BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Mary Elizabeth Childs,
Objector,

v.

Lori Gimelshteyn and Erin Lee,
Proponents of Initiative 2023-2024 #142.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142

Through their legal counsel, Mary Elizabeth Childs, registered elector of Douglas County, hereby files this motion for rehearing on Initiative 2023-2024 #142.

On January 17, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #142:

The ballot title and submission clause as designated and fixed by the Board is as follows:

> *Shall there be an amendment to the Colorado Revised Statutes requiring a school representative to notify the parents or legal guardian of a child's gender incongruence, and, in connection therewith, requiring any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian within forty-eight hours of receiving any information that the child is experiencing gender incongruence; defining gender incongruence as a difference between a child's biological sex and the child's perceived or desired gender; and applying the notification requirement to any preschool, primary, or secondary school that receives state or federal funding?*

I. The Title Board lacked jurisdiction to set titles because key elements of the measure are so unclear that neither voters nor the Board can know the measure's scope and true intent, and this result is inconsistent with the single subject requirement.

Initiative #142 requires "public school representatives" to notify "parents" of a child experiencing gender incongruence. This reporting requirement is the essence of this measure.

A. The measure is excessively vague because voters will not understand the scope of persons specifically listed as "public school representatives."

"Public school representative" is defined as "any public school administrator, teacher, nurse, contractor, volunteer, or any other person associated with public schools." Proposed section 22-1-144(1)(e).

First, #142 expressly covers "volunteers" at a school. Thus, any person (including a parent) who reads to a class, helps decorate a classroom, or comes to talk about an issue within his or her specialized expertise is covered by this requirement. For anyone who has ever volunteered in a school setting, the hidden burden and responsibility imposed by this measure is staggering. In part, for this reason, Initiative 2021-2022 #94 (a measure that imposed the obligations of the Colorado Open Records Act on "educators" defined to include any "volunteer" at a school) was denied title setting because it violated the single subject requirement.[1]

Second, #142 covers "contractors." Are those just persons who provide services (substitute teachers, maintenance professionals, and technology specialists)? Or does it include providers of goods under contract with the school or school district (vendors who deliver foodstuffs to the school kitchen or who replace the school boiler or roof)? All are contractors who may see students in the school building and thus are covered by the measure.

This structural vagueness in the measure presents exactly the dangers the single subject requirement was supposed to avert. It was adopted to "prevent surreptitious measures" and to "prevent surprise and fraud from being practiced upon voters." C.R.S. §1-40-106.5(1)(e)(II). Among this Board's many duties, one stands out: "protecting the voters against confusion and fraud." *In re Initiative 1999-2000 #25*, 974 p.3d 458, 465 (Colo. 1999). The Board can fulfill that responsibility here by finding the measure is so confusing as to prevent the setting of a title and returning the measure to the proponents.

B. The measure is excessively vague because voters will not understand the reach of "any other person associated with public schools."

A "public school representative" is also "**any other person associated with** public schools." *Id*. Voters will not appreciate what it means to be "associated with" a public school insofar as this aspect is a key, hidden element of Initiative #142.

"[A]ssociated with" is a "general relational term." *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1185 (Colo. 2001). "Associated" commonly means "connected with something else so as to exist or occur along with it." https://www.dictionary.com/browse/associated (last viewed Feb. 10, 2024). Applying this judicial standard and this common definition, "associated with" includes virtually everyone with some tie or relationship to a school – including but certainly not limited to every parent of every student at the school as well as every student at that school. It also includes coaches, tutors, and businesses that serve the schools.

[1] *See* https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/2021-2022index.html.

Voters will not understand that this subtle but complex element of #142 deputizes a wide swath of persons to be required to inform parents if a child is believed to be experiencing gender incongruence. A "yes" vote imposes a reporting requirement on children who become aware of a classmate's gender identity that varies from their sex as assigned at birth. And that the same "yes" vote means every parent who is privy to information (at a dinner conversation, a ride to a movie, or a class field trip) must notify the child's parents of what they have overheard. This mandate is both broad and concealed – from engaged voters as well as those who are uninformed about the specifics of this measure.

Proponents will likely argue they really intend a more narrow interpretation of this phrase, but that argument is unconvincing. Proponents specifically used "**any** other person" who has a relation to the public schools in the definition of "public school representative." "[T]he word 'any' means 'all.'" *Stamp v. Vail Corp*., 172 P.3d 437, 447 (Colo. 2007). The proponents affirmatively made this an overly comprehensive reporting duty.

Proponents seek to mask the reach of #142 by using the phrase, "public school representative." That phrase has an official ring to it, suggesting that the affected persons are authorized agents of the schools and thus are actual "representatives" of a school. But that is inaccurate. Volunteers and contractors – not to mention students and parents – have no such authority to act on behalf of a public school. They are nevertheless wound into the measure by its indistinct, confusing wording.

The single subject requirement was intended to prevent voters from realizing, too late, that they had enacted a measure with hidden aspects. As was true for other initiatives the Supreme Court has invalidated on single subject grounds, "this Initiative's complexity and omnibus proportions are hidden from the voter." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). Specifically, here, this measure hides the fact that #142 turns persons with only minor or episodic connections to a school into watchdogs on the issue of gender identity – watchdogs who must report to parents on the lives of children. This aspect of #142 is inconsistent with the single subject requirement, and the Board lacks jurisdiction to set titles.

C. <u>The measure is excessively vague because voters will not understand the reach of the definition of "public school."</u>

Initiative #142 ostensibly applies only to "public schools," but the definition the Proponents included is far broader, as it includes "any" school that "receives state or federal funds." Under this definition, $1 of public funds from the federal government or the state converts a private school into a "public school" for purposes of reporting. In fact, under the definition, there is no requirement that the state or federal government pay the funds to the school. It appears that government funds paid to a private person and then paid by that person to the school would trigger "public school" status.

This is not a speculative concern, as private schools in Colorado do receive federal monies. In fact, the Colorado Department of Education identifies more than 10 federal programs that also

affect private schools.[2] For example, for one program, a local educational agency allocates federal funds for at-risk students. "[T]he LEA must select private school children who are failing, or most at risk of failing, to meet high student academic achievement standards."[3] In another program, federal funds pay for professional development activities of educators, including "private school participants."[4]

Voters would have no way of knowing that the potential reach of the measure goes so far as to include private, including religious, schools. Yet again, this measure promises to result in exactly what the single subject requirement sought to prevent – voter surprise. *See* C.R.S. §1-40-106.5(1)(e)(II).

The scope of the "public school" definition also should be considered in relation to the expansive definition of "public school representative" described above. In religious schools, for instance, a "public school representative" would extend to religious authorities who are "associated" with the school.

Consider, for example, a religious school that receives funds under the state preschool program, rendering it a "public school." A clergy member who conducts confessions as part of religious education could hear from a student that (s)he is "experiencing gender incongruence." Under #142, the clergy member, although acting in a pastoral capacity, nonetheless now has a legal obligation to report what the child said to the child's parents.

The measure is extraordinarily broad in its sweep, such that voters will not understand what they are being asked to support or oppose. Such a measure violates the single subject requirement.

II. The title set by the Board is misleading to voters.

A. The use of "public school representative" is misleading.

For the reasons set forth above, "public school representative" is misleading and confusing to voters. If a title is set, it should be removed and replaced with a more descriptive phrase, based on the definition in the measure: "any person who is associated with a school."

B. Both of the title's references to "parents or legal guardian" are inaccurate.

The title's single subject statement states that the subject is "requiring a school representative to notify the parents **or** legal guardian of a child's gender incongruence." (Emphasis added.) The title later refers to "parents or a legal guardian."

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[2] https://www.cde.state.co.us/choice/nonpublic_programs (last viewed Feb. 14, 2024).
[3] https://www.cde.state.co.us/fedprograms/equitableservicesfaq-1 at 5 (last viewed Feb. 14, 2024).
[4] *Id.* at 5, 6.

The initiative defines "parent" as "a person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian." Proposed Section 22-1-144(1)(c). "Person" means "any individual, corporation, government or governmental subdivision or agency,… or other legal entity." C.R.S. §2-4-401(8).

*1. The measure requires that **all** parents be notified, but the title misstates this mandate.*

The relevant substantive provisions of the initiative impose the mandate that every "school representative" "shall notify the child's **parents** within forty-eight hours." Proposed Section 22-1-144(2) (emphasis added). Under #142, a legal guardian is a "parent," and the measure itself requires notice to all persons who qualify as "the child's parents." A school representative is not authorized to choose to notify either the parents or the legal guardian.

Given the use of the plural of "parent" in the initiative, the school representative must give notice to everyone who qualifies with that status. At times, parents consent to the appointment of a guardian for their child. *See Sidman v. Sidman (In re D.I.S.)*, 249 P.3d 775, 783 (Colo. 2011). This duality of a child's legal custodians can set up a potential conflict in who makes decisions for the child. *Id.*

Therefore, the title should reflect that the new mandate applies to "all" persons or entities that qualify as legal custodian of a child.

2. The measure requires notice to persons with "legal custody" of a child.

The initiative actually defines "parent" as any person "who has legal custody of a child." Examples of persons with such legal custody, as listed in #142, are natural parents, adoptive parents, and legal guardians.

This is far from a complete list of persons who can have legal custody of a child. For instance, under foreseeable and already statutorily prescribed circumstances:

- A "grandparent, or other suitable person" may be awarded legal custody of a child or youth. C.R.S. §19-3-508 (1)(b).
- A "child placement agency for placement in a foster care home or other child care facility" may be awarded legal custody of a child. C.R.S. §19-3-508 (1)(c).
- A court may enter "an order awarding legal custody of a child or youth to the department of human services or to a county department" of human or social services. *See* C.R.S. §19-1-115(6).

This is a demonstrative list of persons other than those listed in the measure's "including" clause in the "parent" definition. It is sufficient to establish that the initiative's definition of "parent" is much broader than acknowledged by proponents or reflected in the title as currently set.

Therefore, "parents and a legal guardian" is simply not accurate. The title should be revised to state that the required notification must be provided to "all individuals and governmental or private agencies having legal custody of a child" rather than "the parents or a legal guardian."

C. The title contains #142's definition of "gender incongruence," but that definition appears so far into the title that the nub of this measure remains hidden from voters.

The title uses "gender incongruence" twice before defining it. Voters must read through the title to the third phrase before they would know what the measure actually addresses.

A more insightful way for voters to understand the meaning of this measure is to insert after "to notify the parents or a legal guardian of" (or the more accurate wording about persons having legal custody of a child, as set forth above) the phrase: "a child that the child is experiencing a difference between the child's biological sex and the child's perceived or desired gender."

Alternatively, the definition could be reflected in a combination of the second and third phrases in the title:

> and, in connection therewith, requiring ~~any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian~~ such notice to be provided within forty-eight hours of receiving any information that the child is experiencing ~~gender incongruence; defining gender incongruence as~~ a difference between ~~a~~the child's biological sex and the child's perceived or desired gender;

D. If the Board finds that #142 comprises a single subject, it should only approve a ballot title that contains the following edits.

> An amendment to the Colorado Revised Statutes requiring any person who is associated with a school ~~a school representative~~ to provide notice to the persons who have legal custody of a child enrolled in a public school that the child is ~~notify the parents or legal guardian of a child's~~ experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided ~~any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian~~ within forty-eight hours of receiving any information that the child is experiencing ~~gender incongruence; defining gender incongruence as~~ a difference between ~~a~~the child's biological sex and the child's perceived or desired gender; defining parent as any person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian; and applying the notification requirement to any persons associated with any preschool, primary, or secondary school that receives state or federal funding.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #142 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading ballot title set.

Respectfully submitted this 14th day of February, 2024.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142** was sent this day, the 14th day of February, 2024, via first-class mail, postage paid to:

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