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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2024)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #142 ("Parental Notification of Gender Incongruence")

Petitioner: Mary Elizabeth Childs,

v.

Respondents: Lori Gimelshteyn and Erin Lee

and

Title Board: Theresa Conley, Jeremiah Berry, and Kurt Morrison.

▲ **COURT USE ONLY** ▲

Case No. 2024SA63

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THE TITLE BOARD'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,054 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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ISSUE ON REVIEW

I. Whether the Title Board set a clear title for initiative 2023-2024 #142.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #142 ("#142") would require that "public school representatives" who obtain information that a child enrolled in a "public school" is experiencing "gender incongruence," shall, within forty-eight hours, notify the child's parents or legal guardians of that information. As defined by the initiative, "public schools" are any "preschool, primary, or secondary school[s] that receive[] state or federal funds" and "public school representatives" are any persons "associated with public schools," including administrators, teachers, nurses, contractors, or volunteers. Record for #142, p 3, filed February 27, 2024 ("Record"). "Parent" means "any person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian." *Id.*

The Title Board set a title on the measure at its February 7, 2024 hearing. *Id.* at 5. Petitioner Mary Elizabeth Childs filed a timely motion

for rehearing under § 1-40-107, C.R.S. (2024). *Id.* at 9. Childs argued that (1) the Title Board lacked jurisdiction to set title because the measure is so unclear that neither voters nor the Board could understand its scope, *id.* at 9–12, and (2) the title set by the Board was misleading, including in its references to the terms "public school representative" and "parent" as defined by #142, *id.* at 12–14.

The Board held rehearing on February 21, 2024, and amended the title of #142 to, among other things, clarify the title's reference to the terms "public school representative" and "parent" as defined by #142. *Id.* at 7. The title is set as follows:

> An amendment to the Colorado Revised Statutes requiring any person associated with any school to notify the parents or legal guardians that their child is experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided within 48 hours of receiving any information that a child is experiencing gender incongruence defined as a difference between a child's biological sex and the child's perceived or desired gender; applying the notification requirement to any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school regarding any child enrolled at any public, private, or parochial preschool, primary, or secondary school that receives state or federal funding.

Id. Childs timely appealed. Pet. for Review, pp 1–3.

SUMMARY OF THE ARGUMENT

The Title Board set an appropriate title for 2023-2024 #142. Petitioner Childs raises two clear title objections in this appeal, both focusing on the title's use of the phrase "parents or legal guardians." Pet. for Review at 3. Neither objection overcomes the discretion afforded the Title Board in setting a title that alerts the electorate to the salient features of the proposed initiative.

First, Childs argues that the title misrepresents the initiative by referring to the persons required to receive notice under #142 as "parents or legal guardians" when the measure itself requires notice to any "person who has legal custody of a child." Record, p 13. But in common usage, the terms "legal guardian" and "person who has legal custody of a child" have the same meaning. No voter will be misled or confused by the Title Board's use of "parents or legal guardians" in place of the synonym preferred by Petitioner Childs.

Second, Childs argues that the title misrepresents #142 by summarizing the required notification as applying to a child's parents "or" legal guardian when the measure would require notification to a child's parents *and* legal guardian. *Id.* Childs contends that, in the hypothetical situation that a child has both a parent and a non-parent legal guardian, #142 does not permit a public school representative to "choose to notify either the parents or the legal guardian." *Id.* But titles need not address every conceivable application of a proposed measure; they need only accurately summarize its central features. The title set by the Board for #142 does so by reciting that notification under the measure, if approved by the voters, would be sent to a child's "parents or legal guardians."

ARGUMENT

I. The title set by the Board satisfies the clear title standard.

A. Standard of review and preservation.

When considering a challenge to a title, the Court does not "consider whether the Title Board set the best possible title." *In re Title, Ballot Title*

& Submission Clause for 2019-2020 #3, 2019 CO 107, ¶ 17. Rather, the Court only "ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed." *Id.* "The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board therefore "is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause." *Id.* The Court will reverse the title set by the Board "only if a title is insufficient, unfair, or misleading." *Id.* ¶ 8.

B. The title's use of "parents or legal guardians" to describe persons "with legal custody of a child" is not misleading.

The Board's use of "parents or legal guardians" in the title to describe the persons with "legal custody of a child" required to receive notification under #142 does not violate the clear title standard.

The term used by the Title Board—"parent or legal guardian"—is commonly understood to mean the biological parent, adoptive parent, or other person with legal custody of a child. *See, e.g.*, *People v. Barrios*, 2019 CO 10, ¶ 13 (summarizing a statute's reference to "a parent, guardian, or legal or physical custodian" as pertaining to a "parent or legal guardian" or simply "a guardian"). The use of the same or similar terms throughout Colorado law to refer to the adult charged with responsibility for a child confirms this fact. *See, e.g.*, § 13-92-102(4), C.R.S. (2024) (Defining parent as "a natural parent of a child, . . . a parent by adoption, or a legal guardian."); § 22-7-302(6), C.R.S. (2024) (defining parent as "a child's biological parent, adoptive parent, or legal guardian or another adult person recognized . . . as the child's primary caregiver."); § 22-33-104.5(1)(b), C.R.S. (2024) (defining "parent" as "includ[ing] a parent or guardian."). The title's use of this widely understood term accurately and succinctly conveys that #142's notification requirement would apply to those persons with "legal custody of a child, including a natural parent, adoptive parent, or legal guardian." Record, p 3.

Childs' contention that persons with "legal custody" of a child, as defined by #142, may in exceptional circumstances include "a child placement agency for placement in a foster care home" or "the department of human services" or "a county department of human or social services," does create a clear title violation. Record, p 5 (citing § 19-3-508(1)(c), C.R.S. (2024); § 19-1-115(6), C.R.S. (2024)). As an initial matter, even if the entity charged with legal custody of a child were a government agency, that agency would fall within the definition of "legal guardian" in #142's title. *See* § 19-1-115(1)(a), C.R.S. (2024) (contemplating that a court may award legal custody to a grandparent, natural parent, adoptive parent, or an agency or institution); *People v. S.M.D.*, 864 P.2d 1103, 1104 (Colo. 1994) ("The police, before interrogating him, contacted his legal guardian, the Adams County Department of Social Services, because the defendant was a juvenile."); *id.* at 1107 (explaining the juvenile "was in the legal custody of the Department of Social Services"). Moreover, titles "are not intended to address every conceivable hypothetical effect [an] [i]nitiative may have if

adopted by the electorate." *In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 No. 255*, 4 P.3d 485, 497 (Colo. 2000). Rather, a title is adequate when the "commonly understood meaning" of its words reflect a measure's essential features. *Id.* This #142's title accomplishes by using the common term "parents or legal guardians" in place of the more expansive language proposed by Childs. *See* Record, p 13 (Petitioner Childs proposing "individuals and governmental or private agencies having legal custody of a child" in place of "parents or legal guardians").

Childs may have preferred different language, but the choice of particular language is the sort of decision where the Board is owed the greatest deference. *See, e.g., In re Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 27 ("We will generally defer to the Board's choice of language unless the titles set contain a material and significant omission, misstatement, or misrepresentation.") (quotations omitted). The Board did not abuse its discretion in choosing an accurate and more succinct formulation.

C. The title accurately summarizes the persons entitled to notice under #142.

Childs' second clear title objection—that #142's title should refer to parents *and* legal guardians instead of "parents or legal guardians"—fails for similar reasons.

First, as discussed above, #142's title need not address every conceivable effect of the measure if approved by the voters. *See In re No. 255*, 4 P.3d at 497. Petitioner Childs speculates that confusion over #142's application may arise where, for instance, "parents consent to the appointment of a guardian for their child." Record, p 13. Such a child, Petitioner appears to suggest, could simultaneously have a parent with legal custody and a legal guardian, arguably mandating notice under #142 to both, and setting up a "potential conflict in who makes decisions for the child." *Id.* But, assuming this situation could occur,[1] the title set

[1] *In re D.I.S.*, 249 P.3d 775, 783 (Colo. 2011), the only case cited by Petitioner Childs in support of this contention, *see* Record at 13, suggests that a legal guardianship created by parental consent "functions as a delegation of . . . custody" pursuant to which "parents have exercised their fundamental right to place their child in the

by the Board must reflect only the measure's "essential concept," not every hypothetical application raised by objectors. *See In re No. 255*, 4 P.3d at 497. The essential concept of #142's notification requirement is that notice be provided to a child's legal custodians—to the child's parents, if natural or adoptive parents are the child's legal custodians, or to a legal guardian in the event that the child's parents are not the legal custodians.

Second, the use of "or" in #142's title does not imply, as Childs contends, that a public school representative is entitled to "choose to notify either the parents or the legal guardian" in the event that a child has both. Record, p 13. The word "or" can be used inclusively or exclusively. *See, e.g.*, *Kulmann v. Salazar*, 2022 CO 58, ¶ 59 (Hood, J., dissenting) ("The word ['or'] can be either inclusive or exclusive depending on how it is used, and . . . both interpretations can be

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custody of another." In that circumstance, the parent would seemingly lack "legal custody" of the child, and #142 would no longer require notice to the parent *lacking* legal custody under #142, but only to the guardian *with* legal custody. Record, p 3 (defining "parent" as a "person who has legal custody of a child").

reasonable."). The title set by the Board—explaining notice would be required under #142 to "parents or legal guardians"— uses "or" inclusively, meaning notice to "parents" is not exclusive of notice to legal guardians. *See id.* at n.1 (explaining "courts recognize that the word 'or' is usually used in legal drafting in an inclusive manner); *In re Estate of Dodge*, 685 P.2d 260, 266, 266 n.1 (Colo. App. 1984) (concluding that "or" was "to be given its usual inclusive construction" because "it simply 'is not usual to interpret the "or" in an alternative proposition as expressing the exclusion of one alternative'" (quotations omitted)).

The title does not suggest that notice to one legal custodian prevents notice to the other, nor that notice would not be required to both parents and legal guardians in the hypothetical event that a child has both forms of legal custodian. Accordingly, the title is not "insufficient, unfair, or misleading" and should be affirmed. *In re #90*, 2014 CO 63, ¶ 8.

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 19th day of March, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 19th day of March, 2024, addressed as follows:

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