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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▲**
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PETITIONERS' 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, the undersigned certifies that:

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

Choose one:

X It contains 3,094 words.

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X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

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ISSUE PRESENTED

Whether Initiative #205 violates the single subject requirement by providing that private schools, receiving federal or state funds, are "public schools" and thus must disclose a student's "experience" with gender "incongruence" to the student's parents.

STATEMENT OF THE CASE

A. Statement of Facts.

Lori Gimelshteyn and Erin Lee (hereafter "Proponents") proposed Initiative 2023-2024 #205 (the "Initiative" or "Initiative #205). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted a final version of the Initiative to the Secretary of State for purposes of submission to the Title Board.

1. The Initiative.

This measure seeks to impose a requirement on "public school representatives" to report on a child who is "experiencing gender incongruence." (CF p. 3 (Proposed C.R.S.§ 22-1-144).) Such a representative has two business days after receiving the information to inform the principal of the "public school," who, in turn, must notify one of the child's "parents" within two more business days. (*Id.* (Proposed C.R.S.§ 22-1-144(3)).)

The measure strongly suggests that it applies to "public" schools, as its critical defined terms are "***public*** school" and "***public*** school representative." (*See id.* (Proposed C.R.S.§ 22-1-144(2)) (emphasis added).) The "public" limitation is, however, illusory. The measure's requirement extends beyond the schools that voters would understand as being "public" to include private schools (and, in fact, religious schools too as Proponents confirmed (*see* Apr. 19, 2024, Title Bd. Hr'g, at 3:35:45 to 3:37:55[1]). It accomplishes this by defining "public school" not by a school's status as being run by a political subdivision of the state or one that is otherwise open to any student to attend but instead by whether a school receives any state or federal money:

> "Public school" means any preschool, primary, or secondary school ***that receives state or federal funds***.

(*Id.* (Proposed C.R.S.§ 22-1-144(2)(d)) (emphasis added).) Neither the definition nor the measure more generally include any materiality requirement—one dollar of "state or federal funds" triggers its application. (Apr. 19 Hr'g at 3:38:12 to 3:38:38.)

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[1] The recording is available at https://csos.granicus.com/player/clip/453?view_id=1&redirect=true

B. Nature of the Case, Course of Proceedings, and Disposition Below.

The Title Board heard the measure on April 3, 2024, at which time it set a title. (CF p. 5.) On April 10, 2024, Petitioners filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set a title. (*Id.* p. 9-11.)

The Title Board heard the Motion for Rehearing on April 19. The Board recognized the second subject problems created by Proponents. As the Chair noted, the measure could be misleading:

> 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, that it is really intended to include all schools.

(Apr. 19 Hr'g at 3:39:10 to 3:39:20.) The Chair further commented that the inclusion of private institutions in the measure "might" present a second subject. (*Id.* at 3:41:15.)

Although a clear title argument was not raised in the motion for rehearing, the Board made changes to the title in attempt to address the single subject violation. The Board thus granted the motion for rehearing only to the extent that it made changes to the title. (CF p. 7-8.) The Board set the following title and submission clause:

> Shall there be a change to the Colorado Revised Statutes concerning parental notification of a child's gender incongruence from a school representative, and, in connection therewith, requiring a school representative who obtains information that a child enrolled in the school is experiencing gender incongruence to notify the school's principal within two days; requiring the school's principal to notify the child's parent within two days after receiving the information; defining "gender incongruence" as the difference between the child's biological sex and their perceived or desired gender; and applying this requirement to a school representative, regardless of existing confidentiality requirements, which includes an administrator, teacher, nurse, counselor, social worker, or coach, and to any preschool through secondary school that receives any state or federal funds?

(*Id.* p. 7.)

2. Jurisdiction

Petitioners are entitled to review before this Court pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed their Motion for Rehearing with the Board. *See* C.R.S. § 1-40-107(1). They timely filed their Petition for Review seven days from the date of the hearing on the Motion for Rehearing. *See* C.R.S. § 1-40-107 (2).

SUMMARY OF ARGUMENT

Initiative #205 baits voters with a politically volatile issue—gender identification by minors. And it masks its reach by cloaking this topic under the rubric of "public schools." But it governs the staff and administration of private schools that are deemed "public schools" because they access federal financial programs for reading, drug-free schools, technology services, migrant education,

gifted and talented students, or a host of other federally funded programs that are available both to public and private schools.

This equivalent treatment runs contrary to a rich history, acknowledged by this Court's precedent, of the sharp distinction between public and private schools, a distinction that reaches back to the constitutional convention of 1875. This gap continues to the present time, highlighting the problems with the Title Board's decision that this measure constitutes one subject.

This Court has previously acknowledged that an initiative's definition that creates voter surprise constitutes a second subject. It should find those decisions to be applicable here and direct the Title Board to return Initiative #205 to its designated representatives.

LEGAL ARGUMENT

I. Initiative #205 violates the constitutional single subject limitation.

A. Standard of Review

A proposed initiative must contain no more than one subject. Colo. Const. art. V, § 1(5.5). Provisions that are "disconnected or incongruous" violate this requirement. *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 13, 395 P.3d 318, 321 (quoting *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 13, 500 P.3d 363, 367).

A linkage of concepts under a broad umbrella does not meet this standard. A justification that attempts to "characterize an initiative under some general theme will not save [it] from violating the single-subject rule if the initiative contains multiple subjects." *In re 2019-2020 #315, supra*, ¶ 16, 500 P.3d at 367. Historically, the Court has acknowledged that a measure's provisions might seem "related when considered at a high level of generality," but those provisions "serve[] different purposes not sufficiently connected to constitute a single subject." *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37 ¶ 19; 526 P.3d 927 ("*In re #67, #115, & #128*").

Assuring that initiatives do not contain such provisions serves a fundamental goal of the single subject requirement—to "prevent surprise and fraud from being practiced upon voters" by ensuring that the title of the measure "apprise the people of the subject." C.R.S § 1-40-106.5(1)(e)(II); *see also, e.g.*, *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 16 (explaining that, to effectuate the "anti-fraud purposes of the single-subject requirement, our application of the necessarily-and-properly-related test has often taken into account … the potential for voter surprise").

B. Preservation of Issue Below.

Objectors preserved this issue in the Motion for Rehearing and by arguing it during the Board's hearing. (CF p. at 9-11; Apr. 19 Hr'g, *supra*, at 3:21:35 to 3:24:50.

C. Forcing private schools to disclose a private school student's gender identity issues to parents, in addition to imposing this requirement on public schools, is a second subject of Initiative #205.

The stark difference between private and public schools in Colorado has a long history. Dating back to Colorado's Constitutional Convention in 1875, "provisions 'draw[ing] a sharp distinction between public and private school'… proved highly controversial." *Lobato v. State*, 2013 CO 30, ¶ 101, 304 P.3d 1132, 1155, (Hobbs, J., dissenting), citing Tom I. Romero, II, *"Of Greater Value than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. Colo. L. Rev. 828-31 (2012) ("Romero").[2]

In one regard, "state constitutions themselves recognized the direct link between the common schools and the use of governmental authority to redistribute wealth." Romero, *supra*, at 799. In Colorado, this was the impetus for a

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[2] This historical review can be found in its entirety at: https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1359&context=lawreview (last viewed May 1, 2024).

constitutional value of "thorough and uniform" system of public schools. Colo. Const., art. IX, sec 2. The "dual goals of fostering republican ideology and providing broad-based skills for a changing economy" provided adequate justification for common schools whose financial support came from local and state funding. Romero, *supra*, at 800. But this attempt to equalize resource bases (and thus economic opportunity) did not quell the different treatment given to and priorities of non-public educational institutions. "It should come as no surprise, then, that one of the most salient features in the rise of the consensus regarding mass education during the nineteenth century was the sharpening line between public and private education." *Id.*

This line has not softened all that much with time. In 2015, for example, the General Assembly approved a voucher program for students in elementary and secondary schools, using public funds to help pay student tuition at private schools. After contentious litigation, this Court reversed the Court of Appeals and found that the program violated Art. IX, sec. 7 of the Colorado Constitution. *Taxpayers Pub. Educ. v. Douglas Cnty. Sch*., 2015 CO 50, ¶ 28, 351 P.3d 461 (voucher plan "functions as a recruitment program, teaming with various religious schools (i.e., the Private School Partners) and encouraging students to attend those schools via

the inducement of scholarships"), cert. granted, judgment vacated, and case remanded to the Colorado Supreme Court for further consideration in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017).

The Court often uses a historical perspective on public policy issues to determine if initiative subjects are of such public concern that they warrant voter consideration on their own merits. For example, the Court found the ongoing controversy over the sale of wine in grocery stores—more than 60 years of initiative and legislative disputes—warranted the Court's finding that joining grocery store wine sales with expanded home alcohol delivery violated the single subject requirement. Given this history, the high-level relationship between the subjects was insufficient to satisfy the single subject requirement. These were subjects on which the same voter could be of two minds. *In re #67, #115, & #128, supra,* 2022 CO 37, ¶ 21.

The "indirect relationship," *see id.,* ¶ 22, between imposing duties on public school staff, the salaries and program costs (which are exclusively paid by tax dollars and controlled by publicly elected school boards) and a private school nurse or counselor (whose salaries and program costs may never see any public funds) does not make for a single subject. "The mere fact that both topics involve the

regulation of [privacy about gender identity] is not enough to make them necessarily and properly connected." *See id*., ¶ 23.

In addition, given that Initiative #205 masks its treatment of a private school as a "public school" if it takes a nickel of state or federal funds (and defines "public school" as such), (CF p. 3), voters would be mightily surprised that they had required private school personnel (whom the measure misleadingly defines as public school representatives) to "out" private school students to their private school parents.

Any voter who reads the operative provision of Initiative #205 would be hard-pressed to think that the measure applies to private institutions of learning.

> A **PUBLIC SCHOOL** REPRESENTATIVE WHO OBTAINS INFORMATION THAT A CHILD ENROLLED IN THE **PUBLIC SCHOOL** AT WHICH THEY WORK IS EXPERIENCING GENDER INCONGRUENCE SHALL NOTIFY THE **PUBLIC SCHOOL** PRINCIPAL WITHIN TWO BUSINESS DAYS AFTER RECEIVING SUCH INFORMATION. THE **PUBLIC SCHOOL** PRINCIPAL SHALL THEN NOTIFY AT LEAST ONE OF THE CHILD'S PARENTS WITHIN TWO BUSINESS DAYS AFTER THE DATE OF RECEIVING SUCH INFORMATION.

(CF p. 3 (Proposed C.R.S. § 22-1-144(3)) (emphasis added)). Nothing in this provision shouts, or even whispers, "private school" to a voter. Hence, the inevitable voter surprise.

The Title Board attempted to meet this concern by removing "public" as a modifier of "school" in the single subject statement of the title. It did the same elsewhere in the title when it refers to "school" (instead of "public school") and "school representative" (instead of "public school representative"). (*Compare* CF p. *with* p. 7.)

Of course, neither "school" nor "school representative" is a defined term in the initiative text. As a result, the Board was forced to use terms it knew were legally inconsistent with the provisions of Initiative #205 itself. The Court has disapproved of this type of action by the Board to attempt to salvage a measure that violates the single subject requirement. *See In re Title, Ballot Title And Submission Clause, And Summary For 1999-2000 # 25*, 974 P.2d 458, 469 (Colo. 1999) (explaining that the Board erred by "resolving all ambiguities in favor of the proponents" at the expense of its "equally important duty" to protect voters).

Moreover, the Board's acknowledgment of the overbroad reach of the measure by omitting the actual terms from #205 doesn't mean the initiative only has one subject. It just means that, due to the title revisions the Board was compelled to make, the second subject will be ***less*** discernible by a voter's scan of the title. This accommodation for #205's unique treatment of private schools runs

contrary to the purpose of a ballot title which is supposed to "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

Proponents defined a "public school" as one that "receives state or federal funds." (CF p. 3 (Proposed C.R.S. § 22-1-144(2)(d))). The surprise element that Proponents built into this definition is the inclusion of *federal* funds because existing law, in the very title and article Initiative #205 amends, defines "public school" as follows: "A public school is a school that derives its support, in whole or in part, from moneys raised by a **general state, county, or district tax**." C.R.S. § 22-1-101(1) (emphasis added).

As the Motion for Rehearing established, there are eleven (11) different federal programs that support Colorado private schools, according to the Colorado Department of Education. (CF p. 10.[3]) A private school that avails itself of just one

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[3] The programs adopted as part of the "No Child Left Behind Act of 2001" are:

Title I, Part A – Improving the Academic Achievement of the Disadvantaged
Title I, Part B – Reading First and Even Start

of these 11 federal funding programs is not identified as a "public school" under existing law. *See* C.R.S. § 22-1-101(1). But this private school will be a "public school" under Initiative #205.

In the same way, a "public school representative" is any "public school" administrator, nurse, teacher, counselor, social worker or coach. (CF p. 3 (Proposed C.R.S. § 22-1-144(2)(e)).) Because private schools are "public schools" under Initiative #205, this measure regulates the staff at private schools as well, including staff at a religious school that happens to receive some state or federal funds.

Title I, Part C – Migrant Education
Title II, Part A – Preparing, Training and Recruiting High Quality Teachers and Principals
Title II, Part B – Preparing Tomorrow's Teachers to use Technology
Title II, Part D – Enhancing Education Through Technology
Title III, Part A – Language Instruction for Limited English Proficient and Immigrant Students
Title IV, Part A – Safe and Drug-Free Schools and Communities
Title IV, Part B – Rural and Low-Income School Programs
Title V, Part A – Innovative Programs
Title V, Part D – Gifted and Talented Students

See https://www.cde.state.co.us/choice/nonpublic_programs (last viewed April 30, 2024).

This Court has previously held that definitions can be as much a source of a second subject (and the basis for a fraud on voters) as any other substantive provision in an initiative:

> The initiative excludes "referendum petitions that reduce private property rights, such as zoning issues," from the definition of "Petition"…. Thus, just as in the case of the elimination of the single subject requirement, and the proposed constitutional prohibition on the wholesale repeal of TABOR, voters would be surprised to learn that by voting for an initiative purporting to deal with the procedural aspects of the right to petition, they had excluded zoning matters that "reduce private property rights" from the right of referendum.

In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2001-2002 #43, 46 P.3d 438, 448 (Colo. 2002).

Similarly, this Court found that a redefinition of "sexual act with an animal" was itself the second subject of an initiative dealing with livestock. *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶¶ 34-41, 489 P.3d 1217. The Court ruled that, "notwithstanding the initiative's brevity,… the initiative's joining of these two subjects "run[s] the risk of surprising voters with a 'surreptitious' change… because voters may focus on one change and overlook the other." *Id*. at ¶ 41 (citations omitted). Similarly, the bill of goods to be sold to voters about Initiative #205 will be all about public schools while the measure they are considering is, by design, not nearly that limited.

At least, in 1875, when "no issue was as controversial" as the potential "distinction between public and private school" in the Colorado Constitution, Romero, *supra*, at 828, there could be no question as to whether a public school was really "public." Initiative #205 has crystallized one of the most controversial issues of this age, but it does so without the clarity of the 19th century dividing line between "public" and "private." Because of this conscious choice, its proponents are positioned to surprise voters with the expanse of their measure. As such, they have violated the single subject requirement, and the Title Board erred in setting this title. Therefore, Initiative #205 should be returned to the Proponents.

CONCLUSION

The Title Board struggled with a measure that it knew would lead voters to one conclusion when its text led to a different conclusion. The Board's modifications to the title for Initiative #205 cannot cure the underlying surprise awaiting voters if they adopt this measure, as reflected by this Court's findings of second subjects that were concealed in initiatives' definitions. Therefore, the Board's decision should be vacated for the failure of Initiative #205 to meet the single subject requirement.

Respectfully submitted this 3rd day of May, 2024.

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