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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #205 ("Parental Notification of Gender Incongruence") **Petitioners:** Margaret Bobb, Jonathan Wright, and Janet Wright, **v.** **Respondents:** Lori Gimelshteyn and Erin Lee, **and** **Title Board:** Theresa Conley, Jeremiah Barry, and Kurt Morrison	**▲COURT USE ONLY▲**
Attorneys for Petitioners: Mark G. Grueskin, #14621 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com; nate@rklawpc.com;	Case Number: 24SA124

PETITIONERS' ANSWER 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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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/s Mark G. Grueskin
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SUMMARY OF ARGUMENT

The Title Board's defense of this measure's subjects is rooted in precedent that does not apply here. It also ignores Colorado's rich and contentious history in dealing with public and private schools when arguments have been made to treat them as if they were peas in a scholastic pod. They aren't.

Further, the Board's defense that including private schools in the reporting mandate of this measure is just an element of "implementation" is often the rationale used for unrelated topics that are grouped together. But this Court has rejected that justification in previous, analogous appeals from the Title Board. It should do so again here.

LEGAL ARGUMENT

I. This dispute is not controlled by the Court's decision about a definition of "fee."

The Title Board relies primarily on one decision from this Court, *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2013-2014 #129*, 2014 CO 53, 333 P.3d 101 (Colo. 2014) ("*In re Title for #129*"). Bd. Op. Br. at 7-10. There, the Court found a single subject for an initiative that defined "fee" for all purposes including as it was used in "'the Colorado Constitution, Colorado Revised Statutes, Codes, Directives and all public Colorado legal documents.'" *In re Title for #129, supra,* 333 P.3d at 106. The undefined breadth of this scope was

challenged, but the petitioner there did "not provide concrete examples of Initiative #129's distinct purposes," arguing instead that the applicability of this definition was "so vague that its effect is essentially unknowable." *Id*. at 105.

That is not Objector's claim here. Instead, as Objectors traced in their opening brief, public and private schools present dramatically different constructs as a matter of governmental oversight. They have since the days of Colorado's founding. *See* Obj. Op. Br. at 7-9. They still do.

For example, current state law requires that parents of all children between the ages of 6 and 17 ensure their child's attendance at the public school in which the child is enrolled. C.R.S. § 22-33-104(5)(a). But parents of children enrolled in independent or parochial schools are exempt from this attendance mandate. C.R.S. § 22-33-104(5)(b).

Additionally, a "public school" is "a school maintained and operated by a school district." C.R.S § 22-2-102(4). A "nonpublic school" is "a school organized and maintained by a recognized religious or independent association performing an academic function." C.R.S § 22-2-102(3); *see also* C.R.S. §§ 22-32-116.5(1)(c) and 22-60-102(15.5) (nonpublic school is "any independent or parochial school that provides a basic education").

It's no surprise, then, that "[n]either the state board of education nor any local school board of education has jurisdiction over the internal affairs of any independent or parochial school in Colorado." *Id.* The Colorado Department of Education confirms that there is no state or local control over or involvement in "the internal affairs of non-state independent or parochial schools in Colorado."[1]

The Department reinforces the significant distinction between public and private schools in yet another way. "A non-public school is considered a private business."[2] One could not credibly assert that a public school is a business of any sort, much less that it is a "private business."

The Board justifies its single subject decision because an initiative may make "policy choices that are not inevitably connected." Bd. Op. Br. at 9, citing *In re Title for #129, supra*, 333 P.3d at 105. But dictating reporting requirements about students enrolled in a public school and children observed in a private business are not simply marginally related. In so many ways, they are distinct and unrelated.

Further, this rationale runs headlong into the test for the topics that may comprise a single subject. An initiative's topics must be "necessarily and properly

[1] https://www.cde.state.co.us/choice/nonpublic_index (last viewed May 9, 2024).

[2] *Id.*

connected." *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶ 13, 489 P.3d 1217 (citations omitted). In this regard, the Court's "application of the necessarily-and-properly-related test has often taken into account whether voters might favor only part of an initiative and the potential for voter surprise." *Id*. at ¶ 16. Given the historic divide between public and private schools, voters may wish to require reporting for schools that are run by government but not by private concerns, be they religious or non-sectarian. Or vice versa. But a "yes" or "no" vote on a reporting mandate for truly public schools does not "necessarily" predict voter sentiment for a reporting mandate on private businesses.

The Court's determination that a proposed ballot measure violated the single subject requirement because of its definition of a key term, *id*., is the more relevant precedent here. To link a particular type of animal with all animals, the Board was forced to justify its single subject decision using a "unifying label" that "is the type of overly broad theme" that this Court has consistently rejected. *Id*. at ¶ 22. The Board's argument notwithstanding, this definition didn't serve the purpose of "clarif[ying]" how the measure would be applied. *Id*. at ¶ 38. Initiative #205's use of "public school" and the Board's use of "school" presents the same problem, because neither communicate that what is really covered by this measure: public

and private schools.

Initiative #205's deceptive use of "public school" in its text does not help voters bridge the gap between the two types of schools covered by this initiative. As the chair of the Title Board pointed out, "I do think that's a little, a little bit misleading to say – to keep saying, 'public school, public school, public school' when there is research and intent to expand who, there's really an intent to include all schools."[3] It is this distinction between a public school and a private institution that highlights the second subject in Initiative #205 and the Title Board's error.

II. The inclusion of private schools is not an implementation aspect of Initiative #205.

The Title Board argues that the inclusion of private schools that state or federal funds is an implementation aspect of Initiative #205. Bd. Op. Br. at 7-9.

This is often the response from an initiative's proponents or the Board when an initiative's single subject is challenged. *See, e.g., In the Matter of the Title, Ballot Title and Submission Clause for 2021-2022 #16,* 2021 CO 55, ¶¶ 38-39, 489 P.3d 1217. Notwithstanding the general rule relating to deference to the Title Board, this Court does not look upon the claim of "implementation" as one that is talismanic in nature. Where the Court's independent evaluation of the substance of

[3] April 19, 2024 Rehearing (comments of Theresa Conley, Board chair), https://csos.granicus.com/player/clip/453?view_id=1&redirect=true at 3:39:09-21.

a measure warrants it, the Board's characterization of a provision as "mere implementation" is rejected. *Id.*

The Proponents' thrust is clearly to mandate reporting requirements for public employees at public schools so as to affect the public education system. This objective has little or nothing to do with Initiative #205's reporting requirements that would also be imposed on private businesses (a/k/a "private schools" that receive minimal public funding).

If the Court were to validate this measure as a single subject, nothing would prevent Proponents from introducing an initiative for a future election cycle that requires reporting to parents of the names of children "experiencing gender incongruence" in any government building and any private athletic facility. Or any university dormitory and any personal residence. For that matter, Proponents could target an array of unrelated public and private sites (clothing stores, hair salons, manicurist shops, and nutritionists' offices, as well as district rec centers or city parks) where a person might reveal a gender identity at odds with their biological sex at birth. If single subject designation works for one combination of public and private venues, it is difficult to imagine what argument could be advanced to say that it doesn't work for them all.

But this Court expressly rejects a "common characteristic" as the rationalization for an initiative's subject. A common characteristic doesn't meet this constitutional requirement as it is "too general and too broad" to amount to an actual "subject" for legislation. *See In re Title, Ballot Title, Submission Clause, and Summary for Proposed Initiative "Public Rights in Waters II*," 898 P.2d 1076, 1088 (Colo. 1995).

The single subject statement in Initiative #205's title is "a change to the Colorado Revised Statutes concerning parental notification of a child's gender incongruence from a school representative." R. at 7. As addressed in Objector's Opening Brief, the Board needed to generalize key language ("school" and "school representative") in this title to encompass both public schools and private institutions. Obj. Op. Br. at 11-12.

Had it referred to "public and private" schools or "public and private" school representatives, the Board would have to acknowledge the multiple subjects in this measure. By using the generalized term, "school," the Board left open the question of what schools were affected. Controversy over distinctions between types of schools is rooted in Colorado's history, and, as addressed above, significant differences between public schools and private remain, 149 years after the drafting of the Colorado Constitution.

Initiative 205's rationale may not be as egregious as "water" or "judges" as single subject justifications. But this measure's alleged "subject" is akin to "expanding the animal cruelty statutes to include livestock" or "expanding the retail sale of alcohol beverages," both of which violated the single subject requirement. *See In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37 ¶¶ 19, 20; 526 P.3d 927 (citations omitted). All three conceal covered sub-categories (public vs. private schools; livestock vs. all animals; liquor sales at grocery stores vs. through home delivery) that would require voters to think twice about the trade-off inherent in their vote on these measures.

For the same reason, the coverage of private schools is not an "effect" of Initiative #205. It is an element of the design of this ballot measure. Thus, another often-used justification for unrelated topics in an initiative cannot be credibly used here.

CONCLUSION

The Title Board's single subject decision as to Initiative #205 should be reversed.

Respectfully submitted this 10th day of May, 2024.

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