the first two are very generic like, "Hi, are you registered to vote? Hey, do you have a second to sign this petition?" And the third one is usually issue-oriented. I don't remember exactly what it was, but I can tell you it would be something like, "Hey, do you have a minute to sign this petition to help education"?

Q. Have you had experience with -- let me ask it a different way. Strike that. Have you in your experience been unable to qualify matters because of what was in the actual literal title of the initiative?

A. No, not in any state ever. The only reason we haven't been able to qualify is funds running out from the campaign and for the first time ever in last cycle of '22 a situation where the labor market didn't get us enough people in one of the states, but never from once in a title.

MR. WHITEHAIR: That's all the questions I have at this time, Your Honor. Thank you, Mr. Granofsky. You will now be approached by opposing counsel.

THE COURT: Not literally, but you will be cross-examined by opposing counsel. Ms. Retford, go ahead.

MS. RETFORD: We have no further questions for the witness, Your Honor.

THE COURT: Okay. Then Mr. Granofsky, you are excused. Thank you very much.

THE WITNESS: Thanks so much.

THE COURT: All right. Why don't we have Mr. Wasserman, then, come back and resume the witness stand, and we'll go ahead with Ms. Weddle's cross-examination. And by the way, up through the lunch hour I wanted to give your time totals. Plaintiff had used by that time 53 minutes, defendants 69 minutes. Go ahead.

CROSS-EXAMINATION

BY MS. WEDDLE:

Q. Thank you, Your Honor. Good afternoon, Mr. Wasserman. I am Jennifer Weddle. I am one of the attorneys for plaintiffs in this matter. We have not met before, so nice to meet you here today.

A. Nice to meet you.

Q. Are you a lawyer?

A. I am not a lawyer.

Q. Are you a legislator?

A. I am not a legislator.

Q. Are you a sponsor of any initiative before the Court today?

A. I am not.

Q. Are you a circulator?

A. I am not.

Q. You testified in your conversation with Mr. Whitehair that you were experienced with the Title Board, correct?

A. That's correct.

Q. And I believe your testimony -- and I am paraphrasing based on my notes. We don't yet have a transcript available. But your testimony was that the Title Board's obligation is to accurately describe for voters the changes in law being proposed; is that correct?

A. That is correct.

Q. Okay. And I want to go back specifically to your testimony about House Bill 21-1321. Mr. Whitehair asked you if you were aware of the passage of 1321, and you responded affirmatively. And you said, and again I am paraphrasing here, that you had worked with the legislature batting around concepts, reviewing the legislation that ultimately supported it in the legislative process. Does that sound accurate to you?

A. That does.

Q. Can you please unpack for us what you meant when you said you were batting around concepts?

A. Sure.

Q. With whom were you working in the legislature? When? What was the time line for batting around the concepts?

A. Yeah, I don't remember the exact line. The Bell Policy Center exists for a number of reasons. We are a resource for any legislator that wants to work with us. We often do analysis. Sometimes we are given authority to work with drafters, to work through various forms of drafting, to think about implications in policy. So I don't remember a specific time line, only that this was a priority for 2021, and it's very similar to the role we played for over 20 years.

Q. So is that sort of technical assistance that's provided to specific members of the legislature?

A. It is technical assistance to members of the legislature. We participate in the committee process. We offer testimony. We also spend a lot of time educating the media as well as the general public about what's going on in the state legislative process.

Q. So for 1321 specifically, were you working with -- at the behest of specific legislators who had asked for your assistance or for a specific committee that had asked for your assistance or was this for Bell Policy Institute's own interest that you were engaged with the legislators?

A. So we are the Bell Policy Center and we were working at the behest of the Bell sponsors. In this case I believe it was represented deGruy Kennedy, Representative Weissman. And in the senate we worked with Senator Pettersen and Moreno.

Q. Can you give the Court a sense of the genesis of that conversation? Whose idea was it to go forward? And was there any formal agreement by which this occurred or was it more informal?

A. I don't remember the particular genesis other than to say that, you know, this -- I think a number of legislators had expressed concern that another income tax was on its way. They were fully aware of the challenges we had had on Initiative 271, and they were I think frustrated with some of the lack of information that voters were provided when looking at these ballot measures. And their contention was that, you know, it simply says would you like a tax cut and who doesn't want a tax cut. And so I think there

began the inquiry of are there other ways to provide more ballot transparency for voters.

Q. You mentioned, Mr. Wasserman, that sometimes you participate in drafting language. Did you draft language for 1321?

A. I participated in the drafting process with Legislative Council as is common at the state capital.

Q. And did that involve the exchange of drafts or was that collaboratively in a room? How did the bill become a law?

A. Sure. As is very common, down at the state legislature legislators will give authority to certain individuals to work with drafters. And that's precisely what I did, looked at, you know, talked about various concepts, explored the legality of some of those concepts. And then obviously nothing that we do is final until the legislature responds during the legislation and says yeah, this is the version I want to go with.

Q. And it may not be possible for you to do so, but can you assign even a percentage of how much of the eventual Section 106 language was something that you drafted originally or that came out of a more deliberative process?

A. Yeah, it would be too hard for me to think about it from a percentage basis. It was a robust conversation involving legislative counsel, bill sponsors, and myself and other staff. So it really was a product of -- and this is very common where you go back and forth with drafters and you talk about different options, and so I would say the measure itself was amalgam of different perspectives and ideas.

Q. Do you recall Mr. Whitehair asking you if your experience with the mandatory language of TABOR impacted your involvement in 1321?

A. I do.

Q. And again, my paraphrasing of your answer is, I think for me, if anything, it was an interesting year. I think we had tried to qualify 271, had experienced the challenges we referred to earlier, and immediately switched to defense work against Proposition 116, which is the tax cutting measure. And it really dawned on me at the time, as well as others, that there is something symmetrical here, right? So that symmetry was a motivator for 1321. And then you went on to say, on the one hand there is all these requirements for tax increases, but a tax decrease just has these very simple words, Do you want a tax cut? And I think it was at the time inspired by TABOR that we started to say, well, don't voters kind of deserve to understand the implications of what may occur if this passes.

Does that sound like an accurate version of your testimony?

A. Yes.

Q. And then you finished the answer by saying, and so I think that it is when this idea came about that perhaps there ought to be a little more information available for voters when they are looking at tax reductions.

So kind of trying to summarize what I am understanding for your testimony, this was almost kind of an equity-based concept. That if there are going to be language restrictions for tax increases,

there ought to be some symmetrical language for tax reductions; is that fair?

A. I think that's fair. I would characterize the TABOR -- I would characterize the TABOR sticker shock language as very different in its character, but they are -- these are similar concepts in terms of putting information that's vital for voters in the ballot measure.

Q. Are you aware that TABOR was a citizens' initiative?

A. Very much so.

Q. And you're aware that TABOR is enshrined in Article 10 in the Colorado Constitution?

A. I am.

Q. So if symmetry was a goal and a motivator, why did you not pursue a citizens' initiative seeking mandatory language as to initiatives involving tax changes that reduce taxes?

A. Quite simply, we didn't need to as we did research into the issue and understood the legislature's authority in this area. It was quite clear that they can offer statutory guidance. And so that seemed like the most practical path forward.

Q. Were there any other motivations in addition to this symmetry concept and more voter transparency as you've described for 1321?

A. The simple motive is that voters should understand that tax cuts don't come for free and that there are implications in the provision of public services that they are not made immediately aware of until a few years out when we see the totality of what those tax

reductions do. So I think it was very much within the spirit of everything the Bell believes and many of the legislatures. We believe that again tax cuts, no matter how small, do add up and over time have reduced our revenue base and do jeopardize many of the public services that people say they want to see.

Q. Well, if that's true, why did the legislature exempt themselves from this requirement? Why don't voters need to understand the implications when the legislature is offering the tax reduction?

A. Yeah. As I recall, I think there was just a very practical understanding that the legislature does and has the power to rewrite law. So when you write a law, you think about, okay, you know, what are we trying to do here? At the end of the day, a legislature can simply remove a requirement. And so mine and others' perspective was simply why create a requirement that the legislature can simply get rid of in future years? So to me that was something that was beyond our control, and this was where we chose to spend our effort.

Q. So is it that the implications of legislature-referred measures don't matter as much because the legislature always has the power to change it and therefore the voter transparency isn't necessary?

A. No. It's just, I think, understanding the practical matter is you cannot bind the hands of future legislatures. And thus, if we put this requirement, it would be moot and, frankly, useless. I believe, you know, in the transparency of every measure that comes before the voters. In this case, why put in a requirement that would be easily removed by a future legislature?

Q. Well, nothing about the mandatory title language for ballots would bind a future legislature from decreasing taxes. This is about the language that is encouraging transparency as you have testified. My essential question is why does that matter as to citizen initiatives but not the legislature's own initiatives?

A. It's not that I think that referred measures don't matter. It's that I am a realist when it comes to drafting legislation that is functional and recognizing that we wouldn't be binding their hands against running referred measure. What we would be doing is trying to bind their hands as to the language requirements. And from my -- you can call it cynical -- from mine and other perspectives, it simply was not something that was necessary in the legislation.

Q. So I think you were asked really the same sort of line of things by a Colorado Sun reporter in May of 2021. And your answer about why the legislature had exempted themselves from this requirement was that that's just how we developed the bill at the time. So is that consistent with your recollection today?

A. I would say that's consistent with what I just testified to as well, yes.

Q. Any other motivations for 1321 that you recall other than what you've already testified to today?

A. We just believe very strongly that voters should see what the implications of the policies they are being asked to support will have on their public services.

Q. So you mentioned that you had worked specifically with representative Chris Kennedy. Were you involved in providing messaging for him about the bill either before it was enacted or after?

A. I don't recall very deep messaging conversations. We certainly do do a lot of work with legislators on messaging. And, in fact, I recall the committee itself, there was no opposition in committee. There was support. There were a couple of questions that were critical, as I recall, from legislators. But I think one of the most interesting things about 1321 as it went through the legislative process was there was no recorded opposition in either chamber.

Q. So in that same Colorado Sun article from May 2021 that I just read your answer from, Representative Kennedy was quoted as saying 1321 was a stop-the-bleeding bill. And his quote is, I am reading from the newspaper, what we've seen increasingly is that republicans who have not been successful at winning majorities here at the capitol in recent years are increasingly turning their attention to the ballot and using that as a way to try to get government closer to the size that can be drowned in a bathtub. We prefer that government not drown in the bathtub. We prefer that ballot measures don't continue to chip away at our ability to fund our public schools and other priorities that the voters of the state care about.

Do you recall him saying that?

A. I do.

Q. Do you know that accurately reflects the motivation that you understood for the enactment of 1321?

A. I think that's a different sentiment than the one than I perhaps hold. I fully agree with him that we have seen a steady chipping away at the revenue base

in Colorado. My belief is that more information in a direct democracy is not a bad thing. And, in fact, voters who don't have time to get fiscal notes drafted and be able to ask questions of Legislative Council or even to perhaps look at the Blue Book deserve the opportunity to see right in front of them what the implications of a measure are.

So I hear and respect what Representative deGruy Kennedy was and what his motivation was. I think for me I would back it up a little bit and say sunshine is the best disinfectant. And if we can provide more information for voters, we are giving them a clear understanding of what is at stake with this vote.

Q. Appreciate that clarification.

So just circling back to Representative Kennedy's statement, there is nothing in there that you think is inaccurate or misquotes him in any way.

A. No. It was his quote, so you would have to ask him.

Q. So now your answer that you provided to Mr. Whitehair, and I will go back and read you this part again. Again, I am paraphrasing based on my notes. You said, we started to say, well, don't voters kind of deserve to understand the implications of what may occur if this passes, referring to possible implications of an initiative.

Can you tell the Court how the mandatory language in Section 106 ended up there because it says not may reduce funding, but will reduce funding. And you had permissive language in your answer, potentiality associated with the language you used in

your answer. Why does Section 106 say will reduce funding?

A. Well, in point of fact it will reduce funding. There are two different language, to my recollection, if I look at the exhibits. But both say there will be a reduction of funding in one case used for these purposes, right, and in one case naming the three, the top three services that are funded by that revenue stream, so there is a condition there.

And then in the local district version it says available for and it lists the districts. Certainly those are language requirements, but it is a truth, and I would be happy to discuss this more, that when you reduce the amount of revenue available to the legislature, there are likely targets that will be hit if not in the initial year, in future years.

And one need only look back to '99 and 2000, seemingly harmless income tax reductions that put us on a different trajectory, and that trajectory unfortunately led to the negative factor that an earlier witness talked about in education. Had we not made those cuts, the likelihood of the negative factor occurring would have been less.

So I think the other issue here and I think one of the issues that we are trying to shed light on is that it is not just about the now. It is about the future. And it is about permanent reductions over time and the impact that occurs when we hit a recession or different circumstances.

Q. Thank you for that insight.

Were you present for Mr. Sobanet's testimony in court?

A. I was.

Q. So he testified at great length about the water pitcher of TABOR and what's above the line and that that would simply be refunded to Coloradans absent a citizen initiative or a legislature initiative for retention that passes into law. Do you recall that?

A. I do.

Q. And he testified several times with Mr. Eid that there would be no impact to funding for education and health care specifically as to Initiatives 21 and 22. Do you recall that?

A. I do recall that.

Q. So Section 106 then requires the Title Board to include mandatory language that is false as to Initiatives 21 and 22. A. I couldn't disagree more. It's not false. Let's take 22, which arguably some would argue is the most innocuous of cuts because it's temporary. Well, it's the loss of $101 million in sales tax money. What happens if we hit a recession?

I lived through the great recession. I sat on the joint budget committee as they deliberated. No one saw that one coming. And the loss of revenue in prior years had a deep impact on their choices. So even a one-time temporary reduction I think is absolutely fair to at least advise voters that, hey, this is coming from the money that funds things like education, human services, higher education. And we have in practice seen deep cuts.

21, which is the property tax one, I think has even larger implications. And you know, I have been involved in polling and opinion research, and it's quite clear that voters are very confused about where

property taxes go. And so the delineation and the outlining of which districts receive this revenue and the possibility that the loss of $2.2 billion may impact these services is something that is absolutely realistic and, in fact, I lived through.

Q. So you're disagreeing with Mr. Sobanet's testimony that there is no impact to education or health care funding for Initiatives 21 and 22 as proposed?

A. I am not disagreeing with Mr. Sobanet. Mr. Sobanet was asked about the short-term ramifications of, say, a temporary sales tax increase. What I am adding is additional perspective that it is, I think, our job to make sure that the voters understand the down-the-line implications. Whether it's the small tax cuts of '99 and 2000 or whether or not it's the last two tax cuts that passed over the last three years, there will be implications when we hit an economic downturn. So I don't disagree at all with Henry Sobanet. I am adding additional perspective, and I believe it's important to look beyond one year.

Q. So is it your position, then, that transparency with the voters means transparency in some hypothetical future world and not tied to the language of these individual initiatives?

A. It's not because these aren't hypotheticals. In 2020 no one saw a global pandemic coming and the need to cut $3 billion from the state budget. And over multiple episodes the decisions that voters make in the short term have long-term implications. Perhaps the voters, had they been advised in 1982 about the long-term implications of the Gallagher Amendment, may have voted differently. So what we see is that we believe in

this base time continuum and that these are dynamic decisions and voters deserve a heads-up.

Q. So again, that would seem to be at least a policy-motivated position, which some people might disagree, the idea that tax cuts are generally bad for society because they reduce the overall public fisc in some way. Isn't that conveyed in perhaps at best impermissible language? Why go to the extreme of mandatory language?

So if there is not a catastrophe that says $3 billion is suddenly gone and we rely on the ordinary projections formed by the Colorado state government, it would seem incredibly beyond unlikely that any of these initiatives would have any impact on education or health care funding.

A. Again, I would simply point -- I don't think these are hypotheticals. The 2008 recession devastated education services, meant cuts to Medicaid. Higher education was forced to raise tuition. And we believe in large part it had a lot to do with the reduction of tax rates and the reduction of our tax base in 1999 and 2000.

And as Mr. Sobanet explained, even Amendment 23 does not hold education -- does not hold education harmless because of legal doctrine that is allowed for the negative factor. So we know these things to be true. The state has historically experienced them. And we have experienced it enough that I think it's absolutely appropriate for voters to understand where is this money going and, you know, and I don't believe all tax cuts are bad. And I think that everybody -- but having the information to make that choice, that is what a direct democracy should

feature. And I don't think hiding the implications of one scenario versus another is really in the spirit of the direct democracy that TABOR envisions.

Q. And just closing the loop on this, so recognizing that may, some implications may occur versus what Section 106 requires, which is to say it will reduce funding for these things, you think that that transparency is still served by that imprecise language.

A. Yeah. I guess I just have to disagree with your characterization of will because there are other words there. And it will reduce the funding available for. And this is really important. We can't control what the legislature does. What we can control is the amount of money that they have to make choices. So this language offers, you know, a characterization of what this money is for, what it funds, what the three largest services are, and that this is, in fact, the revenue stream that you are reducing. So I think perhaps you and I may disagree about what that language says.

Q. And again, you are not a lawyer or a legislator.

A. No, but I am a citizen of the state of Colorado and frequently vote on these issues and benefiting from those public services.

MS. WEDDLE: Thank you, Mr. Wasserman.

THE COURT: Redirect?

MR. KOTLARCZYK: Nothing from us, Your Honor.

THE COURT: Thank you, Mr. Wasserman. You are excused.

MR. KOTLARCZYK: Your Honor, defendants have no further witnesses to call.

THE COURT: Any rebuttal witnesses on behalf of plaintiffs?

MS. WEDDLE: Yes, we do, Your Honor. Plaintiffs would call Senator Barbara Kirkmeyer.

(**Barbara Kirkmeyer** was sworn.)

THE WITNESS:

COURT DEPUTY CLERK: Please state your name and spell your first and last name for the record.

THE WITNESS: My name is Barbara Kirkmeyer, B-A-R-B-A-R-A, Kirkmeyer, K-I-R-K-M-E-Y-E-R.

BY MS. WEDDLE:

Q. Good afternoon, Senator.

A. Good afternoon.

Q. Do you currently hold elected office?

A. Yes.

Q. Please tell the Court what that office is and what your job duties entail.

A. I am currently a state senator for the State of Colorado. I also sit on the joint budget committee, so that is a six-member committee that essentially the short answer is they prepare the budget for recommendations to the General Assembly, so we write the budget for the state of Colorado. I also sit on the appropriations committee, and from time to time I will sit on other committees as needed down at the legislature.

Q. Senator, are you familiar with House Bill 1321 now codified at Section 106?

A. Yes.

Q. And it sounds like from your position you are very familiar with the Colorado budget process.

A. I would say I am pretty familiar with it, yes.

Q. Could you tell the Court what limitations there are already on the legislature under Colorado law with respect to education, health care funding, finance, the three areas of funding that we have been talking about in the context of these two initiatives today.

A. Yes. So with regard to education, the limitations there are within the Constitution there are a couple of Constitutional requirements for funding of education at the state of Colorado. It's very clear and I think it's in Article 9 of the Constitution, Section 2, that requires the state to fund a free public school system, both the establishment and maintenance of a free public school system in a uniform and consistent way throughout the state of Colorado.

And then there is also another article within the Constitution. I believe it's article -- it's still in Article 9, but it's Section 17, which is with regard to Amendment 23, which does require that the state fund education and increase it every year, whatever funding that we put forward, that we have to increase it by inflation every year. So we are not able to just go reduce education funding for K through 12.

So again, those are requirements in the Constitution that we have to fund, a free public school system, and that we have to increase our funding

annually, our base per-pupil funding annually and the categorical fundings by inflation.

With regard to health care policy and finance, that is the department. The program actually that is within the Department of Health Care Policy and Finance is Medicaid. Medicaid, the state is required to put together a state plan that has to be approved by the Federal Government, so there are provisions within that plan.

The Federal Government sets out rules and regulations with regard to eligibility. That's a percent of federal poverty level. And it ranges anywhere from 142 percent of federal poverty level on up from there. The state does have the opportunity and the legislature has in the past, so it's in state law, that they've increased the percent of poverty that can be used. So there are some places in Medicaid, certain programs in Medicaid that receive -- that people are eligible if they are like at 260 percent of poverty and even higher.

There are some areas, very small areas like it's 300 percent and there is another one that's 450 percent of poverty. Those people are automatically, they are eligible. And the state is required by federal law and by state law, because we have that state plan and we are accepting Medicaid funds and federal dollars from the federal government, we are obligated to fund that. So we cannot reduce those expenditures. Again, it's based on eligibility. The legislature has no control over that. The Federal Government does with regard to what we have to pay. So in both of those examples, those are areas where we have it make

those expenditures and we would not be reducing them.

With regard to higher ed, there is a lot there as well, but higher ed, our portion, the state's portion of the budget for higher ed is a lot less. Most of it is federal funding. And so if you look at the Constitution again in Article 9, it says when it talks about a free public school system, it says from 6-year-olds to 21-year-olds. So some could say that also relates to higher education, which is I am guessing why when we do fund the higher education, that we also put a cap on what the tuition could be. So it's kind of a trade-off that we have. So again, there just are some limitations there as far as expenditures and what we would do in the budgeting area.

Q. So those are the three areas of highest expenditures in the budget that Section 106 mandates be included in any tax cut, for any tax cut initiative title; is that correct?

A. I believe that to be correct for this year. That would be -- those are general fund expenditures. At least that's my understanding of 1321, that it was general fund expenditures. So those are the three highest program areas, K through 12, Medicaid, and then higher education with human services programs, and the Department of Corrections being pretty close fourth and fifth.

Q. And are there also protections for those budget categories?

A. Yes, ma'am, there is. Again, it relates back with the human services program. So like we are talking the Colorado works program, child welfare programs,

those types of things. Yes, those have an eligibility requirement as well. So the state has a responsibility and an obligation to fund -- we have a maintenance of effort level on those areas that we have to fund. If the people are eligible, we have to pay for it. And there is also, you know, things that go down to counties that are involved in it as well.

With regard to Department of Corrections, the legislature does not have control over who goes to jail. We just have a responsibility. Again, it's in the Constitution. We have to have a court system, a judicial branch. And then we also have the Department of Corrections. They are the ones who decide who goes to jail. We are the ones who pick up the tab.

Q. Thank you, Senator. Were you present in the courtroom for Mr. Sobanet's testimony?

A. Yes, ma'am.

Q. And he testified that, and I am paraphrasing, that Initiatives 21 and 22 would impact the amount available for TABOR refund based on current projections, but would not reduce funding for education, health care or higher education. Did you hear that testimony?

A. Yes.

Q. And do you believe that to be accurate testimony?

A. Yes.

MS. WEDDLE: Thank you, Senator. I have no further questions.

THE COURT: Thank you. Cross-examination?

CROSS-EXAMINATION

BY MR. WHITEHAIR:

Q. Good afternoon, Senator. My name is Greg Whitehair and I am from the Colorado Attorney General's Office and representing today the two public officials named in this case. We have not met before, have we?

A. I don't believe so.

Q. Nor have we discussed this case in any manner.

A. No, we have not.

Q. Am I to take from your testimony that the legislature is essentially fixed in what they can provide under education, the health care, sometimes called HCPF, and the higher education components of the budget?

A. Certainly with regard to education and the Medicaid program, so that is in health care policy and finance. And it is related to again eligibility requirements with regard to Medicaid and then also with regard to the Constitution and education.

Q. And there is floors below which the legislature can't go; is that true? That's the point you are making, that there are fixed floors for each of these three categories.

A. I guess I would say yes to that question.

Q. But the legislature could, in fact, provide additional funds beyond the floors.

A. Yes.

Q. Have they done that ever?

A. Yes.

Q. Have they done it in all three categories?

A. I can't speak for every legislature ever because I have not been there that long.

Q. Fair enough. But in your expert -- I am sorry, in your position as one of the six members of the JBC, in your experience has the legislature in fact provided additional state expenditures in each of those three categories?

A. Yes, they have, and they typically do that through legislation. So it's not just the joint budget committee. It's every 100 legislator has an opportunity to carry a bill that might increase expenditures in any of those areas.

Q. I appreciate that. Thank you for that clarification.

Now, you're focusing, as I understand it, on Initiative No. 22 which has the so-called big three language in it. I can turn you to Exhibit 4 has a real quick -- you can look at the titles of 2 and 3, but they are small, small print. But do you see four at the top?

A. Exhibit 4? Is that under Tab 4?

Q. Yes, ma'am. And it says Exhibit F in the upper right-hand corner. That's an artifact from an earlier draft. And I want to make sure I have it here. Let me stay close to the microphone. The beginning of this -- and this is the top line, isn't it, for this? There should be a reduction to the state sales and use tax rate by .61 percent? Is that the top line?

A. Yes, it is.

Q. Yeah. And thereby reducing state revenue, does the cutting of state sales tax and use tax reduce state revenue?

A. I would argue that it may not.

Q. Well, are you defining revenue as something different than how much money we bring in?

A. No. I just understand that sales tax is a function also of sales. And state revenue is a function of the sales tax specific and the number of sales. So if sales increased, just because the sales tax rate decreases doesn't mean that there will be a revenue reduction for the state of Colorado.

Q. So there is some variables here on what's going to happen in the future.

A. Yes, there is.

Q. Yeah. So it then goes on to say "which will reduce funding for." Do you see that language?

A. Yes, sir.

Q. And then next to that it says, "state expenditures that include." Do you see that?

A. Yes, sir.

Q. Now, do state expenditures include education?

A. Yes.

Q. Do they include health care policy and financing?

A. So they include the programs that are within the Department of Health Care Policy and Financing, which would be essentially Medicaid.

Q. Okay. But state expenditures include health care policy and financing programs.

A. Correct.

Q. And in state expenditures include higher education.

A. Correct.

Q. And it says "state expenditures that include but are not limited to." Do you see that language?

A. Yes, sir.

Q. Do you see that?

A. Uh-huh.

Q. Now, I meant to ask, and I apologize, I should know, are you a lawyer?

A. No, sir.

Q. But have you used "but are not limited to" language in legislation before?

A. Yes, sir.

Q. And it means what to you when it says but are not limited to? What do we take from the things that follow the words "but are not limited to"?

A. So it includes these items, but it's not the only thing that it's limited to. It may include other items.

Q. It may indeed. And then it goes on to describe in more detail exactly how this tax applies, right? It talks about reducing from 2.90 to 2.89, what day, what day it starts, what day it stops. o you see that?

A. Correct.

Q. So let's go back here. And I take it your concern is that somehow you believe that the term -- that the state expenditures that include but are not limited to these three, the big three, that that's an incorrect statement, that that's somehow false?

A. I think that when you look at the entirety of the sentence which talks about will reduce funding for state expenditures, and then it lists the three highest program areas, and it could be other areas as well as state government, I think that is deceiving language and, yes, could be false, especially in years where we will have a TABOR surplus, because at that point it would not reduce expenditures for the State of Colorado.

Q. But you're assuming state expenditures don't include the TABOR refund.

A. State expenditures do not include the TABOR refund.

Q. That's not how the budget overview documents that

Mr. Sobanet testified to earlier today stated in public domain, right?

A. I believe that's what Dr. Sobanet was stating, but however, the TABOR refund, it's a TABOR -- it's an obligation. It's not necessarily an expenditure. I understand where it's listed in the budget, but again it's a TABOR obligation. And, in fact, the state does not have to expend any funds. We can simply reduce the income tax amount, the percentage, or we can reduce the state sales tax.

Just because last year there was a check that was sent out to people which makes it look like we were sending checks back to people or makes it almost look like an expenditure, in fact, it is not an expenditure. It's an obligation. And the state can reduce our obligation by reducing the amount of money that people have to pay in their income tax or the amount of money that they pay on sales tax.

Q. And that obligation is a tax expenditure, right? Under the protocol that Mr. Sobanet described, tax expenditures include essentially the expense of compensating out back to the world the tax.

A. So again, the TABOR refund which is defined under the Taxpayer Bill of Rights in Article 10 is an obligation by any government, so it's state government and by local government, by taxing entities. For the state it requires -- TABOR required a limitation on the amount of revenues that could be brought on and there is a base amount.

Taxes are collected sort of after the fact. Budgets are after the fact. For example, with property taxes, those are collected two years, basically, in arrears. Same with income tax. They are after the fact. So you know what you have to from a state perspective and even from a local government perspective, you know what the obligation is with regard to what you must refund, not expense, but refund back.

You can reduce that refund by in the state's case reducing the income tax that is brought into the state in the subsequent year or by reducing the sales tax which would reduce -- the sales tax percentage, which would reduce the sales tax coming in. Hence, you would refund the money or you wouldn't even collect it in the first place.

So it's not really an expenditure. It's just an obligation. It's a liability that we have underneath the Constitution, but there are several mechanisms. And, in fact, until last year people didn't receive checks. They received a reduction in the requirement of what

they paid on their income tax. So we didn't collect the tax in the first place. Therefore, you can't expend it.

Q. You say there is a time disconnect between when the revenue would be recognized. If all things being equal, the revenue will be recognized in one, two. You know, if it's property tax, it's recognized later. But at the end of the day, the sum total revenue anticipated before the change in law suggested by 22 and after the change in law suggested by 22, that there is a reduction in revenue when they reduce the rate.

A. There would be a reduction in revenue when the rate is reduced as it comes in. But however, in the case of a sales tax, the revenues may not be reduced if the number of sales are substantially increased or increased within the state, which when you take into consideration that we always have population growth, there are always -- at least I don't know of any case where this hasn't happened, but I am not going to swear by anything here -- but in most cases simply reducing the sales and use tax does not necessarily reduce the revenue that is brought in by the state.

Q. So there is a use case or an application where in your view this could be a false statement. It's not likely because the population you described is increasing and other things we know about how taxes on sales tend to run, but so what I am hearing you saying is there is a use case that makes this false. But isn't it true that when you reduce the tax rate, you reduce the flow of income per capita, per person?

A. I don't know that that's true and I don't believe it to be true. I think again just because reducing a percent, .61 percent of state sales and use tax, does not necessarily mean and I don't think you can state

will reduce funding for state expenditures because it will reduce state revenue. I don't think there is any guarantee, and I am not sure of any past example that anyone has brought up that I know of that just because sales tax was reduced, that state revenue was reduced, because again, it's a function of the number of sales that occur. So if sales go up, even though you reduced the sales tax rate, you will still have an increase in revenues.

Q. So if it went to zero, if this was a proposal to eliminate the sales tax in Colorado -- I understand some states have done that. If this said zero, would that be true, then, that it would reduce state revenue?

A. So I just want to make sure I am understanding your question. That if we reduced the state sales tax to zero, would that reduce state revenue. In that case the answer would be yes because the percent would be zero. So even if sales went up, there would be no sales tax collected, so yes.

Q. And we find ourselves in some odd English fight here, right, a semantic dispute over what it means to have funding for state expenditures? Because what I heard you say was state expenditures include but are not limited to education, HCPF and higher education, that that's a true statement, that state expenditures do include those things and other things, right?So now we are left with reduce funding for. And I take it you are trying to -- let me back up. Are you able to speak on behalf of the state legislature as to what the meaning of this particular word is as it was used in the Statute 1321 or 106 as we've called it?

MS. WEDDLE: Objection, Your Honor. Is there a question here? I am trying to follow what it is.

THE COURT: Yeah, he just asked it. I think it's an appropriate question. Overruled.

BY MR. WHITEHAIR:

Q. So I am trying to understand if you are speaking on behalf of the legislature for the meaning of the word "reduced funding for" as it relates to a statute known as 106 in today's proceedings.

A. I believe the question was directed to me, so I am speaking for myself.

Q. Not on behalf of the state legislature.

A. No, I am not speaking on behalf of state legislature because we do that by voting. And everyone has their own vote and they also speak for themselves, so the legislature speaks after they've had a vote and they've made a decision on a bill.

Q. And you're assuming the term "funding for" is somehow synonymous with the exact amount applied in the budget as opposed to, for instance, the common use of the word funding is available resources. So are you -- so one interpretation of reduced funding is available resources. That's what funding is. If I am funding my child's education, it's grandpa's money, my money, newspaper route, that's the funding available to my child's college education. So aren't we trying to decide the legal meaning of the term "reduced funding for" here somehow?

A. I am not trying to figure out the legal interpretation of what will reduce funding for. I am telling you specifically how it's actually applied with regard to reduced funding. And I think the confusion that you have is probably exactly the reason why I voted against 1321. But when I read this and when you read

it in plain language, and if someone else had to read this that wasn't in the legislature, they read that shall a reduction of state sales and use tax by .61 percent, thereby reducing state revenue, which I disagree with, there is no thereby that it has to reduce state revenues because again if sales increase, just because you have increased the -- or decreased the sales tax does not mean that revenues to the state would be reduced.

The next, after the comma reads, which will reduce funding for state expenditures. Well, if state revenues were reduced, there is a probability or a possibility that it could be a may reduce funding for state expenditures in this manner if we are talking about this. So we are talking about a hundred million dollars or so here. And that may reduce funding for certain state expenditures. But will it reduce funding for state expenditures? Not in a year when we have TABOR surplus because what it will do is reduce the TABOR surplus and reduce the amount of the TABOR obligation by which we have to refund.

Q. So it's not reduce state expenditures. It's reduce funding. Do you see that?

A. Yes, sir, I do. And I am looking at it as a whole sentence after the comma, which will reduce funding for state expenditures. So I don't think you can just pull out funding or say reduced state funding because you have to add in the part and you have to complete the sentence for state expenditures.

What I am saying is in years where we have a TABOR surplus, we will not be reducing state expenditures. We will be reducing the amount of money that we are obligated to refund under TABOR.

Q. So you are not agreeing with Mr. Sobanet's statement that state expenditures are tax expenditures. TABOR refunds are budgeted by the budget committee as an expense. That is as a taxed expenditure, i.e., a state expenditure. You just don't agree with him, right?

A. I would agree with the statement Dr. Sobanet made with regard to that if there is a TABOR surplus, that it would not impact expenditures to these programs. I would also state that --

Q. Was that my question, ma'am?

A. No. I am just trying to make sure I understand and I am telling you what I think you're saying. And what I also am saying -- well, now I have lost my train of thought. I am sorry. How about you repeat the question and I will attempt to answer it directly.

Q. I think we are all on the same page of not being on the same page. So there is an interpretation, a legitimate English interpretation that Mr. Sobanet shared that state expenditures or tax expenditures, that TABOR refunds are budgeted as expenditures. And you disagree.

A. I am raising my hand. I do disagree because again, if you look under the budget, you will see that it refers to TABOR as an obligation. Yes, it's in the liability category, but it's an obligation. It is not a state expenditure because as I explained, with regard to our TABOR obligation, we don't have to necessarily just write a check. Just because that was done last year during a campaign year doesn't mean that it's done that way every year. And, in fact, the refund has come by means of reducing people's income tax liability,

individuals' income tax liability or even their sales tax liability. And so those are not expenditures.

Q. And with all that being said, let's turn to No. 21 which is Tab 5. None of that applies in this particular setting, does it? t doesn't talk about the big three. Indeed, it talks about funding available.

A. Under Tab 5, which is the Initiative No. 21, does not talk about what you refer to as the big three, education, health care policy and finance, which actually should be Medicaid and/or does it talk about higher education. I am not sure what the rest of your question was there.

MR. WHITEHAIR: I am comfortable with where we are. Thank you so much for your time here today and for coming out.

I am complete with my questions, Your Honor, at this time.

THE COURT: Thank you. Redirect?

MS. WEDDLE: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. WEDDLE:

Q. Senator, you testified extensively about a reduction in sales tax rate, not necessarily triggering sales tax revenue, and indeed in your experience that the opposite is true; is that correct?

A. Correct.

Q. And that's because sales tax revenue realization is a function of economic activity and numbers of people engaged in that activity?

A. And the rate.

Q. And the rate. Are you able to share any other examples where a tax rate has been decreased but tax revenue has nonetheless increased?

A. I can with regard to my experience as a Weld County Commissioner and property taxes. So over the course of my 20 years of being a Weld County Commissioner, we did not "de-Bruce." I think that was mentioned earlier with regard to TABOR. We didn't take a vote of our people to say we could keep all the additional revenues that came in above the base limit. But what we did was is decrease our mill levy. So in looking at No. 21 here where it talks about property taxes shall be impacted by a reduction of 2.2 billion, I don't agree with that statement because, for example, in Weld County we reduced the mill levy, because we were over a TABOR limit where we had a revenue limit, we reduced the mill levy. However, our property taxes still continued to increase because property taxes are based on the value of the property, the assessment rate which is set by the legislature and the mill levy which is set by the taxing entity. And it fluctuates based on any of those three items.

So if the value of your property goes up, regardless if you are reducing the mill levy or even the assessment rate, you could still see a huge increase in your property taxes and in the property tax revenues that come into the local government. Hence, what happened after 2020 when we got rid of the Gallagher Amendment and everybody said, oh, we are going to freeze the property tax rate for residential at 7.1 and that is going to decrease your property taxes everybody. You should vote for this because your

property taxes are going down. And what happened was we had a substantial increase in property values. So unless you are affecting all three of those things, which this is not, you cannot say that property taxes are impacted by a reduction.

MS. WEDDLE: Thank you, Senator. Nothing further.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Senator, let me ask you a question. So going back to Tab 4, and you testified that by decreasing the state sales tax you could experience an increase in sales, and as a result, there wouldn't be a decrease in revenue. Would you anticipate that the Legislative Council would take that into account when they prepared the fiscal summary or in your experience has that not seemed to take place?

A. They try to take all of those things into consideration, but what you can't take into consideration is how much -- like what's going to happen in the next 12 months. I mean, we heard the earlier testimony of, you know, the 2020, the COVID things that happened. I mean, we can't always gauge those things. But generally they do try to take that into consideration, but they don't necessarily know exactly what people's spending habits are going to be or what's going to happen in the economy.

But I think if you go back and look, like especially because where this happens a lot is in municipalities where they may increase or even decrease their sales tax. But when they decrease their sales tax percentage, which they can do, they still see

an increase in revenues. So while they are trying to give their citizens sort of a tax break, if you will, they still end up seeing an increase in revenues.

Q. And is that because you believe that when a municipality does that or maybe a county does that, it would give them an advantage in terms of their tax rate and you would get more people coming into the city to make purchases?

A. Yes, sir, that's one thing of it. And also it helps increase economic activity within their --

Q. Just maybe within the city or county.

A. Yeah, uh-huh.

THE COURT: Any questions, Ms. Weddle, based upon the Court's questions?

MS. WEDDLE: No, Your Honor.

THE COURT: Mr. Whitehair?

MR. WHITEHAIR: None, Your Honor. Thank you.

THE COURT: Thanks a lot, Senator. You are excused.

MS. WEDDLE: Plaintiffs have no further rebuttal witnesses, Your Honor.

THE COURT: Thank you. Then the evidence is closed. Why don't we do this. Why don't we go ahead and take a 15-minute break at this time and let people collect their thoughts a bit, if you would like. And then when we come back, we will begin with our arguments. We will be in recess why don't we say until five of 3:00. We will be in recess until five of 3:00.

(Recess at 2:42 p.m. until 3:00 o'clock p.m.)

THE COURT: All right. We are back on the record in the Advance Colorado matter. It is plaintiffs' motion, so I will hear from plaintiffs first. Then I will hear from the defendants. Then I will give, assuming there is time left, I will give plaintiffs the last word.

Mr. Eid, go ahead.

MR. EID: Thank you, Your Honor. I appreciate it. So this is a First Amendment case, and I just want to mention that because in my whole career I have never been this far along in a proceeding like this where the other side didn't mention the First Amendment when that's the issue. We didn't talk about 303 Creative. We didn't talk about the fact that our clients have a right to present their message undiluted by views they do not share. We didn't talk about Hurley. We didn't talk about the fact that this is a lot more serious than veterans marching in Boston who are discriminatory against gays and lesbians or cake bakers or people designing websites for weddings. We just never talked about those things.

And I guess I am still wondering after all this today, especially after listening to my friend, Henry Sobanet, what exactly is the government's compelling interest in providing misinformation to voters, because that was not contested in this hearing.

So I would simply say that, Your Honor, we'd ask this Court to enjoin enforcement of Section 106(e), (h). We ask them respectfully to order the Secretary of State to convene the Title Board to approve clear titles that are not diluted by the state's preferred policy message. And we appreciate your time and I will close.

Thank you, Your Honor.

THE COURT: Well, I have some questions for you, Mr. Eid. I wouldn't want you to get off that easy. Okay. Here is the deal. First of all, so let's talk about -- so the relief that plaintiffs are seeking is, I mean, what would it say? Would it hold something unconstitutional?

MR. EID: Well, it's a facial challenge, Your Honor, first and foremost, to a statute that --

THE COURT: That's what I am wondering. Where in your motion -- because your motion, it seems, suggests that the relief that plaintiffs want is for me to order the Secretary of State to convene the Title Board and then have the Title Board presumably, because I have done something that would enable them, enable the Title Board to ignore 1321, and then set a title without the mandatory language being something that they are compelled to include. Would that be true?

MR. EID: I think that's true for the preliminary injunction, Your Honor. And certainly I would want to seek a permanent injunction if the Court were to agree that this language violates the First Amendment. We do think it violates the First Amendment.

And we talked a lot -- and I appreciate the question, sir -- we talked a lot about should we just come in here and tell you that permanent injunction, the statute needs to go. And, of course, that is the case. It does need to go. It violates the First Amendment. But we also understand your time is limited. We had a very short time to prepare briefs on both sides. You

know, I think you start my approach has always been with the smallest amount of relief that's necessary for the current situation. We, I think, explained why it is that these particular two initiatives are a direct risk. We want to go forward with them. But that does, of course, it begs the question, well, we made a facial challenge. If the Court agrees that the statute is invalid, then I think it is invalid across the board.

THE COURT: There is no doubt about that. The complaint, there is a claim, facial challenge. But I was just wondering for purposes of today, for purposes of the motion for preliminary injunction whether the relief is really based upon an as-applied challenge.

MR. EID: I think the relief with respect to these two measures, sir, is as applied. That is to say it is a direction to the Secretary of State's office that this language needs to be eliminated because it is false and it is compulsory, and that then the Title Board should be convened by the Secretary of State. They ought to approve clear titles and then we can circulate these petitions, these two petitions.

THE COURT: Okay. And then how about this question? 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 speech of plaintiffs' and not the speech of the government?

MR. EID: Yes, sir. And then our position is it's not governmental speech.

THE COURT: And why do you say that?

MR. EID: Well, because I think what the evidence adduced in this proceeding shows is that

petitions are circulated by proponents in the political process or advocates. They have a right to be able to come up with an idea. And, in fact, in a way they are entrepreneurs. Whatever position they are advocating, they have to get the means to be able to get that forward in the process and in some cases as we talked about the financial means too to get the petition circulators going and to get through that process.

THE COURT: Yeah, but the language, what you are complaining about is the language of the title, right?

MR. EID: Yeah.

THE COURT: So the language of the title, though, heavily regulated, would you agree with that?

MR. EID: The language of the title is heavily regulated, but it is -- there is a difference between procedural regulation and substantive regulation meaning speech that the voters, then, are going to be able to see that have to see or the petition signers have to see. To me that's the Todd case in the 10th Circuit.

THE COURT: Any evidence of people -- at least the only testimony that we really got had to do with people who are being asked to sign a petition, what they thought of it. And the only testimony that I recall is the testimony of Ms. Nieland who said that people didn't know whose language that was.

MR. EID: Yeah, Your Honor, I appreciate that position. But I guess what I would say is the Constitution requires that there be undiluted speech. That's clear from 303 Creative, from Hurley, from the other cases undiluted by a message that these

particular individuals don't share. The state has the right to regulate procedure, but they do not have a right to regulate the substance of the speech. And they certainly don't have the right to compel false speech which they are doing with respect to each one of these initiatives.

THE COURT: But the defendants say the issue of falsity is completely irrelevant to the issue of either compelled speech or government speech. Any case that you can cite that would suggest otherwise?

MR. EID: Well, I think the Todd case, Save Palisade Fruitlands v. Todd in the 10th Circuit is a good case for that. What it basically says, Your Honor, is that, quote -- it's at 279, 1211, "the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech associated with an initiative procedure."

And that's essentially what we have here. And, you know, we basically have undisputed testimony, I think, that they put the language in at 106 to discourage and dissuade people from voting for tax cuts. I mean, I heard that fairly clearly, that now it's required for everything that affects the tax change. Doctor -- or Mr. Sobanet testified that it's not accurate with respect to these three measures. So I think it falls squarely within Todd.

They have just crossed the line. You know, they are trying to act like it's government language in a government form, but that's not their positions. They're an initiative by citizens. And there are others who help them get through the process, but it's still the citizens' initiative. They came up with the idea.

They come up -- ultimately they have to decide if the wording matches their views sufficiently to be able to move it forward. And I think that's what this case is about.

THE COURT: Okay. Claim Three, Eleventh Amendment immunity, why wouldn't -- and let's back up before that. So it would appear from plaintiffs' reply brief that plaintiffs for purposes of this motion, not for the complaint but for purposes of this motion, concede that the governor is someone who because he is not involved in the initiative process is not an appropriate person who could be enjoined. Is that true?

MR. EID: I think that's their position, and I don't have reason to disagree with that position, Your Honor.

THE COURT: Okay. Now let's focus on the Secretary of State. Why isn't she entitled to Eleventh Amendment immunity since the third claim is asking me to enforce state law against her?

MR. EID: Well, I think, Your Honor, it has to do with the scope of how you interpret the Abstention Doctrine generally and Pullman abstention in particular. In a First Amendment case, I believe that you have the ability here to pull in the state law issues. There is still the issue of supremacy of federal law. The First Amendment trumps whatever the State of Colorado is doing. But with respect to deciding a related state issue, it certainly we think violates the single subject rule, but it's not necessary for the relief that we seek.

THE COURT: That's my other question. Then why does the motion for preliminary injunction involve the third claim?

MR. EID: I think that's a great point, and we talked a lot about that as a team. And I think it was odd to leave it out because you probably would have asked why is it not in here at least addressed. I don't think, by the way, that Pullman abstention applies here, but I don't believe it's necessary for the relief that we are seeking, so...

THE COURT: Okay. Thank you, Mr. Eid.

MR. EID: Thank you, Your Honor.

THE COURT: Mr. Kotlarczyk?

MR. KOTLARCZYK: Thank you, Your Honor, and thank the Court and the court staff for their time today for this hearing. We are here, Your Honor, in a pretty remarkable posture. We have plaintiffs who are seeking a disfavored preliminary injunction, which they did not contest in their reply brief, to interfere --

THE COURT: Did not contest the fact that it's a disfavored injunction?

MR. KOTLARCZYK: Correct. To have a federal court interfere with an ongoing state legislative process, here an initiative process, and that's after the plaintiffs declined to seek state judicial intervention to which they are expressly titled and which is based on a body of case law in the Colorado Supreme Court that goes back decades.

THE COURT: Yeah, but here is the problem. That may be true and there may be all sorts of ironies involved here, but why do all those things prevent

plaintiffs from putting the First Amendment issue before this Court? You know, maybe there has been a waiver as to Claim Three and all these other things, and maybe it would be really super ironic if a facial challenge were granted and it got rid of, you know, the previous bill that required the language if there is going to be a tax increase, but why is any of that relevant to the First Amendment claims?

MR. KOTLARCZYK: It's a great question, Your Honor. So I want to answer that question by first discussing the Pennhurst blocking out the state law claim. The state law claim is about whether the title itself is false or misleading. That's a state law claim under the Colorado Constitution. It has the path for resolution before the Colorado Supreme Court.

As I read plaintiffs' motion and reply brief and as I think as I heard them here today, there is no way to disaggregate their claim of falsity from their First Amendment claim. It is in their reply brief. It's their limiting principle for how this doesn't just blow up entirely the title setting process. Is this falsity?

So to answer the question directly, we are not taking the position that there is an absolute jurisdictional bar to this Court addressing the First Amendment claim. We do think that absolute jurisdictional bar exists as the state law claim. What we are saying is because of the nature of that First Amendment claim being so inextricably interwoven with the state law claim, that abstention from the First Amendment claims under Pullman is appropriate. It meets the factors of Pullman if there is an uncertain issue of state law. We have HB 21-1321.

THE COURT: Let's hold on for just one second and explore the premise there because your premise is that it can't be disaggregated, but that assumes that the -- I am not sure. It seems like if Mr. Eid is correct that the speech at issue is the speech of the plaintiffs and it's compelled speech, then why do we have to worry about the falsity issue if the, you know, it's not their speech, but they are being compelled by the state to say it?

MR. KOTLARCZYK: If I understand the Court's question, the compelled speech doctrine on which they rely, it obviously has as the first element that it is their speech and not the government's speech. And we think that's just completely unsupported. The ballot title is not something that exists out in the ether. It exists -- it is printed in three places. It's printed on the ballot.

THE COURT: Yeah, I mean, we'll get into government speech. But accepting the premise that it's their speech, why do plaintiffs have to somehow disaggregate from falsity?

MR. KOTLARCZYK: Well, I think they could have brought a different claim that did disaggregate from falsity. But they have taken the position in their papers that falsity is, in fact, the limiting principle that sets -- that on the one side invalidates 1321 as applied to these measures, but on the other hand does not completely eviscerate the title setting process that currently exists in state law.

So if they had just said we don't think -- if their claim, the claim they have brought had said we don't want to be forced to circulate petitions with language we disagree with, then that would be a different claim

and I wouldn't have this argument that falsity shoots through everything, but that's not how they have articulated their claim. They have articulated their claim as you don't have to worry that you are invalidating and pulling down the whole edifice of the Colorado state initiative process because all we're saying is when the ballot title language is what we consider to be false, that's the only time we think there is a First Amendment problem.

THE COURT: I am not sure because let's take a look at their motion for preliminary injunction and we can see. This is Docket No. 12, and I am looking at Page 3, "Plaintiffs respectfully request that this Court issue an injunction requiring the Secretary of State to convene the Title Board to issue new titles for the initiatives described below that state the content of those initiatives clearly, simply and accurately."

But don't you think the reason that I could order the Secretary of State to convene the Title Board would be because I found that 1321 and the mandatory language is somehow in violation of the First Amendment so that the effect of my order would be to excise the mandatory language from 1321 from the Title Board's consideration?

MR. KOTLARCZYK: If the question is whether the Court could fashion such –

THE COURT: No, my question is do you understand that to be what plaintiffs are asking for?

MR. KOTLARCZYK: I do, Your Honor. But the legal basis on which they are asking to do that, I would direct the Court to the plaintiffs' reply brief at Page 8. That's Docket No. 32. =And this is where they take

up the argument we raised in our opposition that there is no -- there is no limiting principle, that no legally articulable limiting principle that would invalidate 1321 --

THE COURT: Well, that's what I was asking Mr. Eid. Isn't this just an applied challenge? If it's an applied challenge, that's a limiting principle, right?

MR. KOTLARCZYK: That would provide limited relief, Your Honor, but I don't think that would answer the question of why does -- when you have no compelled speech doctrine that treats falsity as an element, no government speech doctrine that treats truth or falsity as an element, how the Court could say, well, this particular type of speech with which plaintiffs disagree causes me to invalidate 1321. There is no way to get around the falsity issue based on the claims that they've brought.

THE COURT: Unless, as you say, falsity is irrelevant to the constitutional question anyway, which brings us to government speech.

MR. KOTLARCZYK: Thank you, Your Honor.

So as I was starting or as we mentioned in our brief, you know, the ballot title appears in these three places. There has been no testimony and I haven't seen any argument from the plaintiffs that the Blue Book, one of those three places, is not government speech. It's unclear to me whether the plaintiffs are contesting whether the ballot title appearing on the ballot is government speech. We think the Timmons case pretty clearly forecloses the idea that it's private speech. So really all the testimony today and the vast

majority of the briefing has focused on the use of ballot title in the petition form.

There was testimony today from -- her name just escaped me -- Ms. Richards, I believe?

THE COURT: Roberts?

MR. KOTLARCZYK: Roberts, thank you, where she agreed with the statement that the client doesn't get to put their own language anywhere in the packet. And that's the initiative packet that's at Exhibits 2 and 3 of the stipulated exhibits. And that's right, Your Honor. The packet itself is a government form. It's mandated by statute. The things that go in it are mandated by statute. And importantly, the packet itself says that it's government speech before the ballot title. It has that language. "The ballot title and submission clause as designated by the Initial Title Setting Review Board is as follows."

So the form itself is government speech. There are undoubtedly vast areas of the initiative process that the government does not have a right to regulate. The government plays no role in determining what goes into an initiative. The actual text of the initiative itself is entirely in the hands of the proponents. And the interactive communication when signatures are being requested, the circulators discussing their talking points and their frequently asked questions that we heard so much about today, that's a process that the state doesn't regulate.

THE COURT: Right. But you did have the testimony of Ms. Roberts. It sounds right that if someone particularly when shown a petition form that has legal warning on it, that they will want to do what

she called some verification just to make sure that what the person is actually signing seems to, you know, be what the circulator just talked about. So wouldn't that verification then be some type of reading of the language of the petition?

MR. KOTLARCZYK: Sure. We don't dispute that some signatories are going to read that petition packet.

THE COURT: She suggested that anyone who signed it is going to look at it.

MR. KOTLARCZYK: I thought the testimony that came in through -- I think she was a little more hesitant on assigning a percentage. I think Ms. Nieland who followed her said 55 percent would review the language. So we certainly don't dispute that everyone is entitled to the warning that we've talked about. That government mandated warning at the top of the petition form encourages people to read the ballot title language. We certainly don't suggest any of that is wrong or improper, but that doesn't change it into the petitioner's speech. We cited in our papers examples of passports or birth certificates. Those contain, you know, things that are actually filled out by individuals, but that doesn't transform them.

THE COURT: Yeah, this is a little bit different because, of course, the person who is the sponsor, they --would you agree with me they are the ones that come up with the initiative proposal in the first place and then they have to submit it to the Title Board, right?

MR. KOTLARCZYK: That's correct, Your Honor. And the Title Board --

THE COURT: And then Ms. Roberts said that the purpose of the Title Board is to somehow come up with language that expresses the intent of the proponents.

MR. KOTLARCZYK: Yes. And that is completely incorrect, Your Honor.

THE COURT: Would it be largely true except in a situation where the intent -- the intent to verge from essentially the language that was originally proposed?

MR. KOTLARCZYK: No, Your Honor. That is not true. That is not an accurate description of the Title Board's charge in any instance whether TABOR language, 1321 language, whether any of that is mandated. The Title Board's charge is to set --first to determine that there is a single subject, that the constitutional single subject requirement is met, and then to set a title that clearly expresses that single subject in a way that is not unfair or misleading to any voters. There is nothing --

THE COURT: But they are using something to figure out what the proposal is.

MR. KOTLARCZYK: Correct, Your Honor. The Title Board, both by nature of the various expertises, the members of the Title Board as well as armed with the fiscal summary, they are provided with a staff draft prepared by Legislative Council of a draft title that they are able to use as a starting point. They have all sorts of resources.

THE COURT: And there is a certain session that meets with people who don't have lawyers. Presumably they've drafted something up, not maybe in the proper form, maybe somewhat vague, and

someone is working with them to try to come up with the title.

MR. KOTLARCZYK: So I did want to clarify one thing, Your Honor, that I think might not have been perfectly clear in the testimony today. The process whether you have a lawyer or not is the same. You have an obligation to go through -- you draft your initiative. You have an obligation to go through a public review and comment period with the legislature. Then you can submit your proposal to the Title Board. The presence or absence of a lawyer does not affect the steps you have to cross there.

THE COURT: It doesn't affect the steps, but if someone doesn't have a lawyer, do you think that there would be more of a process of trying to figure out what the person is, you know, attempting to do through the initiative so it could be expressed in a single subject and be done clearly?

MR. KOTLARCZYK: And that's the exact purpose of the review and comment hearing with Legislative Council. So they submit an original draft of their petition to Legislative Council. They'll have this review and comment. They get a memo, sometimes a dozen-page memo, saying have you thought about this? Have you thought about this? Have you thought about this? And then they are allowed to, before they present their proposal to the Title Board, they are allowed to make amendments to their proposal in response to those comments they receive through review and comment. And again, that's the same process as to whether they are represented or not.

THE COURT: Okay. And by the time the Title Board's set the title, has there been a transformation of the proposal from private speech to government speech at some point along the line?

MR. KOTLARCZYK: Well, the title was never private speech. The initiative in some sense always was. The initiative the government doesn't have any fingerprints on other than making suggestion saying, have you thought about this? Have you thought about that? The government doesn't have a right to go in there and change any of the substance of the actual measure.

But the proponents of a measure, and this is important, the proponents of a measure never submit a proposed title. They never come to the Title Board and say this should be your starting point. Well, they can, but Title Board is under no obligation to take it into account and it certainly doesn't happen very frequently. So the title from the very beginning is a government -- is a production of government speech. There is no title without the government's while as there could be initiatives.

THE COURT: And once that title appears on the petition, what evidence is there about the public's perception since that's one of the factors in Shurtleff.

MR. KOTLARCZYK: Well, we point out that the actual language that's used in the ballot -- or, excuse me, used in the packet expressly says that it is not the circulator who is holding it's speech. It's not --

THE COURT: But what if no one looks at it? What if no one reads it? What if, as you say, you know,

we are probably not talking here about it appearing on the ballot in November, but we are really just talking about it appearing on a petition in a King Soopers parking lot.

MR. KOTLARCZYK: Well, in that case, Your Honor, the plaintiffs have moved to enjoin the wrong law because by moving to enjoin 1321 talks about the ballot title language which flows through to all three of these documents we have been talking about. hey should have moved to enjoin a different law if that was what they wanted.

So I don't think -- to circle back to the question what evidence has been presented today, I haven't heard any of the witnesses with any foundation -- I made several objections on this ground -- say what voters understand the title --understand voters to understand by the title. What we have is the packet itself.

THE COURT: I think it was only Ms. Nieland who said they don't have any idea who wrote it.

MR. KOTLARCZYK: You are right, Your Honor, there was that testimony. But that certainly doesn't transform it into private speech when it's expressly preceded by language making clear that it's government speech.

THE COURT: Clear but in tiny writing right under a box, and then there is a spacing and then there is the question.

MR. KOTLARCZYK: Well, there is a tiny writing on many parts of government forms.

THE COURT: I know, but there is also case law about if you want someone to read something, you put it in big language, bold, caps.

MR. KOTLARCZYK: I am not aware of any of that case law affecting ballot initiative and ballot circulation, Your Honor.

THE COURT: Me neither, but I just wanted to check.

MR. KOTLARCZYK: I don't think in the absence of any evidence that there are voters who are being actively confused or misled by it and in the presence of evidence that the language on the packet itself expressly says that it's the language of the ballot title setting board, I don't think that gets us across the bridge from government speech to compelled private speech.

And one last note, Your Honor, if I am not over my time. The plaintiffs cited Semple v. Griswold out of the 10th Circuit as their example of compelled speech. But it's important to note that Semple found there was no compelled speech problem. And they -- the Semple court expressly said that the failure of a ballot initiative is not an adverse governmental action that constitutes -- that gives rise to a claim for compelled speech.

So I don't think they've cited any cases that really establish that this type of speech appearing on a government form could constitute compelled speech whether the form is the Blue Book, the ballot or the petition form.

THE COURT: Anything else? Claim Three, any more Eleventh Amendment?

MR. KOTLARCZYK: Your Honor, I could bang my drum on the Eleventh Amendment a little more, but I think the Court understands our position. I think Pennhurst clearly controls as to Claim Three. Federal courts cannot -- the Ex parte Young exception to the Eleventh Amendment does not extend to federal courts enjoining state officials in telling them how to enforce state law. That is clearly a claim for the state courts.

And it's why, you know, especially when considered in conjunction with the falsity allegations that sort of permeate this case, why we think this is a matter that's better for the state courts to begin with because there is an immediate right of review in the state court to determine whether ballot titles are false. We don't yet have with this new law any ruling from the Colorado Supreme Court about how Title Boards should be applying 1321.

The Title Board all the time hears from the Supreme Court and has to change its practices and adjust what it's doing to respond to concerns of the Colorado Supreme Court. That process has not played out with 1321, and it didn't have the chance to play out with these two initiatives because the plaintiffs chose not to appeal.

THE COURT: All right. Thank you. Mr. Eid, rebuttal?

MR. EID: Thank you, Your Honor. Just two things very quickly.

With respect to this distinction about falsity versus coerced speech, in our complaint, I just would say it's right on Page 2., and let me just read it quickly.

This “poison-pill language” is unconstitutional compelled speech and violates Plaintiffs' "First Amendment right," quoting from 303 Creative, "to present their message undiluted by views they do not share." And then it goes on in the next paragraph, "Worse, it is compelled false speech."

So I don't really understand why there was some implication that we didn't make the argument that it was compelled speech. Of course, it violates the First Amendment as compelled speech. What's remarkable is the state sitting here defending compelled false speech. I am flabbergasted as someone who has been in public service for years. I just don't understand what the compelling interest is when we have undisputed testimony that the speech is false.

And so that I would just say in terms of limiting principle, falsity is not the limiting principle. You suggested, Your Honor, that the limiting principle is the applied challenge, and that is certainly true. But I would also just say our complaint is clear. They are coercing our plaintiffs. And it gets to the issue of government versus private speech, and that's the other thing I would like to talk about just very quickly.

I've wondered about this. We talked about at what point could this become government speech, and I am just not seeing it. These petitioners, as I mentioned, whatever their views are, they are entrepreneurs. They come up with ideas. And in the case of tax changes, they are usually really simple ideas. We want to cut the tax rate by this amount. We want to cap property tax rate growths by this amount.

And so what we basically have here is that it doesn't become government speech because the Title

Board has a role within its sphere to determine procedures about what needs to happen for it to be in front of the voters for petitions. And if it did, Your Honor, we wouldn't have a citizen initiative process. We would be one of the states that doesn't allow citizens to initiate petitions.

THE COURT: Yeah, that's true, but you are not, plaintiffs are not challenging -- you are not trying to get a declaration that the Title Board is unconstitutional.

MR. EID: No, not at all. I respect the role of the Title Board.

THE COURT: It just seems to be focused on --

MR. EID: This statute, Your Honor, hijacks the Title Board's role. 106 forces the Title Board basically to put compelled -- in this case compelled falsities, but compelled speech into these measures. That's the real issue here, Your Honor. And it would be true if we didn't initiate it and someone else initiated something else that was a "tax change." That's the problem here, Your Honor.

THE COURT: But that is then the essence of the Secretary's limiting principle claim is that if the Court were to declare 1321 unconstitutional on a First Amendment ground that it's some type of compelled speech, then why wouldn't the Title Board become unconstitutional because the predicate would be that plaintiffs or -- and just so we are clear, I have big concerns about standing of most of the plaintiffs, but I think that Advance Colorado and Mr. Ward at least have standing, so I think that I can rule on the motion. But getting back to the point, I think that if that -- if

that statute is unconstitutional because it compels speech, then why doesn't --you know, how can the Title Board operate constitutionally because it's compelling speech all the time?

MR. EID: I think Mr. Wasserman really said it best to answer your question, Your Honor. He said -- I am paraphrasing, but I think I am close. The Title Board's obligation is to accurately describe for voters the changes in law being proposed. And the Title Board has done that in the state very well for many, many decades until 106 now in this context hijacks essentially their ability to describe for voters the change in law being proposed.

It's simply -- it's not about striking down the Title Board. It's about striking down 106 so that they don't have to lard this language on that is not consistent with the First Amendment. That's all there is to it.

THE COURT: Anything else, Mr. Eid?

MR. EID: No. Thank you. I appreciate your putting up with my voice today. Thank you.

THE COURT: It held out pretty well.

MR. EID: Get your flu shot everybody. Thank you, Your Honor.

THE COURT: All right. So the matter before the Court is Docket No. 12, which is the plaintiffs' motion for preliminary injunction. It's been somewhat limited since it was filed. Namely, plaintiffs have clarified that it's not --that no injunctive relief is being sought against the governor. Second, it seems to really be focused on an as-applied basis, but there could be a

little bit of doubt in between. As will be apparent, it doesn't really matter.

`In order to obtain a preliminary injunction, the moving party has to demonstrate four factors. And I am looking to the 10th Circuit's description of those four factors in a case called RoDa Drilling Company v. Siegal, S-I-E-G-A-L, which is a 10th Circuit case from 2009. Namely, it has to show a likelihood of success on the merits; a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3), that the balance of the equities tip in the movant's favor; and (4), that the injunction is in the public interest.

"Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." And that's a 10th Circuit case, Beltronics, from 2009.

There are, as the 10th Circuit has explained, three types of preliminary injunctions that are disfavored: Namely, injunctions that disturb the status quo; injunctions that are mandatory rather than prohibitory; and third, injunctions that provide the movant substantially all the relief that it could feasibly obtain after a full trial on the merits.

In order to obtain a disfavored injunction, the moving party must make a strong showing on the likelihood of success on the merits factor. I find here that because the plaintiffs are seeking an injunction that doesn't stop someone from doing things, but rather orders someone to do something, namely to order the Secretary of State to convene the Title Board, that this is, in fact, a disfavored type of injunction.

The first and second claims are respectively facial and as-applied challenges to a law which I am going to refer to as 1321, which is actually House Bill 21-1321. And the plaintiffs' challenge in the First and Second Claims is brought under the First Amendment to the United States Constitution.

The plaintiffs are arguing that the mandatory language that 1321 causes to be included in ballot titles to tax measures where there is a proposed decrease in taxes is unconstitutional as compelled speech in violation of the First Amendment. The Third Claim is a state law claim asking that the Court find that 1321 is unconstitutional under the State Constitution because it violates the single subject requirement of the State Constitution.

The Court will now make the following findings of fact: First of all, in regard to the State Title Board, the Title Board consists of the Secretary of State, the Attorney General, and the Director of the Office of Legislative Legal Services or their designees, and that is codified at Colorado revised 1-40-106(1).

The Title Board has the statutory authority to designate and fix a proper fair title for each proposed law or constitutional amendment. That title pursuant to the statutory authority shall "correctly and fairly express the true intent and meaning" of the proposed law or the constitutional amendment. If a proponent of an initiative is "not satisfied" with the title set by the Title Board and believes that the title is "unfair" or does not "express the true meaning and intent of the proposed state law," the proponent may file a motion for a rehearing with the Title Board.

If the proponent is not satisfied with the Title Board's ruling on rehearing, then the proponent may appeal the decision to the Colorado Supreme Court. The Supreme Court must decide the matter "promptly, consistent with the rights of the parties, either affirming the action of the Title Board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the Title Board is in error." And that is C.R.S. 1-40-107(2).

In regard to the statute in question, 1321, that is codified at C.R.S. 1-40-106(3)(e). And that requires "For measures that reduce state tax revenue through a 'tax change,' the ballot 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 ...?"

The statute also in Subsection (f) requires that: For measures that reduce local district property tax revenue through a tax change, the ballot title must begin, "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue...?"

Initiative 21 is an initiative on which the Title Board met to consider on April 5th of 2023. The Title Board included the language from 1321 in the title of Initiative 21, which is reflected in Exhibit 5. On April 12th of this year Plaintiff Steven Ward filed a motion for a rehearing with the Title Board arguing that the title language for Initiative 21 was misleading because it described the initiative as decreasing property tax revenue rather than decreasing the "growth of property tax revenue." That's in Exhibit 5.

On April 19th of this year the Title Board denied Mr. Ward's motion in its entirety. The Title Board set the titling which for Initiative 21 as reflected in Exhibit 5. I am not going to read that again, but it includes the mandatory language from 1321. Mr. Ward did not file an appeal to the Colorado Supreme Court pursuant to C.R.S. 1-40-107(2), which allows an appeal on the ground that the title is misleading.

Talking now about Initiative 22, the Title Board met on April 5th of this year to consider Initiative 22, which is reflected in Exhibit 4. The Title Board did include the disputed language from 1321 in the title, once again as reflected in Exhibit 4. And on April 12th of this year Mr. Ward filed a motion for rehearing with the Title Board arguing that the title language for Initiative 22 was misleading because it stated that the initiative "would reduce funding for education, health care policy and financing and higher education." Mr. Ward argued that Initiative 22 would not reduce funding for these programs given the economic revenue projections for the next fiscal year and the projected TABOR refunds.

The fiscal summary of Initiative 22 which was prepared by the nonpartisan legislative staff notes that the initiative will result in a "total revenue reduction of $101.9 million for fiscal year 2024-25." However, "based on current forecast, the measure is expected to reduce the amount of revenue required to be refunded to taxpayers under TABOR with no net impact on the amount available for the budget," once again as reflected in Exhibit 4. On April 19th of this year the Title Board denied Mr. Ward's motion in its entirety. The Title Board set the language as reflected in Exhibit 4. Mr. Ward did not file an appeal to the Colorado Supreme Court on the grounds that the title was misleading.

As reflected in both Exhibit 2 and Exhibit 3, the second page of each of those exhibits, which is essentially the petition language, includes under the box at the top of Page 2, that box consisting of a warning, language that indicates, "The ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:" And then what follows is the language "Shall there be" which describes what the initiative is about, in other words, the title.

Pursuant to statute, the Secretary of State's Office must approve the printer's proof of a petition before the petition can be circulated. That's in C.R.S.1-40-113(1)(a). Mr. Ward did not file a printer's proof for the two initiatives until Friday, August 4th of 2023, which was a period of months after the titles were finalized. The Secretary of State's office approved the petition the same day as reflected in Exhibits 9 and 10. The plaintiffs filed the present lawsuit on Monday, August 7th of this year.

There was testimony today from Ms. Nieland and whose first name is Dawn, and she is employed by Blitz Canvassing. She has familiarity with petition circulation and approval and also with canvassing. And when -- she testified also about working as a circulator which she has done in the past and explained how she goes about approaching prospective signators for a petition.

She indicated that of people who read the title, that she estimated that about 55 percent of the people would. She thinks that of those, probably 75 percent read the title, and then maybe 40 percent of those people actually read the full proposal. She indicates that quite a few people do read the – or, rather, ask questions of the circulator. She estimated that once a person was engaged in a discussion with her as a circulator, that they were probably engaged for on average about two to five minutes.

She was asked if the typical person who she engaged a discussion with regarding a petition when she was working as a circulator understood where the ballot title came from. And she answered no, that people say those titles are complicated and they would really like if it was a simple title. Those are my findings of fact. Here are my conclusions of law.

So in regard to the First and Second Claims, I am going to focus on a likelihood of success on the merits, first of all. Plaintiffs claim that the First Amendment is violated because the mandatory language that the Title Board feels compelled to include in the title from 1321 is compelled speech. Semple v. Griswold, a 10th Circuit case from 2019, indicates that, "To state a compelled-speech claim, a

plaintiff must establish three elements: (1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action."

So the question then becomes whether the mandatory language in the titles compelled by -- sorry, are mandatory because of 1321 is speech of the plaintiffs or whether it is as the defendants claim speech of the government. The United States Supreme Court has made it clear that the First Amendment free speech clause does not apply to government speech. It only restricts the government's ability. The First Amendment free speech clause restricts the government regulation of private speech. It doesn't apply to government speech. And that was made clear in the Pleasant Grove City, Utah, v. Summum from 2009 and also more recently in Walker v. Texas Division, Sons of Confederate Veterans, Inc. from 2015.

The test to determine whether or not speech is government speech or private speech is the following: Namely, a court should conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. A court should review several types of evidence including, No. 1, the history of the expression at issue; No. 2, the public's likely perception as to who (the government or private person) is speaking; and 3, the extent to which the government has actively shaped or controlled the expression. Those particular factors are ones which the Supreme Court identified this last year in the case of Shurtleff v. City of Boston, Massachusetts.

So let's talk first of all about the history of the expression at issue. As best I can glean from the case law, we're not really focused narrowly on the history of this particular expression. In other words, we are not talking about the legislative history of 1321, but rather looking back a little bit more about the nature of the speech at issue and that in my opinion are titles. So the Title Board has existed for quite some time, and it has historically set the titles for initiatives proposed by citizens in the State of Colorado for, as I said, initiatives proposed through citizens such as plaintiffs.

Let's now look at the extent to which the government has actively shaped or controlled the expression. So I would say overall this is an area of speech that within the Colorado initiative process is heavily regulated by the government. First of all, the Title Board statutorily is not just authorized, but it has the responsibility to set the title. And that is found in C.R.S. 1-40-106(1).

Of course, as I noted in regard to the two initiatives before the Court today, a proponent can file a motion for a rehearing with the Title Board and can appeal the decision to the Colorado Supreme Court. That procedure is set forth in Colorado Revised Statute 1-40-107(1)(a)(I)(II).

The Colorado Supreme Court in the matter of Title, which is reported at 454 P.3d 1056 at 1059, an opinion from the Colorado Supreme Court in 2019, has held that, "The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause, which we will reverse the Board's

decision only when a title is insufficient, unfair, or misleading."

Now, let's take a look at the second factor which I skipped over, and that's the public's likely perception as to who the government or a private person is speaking. Given the Title Board's action, given -- and this is consistent with the testimony that we heard today, but it's also mandated by statute -- the Title Board is the one who sets the language at issue in Claims One and Two.

Without question the initiative has its genesis in, for instance, people like the plaintiffs here, and those are clearly private persons, they may be citizens, they may be a company like Advance Colorado, who have the ability under Colorado law to suggest some type of initiative. But the title is not up to them. The title pursuant to state law is up to the Title Board. And, in fact, the plaintiffs here don't challenge the Title Board's authority in any way, shape or form. That's not the challenge here.

The challenge is that 1321 has in effect limited the discretion of the Title Board because it's commanding the Title Board to include certain types of mandatory language which the plaintiffs believe is the heart of the compelled speech in this case. Nevertheless, the issue for the second factor in Shurtleff is the public's likely perception as to who the government or private person is speaking.

The fact that 1321 may limit the discretion of the Title Board certainly doesn't somehow change the fact that it's the Title Board, an instrumentality of the government, that is setting the language because even if you say that 1321 sets the language, it's not a

private party setting the language. It's perhaps you could say the General Assembly through that particular statute including mandatory language.

There has been no testimony today that the -- as to the public having a likely perception when shown a petition that they would believe that the description of the initiative or the petition or the question, whatever you want to call it, is the speech of the electors. Electors are named under the section Petition to Initiate. But there has been no testimony that anyone would, upon reviewing Page 2 or any of the other pages that contain that question, would believe or have believe or tend to believe that the language of the question is that of the electors or the people who initiated the petition.

The only language -- or sorry, the only testimony that we really had was from Ms. Nieland who testified that they don't have any clue who wrote it, but not that it was perceived or likely to be perceived as the language of a private person. In fact, as the defendants pointed out, there is language right on the petition that would disabuse any close reader of the question. To the contrary, namely that language that says, "The ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:" It would be unlikely that anyone who actually read that would believe that an Initiative Title Setting Review Board was equivalent to the electors who were later listed there.

So in reviewing those Shurtleff factors, I find that none of them weigh in favor of the plaintiffs. And as a result of that, I find that the plaintiffs have failed to show that the speech at issue here is, in fact,

compelled speech of them as opposed to simply being government speech. And because plaintiffs have failed to do that, I find that plaintiffs have failed to make a strong showing of a likelihood of success on the standard of a disfavored type of injunction. But even if the Court were not to use the standard for a disfavored type of injunction, just the normal injunctive factors, the Court also finds that plaintiffs have failed to demonstrate a likelihood of success on the merits.

Because the failure of plaintiffs to show one factor is fatal to the other factors, the Court will not rule on the other factors; but rather, I will deny the injunction based upon Claims One and Two.

As I said before, as to Claim Three, it may be that plaintiffs disclaimed that as a basis for the injunction, but in case that's not 100 percent clear, I do find that that particular claim is asking a federal court to rule on a matter of a state official. And, of course, the Secretary of State and the Governor sued in their official capacities to comply with state law.

The Eleventh Amendment bars suits in federal court seeking to enjoin a state official from violating state law. That was made clear not only in Pennhurst, but also in a 10th Circuit case, Johns v. Stewart from 1995 and more recently in Safe Streets Alliance v. Hickenlooper, a 10th Circuit case from 2017. The 10th Circuit noted that, "Article III courts sitting in equity are without authority to remedy a State's or its officers' violations of State law; we may only grant injunctive relief of this type to 'vindicate federal rights.'"

So to the extent that the third claim may have some basis for the motion, the Court finds that there was no likelihood of success on the merits either because it would be -- that type of relief would be barred by the Eleventh Amendment. So as a result, the Court will deny plaintiffs' motion for a preliminary injunction.

Mr. Eid, anything else on behalf of plaintiffs today?

MR. EID: No. Thank you, Your Honor.

THE COURT: Thank you. Anything else on behalf of defendants?

MR. KOTLARCZYK: No, Your Honor. Thank you.

THE COURT: Then the Court will be in recess. Thank you.

(Recess at 4:10 p.m.)

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EXHIBITS

Exhibit	Offered	Received	Refused
1-12		5	

Reserved Withdrawn

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-

entitled matter. Dated at Denver, Colorado, this 11th day of September, 2023.

S/Janet M. Coppock

Appendix F

N THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 23-cv-01999-PAB-SKC

ADVANCE COLORADO, a Colorado non-profit; GEORGE HANKS "HANK" BROWN, an individual; STEVEN WARD, an individual; CODY DAVIS, an individual; JERRY SONNENBERG, an individual; CARRIE GEITNER, an individual,

Plaintiffs,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant.

[Filed: December 14, 2023]

ORDER

This matter is before the Court on the parties' Joint Motion to Stay [Docket No. 51]. The Court has jurisdiction under 28 U.S.C. § 1331.

On August 30, 2023, the Court denied plaintiffs' motion for a preliminary injunction. Docket No. 36 at 3. On September 8, 2023, plaintiffs filed a notice of an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit from the

Court's order denying the preliminary injunction. Docket No. 37.

On December 8, 2023, the parties filed a joint motion to stay all deadlines in this case until the Tenth Circuit rules on the appeal. Docket No. 51 at 1. The parties state that the "primary and dispositive issues raised by this case are legal and are currently before the Tenth Circuit on the appeal of this Court's denial of the Plaintiffs' Motion for Preliminary Injunction, in *Advance Colorado v. Griswold*, No. 23-1282." *Id.* at 2, ¶ 1. The parties argue that it would conserve the resources of the Court and the parties to wait until the Tenth Circuit rules on the appeal. *Id.*, ¶ 2.

A court may enter a stay of proceedings incidental to its inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Springmeadows Condo. Ass'n v. Am. Family Mut. Ins. Co.*, No. 14-cv-02199-CMA-KMT, 2014 WL 7005106, at *1 (D. Colo. Dec. 9, 2014) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). However, the Tenth Circuit has cautioned that "the right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (citation omitted). Stays of all proceedings in a case are thus "generally disfavored in this District" and are considered to be "the exception rather than the rule." *Davidson v. Bank of Am. N.A.*, No. 14-cv-01578-CMA-KMT, 2015 WL 5444308, at *1 (D. Colo. Sept. 16, 2015). A stay may, however, be appropriate in certain circumstances. Courts in this district consider the following factors

(the "*String Cheese Incident* factors") in determining whether a stay is appropriate: (1) the plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendant; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *Springmeadows Condo. Ass'n*, 2014 WL 7005106, at *1 (citing *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 02-cv-01934-LTB-PA, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006)). The parties do not directly address the *String Cheese Incident* factors.

The Court finds that the *String Cheese Incident* factors weigh in favor of a stay. The parties jointly request a stay because it would conserve the parties' resources. Docket No. 51 at 2, ¶ 2. The parties have identified no prejudice that would result to either party from the Court staying this case pending the Tenth Circuit's decision on the preliminary injunction appeal. The convenience to the Court also weighs in favor of a stay of the proceedings because dispositive legal issues in this case are currently pending before the Tenth Circuit. A stay, pending the Tenth Circuit's disposition of the interlocutory appeal, would conserve judicial time and resources. *See Martinez v. Back Bone Bullies Ltd*, No. 21-cv-01245-MEH, 2022 WL 1027148, at *3 (D. Colo. Apr. 6, 2022) ("The district court has discretion to determine whether to stay proceedings pending disposition of an interlocutory appeal." (citation omitted)). The Court is unaware of any interests of non-parties and therefore finds that the fourth factor is neutral. With respect to factor five, the public has an interest in the "efficient

and just" resolution of legal disputes. *Thomas v. Rogers*, No. 19-cv-01612-RM-KMT, 2019 WL 5085045, at *3 (D. Colo. Oct. 10, 2019). While there is a public interest in the expeditious resolution of this case, there is also a public interest in the efficient use of judicial resources. The Court therefore finds that the fifth factor is neutral.

This case presents a rare circumstance where a stay of proceedings is warranted. Administrative closure pursuant to D.C.COLO.LCivR 41.2 may be appropriate when a case would otherwise be stayed for an indefinite amount of time. *See Garcia v. State Farm Mut. Fire & Cas. Co.*, No. 20-cv-02480-PAB-MEH, 2021 WL 4439792, at *6 (D. Colo. Sept. 27, 2021) (ruling that case should be administratively closed pursuant to D.C.COLO.LCivR 41.2 because the arbitration proceedings would last for an indefinite period of time). Administrative closure is "the practical equivalent of a stay." *sPower Dev. Co., LLC v. Colo. Pub. Utilities Comm'n*, No. 17-cv-00683-CMA-NYW, 2018 WL 5996962, at *4 (D. Colo. Nov. 15, 2018) (quoting *Quinn v. CGR*, 828 F.2d 1463, 1465 n.2 (10th Cir. 1987)). Because this case will be stayed for an unknown period of time pending the Tenth Circuit's decision on the interlocutory appeal, the Court finds good cause to administratively close this case pursuant to D.C.COLO.LCivR 41.2, subject to being reopened for good cause shown. The Tenth Circuit's ruling on the interlocutory appeal will constitute "good cause."

Accordingly, the Court will deny without prejudice defendant's Motion to Dismiss Amended Complaint (Doc. 47) [Docket No. 50]. *See* D.C.COLO.LCivR 41.2 ("Administrative closure of a

civil action terminates any pending motion."). Defendant may move to re-file the motion to dismiss after the Tenth Circuit decides the interlocutory appeal.

It is therefore

ORDERED that the parties' Joint Motion to Stay [Docket No. 51] is **GRANTED**. It is further

ORDERED that, pursuant to D.C.COLO.LCivR 41.2, this case is administratively

closed. Either party may move to reopen the case for good cause. It is further

ORDERED that the parties shall file a **status report** with the Court within **21 days** of the Tenth Circuit's ruling in Case No. 23-1282. It is further

ORDERED that defendant's Motion to Dismiss Amended Complaint (Doc. 47) [Docket No. 50] is **DENIED without prejudice**.

DATED December 14, 2023.

BY THE COURT:

_____

PHILIP A. BRIMMER

Chief United States
District Judge

Appendix G — Statutory and regulatory provisions

1. U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Const. amend. XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. C.R.S.A. Const. Art. 5 § 1. General assembly--initiative and referendum provides:

(1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

(2.5) In order to make it more difficult to amend this constitution, a petition for an initiated constitutional amendment shall be signed by registered electors who reside in each state senate district in Colorado in an amount equal to at least two percent of the total registered electors in the senate district provided that the total number of signatures of registered electors on the petition shall at least equal the number of

signatures required by subsection (2) of this section. For purposes of this subsection (2.5), the number and boundaries of the senate districts and the number of registered electors in the senate districts shall be those in effect at the time the form of the petition has been approved for circulation as provided by law.

(3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election or by the general assembly. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative.

(4)(a) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon or, if applicable the number of votes required pursuant to paragraph

(b) of this subsection (4), and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(b) In order to make it more difficult to amend this constitution, an initiated constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon; except that this paragraph (b) shall not apply to an initiated constitutional amendment that is limited to repealing, in whole or in part, any provision of this constitution.

(5) The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment. No later than two weeks after submission of the original draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public, which shall be held only after full and timely notice to the public. Such meeting shall be held prior to the fixing of a ballot title. Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure.

(5.5) No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

(6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to

the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

(7) The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance with this section. In submitting the same and in all matters pertaining to the form of all petitions, the secretary of state and all other officers shall be guided by the general laws.

(7.3) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly shall cause to be published the text and title of every such measure. Such publication shall be made at least one time in at least one legal publication of general circulation in each county of the state and shall be made at least fifteen days prior to the final date of voter registration for the election. The form and manner of publication shall be as prescribed by law and shall ensure a reasonable opportunity for the voters statewide to become informed about the text and title of each measure.

(7.5)(a) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly shall prepare and make available to the public the following information in the form of a ballot information booklet:

(I) The text and title of each measure to be voted on;

(II) A fair and impartial analysis of each measure, which shall include a summary and the major arguments both for and against the measure, and which may include any other information that would assist understanding the purpose and effect of the measure. Any person may file written comments for consideration by the research staff during the preparation of such analysis.

(b) At least thirty days before the election, the research staff shall cause the ballot information booklet to be distributed to active registered voters statewide.

(c) If any measure to be voted on by the voters of the entire state includes matters arising under section 20 of article X of this constitution, the ballot information booklet shall include the information and the titled notice required by section 20(3)(b) of article X, and the mailing of such information pursuant to section 20(3)(b) of article X is not required.

(d) The general assembly shall provide sufficient appropriations for the preparation and distribution of the ballot information booklet pursuant to this subsection (7.5) at no charge to recipients.

(8) The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado".

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective

municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen percent to propose any measure by the initiative in any city, town, or municipality.

(10) This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law.

4. C.R.S.A. Const. Art. 10 § 20. The Taxpayer's Bill of Rights provides:

(1) General provisions. This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds

under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. When annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.

(2) Term definitions. Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

(3) Election provisions.

(a) Ballot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years. Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1(7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: "NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE." Except for district voter-approved additions, notices shall include only:

(i) The election date, hours, ballot title, text, and local election office address and telephone number.

(ii) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change.

(iii) For the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1(7.5) of article V of this constitution.

(c) Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined

dollar excess, and the combined excess revenue refunded in the next fiscal year. District bonded debt shall not issue on terms that could exceed its share of its maximum repayment costs in (b)(iv). Ballot titles for tax or bonded debt increases shall begin, "SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost),...?"

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

(5) Emergency reserves. To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service. Unused reserves apply to the next year's reserve.

(6) Emergency taxes. This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3)(c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.

(b) Emergency tax revenue shall be spent only after emergency reserves are depleted, and shall be refunded within 180 days after the emergency ends if not spent on the emergency.

(c) A tax not approved on the next election date 60 days or more after the declaration shall end with that election month.

(7) Spending limits. (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

(b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(c) The maximum annual percentage change in each district's property tax revenue equals inflation in the

prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset. Initial district bases are current fiscal year spending and 1991 property tax collected in 1992. Qualification or disqualification as an enterprise shall change district bases and future year limits. Future creation of district bonded debt shall increase, and retiring or refinancing district bonded debt shall lower, fiscal year spending and property tax revenue by the annual debt service so funded. Debt service changes, reductions, (1) and (3)(c) refunds, and voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base. Voter-approved revenue changes do not require a tax rate change.

(8) Revenue limits. (a) New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed. Neither an income tax rate increase nor a new state definition of taxable income shall apply before the next tax year. Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

(b) Each district may enact cumulative uniform exemptions and credits to reduce or end business personal property taxes.

(c) Regardless of reassessment frequency, valuation notices shall be mailed annually and may be appealed annually, with no presumption in favor of any pending valuation. Past or future sales by a lender or government shall also be considered as comparable market sales and their sales prices kept as public records. Actual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal.

(9) State mandates. Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration. For current programs, the state may require 90 days notice and that the adjustment occur in a maximum of three equal annual installments.

5. § 1-40-101. Legislative declaration provides:

(1) The general assembly declares that it is not the intention of this article to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government.

(2)(a) The general assembly finds, determines, and declares that:

(I) The initiative process relies upon the truthfulness of circulators who obtain the petition signatures to qualify a ballot issue for the statewide ballot and that during the 2008 general election, the honesty of many

petition circulators was at issue because of practices that included: Using third parties to circulate petition sections, even though the third parties did not sign the circulator's affidavit, were not of legal age to act as circulators, and were paid in cash to conceal their identities; providing false names or residential addresses in the circulator's affidavits, a practice that permits circulators to evade detection by persons challenging the secretary of state's sufficiency determination; circulating petition sections without even a rudimentary understanding of the legal requirements relating to petition circulation; and obtaining the signatures of persons who purported to notarize circulator affidavits, even though such persons were not legally authorized to act as notaries or administer the required oath;

(II) The per signature compensation system used by many petition entities provides an incentive for circulators to collect as many signatures as possible, without regard for whether all petition signers are registered electors; and

(III) Many petition circulator affidavits are thus executed without regard for specific requirements of law that are designed to assist in the prevention of fraud, abuse, and mistake in the initiative process.

(b) The general assembly further finds, determines, and declares that:

(I) Because petition circulators who reside in other states typically leave Colorado immediately after petitions are submitted to the secretary of state for verification, a full and fair examination of fraud related to petition circulation is frustrated, and as a result, the secretary of state has been forced to give

effect to certain circulator affidavits that were not properly verified and thus were not prima facie evidence of the validity of petition signatures on affected petition sections; and

(II) The courts have not had authority to exercise jurisdiction over fraudulent acts by circulators and notaries public in connection with petition signatures reviewed as part of the secretary of state's random sample.

(c) Therefore, the general assembly finds, determines, and declares that:

(I) As a result of the problems identified in paragraphs (a) and (b) of this subsection (2), one or more ballot measures appeared on the statewide ballot at the 2008 general election even though significant numbers of the underlying petition signatures were obtained in direct violation of Colorado law and the accuracy of the secretary of state's determination of sufficiency could not be fully evaluated by the district court; and

(II) For the initiative process to operate as an honest expression of the voters' reserved legislative power, it is essential that circulators truthfully verify all elements of their circulator affidavits and make themselves available to participate in challenges to the secretary of state's determination of petition sufficiency.

6. § 1-40-102. Definitions provides:

As used in this article 40, unless the context otherwise requires:

(1) “Ballot issue” means a nonrecall, citizen-initiated petition or legislatively-referred measure which is

authorized by the state constitution, including a question as defined in sections 1-41-102(3) and 1-41-103(3), enacted in Senate Bill 93-98.

(2) "Ballot title" means the language which is printed on the ballot which is comprised of the submission clause and the title.

(3.5) "Circulator" means a person who presents to other persons for possible signature a petition to place a measure on the ballot by initiative or referendum.

(3.7) "Designated representative of the proponents" or "designated representative" means a person designated pursuant to section 1-40-104 to represent the proponents in all matters affecting the petition.

(4) "Draft" means the typewritten proposed text of the initiative which, if passed, becomes the actual language of the constitution or statute, together with language concerning placement of the measure in the constitution or statutes.

(6) "Section" means a bound compilation of initiative forms approved by the secretary of state, which shall include pages that contain the warning required by section 1-40-110(1), the ballot title, the fiscal summary required by section 1-40-110(3), and a copy of the proposed measure; succeeding pages that contain the warning, the ballot title, and ruled lines numbered consecutively for registered electors' signatures; and a final page that contains the affidavit required by section 1-40-111(2). Each section shall be consecutively prenumbered by the petitioner prior to circulation.

(8) "Submission clause" means the language which is attached to the title to form a question which can be

answered by "yes" or "no".

(10) "Title" means a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative.

7. § 1-40-103. Applicability of article provides:

(1) This article shall apply to all state ballot issues that are authorized by the state constitution unless otherwise provided by statute, charter, or ordinance.

(2) The laws pertaining to municipal initiatives, referenda, and referred measures are governed by the provisions of article 11 of title 31, C.R.S.

(3) The laws pertaining to county petitions and referred measures are governed by the provisions of section 30-11-103.5, C.R.S.

(4) The laws pertaining to school district petitions and referred measures are governed by the provisions of section 22-30-104(4), C.R.S.

8. § 1-40-104. Designated representatives provides:

At the time of any filing of a draft as provided in this article, the proponents shall designate the names and mailing addresses of two persons who shall represent the proponents in all matters affecting the petition and to whom all notices or information concerning the petition shall be mailed.

9. § 1-40-105. Filing procedure--review and comment meeting--amendments--filing with secretary of state provides:

(1) The original typewritten draft of every initiative petition for a proposed law or amendment to the state

constitution to be enacted by the people, before it is signed by any elector, shall be submitted by the proponents of the petition to the directors of the legislative council and the office of legislative legal services for review and comment. Proponents are encouraged to write such drafts in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning that are understandable to the average reader. Upon request, any agency in the executive department shall assist in reviewing and preparing comments on the petition. No later than two weeks after the date of submission of the original draft, unless it is withdrawn by the proponents, the directors of the legislative council and the office of legislative legal services, or their designees, shall render their comments to the proponents of the petition concerning the format or contents of the petition at a review and comment meeting that is open to the public. Where appropriate, such comments shall also contain suggested editorial changes to promote compliance with the plain language provisions of this section. Except with the permission of the proponents, the comments shall not be disclosed to any person other than the proponents prior to the review and comment meeting.

(1.5) Both designated representatives of the proponents must appear at all review and comment meetings. If either designated representative fails to attend a meeting, the measure is considered withdrawn by the proponents. If one of the two designated representatives fails to attend the review and comment meeting, the petition is deemed to be automatically resubmitted to the directors of the legislative council and the office of legislative legal

services for review and comment, unless the designated representative present objects to the automatic resubmission. No later than five business days after the resubmission, the directors shall conduct a review and comment meeting in accordance with the requirements of this section. If both designated representatives fail to attend the review and comment meeting or if the designated representative present objects to the automatic resubmission, the proponents may thereafter resubmit the initiative petition in accordance with subsection (1) of this section.

(2) After the review and comment meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition must be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the secretary of state as provided in subsection (4) of this section. If the directors have no additional comments concerning the amended petition, they may so notify the proponents in writing, and, in such case, a review and comment meeting on the amended petition pursuant to subsection (1) of this section is not required.

(3) To the extent possible, drafts shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause

confusion among voters. The draft shall not present the issue to be decided in such manner that a vote for the measure would be a vote against the proposition or viewpoint that the voter believes that he or she is casting a vote for or, conversely, that a vote against the measure would be a vote for a proposition or viewpoint that the voter is against.

(4) After the review and comment meeting provided in subsections (1) and (2) of this section, a copy of the original typewritten draft submitted to the directors of the legislative council and the office of legislative legal services; a copy of the amended draft with changes highlighted or otherwise indicated, if any amendments were made following the last review and comment meeting conducted pursuant to subsections (1) and (2) of this section; and an original final draft that gives the final language for printing shall be submitted to the secretary of state without any title, submission clause, or ballot title providing the designation by which the voters shall express their choice for or against the proposed law or constitutional amendment.

10. § 1-40-105.5. Initial fiscal impact statement—definition

(1) As used in this section, unless the context otherwise requires, "director" means the director of research of the legislative council of the general assembly.

(1.5)(a) For every initiated measure properly submitted to the title board, the director shall prepare a fiscal summary that consists of the following information:

(I) A description of the measure's fiscal impact, including a preliminary estimate of any change in state and local government revenues, expenditures, taxes, or fiscal liabilities if implemented;

(II) A qualitative description of the economic impacts of the measure if implemented;

(III) Any information from the initiated measure or a description of state and local government implementation in order to provide the information required in subsection (1.5)(a)(I) or (1.5)(a)(II) of this section;

(IV) The following statement: "This fiscal summary, prepared by the nonpartisan Director of Research of the Legislative Council, contains a preliminary assessment of the measure's fiscal impact. A full fiscal impact statement for this initiative is or will be available at www.ColoradoBlueBook.com.".

(V) If the measure would either increase or decrease the individual income tax rate, a table that shows the estimated effect of the change on the tax owed by individuals in different income categories. The table prepared by the director must have one column titled "income categories" that shows income categories, one column titled "current average income tax owed" that shows the average income tax owed by filers within each income category, one column titled "proposed average income tax owed" that shows the average income tax owed by filers within each income category if the initiated measure were to pass, and one column titled "proposed change in average income tax owed" that identifies the difference between the average income tax owed by filers within each income category if the initiated measure were to pass and if the

initiated measure were not to pass. If the difference in the amount of tax owed shown in the table is an increase, the change must be expressed as a dollar amount preceded by a plus sign. If the change in the amount of tax owed shown in the table is a decrease, the change must be expressed as a dollar amount preceded by a negative sign. The director shall use the following income categories in creating the table:

(A) Federal adjusted gross income of twenty-five thousand dollars or less;

(B) Federal adjusted gross income greater than twenty-five thousand dollars and no more than fifty thousand dollars;

(C) Federal adjusted gross income greater than fifty thousand dollars and no more than one hundred thousand dollars;

(D) Federal adjusted gross income greater than one hundred thousand dollars and no more than two hundred thousand dollars;

(E) Federal adjusted gross income greater than two hundred thousand dollars and no more than five hundred thousand dollars;

(F) Federal adjusted gross income greater than five hundred thousand dollars and no more than one million dollars;

(G) Federal adjusted gross income greater than one million dollars and no more than two million dollars; and

(H) Federal adjusted gross income greater than two million dollars and no more than five million dollars.

(b) If an initiated measure has no fiscal impact as

specified in subsection (1.5)(a)(I) or (1.5)(a)(II), then the director may include a statement that there is no fiscal impact under that provision.

(c) The director shall notify the secretary of state if the website for fiscal summaries changes, and in such case, the statement required in subsection (1.5)(a)(IV) must include the new website.

(d) The director shall provide the designated representatives of the proponents and the secretary of state with the fiscal summary no later than the time of the title board meeting at which the proposed initiated measure is to be considered. The title board shall not conduct a hearing on the fiscal summary at this title board meeting, and the director's fiscal summary is final, unless modified in accordance with section 1-40-107.

(2)(a) For every initiated measure for which the secretary of state has approved a petition section in accordance with section 1-40-113(1)(a), the director shall prepare an initial fiscal impact statement, taking into consideration any fiscal impact estimate submitted by the designated representatives of the proponents or other interested person that is submitted in accordance with subsection (2)(b) of this section, the office of state planning and budgeting, and the department of local affairs. The director shall provide the designated representatives of the proponents and the secretary of state with a copy of the fiscal impact statement no later than fourteen days after the petition section was approved. The director shall also post the fiscal impact statement on the legislative council staff website on the same day that it is provided to the designated representatives of

the proponents. The fiscal impact statement is not subject to review by the title board or the Colorado supreme court under this article 40.

(b) The designated representatives of the proponents or any other interested person may submit a fiscal impact estimate that includes an estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if it is enacted, or a draft fiscal summary with the information specified in subsection (1.5) of this section. The director shall consider these estimates and the bases thereon when preparing the initial fiscal impact statement and shall consider the draft fiscal summary when preparing the fiscal summary.

(c) The initial fiscal impact statement must:

(I) Be substantially similar in form and content to the fiscal notes provided by the legislative council of the general assembly for legislative measures pursuant to section 2-2-322, C.R.S.;

(II) Indicate whether there is a fiscal impact for the initiated measure.

(4) The fiscal summary for a measure, as amended in accordance with section 1-40-107, must be included in a petition section as provided in section 1-40-110(3).

(5) Neither the legislative council of the general assembly nor its executive committee may modify the initial fiscal impact statement prepared by the director. This restriction does not apply to the final fiscal impact statement prepared in accordance with section 1-40-124.5.

(6) At the same time the director posts the initial fiscal impact statement on the legislative council website,

he or she shall also post on the website all fiscal impact estimates received in accordance with paragraph (b) of subsection (2) of this section.

11. § 1-40-106. Title board--meetings--ballot title--initiative and referendum—definitions

(1) For ballot issues, beginning with the first submission of a draft after an election, the secretary of state shall convene a title board consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services or their designees. The title board, by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment, together with a submission clause, at public meetings to be held at the hour determined by the title board on the first and third Wednesdays of each month in which a draft or a motion for reconsideration has been submitted to the secretary of state. To be considered at such meeting, a draft shall be submitted to the secretary of state no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered by the title board, and the designated representatives of the proponents must comply with the requirements of subsection (4) of this section. The first meeting of the title board shall be held no sooner than the first Wednesday in December after an election, and the last meeting shall be held no later than the third Wednesday in April in the year in which the measure is to be voted on.

(b) In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a

"yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed, except as otherwise required by section 1-40-107, within two weeks after the first meeting of the title board. Immediately upon completion, the secretary of state shall deliver the same with the original to the designated representatives of the proponents, keeping the copy with a record of the action taken thereon. Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

(c) In order to avoid confusion between a proposition and an amendment, as such terms are used in section 1-5-407(5)(b), the title board shall describe a proposition in a ballot title as a "change to the Colorado Revised Statutes" and an amendment as an "amendment to the Colorado constitution".

(d) A ballot title for a statewide referred measure must be in the same form as a ballot title for an initiative as required by paragraph (c) of this subsection (3).

(e) For measures that reduce state tax revenue through a tax change, the ballot 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...?". If the ballot measure specifies the public services or programs that are to be reduced by the tax change, those public services or programs must be stated in the ballot title. If the public services or programs identified in the measure are insufficient to account for the full dollar value of the tax change in the first full fiscal year that the measure reduces revenue, then the three largest areas of program expenditure must be stated in the bill title along with the public services or programs identified in the measure. The estimates reflected in the ballot title shall not be interpreted as restrictions of the state's budgeting process.

(f) For measures that reduce local district property tax revenue through a tax change, the ballot title must begin "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue...?". The title board shall exclude any districts whose property tax revenue would not be reduced by the measure from the measure's ballot title. The estimates reflected in the ballot title shall not be interpreted as restrictions of a

local district's budgeting process.

(g) For measures that increase tax revenue for any district through a tax change and specify the public services to be funded by the increased revenue, after the language required by section 20 (3)(c) of article X of the state constitution, the ballot title shall state "in order to increase or improve levels of public services, including, but not limited to (the public service specified in the measure)...". For measures that increase tax revenue for any district through a tax change and do not specify the public services to be funded by the increased revenue, after the language required by section 20 (3)(c) of article X of the state constitution, the ballot title shall state "in order to increase or improve levels of public services...". The estimates reflected in the ballot title shall not be interpreted as restrictions of a district's budgeting process.

(h) In determining whether a ballot title qualifies as brief for purposes of section 1-40-102(10) and subsection (3)(b) of this section, the language required by subsection (3)(e), (3)(f), (3)(g), or (3)(j) of this section may not be considered.

(i) As used in this subsection (3), unless the context otherwise requires:

(I) "Areas of program expenditure" means categories of spending by issue area. For state expenditures, "the three largest areas of program expenditure" refers to the three program types listed as receiving the largest general fund operating appropriations in the joint budget committee's annual appropriations report for the most recent fiscal year.

(II) "Tax change" means any initiated ballot issue or initiated ballot question that has a primary purpose of lowering or increasing tax revenues collected by a district, including a reduction or increase of tax rates, mill levies, assessment ratios, or other measures, including matters pertaining to tax classification, definitions, credits, exemptions, monetary thresholds, qualifications for taxation, or any combination thereof, that reduce or increase a district's tax collections. "Tax change" does not mean an initiated ballot issue or initiated ballot question that results in a decrease or increase in revenue to a district in which such decrease or increase is incidental to the primary purpose of the initiated ballot issue or initiated ballot question.

(j) A ballot title for a measure that either increases or decreases the individual income tax rate must, if applicable, include the table created for the fiscal summary pursuant to section 1-40-105.5(1.5)(a)(V).

(3.5) For every proposed constitutional amendment, the title board shall determine whether the proposed constitutional amendment only repeals in whole or in part a provision of the state constitution for purposes of section 1(4)(b) of article V of the state constitution. The secretary of state shall keep a record of the determination made by the title board.

(4)(a) Each designated representative of the proponents shall appear at any title board meeting at which the designated representative's ballot issue is considered.

(b) Each designated representative of the proponents shall certify by a notarized affidavit that the designated representative is familiar with the

provisions of this article, including but not limited to the prohibition on circulators' use of false addresses in completing circulator affidavits and the summary prepared by the secretary of state pursuant to paragraph (c) of this subsection (4). The affidavit shall include a physical address at which process may be served on the designated representative. The designated representative shall sign and file the affidavit with the secretary of state at the first title board meeting at which the designated representative's ballot issue is considered.

(c) The secretary of state shall prepare a summary of the designated representatives of the proponents' responsibilities that are set forth in this article.

(d) The title board shall not set a title for a ballot issue if either designated representative of the proponents fails to appear at a title board meeting or file the affidavit as required by paragraphs (a) and (b) of this subsection (4). The title board may consider the ballot issue at its next meeting, but the requirements of this subsection (4) shall continue to apply.

(e) The secretary of state shall provide a notary public for the designated representatives at the title board meeting.

12. § 1-40-106.5. Single-subject requirements for initiated measures and referred constitutional amendments--legislative declaration

(1) The general assembly hereby finds, determines, and declares that:

(a) Section 1(5.5) of article V and section 2(3) of article XIX of the state constitution require that every constitutional amendment or law proposed by

initiative and every constitutional amendment proposed by the general assembly be limited to a single subject, which shall be clearly expressed in its title;

(b) Such provisions were referred by the general assembly to the people for their approval at the 1994 general election pursuant to Senate Concurrent Resolution 93-4;

(c) The language of such provisions was drawn from section 21 of article V of the state constitution, which requires that every bill, except general appropriation bills, shall be limited to a single subject, which shall be clearly expressed in its title;

(d) The Colorado supreme court has held that the constitutional single-subject requirement for bills was designed to prevent or inhibit various inappropriate or misleading practices that might otherwise occur, and the intent of the general assembly in referring to the people section 1(5.5) of article V and section 2(3) of article XIX was to protect initiated measures and referred constitutional amendments from similar practices;

(e) The practices intended by the general assembly to be inhibited by section 1(5.5) of article V and section 2(3) of article XIX are as follows:

(I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;

(II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

(2) It is the intent of the general assembly that section 1(5.5) of article V and section 2(3) of article XIX be liberally construed, so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.

(3) It is further the intent of the general assembly that, in setting titles pursuant to section 1(5.5) of article V, the initiative title setting review board created in section 1-40-106 should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills.

13. § 1-40-107. Rehearing--appeal--fees—signing

(1)(a)(I) Any person presenting an initiative petition or any registered elector who is not satisfied with a decision of the title board with respect to whether a petition contains more than a single subject pursuant to section 1-40-106.5, or who is not satisfied with the titles and submission clause provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the decision is made or the titles and submission clause are set.

(II) The designated representatives of the proponents

or any registered elector who is not satisfied with the fiscal summary prepared by the director of research of the legislative council of the general assembly in accordance with section 1-40-105.5 may file a motion for a rehearing with the secretary of state within seven days after the titles and submission clause for the initiative petition are set on the grounds that:

(B) The fiscal summary is misleading or prejudicial; or

(C) The fiscal summary does not comply with the requirements set forth in section 1-40-105.5(1.5).

(III) The designated representatives of the proponents or any registered elector who is not satisfied with the determination by the title board made pursuant to section 1-40-106(3.5) with respect to whether a petition that proposes a constitutional amendment only repeals in whole or in part a provision of the state constitution may file a motion for a rehearing with the secretary of state within seven days after the titles and submission clause for the initiative petition are set on the grounds that the determination is incorrect.

(b) A motion for rehearing must be typewritten and set forth with particularity the grounds for rehearing. If the motion claims that the petition contains more than a single subject, then the motion must, at a minimum, include a short and plain statement of the reasons for the claim. If the motion claims that the title and submission clause set by the title board are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment, then the motion must identify the specific wording that is challenged. If the motion claims that the fiscal summary is misleading

or prejudicial or does not comply with the statutory requirements, the motion must specifically identify the specific wording that is challenged or the requirement at issue. The title board may modify the fiscal summary based on information presented at the rehearing. If the motion claims that the determination of whether the petition that proposes a constitutional amendment only repeals in whole or in part a constitutional provision is incorrect, the motion must include a short and plain statement of the reasons for the claim.

(c) The motion for rehearing shall be heard at the next regularly scheduled meeting of the title board; except that, if the title board is unable to complete action on all matters scheduled for that day, consideration of any motion for rehearing may be continued to the next available day, and except that, if the titles and submission clause protested were set at the last meeting in April, the motion shall be heard within forty-eight hours after the expiration of the seven-day period for the filing of such motions. The decision of the title board on any motion for rehearing shall be final, except as provided in subsection (2) of this section, and no further motion for rehearing may be filed or considered by the title board.

(2) If any person presenting or the designated representatives of the proponents of an initiative petition for which a motion for a rehearing is filed, any registered elector who filed a motion for a rehearing pursuant to subsection (1) of this section, or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing is not satisfied with the ruling of the title board upon the motion, then the secretary of state shall furnish

such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, the fiscal summary, or the determination whether the petition repeals in whole or in part a constitutional provision, together with a certified copy of the motion for rehearing and of the ruling thereon. If filed with the clerk of the supreme court within seven days thereafter, the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.

(3) The secretary of state shall be allowed a fee which shall be determined and collected pursuant to section 24-21-104(3), C.R.S., for certifying a record of any proceedings before the title board. The clerk of the supreme court shall receive one-half the ordinary docket fee for docketing any such cause, all of which shall be paid by the parties desiring a review of such proceedings.

(4) No petition for any initiative measure shall be circulated nor any signature thereto have any force or effect which has been signed before the titles and submission clause have been fixed and determined as provided in section 1-40-106 and this section, or before the fiscal summary has been fixed and determined as provided in section 1-40-105.5 and this section.

(5) In the event a motion for rehearing is filed in accordance with this section, the period for filing a petition in accordance with section 1-40-108 shall not begin until a final decision concerning the motion is

rendered by the title board or the Colorado supreme court; except that under no circumstances shall the period for filing a petition be extended beyond three months and three weeks prior to the election at which the petition is to be voted upon.

(5.5) If the title board modifies the fiscal summary pursuant to this section, the secretary of state shall provide the director of research of the legislative council of the general assembly with a copy of the amended fiscal summary, and the director shall post the new version of the fiscal summary on the legislative council website.

14. § 1-40-108. Petition--time of filing

(1) No petition for any ballot issue is of any effect unless filed with the secretary of state within six months from the date that the titles and submission clause have been fixed and determined pursuant to the provisions of sections 1-40-106 and 1-40-107 and unless filed with the secretary of state no later than three months before the election at which it is to be voted upon. A petition for a ballot issue for the election to be held in November of odd-numbered years must be filed with the secretary of state no later than three months before such odd-year election. All filings under this section must be made by the close of business on the day of filing.

15. § 1-40-109. Signatures required—withdrawal

(1)(a) No petition for any initiated law is of any force or effect, nor shall the proposed law be submitted to the people of the state of Colorado for adoption or rejection at the polls, as is by law provided for, unless the petition for the submission of the initiated law is

signed by the number of registered electors required by section 1(2) of article V of the state constitution.

(b) No petition for any initiated amendment to the state constitution is of any force or effect, nor shall the initiated amendment to the state constitution be submitted to the people of the state of Colorado for adoption or rejection at the polls, as is by law provided for, unless the petition for the submission of the initiated amendment to the state constitution is signed by the number of registered electors required by the state constitution who reside in each state senate district in Colorado, so long as the total number of registered electors who have signed the petition is at least the number of registered electors required by section 1(2) of article V of the state constitution. For purposes of this subsection (1)(b), the number and boundaries of the state senate districts are those in existence, and the number of registered electors in the state senate districts is those registered, at the time the form of the petition is approved for circulation in accordance with section 1-40-113(1)(a).

(3) Any person who is a registered elector may sign a petition for any ballot issue for which the elector is eligible to vote. A registered elector who signs a petition may withdraw his or her signature from the petition by filing a written request for such withdrawal with the secretary of state at any time on or before the day that the petition is filed with the secretary of state.

16. § 1-40-110. Warning--ballot title

(1) At the top of each page of every initiative or referendum petition section shall be printed, in a form

as prescribed by the secretary of state, the following:

WARNING:

IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign a petition when not a registered elector who is eligible to vote on the measure.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR AND ELIGIBLE TO VOTE ON THIS MEASURE. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Before signing this petition, you are encouraged to read the text or the title of the proposed initiative or referred measure.

You are also encouraged to read the fiscal summary that is included at the beginning of this petition.

By signing this petition, you are indicating that you want this measure to be included on the ballot as a proposed change to the (Colorado constitution/Colorado Revised Statutes). If a sufficient number of registered electors sign this petition, this measure will appear on the ballot at the November (year) election.

(2) The ballot title for the measure shall then be

printed on each page following the warning.

(3) For a petition section for a measure to be valid, the fiscal summary prepared in accordance with section 1-40-105.5 must be printed on the first page of an initiative petition section.

17. § 1-40-111. Signatures--affidavits--notarization--list of circulators and notaries

(1) Any initiative or referendum petition shall be signed only by registered electors who are eligible to vote on the measure. Each registered elector shall sign his or her own signature and shall print his or her name, the address at which he or she resides, including the street number and name, the city and town, the county, and the date of signing. Each registered elector signing a petition shall be encouraged by the circulator of the petition to sign the petition in ink. In the event a registered elector is physically disabled or is illiterate and wishes to sign the petition, the elector shall sign or make his or her mark in the space so provided. Any person, but not a circulator, may assist the disabled or illiterate elector in completing the remaining information required by this subsection (1). The person providing assistance shall sign his or her name and address and shall state that such assistance was given to the disabled or illiterate elector.

(2)(a) To each petition section shall be attached a signed, notarized, and dated affidavit executed by the person who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and

understands the laws governing the circulation of petitions; that he or she was a citizen of the United States and at least eighteen years of age at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; that he or she has not paid or will not in the future pay and that he or she believes that no other person has paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition; that he or she understands that he or she can be prosecuted for violating the laws governing the circulation of petitions, including the requirement that a circulator truthfully completed the affidavit and that each signature thereon was affixed in the circulator's presence; and that he or she understands that failing to make himself or herself available to be deposed and to provide testimony in the event of a protest shall invalidate the petition section if it is challenged on the grounds of circulator fraud.

(b)(I) A notary public shall not notarize an affidavit required pursuant to subsection (2)(a) of this section, unless:

(A) The circulator is in the physical presence of the notary public; and

(B) The circulator has dated the affidavit and fully

and accurately completed all of the personal information on the affidavit required pursuant to subsection (2)(a) of this section.

(II) An affidavit that is notarized in violation of any provision of subparagraph (I) of this paragraph (b) shall be invalid.

(III) If the date signed by a circulator on an affidavit required pursuant to paragraph (a) of this subsection (2) is different from the date signed by the notary public, the affidavit shall be invalid. If, notwithstanding sub-subparagraph (B) of subparagraph (I) of this paragraph (b), a notary public notarizes an affidavit that has not been dated by the circulator, the notarization date shall not cure the circulator's failure to sign the affidavit and the affidavit shall be invalid.

(c) The secretary of state shall reject any section of a petition that does not have attached thereto a valid notarized affidavit that complies with all of the requirements set forth in paragraphs (a) and (b) of this subsection (2). Any signature added to a section of a petition after the affidavit has been executed shall be invalid.

(3)(a) As part of any court proceeding or hearing conducted by the secretary of state related to a protest of all or part of a petition section, the circulator of such petition section shall be required to make himself or herself available to be deposed and to testify in person, by telephone, or by any other means permitted under the Colorado rules of civil procedure. Except as set forth in paragraph (b) of this subsection (3), the petition section that is the subject of the protest shall be invalid if a circulator fails to comply with the

requirement set forth in this paragraph (a) for any protest that includes an allegation of circulator fraud that is pled with particularity regarding:

(I) Forgery of a registered elector's signature;

(II) Circulation of a petition section, in whole or part, by anyone other than the person who signs the affidavit attached to the petition section;

(III) Use of a false circulator name or address in the affidavit; or

(IV) Payment of money or other things of value to any person for the purpose of inducing the person to sign the petition.

(b) Upon the finding by a district court or the secretary of state that the circulator of a petition section is unable to be deposed or to testify at trial or a hearing conducted by the secretary of state because the circulator has died, become mentally incompetent, or become medically incapacitated and physically unable to testify by any means whatsoever, the provisions of paragraph (a) of this subsection (3) shall not apply to invalidate a petition section circulated by the circulator.

(4) The proponents of a petition or an issue committee acting on the proponents' behalf shall maintain a list of the names and addresses of all circulators who circulated petition sections on behalf of the proponents and notaries public who notarized petition sections on behalf of the proponents and the petition section numbers that each circulator circulated and that each notary public notarized. A copy of the list shall be filed with the secretary of state along with the petition. If a copy of the list is not filed, the secretary

of state shall prepare the list and charge the proponents a fee, which shall be determined and collected pursuant to section 24-21-104(3), C.R.S., to cover the cost of the preparation. Once filed or prepared by the secretary of state, the list shall be a public record for purposes of article 72 of title 24, C.R.S.

18. § 1-40-112. Circulators--requirements—training

(1) No person shall circulate a petition for an initiative or referendum measure unless the person is a citizen of the United States and at least eighteen years of age at the time the petition is circulated.

(2)(a) A circulator who is not to be paid for circulating a petition concerning a ballot issue shall display an identification badge that includes the words "VOLUNTEER CIRCULATOR" in bold-faced type that is clearly legible.

(b) A circulator who is to be paid for circulating a petition concerning a ballot issue shall display an identification badge that includes the words "PAID CIRCULATOR" in bold-faced type that is clearly legible and the name and telephone number of the individual employing the circulator.

(3) The secretary of state shall develop circulator training programs for paid and volunteer circulators. Such programs shall be conducted in the broadest, most cost-effective manner available to the secretary of state, including but not limited to training sessions for persons associated with the proponents or a petition entity, as defined in section 1-40-135(1), and by electronic and remote access. The proponents of an

initiative petition or the representatives of a petition entity shall inform paid and volunteer circulators of the availability of these training programs as one manner of complying with the requirement set forth in the circulator's affidavit that a circulator read and understand the laws pertaining to petition circulation.

19. § 1-40-113. Form--representatives of signers

(1)(a) Each section of a petition shall be printed on a form as prescribed by the secretary of state. No petition shall be printed, published, or otherwise circulated unless the form and the first printer's proof of the petition have been approved by the secretary of state. The designated representatives of the proponent are responsible for filing the printer's proof with the secretary of state, and the secretary of state shall notify the designated representatives whether the printer's proof is approved. Each petition section shall designate by name and mailing address two persons who shall represent the signers thereof in all matters affecting the same. The secretary of state shall assure that the petition contains only the matters required by this article and contains no extraneous material. All sections of any petition shall be prenumbered serially, and the circulation of any petition section described by this article other than personally by a circulator is prohibited. Any petition section circulated in whole or in part by anyone other than the person who signs the affidavit attached to the petition section shall be invalid. Any petition section that fails to conform to the requirements of this article or is circulated in a manner other than that permitted in this article shall be invalid.

(b) The secretary of state shall notify the proponents at the time a petition is approved pursuant to paragraph (a) of this subsection (1) that the proponents must register an issue committee pursuant to section 1-45-108(3.3) if two hundred or more petition sections are printed or accepted in connection with circulation of the petition.

(c) The secretary of state shall notify the proponents at the time a petition format for an initiated amendment to the state constitution is approved pursuant to subsection (1)(a) of this section of the number and boundaries of the state senate districts in existence and the number of registered electors in each state senate district at the time of approval.

(d) The secretary of state shall notify the director of research of the legislative council at the time a petition is approved pursuant to (1)(a) of this section.

(2) Any disassembly of a section of the petition which has the effect of separating the affidavits from the signatures shall render that section of the petition invalid and of no force and effect.

(3) Each section of the petition must include the affidavits required by section 1-40-111(2), together with the sheets containing the signatures accompanying the same.

20. § 1-40-114. Petitions--not election materials--no bilingual language requirement

The general assembly hereby determines that initiative petitions are not election materials or information covered by the federal "Voting Rights

Act of 1965",[8] and therefore are not required to be printed in any language other than English to be circulated in any county in Colorado.

21. § 1-40-115. Ballot--voting—publication

(1) Measures shall appear upon the official ballot by ballot title only. The measures shall be placed on the ballot in the order in which they were certified to the ballot and as provided in section 1-5-407(5), (5.3), and (5.4).

(2)(a) All ballot measures shall be printed on the official ballot in that order, together with their respective letters and numbers prefixed in bold-faced type. A ballot issue arising under section 20 of article X of the state constitution shall appear in capital letters. Each ballot shall have the following explanation printed one time at the beginning of such ballot measures: "Ballot questions referred by the general assembly or any political subdivision are listed by letter, and ballot questions initiated by the people are listed numerically. A ballot question listed as an 'amendment' proposes a change to the Colorado constitution, and a ballot question listed as a 'proposition' proposes a change to the Colorado Revised Statutes. A 'yes/for' vote on any ballot question is a vote in favor of changing current law or existing circumstances, and a 'no/against' vote on any ballot question is a vote against changing current law or existing circumstances." Each ballot title shall appear on the official ballot but once. For each ballot title that is an amendment, the amendment number or letter shall be immediately followed by the

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[8] 52 U.S.C.A. § 10101 et seq.

description "(CONSTITUTIONAL)". For each ballot title that is a proposition, the proposition number or letters shall be immediately followed by the description "(STATUTORY)". Each ballot title shall be separated from the other ballot titles next to it by heavy black lines and shall be followed by the words "YES/FOR" and "NO/AGAINST", along with a place for an eligible elector to designate his or her choice by a mark as instructed.

(b) For purposes of preparing an audio ballot as part of an accessible voting system:

(I) In lieu of the parenthetical description preceding a ballot title that is an amendment required by paragraph (a) of this subsection (2), the audio ballot shall include the following: "The following ballot question proposes a change to the Colorado constitution."; and

(II) In lieu of the parenthetical description preceding a ballot title that is a proposition required by paragraph (a) of this subsection (2), the audio ballot shall include the following: "The following ballot question proposes a change to the Colorado Revised Statutes.".

(3) A voter desiring to vote for the measure shall designate his or her choice by a mark in the place for "yes/for"; a voter desiring to vote against the measure shall designate his or her choice by a mark in the place for "no/against"; and the votes marked shall be counted accordingly. Any measure approved by the people of the state shall be printed with the acts of the next general assembly.

22. § 1-40-116. Validation--ballot issues--random sampling—rules

(1) For ballot issues, each section of a petition to which there is attached an affidavit of the registered elector who circulated the petition that each signature thereon is the signature of the person whose name it purports to be and that to the best of the knowledge and belief of the affiant each of the persons signing the petition was at the time of signing a registered elector shall be prima facie evidence that the signatures are genuine and true, that the petitions were circulated in accordance with the provisions of this article, and that the form of the petition is in accordance with this article.

(2) Upon submission of the petition, the secretary of state shall examine each name and signature on the petition. The petition shall not be available to the public for a period of no more than thirty calendar days for the examination. The secretary shall assure that the information required by sections 1-40-110 and 1-40-111 is complete, that the information on each signature line was written by the person making the signature, and that no signatures have been added to any sections of the petition after the affidavit required by section 1-40-111(2) has been executed.

(3) No signature shall be counted unless the signer is a registered elector and eligible to vote on the measure. A person shall be deemed a registered elector if the person's name and address appear on the master voting list kept by the secretary of state at the time of signing the section of the petition. In addition, the secretary of state shall not count the signature of any person whose information is not complete or was

not completed by the elector or a person qualified to assist the elector. The secretary of state may adopt rules consistent with this subsection (3) for the examination and verification of signatures.

(4)(a) The secretary of state shall examine the signatures on the petition by use of random sampling. The random sample of signatures to be examined must be drawn so that every signature filed with the secretary of state is given an equal opportunity to be included in the sample. The secretary of state is authorized to engage in rule-making to establish the appropriate methodology for conducting such random sample.

(b)(I) The random sampling to validate signatures on a petition proposing an initiated law must include an examination of no less than five percent of the signatures, but in no event fewer than four thousand signatures. If the random sample examination establishes that the number of valid signatures is ninety percent or less of the number of registered eligible electors needed to find the petition sufficient, the secretary of state shall deem the petition to be not sufficient. If the random sample establishes that the number of valid signatures totals one hundred ten percent or more of the number of required signatures of registered eligible electors, the secretary of state shall deem the petition sufficient. If the random sample shows the number of valid signatures to be more than ninety percent but less than one hundred ten percent of the number of signatures of registered eligible electors needed to declare the petition sufficient, the secretary of state shall order the examination and validation of each signature filed.

(II) The random sampling to validate signatures on a petition proposing an amendment to the state constitution must include an examination of no fewer than five percent of the signatures, but in no event less than four thousand signatures. If the random sample establishes that the number of valid signatures is ninety percent or less of the number of registered electors required by section 1(2) of article V of the state constitution to find the petition sufficient, the secretary of state shall deem the petition to be not sufficient. If the random sample shows the number of valid signatures to be more than ninety percent of the number of registered electors required by section 1(2) of article V of the state constitution to declare the petition sufficient, the secretary of state shall order the examination of each signature filed.

23. § 1-40-117. Statement of sufficiency—cure

(1) After examining the petition:

(a) If the petition proposes a law, the secretary of state shall issue a statement as to whether a sufficient number of valid signatures appears to have been submitted to certify the petition to the ballot; or

(b) If the petition proposes an amendment to the state constitution, the secretary of state shall issue a statement as to whether a sufficient number of valid signatures from each state senate district and a sufficient total number of valid signatures appear to have been submitted to certify the petition to the ballot.

(2) If the petition proposes an initiated law and was validated by random sample, the statement must contain the total number of signatures submitted and

whether the number of signatures presumed valid was ninety percent of the required total or less or one hundred ten percent of the required total or more.

(3)(a) If the secretary declares that the petition appears not to have a sufficient number of valid signatures, the statement issued by the secretary must specify the number of sufficient and insufficient signatures. The secretary shall identify by section number and line number within the section those signatures found to be insufficient and the grounds for the insufficiency. Such information shall be kept on file for public inspection in accordance with section 1-40-118.

(4) During the review of a petition, the secretary of state shall notify the designated representatives of the proponents of any errors and insufficiencies regarding circulator affidavits. Upon the receipt of such a notification, the designated representatives of the proponents have five calendar days from the date of receipt of the notice to cure the errors and insufficiencies described in the notice. To cure a circulator affidavit, the designated representative of the proponents must provide the secretary of state with a new circulator affidavit that corrects the errors of the previously submitted affidavit.

24. § 1-40-118. Protest

(1) A protest in writing, under oath, together with three copies thereof, may be filed in the district court for the county in which the petition has been filed by some registered elector, within fifteen days after the secretary of state issues a statement as to whether the petition has a sufficient number of valid signatures, which statement must be issued no later than thirty

calendar days after the petition has been filed. If the secretary of state fails to issue a statement within thirty calendar days, the petition is deemed sufficient. Regardless of whether the secretary of state has issued a statement of sufficiency or if the petition is deemed sufficient because the secretary of state has failed to issue a statement of sufficiency within thirty calendar days, no further agency action is necessary for the district court to have jurisdiction to consider the protest. During the period a petition is being examined by the secretary of state for sufficiency, the petition shall not be available to the public; except that such period must not exceed thirty calendar days. Immediately after the secretary of state issues a statement of sufficiency or, if the petition is deemed sufficient because the secretary of state has failed to issue the statement, after thirty calendar days, the secretary of state shall make the petition available to the public for copying upon request.

(2)(a) If the secretary of state conducted a random sample of the petitions and did not verify each signature, the protest shall set forth with particularity the defects in the procedure used by the secretary of state in the verification of the petition or the grounds for challenging individual signatures or petition sections, as well as individual signatures or petition sections protested. If the secretary of state verified each name on the petition sections, the protest shall set forth with particularity the grounds of the protest and the individual signatures or petition sections protested.

(b) Regardless of the method used by the secretary of state to verify signatures, the grounds for challenging individual signatures or petition sections pursuant to

paragraph (a) of this subsection (2) shall include, but are not limited to, the use of a petition form that does not comply with the provisions of this article, fraud, and a violation of any provision of this article or any other law that, in either case, prevents fraud, abuse, or mistake in the petition process.

(c) If the protest is limited to an allegation that there were defects in the secretary of state's statement of sufficiency based on a random sample to verify signatures, the district court may review all signatures in the random sample.

(d) No signature may be challenged that is not identified in the protest by section number, line number, name, and reason why the secretary of state is in error. If any party is protesting the finding of the secretary of state regarding the registration of a signer, the protest shall be accompanied by an affidavit of the elector or a copy of the election record of the signer.

(2.5)(a) If a district court finds that there are invalid signatures or petition sections as a result of fraud committed by any person involved in petition circulation, the registered elector who instituted the proceedings may commence a civil action to recover reasonable attorney fees and costs from the person responsible for such invalid signatures or petition sections.

(b) A registered elector who files a protest shall be entitled to the recovery of reasonable attorney fees and costs from a proponent of an initiative petition who defends the petition against a protest or the proponent's attorney, upon a determination by the district court that the defense, or any part thereof,

lacked substantial justification or that the defense, or any part thereof, was interposed for delay or harassment. A proponent who defends a petition against a protest shall be entitled to the recovery of reasonable attorney fees and costs from the registered elector who files a protest or the registered elector's attorney, upon a determination by the district court that the protest, or any part thereof, lacked substantial justification or that the protest, or any part thereof, was interposed for delay or harassment. No attorney fees may be awarded under this paragraph (b) unless the district court has first considered the provisions of section 13-17-102(5) and (6), C.R.S. For purposes of this paragraph (b), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) A district court conducting a hearing pursuant to this article shall permit a circulator who is not available at the time of the hearing to testify by telephone or by any other means permitted under the Colorado rules of civil procedure.

(4) The secretary of state shall furnish a requesting protestor with a computer tape or microfiche listing of the names of all registered electors in the state and shall charge a fee which shall be determined and collected pursuant to section 24-21-104(3), C.R.S., to cover the cost of furnishing the listing.

(5) Written entries that are made by petition signers, circulators, and notaries public on a petition section that substantially comply with the requirements of this article 40 shall be deemed valid by the secretary of state or any court, unless:

(a) Fraud, as specified in section 1-40-135(2)(c), is established by a preponderance of the evidence;

(b) A violation of any provision of this article or any other provision of law that, in either case, prevents fraud, abuse, or mistake in the petition process, is established by a preponderance of the evidence;

(c) A circulator used a petition form that does not comply with the provisions of this article or has not been approved by the secretary of state.

25. § 1-40-119. Procedure for hearings

At any hearing held under this article, the party protesting the finding of the secretary of state concerning the sufficiency of signatures shall have the burden of proof. Hearings shall be had as soon as is conveniently possible and shall be concluded within thirty days after the commencement thereof, and the result of such hearings shall be forthwith certified to the designated representatives of the signers and to the protestors of the petition. The hearing shall be subject to the provisions of the Colorado rules of civil procedure. Upon application, the decision of the court shall be reviewed by the Colorado supreme court.

26. § 1-40-120. Filing in federal court

In case a complaint has been filed with the federal district court on the grounds that a petition is insufficient due to failure to comply with any federal law, rule, or regulation, the petition may be withdrawn by the two persons designated pursuant to section 1-40-104 to represent the signers of the petition and, within fifteen days after the court has issued its order in the matter, may be amended and refiled as an original petition. Nothing in this section

shall prohibit the timely filing of a protest to any original petition, including one that has been amended and refiled. No person shall be entitled, pursuant to this section, to amend an amended petition.

27. § 1-40-121. Designated representatives--expenditures related to petition circulation--report--penalty—definitions

(1) As used in this section, unless the context otherwise requires:

(a) "Expenditure" shall have the same meaning as set forth in section 2(8) of article XXVIII of the state constitution and includes a payment to a circulator.

(b) "False address" means the street address, post office box, city, state, or any other designation of place used in a circulator's affidavit that does not represent the circulator's correct address of permanent domicile at the time he or she circulated petitions. "False address" does not include an address that merely omits the designation of "street", "avenue", "boulevard", or any comparable term.

(c) "Report" means the report required to be filed pursuant to subsection (2) of this section.

(2) No later than ten days after the date that the petition is filed with the secretary of state, the designated representatives of the proponents must submit to the secretary of state a report that:

(a) States the dates of circulation by all circulators who were paid to circulate a section of the petition, the total hours for which each circulator was paid to circulate a section of the petition, the gross amount of wages paid for such hours, and any addresses used by

circulators on their affidavits that the designated representatives or their agents have determined, prior to petition filing, to be false addresses;

(3)(a) Within ten days after the date the report is filed, a registered elector may file a complaint alleging a violation of the requirements for the report set forth in subsection (2) of this section. The designated representatives of the proponents may cure the alleged violation by filing a report or an addendum to the original report within ten days after the date the complaint is filed. If the violation is not cured, an administrative law judge shall conduct a hearing on the complaint within fourteen days after the date of the additional filing or the deadline for the additional filing, whichever is sooner.

(b)(I) After a hearing is held, if the administrative law judge determines that the designated representatives of the proponents intentionally violated the reporting requirements of this section, the designated representatives shall be subject to a penalty that is equal to three times the amount of any expenditures that were omitted from or erroneously included in the report.

(II) If the administrative law judge determines that the designated representatives intentionally misstated a material fact in the report or omitted a material fact from the report, or if the designated representatives never filed a report, the registered elector who instituted the proceedings may commence a civil action to recover reasonable attorney fees and costs from the designated representatives of the proponents.

(c) Except as otherwise provided in this section, any

procedures related to a complaint shall be governed by the "State Administrative Procedure Act", article 4 of title 24, C.R.S.

28. § 1-40-122. Certification of ballot titles

(1) The secretary of state, at the time the secretary of state certifies to the county clerk and recorder of each county the names of the candidates for state and district offices for general election, shall also certify to them the ballot titles and numbers of each initiated and referred measure filed in the office of the secretary of state to be voted upon at such election.

29. § 1-40-123. Counting of votes--effective date--conflicting provisions

(1) The votes on all measures submitted to the people shall be counted and properly entered after the votes for candidates for office cast at the same election are counted and shall be counted, canvassed, and returned and the result determined and certified in the manner provided by law concerning other elections. The secretary of state who has certified the election shall, without delay, make and transmit to the governor a certificate of election. The measure takes effect from and after the date of the official declaration of the vote by proclamation of the governor, but not later than thirty days after the votes have been canvassed, as provided in section 1 of article V of the state constitution.

(2) A majority of the votes cast thereon adopts any measure submitted for a proposed law, and, in case of adoption of conflicting provisions, the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a

conflict.

(3) At least fifty-five percent of the votes cast thereon adopts any measure submitted for an amendment to the state constitution; except that a majority of the votes cast thereon adopts any measure submitted for an amendment to the state constitution that only repeals in whole or in part any provision of the state constitution. In the case of adoption of conflicting provisions, the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict.

30. § 1-40-124. Publication

(1)(a) In accordance with section 1(7.3) of article V of the state constitution, the director of research of the legislative council of the general assembly shall cause to be published at least one time in at least one legal publication of general circulation in each county of the state, compactly and without unnecessary spacing, in not less than eight-point standard type, a true copy of:

(I) The title and text of each constitutional amendment, initiated or referred measure, or part of a measure, to be submitted to the people with the number and form in which the ballot title thereof will be printed in the official ballot; and

(II) The text of each referred or initiated question arising under section 20 of article X of the state constitution, as defined in section 1-41-102(3), to be submitted to the people with the number and form in which such question will be printed in the official ballot.

(b) The publication may be in the form of a notice printed in a legal newspaper, as defined in sections

24-70-102 and 24-70-103(1), C.R.S., or in the form of a publication that is printed separately and delivered as an insert in such a newspaper. The director of research of the legislative council may determine which form the publication will take in each legal newspaper. The director may negotiate agreements with one or more legal newspapers, or with any organization that represents such newspapers, to authorize the printing of a separate insert by one or more legal newspapers to be delivered by all of the legal newspapers participating in the agreement.

(c) Where more than one legal newspaper is circulated in a county, the director of research of the legislative council shall select the newspaper or newspapers that will make the publication. In making such selection, the director shall consider the newspapers' circulation and charges.

(d) The amount paid for publication shall be determined by the executive committee of the legislative council and shall be based on available appropriations. In determining the amount, the executive committee may consider the newspaper's then effective current lowest bulk comparable or general rate charged and the rate specified for legal newspapers in section 24-70-107, C.R.S. The director of research of the legislative council shall provide the legal newspapers selected to perform printing in accordance with this subsection (1) either complete slick proofs or mats of the title and text of the proposed constitutional amendment, initiated or referred measure, or part of a measure, and of the text of a referred or initiated question arising under section 20 of article X of the state constitution, as defined in section 1-41-102(3), at least one week before

the publication date.

(e) If no legal newspaper is willing or able to print or distribute the publication in a particular county in accordance with the provisions of this subsection (1), the director of research of the legislative council shall assure compliance with the publication requirements of section 1(7.3) of article V of the state constitution by causing the printing of additional inserts or legal notices in such manner and form as deemed necessary and by providing for their separate circulation in the county as widely as may be practicable. Such circulation may include making the publications available at government offices and other public facilities or private businesses. If sufficient funds are available for such purposes, the director may also contract for alternative methods of circulation or may cause circulation by mailing the publication to county residents. Any printing and circulation made in accordance with this paragraph (e) shall be deemed to be a legal publication of general circulation for purposes of section 1(7.3) of article V of the state constitution.

31. § 1-40-124.5. Ballot information booklet

(1)(a) The director of research of the legislative council of the general assembly shall prepare a ballot information booklet for any initiated or referred constitutional amendment or legislation, including a question, as defined in section 1-41-102(3), in accordance with section 1(7.5) of article V of the state constitution.

(b) The director of research of the legislative council of the general assembly shall prepare a fiscal impact statement for every initiated or referred measure,

taking into consideration fiscal impact information submitted by the office of state planning and budgeting, the department of local affairs or any other state agency, and any proponent or other interested person. The fiscal impact statement prepared for every measure shall be substantially similar in form and content to the fiscal notes provided by the legislative council of the general assembly for legislative measures pursuant to section 2-2-322. A complete copy of the fiscal impact statement for such measure shall be available through the legislative council of the general assembly. The ballot information booklet shall indicate whether there is a fiscal impact for each initiated or referred measure and shall abstract the fiscal impact statement for such measure. The abstract for every measure shall appear after the arguments for and against such measure in the analysis section of the ballot information booklet, and shall include, but shall not be limited to:

(I) An estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if such measure is enacted;

(II) An estimate of the amount of any state and local government recurring expenditures or fiscal liabilities if such measure is enacted;

(III) For any initiated or referred measure that modifies the state tax laws, if the measure would either increase or decrease individual income tax revenue or state sales tax revenue, a table that shows the number of tax filers in each income category, the total change in the amount of tax owed

for each income category, and the average change in the amount of tax owed for each filer within each income category. If the change in the amount of tax owed shown in the table is an increase, the change must be expressed as a dollar amount preceded by a plus sign. If the change in the amount of tax owed shown in the table is a decrease, the change must be expressed as a dollar amount preceded by a negative sign. The table must use the following income categories:

(A) Federal adjusted gross income of fourteen thousand nine hundred ninety-nine dollars or less;

(B) Federal adjusted gross income greater than or equal to fifteen thousand dollars and less than thirty thousand dollars;

(C) Federal adjusted gross income greater than or equal to thirty thousand dollars and less than forty thousand dollars;

(D) Federal adjusted gross income greater than or equal to forty thousand dollars and less than fifty thousand dollars;

(E) Federal adjusted gross income greater than or equal to fifty thousand dollars and less than seventy thousand dollars;

(F) Federal adjusted gross income greater than or equal to seventy thousand dollars and less than one hundred thousand dollars;

(G) Federal adjusted gross income greater than or equal to one hundred thousand dollars and less than one hundred fifty thousand dollars;

(H) Federal adjusted gross income greater than or

equal to one hundred fifty thousand dollars and less than two hundred thousand dollars;

(I) Federal adjusted gross income greater than or equal to two hundred thousand dollars and less than two hundred fifty thousand dollars;

(J) Federal adjusted gross income greater than or equal to two hundred fifty thousand dollars and less than five hundred thousand dollars;

(K) Federal adjusted gross income greater than or equal to five hundred thousand dollars and less than one million dollars; and

(L) Federal adjusted gross income greater than or equal to one million dollars; and

(IV) If the measure contains a proposed tax change, as defined in section 1-40-106 (3)(i)(II), that reduces state tax revenue, a description of the three largest areas of program expenditure, as defined in section 1-40-106 (3)(i)(I).

(d) The director of research of the legislative council of the general assembly may update the initial fiscal impact statement prepared in accordance with section 1-40-105.5 when preparing the fiscal impact statement required by this subsection (1).

(1.5) The executive committee of the legislative council of the general assembly shall be responsible for providing the fiscal information on any ballot issue that must be included in the ballot information booklet pursuant to section 1(7.5)(c) of article V of the state constitution.

(1.7)(a) After receiving written comments from the public in accordance with section 1(7.5)(a)(II) of

article V of the state constitution, but before the draft of the ballot information booklet is finalized, the director of research of the legislative council of the general assembly shall conduct a public meeting at which the director and other members of the legislative staff have the opportunity to ask questions that arise in response to the written comments. The director may modify the draft of the booklet in response to comments made at the hearing. The legislative council may modify the draft of the booklet upon the two-thirds affirmative vote of the members of the legislative council.

(b)(I) Each person submitting written comments in accordance with section 1(7.5)(a)(II) of article V of the state constitution shall provide his or her name and the name of any organization the person represents or is affiliated with for purposes of making the comments.

(II) The arguments for and against each measure in the analysis section of the ballot information booklet shall be preceded by the phrase: "For information on those issue committees that support or oppose the measures on the ballot at the (date and year) election, go to the Colorado secretary of state's elections center website hyperlink for ballot and initiative information (appropriate secretary of state website address).".

(2) Following completion of the ballot information booklet, the director of research shall arrange for its distribution to every residence of one or more active registered electors in the state. Distribution may be accomplished by such means as the director of research deems appropriate to comply with section

1(7.5) of article V of the state constitution, including, but not limited to, mailing the ballot information booklet to electors and insertion of the ballot information booklet in newspapers of general circulation in the state. The distribution shall be performed pursuant to a contract or contracts bid and entered into after employing standard competitive bidding practices including, but not limited to, the use of requests for information, requests for proposals, or any other standard vendor selection practices determined to be best suited to selecting an appropriate means of distribution and an appropriate contractor or contractors. The executive director of the department of personnel shall provide such technical advice and assistance regarding bidding procedures as deemed necessary by the director of research.

(3)(a) There is hereby established in the state treasury the ballot information publication and distribution revolving fund. Except as otherwise provided in paragraph (b) of this subsection (3), moneys shall be appropriated to the fund each year by the general assembly in the annual general appropriation act. All interest earned on the investment of moneys in the fund shall be credited to the fund. Moneys in the revolving fund are continuously appropriated to the legislative council of the general assembly to pay the costs of publishing the text and title of each constitutional amendment, each initiated or referred measure, or part of a measure, and the text of a referred or initiated question arising under section 20 of article X of the state constitution, as defined in section 1-41-102(3), in at least one legal publication of general circulation

in each county of the state, as required by section 1-40-124, and the costs of distributing the ballot information booklet, as required by subsection (2) of this section. Any moneys credited to the revolving fund and unexpended at the end of any given fiscal year shall remain in the fund and shall not revert to the general fund.

(b) Notwithstanding any law to the contrary, any moneys appropriated from the general fund to the legislative department of the state government for the fiscal year commencing on July 1, 2007, that are unexpended or not encumbered as of the close of the fiscal year shall not revert to the general fund and shall be transferred by the state treasurer and the controller to the ballot information publication and distribution revolving fund created in paragraph (a) of this subsection (3); except that the amount so transferred shall not exceed five hundred thousand dollars.

(c) Notwithstanding any law to the contrary, any moneys appropriated from the general fund to the legislative department of the state government for the fiscal year commencing on July 1, 2008, that are unexpended or not encumbered as of the close of the fiscal year shall not revert to the general fund and shall be transferred by the state treasurer and the controller to the ballot information publication and distribution revolving fund created in paragraph (a) of this subsection (3).

(d) Notwithstanding any law to the contrary, any moneys appropriated from the general fund to the legislative department of the state government for the fiscal year commencing on July 1, 2009, that are

unexpended or not encumbered as of the close of the fiscal year and that are in excess of the amount of one million forty-two thousand dollars shall not revert to the general fund and shall be transferred by the state treasurer and the controller to the ballot information publication and distribution revolving fund created in paragraph (a) of this subsection (3); except that the amount so transferred shall not exceed one million one hundred twenty-nine thousand six hundred seven dollars.

(e) Notwithstanding any provision of this subsection (3) to the contrary, on August 11, 2010, the state treasurer shall deduct one million one hundred twenty-nine thousand six hundred seven dollars from the ballot information publication and distribution revolving fund and transfer such sum to the redistricting account within the legislative department cash fund.

32. § 1-40-125. Mailing to electors

(1) The requirements of this section shall apply to any ballot issue involving a local government matter arising under section 20 of article X of the state constitution, as defined in section 1-41-103(4), for which notice is required to be mailed pursuant to section 20(3)(b) of article X of the state constitution. A mailing is not required for a ballot issue that does not involve a local government matter arising under section 20 of article X of the state constitution, as defined in section 1-41-103(4).

(2) Thirty days before a ballot issue election, political subdivisions shall mail at the least cost and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "all

registered voters" at each address of one or more active registered electors. Except for voter-approved additions, notices shall include only:

(a) The election date, hours, ballot title, text, and local election office address and telephone number;

(b) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change;

(c) For the first full fiscal year of each proposed political subdivision tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase;

(d) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining local district repayment cost;

(e) Two summaries, up to five hundred words each, one for and one against the proposal, of written comments filed with the election officer by thirty days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments.

(3) The provisions of this section shall not apply to a ballot issue that is subject to the provisions of section 1-40-124.5.

33. § 1-40-126. Explanation of effect of "yes/for" or "no/against" vote included in notices provided by mailing or publication

In any notice to electors provided by the director of research of the legislative council, whether by mailing pursuant to section 1-40-124.5 or publication pursuant to section 1-40-124, there shall be included the following explanation preceding any information about individual ballot issues: "A 'yes/for' vote on any ballot issue is a vote in favor of changing current law or existing circumstances, and a 'no/against' vote on any ballot issue is a vote against changing current law or existing circumstances."

34. § 1-40-126.5. Explanation of ballot titles and actual text of measures in notices provided by mailing or publication

(1) In any notice to electors provided by the director of research of the legislative council, whether in the ballot information booklet prepared pursuant to section 1-40-124.5 or by publication pursuant to section 1-40-124, there shall be included the following explanation preceding the title of each measure:

(a) For referred measures: "The ballot title below is a summary drafted by the professional legal staff for the general assembly for ballot purposes only. The ballot title will not appear in the (Colorado constitution/Colorado Revised Statutes). The text of the measure that will appear in the (Colorado constitution/Colorado Revised Statutes) below was referred to the voters because it passed by a (two-thirds majority/majority) vote of the state senate and the state house of representatives."

(b) For initiated measures: "The ballot title below is a summary drafted by the professional staff of the offices of the secretary of state, the attorney general, and the legal staff for the general assembly for ballot purposes only. The ballot title will not appear in the (Colorado constitution/Colorado Revised Statutes). The text of the measure that will appear in the (Colorado constitution/Colorado Revised Statutes) below was drafted by the proponents of the initiative. The initiated measure is included on the ballot as a proposed change to current law because the proponents gathered the required amount of petition signatures."

35. § 1-40-130. Unlawful acts—penalty

(1) It is unlawful:

(a) For any person willfully and knowingly to circulate or cause to be circulated or sign or procure to be signed any petition bearing the name, device, or motto of any person, organization, association, league, or political party, or purporting in any way to be endorsed, approved, or submitted by any person, organization, association, league, or political party, without the written consent, approval, and authorization of the person, organization, association, league, or political party;

(b) For any person to sign any name other than his or her own to any petition or knowingly to sign his or her name more than once for the same measure at one election;

(c) For any person to knowingly sign any petition who is not a registered elector at the time of signing the same;

(d) For any person to sign any affidavit as circulator without knowing or reasonably believing the statements made in the affidavit to be true;

(e) For any person to certify that an affidavit attached to a petition was subscribed or sworn to before him or her unless it was so subscribed and sworn to before him or her and unless the person so certifying is duly qualified under the laws of this state to administer an oath;

(f) For any officer or person to do willfully, or with another or others conspire, or agree, or confederate to do, any act which hinders, delays, or in any way interferes with the calling, holding, or conducting of any election permitted under the initiative and referendum powers reserved by the people in section 1 of article V of the state constitution or with the registering of electors therefor;

(g) For any officer to do willfully any act which shall confuse or tend to confuse the issues submitted or proposed to be submitted at any election, or refuse to submit any petition in the form presented for submission at any election;

(h) For any officer or person to violate willfully any provision of this article;

(i) For any person to pay money or other things of value to a registered elector for the purpose of inducing the elector to withdraw his or her name from a petition for a ballot issue;

(j) For any person to certify an affidavit attached to a petition in violation of section 1-40-111(2)(b)(I);

(k) For any person to sign any affidavit as a circulator, unless each signature in the petition section to which

the affidavit is attached was affixed in the presence of the circulator;

(l) For any person to circulate in whole or in part a petition section, unless such person is the circulator who signs the affidavit attached to the petition section.

(2) Any person, upon conviction of a violation of any provision of this section, shall be punished by a fine of not more than one thousand five hundred dollars, or by imprisonment for not more than one year in the county jail, or by both such fine and imprisonment.

36. § 1-40-131. Tampering with initiative or referendum petition

Any person who willfully destroys, defaces, mutilates, or suppresses any initiative or referendum petition or who willfully neglects to file or delays the delivery of the initiative or referendum petition or who conceals or removes any initiative or referendum petition from the possession of the person authorized by law to have the custody thereof, or who adds, amends, alters, or in any way changes the information on the petition as provided by the elector, or who aids, counsels, procures, or assists any person in doing any of said acts upon conviction shall be punished as provided in section 1-13-111. The language in this section does not preclude a circulator from striking a complete line on the petition if the circulator believes the line to be invalid.

37. § 1-40-132. Enforcement

(1) The secretary of state is charged with the administration and enforcement of the provisions of this article relating to initiated or referred measures

and state constitutional amendments. The secretary of state shall have the authority to promulgate rules as may be necessary to administer and enforce any provision of this article that relates to initiated or referred measures and state constitutional amendments. The secretary of state may conduct a hearing, upon a written complaint by a registered elector, on any alleged violation of the provisions relating to the circulation of a petition, which may include but shall not be limited to the preparation or signing of an affidavit by a circulator. If the secretary of state, after the hearing, has reasonable cause to believe that there has been a violation of the provisions of this article relating to initiated or referred measures and state constitutional amendments, he or she shall notify the attorney general, who may institute a criminal prosecution. If a circulator is found to have violated any provision of this article or is otherwise shown to have made false or misleading statements relating to his or her section of the petition, such section of the petition shall be deemed void.

38. § 1-40-133. Retention of petitions

After a period of three years from the time of submission of the petitions to the secretary of state, if it is determined that the retention of the petitions is no longer necessary, the secretary of state may destroy the petitions.

39. § 1-40-134. Withdrawal of initiative petition

The designated representatives of the proponents of an initiative petition may withdraw the petition from consideration as a ballot issue by filing a letter with the secretary of state requesting that the petition not

be placed on the ballot. The letter shall be signed and acknowledged by both designated representatives before an officer authorized to take acknowledgments and shall be filed no later than sixty days prior to the election at which the initiative is to be voted upon.

40. § 1-40-135. Petition entities--requirements—definition

(1) As used in this section, "petition entity" means any person or issue committee that directly or indirectly provides compensation to a circulator to circulate a ballot petition.

(2)(a) It is unlawful for any petition entity to provide compensation to a circulator to circulate a petition without first obtaining a license therefor from the secretary of state. The secretary of state may deny a license if the secretary finds that the petition entity or any of its principals have been found, in a judicial or administrative proceeding, to have violated the petition laws of Colorado or any other state; to have been convicted in Colorado or any other state of election fraud, any other election offense, or an offense with an element of fraud; or to have knowingly contracted with a petition entity, or the principal of a petition entity, that has been found, in a judicial or administrative proceeding, to have authorized or knowingly permitted any of the acts set forth in subsection (2)(c) of this section. The secretary of state shall deny a license:

(II) If no current representative of the petition entity has completed the training related to potential fraudulent activities in petition circulation, as established by the secretary of state, pursuant to section 1-40-112(3).

(c) The secretary of state shall revoke the petition entity license if, at any time after receiving a license, a petition entity is determined to no longer be in compliance with the requirements set forth in subsection (2)(a) of this section or if the petition entity authorized or knowingly permitted:

(I) Forgery of a registered elector's signature;

(II) Circulation of a petition section, in whole or part, by anyone other than the circulator who signs the affidavit attached to the petition section;

(III) Use of a false circulator name or address in the affidavit;

(IV) Payment of money or other things of value to any person for the purpose of inducing the person to sign or withdraw his or her name from the petition; or

(VI) A notary public's notarization of a petition section outside of the presence of the circulator or without the production of the required identification for notarization of a petition section.

(d) The secretary of state shall revoke the petition entity license, if, at any time after receiving a license, a petition entity is determined to have knowingly contracted with a petition entity that violated a provision of subsections (2)(c)(I) to (2)(c)(VI) of this section.

(3)(a) Any procedures by which alleged violations involving petition entities are heard and adjudicated shall be governed by the "State Administrative Procedure Act", article 4 of title 24. If a complaint is filed with the secretary of state pursuant to section 1-40-132(1) alleging that a petition entity was not licensed when it compensated any circulator, the

secretary may use information that the entity is required to produce pursuant to section 1-40-121 and any other information to which the secretary may reasonably gain access, including documentation produced pursuant to subsection (2)(b) of this section, at a hearing. After a hearing is held, if a violation is determined to have occurred, such petition entity shall be fined by the secretary in an amount not to exceed one hundred dollars per circulator for each day that the named individual or individuals circulated petition sections on behalf of the unlicensed petition entity. If the secretary finds that a petition entity violated a provision of subsection (2)(c) of this section, the secretary may fine the petition entity in an amount not to exceed five thousand dollars and shall revoke the entity's license for not less than one year or more than two years. Upon finding any subsequent violation of a provision of subsection (2)(c) of this section, the secretary may fine the petition entity in an amount not to exceed five thousand dollars and shall revoke the petition entity's license for not less than two years or more than three years. The secretary shall consider all circumstances surrounding the violations in fixing the length of the revocations.

(b) A petition entity whose license has been revoked may apply for reinstatement to be effective upon expiration of the term of revocation.

(c) In determining whether to reinstate a license, the secretary may consider:

(I) The entity's ownership by, employment of, or contract with any person who served as a director, officer, owner, or principal of a petition entity whose

license was revoked, the role of such individual in the facts underlying the prior license revocation, and the role of such individual in a petition entity's post-revocation activities; and

(II) Any other facts the entity chooses to present to the secretary, including but not limited to remedial steps, if any, that have been implemented to avoid future acts that would violate this article.

(4) The secretary of state shall issue a decision on any application for a new or reinstated license within ten business days after a petition entity files an application, which application shall be on a form prescribed by the secretary. No license shall be issued without payment of a nonrefundable license fee to the secretary of state, which license fee shall be determined and collected pursuant to section 24-21-104(3), C.R.S., to cover the cost of administering this section.

(5)(a) A licensed petition entity shall register with the secretary of state by providing to the secretary of state:

(I) The proposed measure number for which a petition will be circulated by circulators coordinated or paid by the petition entity;

(II) The current name, address, telephone number, and electronic mail address of the petition entity; and

(III) The name and signature of the designated agent of the petition entity for the proposed measure.

(b) A petition entity shall notify the secretary of state within twenty days of any change in the information submitted pursuant to paragraph (a) of this subsection (5).