

**IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE
FOR INITIATIVE 2025-2026 #71
("Prohibiting Certain Surgeries on Minors")**

Initiative Proponents: Erin Lee & Michele Austin

v.

Objector: Rebecca Logsdon

MOTION FOR REHEARING

By undersigned counsel, Rebecca Logsdon, a registered voter of the City & County of Denver, objects to the titles set for Initiative #71, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On May 21, 2025, the Title Board set the following ballot title and submission clause for Initiative #71:

Shall there be a change to the Colorado Revised Statutes prohibiting surgery altering a minor’s biological sex characteristics, and, in connection therewith, prohibiting a health-care professional or other person from knowingly performing, administering, or providing any surgery on a minor for the purpose of altering the minor’s biological sex characteristics and prohibiting state or federal funds, Medicaid reimbursement, or insurance coverage from being used to pay for this type of surgery?

In so doing, the Board erred for the following reasons.

INTRODUCTION

An initiative that is crafted to be so uncertain that voters cannot appreciate its consequence does not comply with the single subject requirement in the Colorado Constitution. Initiative #71 is broad beyond what Proponents have described to date.

When asked by legislative staff what #71’s single subject was at the Review and Comment hearing, Proponents could not answer, offering only “So we’ll reserve that conversation for the Title Board when we get there.”¹ On the substance of the measure, when asked what “other person” meant as used in their amendment, they stated only, “So, we’ll consider whether that causes any ambiguities and respond.”² No significant interchange about the substance of #71 occurred with Proponents at that hearing.

¹ <https://tinyurl.com/yb4dp2w7> at 11:05:29-33 (last viewed May 25, 2025).

² *Id.* at 11:05:39-44.

By the time they arrived at Title Board, Proponents did settle on a single subject: “a prohibition on surgery that alters biological sex characteristics.”³ Of course, this statement was underinclusive in multiple ways, addressed below, and the title set does not disclose the multiple hidden aspects of Initiative #71.

I. The Title Board lacks jurisdiction to set a ballot title for Initiative #71.

A. Initiative #71’s vague wording conceals a wide array of non-surgical acts and non-medical personnel that are bound by its terms, concealing from voters its breadth by references to gender affirming surgery for minors.

Initiative #71 doesn’t simply prevent medical doctors who are able to perform surgery from doing so as to a portion of the populace. It applies to another dozen categories of licensed health care professionals, including:

- physical therapists,
- psychologists,
- pharmacists,
- optometrists, and
- anyone in the undefined category of “the healing arts.”

Proposed Section 12-30-125(2)(a). Also covered by Initiative #71 are chiropractors, dentists, and podiatrists, whose involvement in this surgical process is... imaginary. Initiative #71 was drafted to also apply to health care professionals who are not licensed to practice in Colorado (and potentially have never set foot in the state), *id.*, an element coiled in Initiative #71’s folds and not disclosed in the titles. Finally, #71 even applies to the still amorphous category of “other persons.” Proposed Section 12-30-125(3).

Why include all of these people, most of whom are not even alleged to perform the covered surgeries? Because the measure is not limited to “performing” surgery. It also applies to any person who might “prescribe, administer, or provide” such surgery.

How easy is it to overlook any one of these other aspects? The Board need look no further than its own title which omits “prescribe” from the acts covered by the measure. It states only that the measure prohibits “performing, administering, or providing” such surgery. Even Proponents did not object to or comment on this wording that clearly understates at least one potential violation of law under Initiative #71.

More importantly, the acts of prescribing, administering, and providing this surgery are not defined by the initiative. The refusal to provide this insight can be determinative in the single subject analysis. As the Supreme Court has held:

³ https://csos.granicus.com/player/clip/500?view_id=1&meta_id=18277&redirect=true at 2:44:07-13 (last viewed May 25, 2025).

[T]his Initiative’s complexity and omnibus proportions are hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative fails to inform voters of the services its passage would affect.... In the absence of a definition for “services” or a description of the purposes effected by restricting non-emergency services, the additional purpose of restricting access to unrelated administrative services is hidden from the voter. Moreover, **the Initiative’s failure to specify any definitions, services, effects, or purposes makes it impossible for a voter to be informed as to the consequences of his or her vote. This facial vagueness** not only complicates this court’s attempt to understand the Initiative’s subjects, but **results in items being concealed within a complex proposal as prohibited by the single subject rule.**

In re Title & Ballot Title & Submission Clause for Initiative 2005-2006 #55, 138 P.3d 273, 282 (Colo. 2006) (emphasis added).

Should Proponents argue that these terms need not be defined in their measure, Objector would point out, without conceding Proponents’ premise, that the common definitions of these three terms, reflecting their plain meaning, make the case for the hidden expense of #71.

- “In a medical sense **‘prescribe’ means to direct, designate, or order use of a particular remedy, therapy, medicine, or drug.**” *In re Driscoll*, 179 B.R. 664, 665 (1995), citing *Black’s Law Dictionary* 1064 (5th Ed. 1981) (emphasis added).
- “**Administer**” means “to manage or supervise the execution, use or conduct of” an activity and, in the medical field, “should recognize and encompass the activities of **doctors and other medical professionals who are involved in prescribing the claimed compounds or otherwise supervising the care**” of a patient. *Janssen Prods., L.P. v. Lupin Ltd.*, 2013 U.S. Dist. LEXIS 189016, *36 (D.N.J. Oct. 9, 2013) (emphasis added), citing *Merriam-Websters Dictionary* (internal quotation marks omitted).
- “**Provide**” is defined as “To make, **procure**, or furnish for further use, **prepare**. To **supply**; to afford; to **contribute.**” *Wolf Creek Ski Corp. v. Bd. of County Comm’rs*, 170 P.3d 821, 826 (Colo. App. 2007), citing *Black’s Law Dictionary* 1224 (6th Ed. 1990) (emphasis added).

Thus, a relative, friend, neighbor, or co-worker (i.e., “other person”) who informs a person about the potential for them to receive surgical gender affirming care has “prescribed” such surgery by “designating” it to that person. *Black’s Law Dictionary* 447 (6th ed. 1990) (“designate” means “To mark out and make known; to point out; to name; indicate”); *Webster’s Third New International Dictionary Unabridged* 612 (1981) (“designate” means “to make known directly”), cited by *Richardson v. C.I.R.*, 125 F.3d 551, 556 (7th Cir. 1997).

Additionally, there are no limits in #71 on who or what constitutes an “other person.” The plain meaning of “other” makes clear that there is no line drawn. *See People v. Tomaske*, 2022 COA 52, ¶21, 516 P.3d 534, 538 (“other” means “an additional one”), citing *Webster’s Third New International Dictionary* 1598 (2002). And as noted earlier, Proponents have chosen not to

disclose in public hearings on #71 what “other person” is intended to mean and so it must be presumed that they embrace this unbounded meaning of “other.”

Similarly, any health care professional who is involved in the post-operative treatment of such a patient is involved in “administering” the surgery because that person is involved in “otherwise supervising the care” of the patient. *See Janssen Prod., supra*. The physical therapist who assists the patient with recovery is implicated. So is the psychologist, mental health therapist, or psychiatrist who provides counselling before or after surgery. As is the pharmacist who oversees the dispensing of medications in advance of or after surgery.⁴

This initiative is so broad as to include any person providing one of the “healing arts” which is undefined in #71. This phrase is wide-ranging. According to one university, beyond just the practice of medicine, “The term ‘healing arts’ refers to a wide range of creative and disciplined practices that foster an individual’s innate healing potential thereby promoting health, wellness, coping skills, and personal change.”⁵ In fact, it is commonly understood to include music therapy, dance therapy, drama therapy, and art therapy,⁶ as well as massage therapy.⁷

Finally, a person will “provide” surgery by paying for it (“procure” or “contribute”) as well as doing anything to “prepare” for or “supply” anything associated with it. Thus, one who is the payor for the surgery provides it; one who readies the operating theater’s sterile surgical equipment or who launders surgical gowns or preps the O.R. does too.

The inclusion of verbs other than “perform” in #71, in conjunction with the unending list of the many professions and “other” persons who are subject to the measure for acts beyond performing surgery, magnify its reach, unbeknownst to the electorate. And in the world of single subject analysis, that inability to know is precisely what the single subject requirement was intended to preempt. If an average voter could not understand how far this measure goes, the Board cannot set a title for it, and it should reverse its decision to do so.

Furthermore, contrary to C.R.S. § 1-40-105(3), this initiative has not been “worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters.” It is almost certain to confuse voters, both because of the verbiage choices of Proponents and the fact that those choices have resulted in at least one

⁴ According to the American Journal of Psychiatry, transgender individuals were found to “receive 3.4–3.9 times more prescriptions for antidepressants and anxiolytics than the general population, and even 10 years after gender-affirming surgeries, rates of mood and anxiety disorders remain elevated (21.1% for trans compared with 12.5% for cis people).” Mueller, S., *Mental Health Treatment Utilization in Transgender Persons: What We Know and What We Don’t Know*, The American Journal of Psychiatry (Aug. 1, 2020) <https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp.2019.19111151> (last viewed May 26, 2025).

⁵ <https://finearts.unm.edu/arts-in-medicine/education/> (last viewed May 26, 2025).

⁶ *What to know about the healing arts*, Medical New Today, <https://www.medicalnewstoday.com/articles/what-are-the-healing-arts#types> (last viewed May 26, 2025).

⁷ <https://www.chsa.net> (last viewed May 26, 2025).

“surreptitious provision coiled up in the folds” of the text that could contribute to “inadvertent passage” of the initiative. *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 440 (Colo. 2002) (quoting *In re Breene*, 24 P. 3, 4 (1890)). As such, the Board should find it lacks jurisdiction to set these titles.

B. Initiative #71 conceals, and voters will be surprised by, the types of surgeries that are covered by its use of “altering biological sex characteristics.”

Given its purposeful vagueness, voters considering Initiative #71 will not know what types of procedures are covered because a central element of this measure – “altering biological sex characteristics” – is not defined. Because this is the central aspect of the initiative, voters cannot know what this measure will actually do. *See Initiative 2005-2006 #55, supra*.

“Characteristic” is defined as “belonging to or especially typical or distinctive of the character or essential nature of.” *Cooperman v. David*, 214 F.3d 1162, 1166 (10th Cir. 2000), citing *Webster’s Third New International Dictionary* 376 (1986). That seems clear enough. What isn’t clear is how this concept gets applied to “altering” and “biological sex.”

As one example, over half of all male infants in the U.S. are circumcised.⁸ Some are circumcised in light of cultural or religious traditions, while others are circumcised given parents’ preferences or advice received about health concerns. According to Proponents, “biological sex characteristics,” while not defined, “certainly include sexual reproductive organs, . . . ones that are used for reproductive purposes, . . . organs that men have that women don’t have.”⁹ Circumcisions thus would be included. But voters would not know that a standard, long-used procedure, which does alter a boy’s biological sex characteristics, would not be permitted until a young man’s 18th birthday under Initiative #71.

As another example, some babies are born with abnormalities to sexual organs that can be surgically addressed to assist in function and appearance.¹⁰ These surgeries would also be suspended until the age of 18 if Initiative #71 is enacted. This measure would affect babies of both sexes born with such conditions. After all, biological sex characteristics also include “organs that women have that men don’t have.”¹¹ The fact that these surgeries would be prohibited is exceptional in that, historically, “[a]lmost every bill” introduced at the state level

⁸ https://www.cdc.gov/nchs/data/hestat/circumcision_2013/Circumcision_2013.htm (last viewed May 25, 2025).

⁹ May 21, 2025 Title Board Hearing; *see* fn. 3, 3:00:22-3:01:03. It should be noted that biological sex characteristics are not limited to such organs but also include chromosomes and sex hormones. Shawky, N., et al., *Insights Into the Cardiomodulatory Effects of Sex Hormones: Implications in Transgender Care*, Hypertension (July 17, 2023); <https://www.ahajournals.org/doi/10.1161/HYPERTENSIONAHA.123.19501> (last viewed May 26, 2025).

¹⁰ *See* <https://www.mayoclinic.org/diseases-conditions/atypical-genitalia/diagnosis-treatment/drc-20369278> (last viewed May 25, 2025).

¹¹ May 21, 2025 Title Board Hearing; *see* fn. 3, 3:01:04-08).

for this purpose has contained “notable exceptions for minors with ‘medically verifiable’ developmental disorders or intersex conditions.”¹² Initiative #71 does not.

The Board’s lengthy discussion¹³ of what might be included as a “biological sex characteristic” is reflective of Initiative #71’s built-in confusion. If the Board, after studying this measure and listening to Proponents before legislative staff and at title setting was hard pressed to identify what was really at issue in this phrase, why is it reasonable to expect more of a voter who’s asked to sign a petition at a grocery store? Or vote “yes” or “no” on this measure?

Proponents will no doubt contend their measure requires surgery be “for the purpose of” altering biological sex characteristics. But *whose* purpose do they have in mind? The minor’s purpose? The parents’ purpose? A doctor’s purpose? The initiative is open-ended (and thus unclear) on that point. Regardless, this “for the purpose” proviso is a smokescreen, as all of the surgeries mentioned herein are done for the purpose of altering biological sex characteristics.

Proponents’ primary concern is to end gender affirming care for minors (as the legislative declaration indicates). The realities of their chosen language do not match up with this intent, but that stems from using a veiled reference to “altering biological sex characteristics.” It will surely confuse voters about the reach of this initiative. “The single-subject requirement is designed to protect voters against fraud and surprise.” *In re Title, Ballot Title & Submission Clause for Amendment Adding Section 2 to Article VII (Petitions)*, 907 P.2d 586, 589 (Colo. 1995). For this reason, Initiative #71 violates the single subject requirement.

Again, contrary to C.R.S. § 1-40-105(3), this measure has not been written so that it can be comprehended by voters, and its hidden effects are antithetical to the single subject mandate. Therefore, the Board should reverse its earlier title setting decision.

C. The Board lacks jurisdiction to set a ballot title for Initiative #71 because the measure, as drafted, contains a substantive legislative declaration that will affect the application of Initiative #71 but will not become part of Colorado statute.

The “legislative declaration” in Section 1 was not drafted to be, and will not be, included in the Colorado Revised Statutes. When voters’ declarations are included to address merely historical, procedural, or informational matters, the fact that a “legislative declaration” isn’t ultimately part of an adopted law is of no consequence in title setting. But where an initiative’s legislative declaration has substantive impacts on its post-election application, and it was drafted with the clear awareness that it will be used in judicial interpretation of the measure, this “disappearing” declaration represents a jurisdictional defect in the initiative.

¹² *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harvard L.Rev. 2163 (April 2021); <https://harvardlawreview.org/print/vol-134/outlawing-trans-youth-state-legislatures-and-the-battle-over-gender-affirming-healthcare-for-minors/#footnote-76> (last viewed May 26, 2025).

¹³ May 21, 2025 Title Board Hearing; see fn. 3, 2:52:00-3:05:15; see generally https://en.wikipedia.org/wiki/Secondary_sex_characteristic (contrasting primary vs. secondary sex characteristics) (last viewed May 26, 2025).

What is the impact of putting this in a section that isn't printed in the Revised Statutes? As the Board knows, the full initiative text is printed in the Blue Book, and the Blue Book is a source of insight that the courts use to interpret a voter-adopted initiative. *See In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999). Thus, without negotiating with legislative staff about whether certain information deserves to be in the Blue Book, Proponents have given themselves latitude to communicate this framing while still using obscure language in the initiative. Here, they assure that their dot-connecting language will be repeated, without alteration, to guide judicial application of the initiative. It's a win/win for Proponents; their non-statutory language has legal effect without being part of Colorado law.

In this instance, Proponents have likened gender affirming care in their legislative declaration to existing prohibitions on minors' life-shortening activities of "consuming alcohol and smoking." They argue, then, that "The same protections should apply to irreversible medical interventions related to biological sex." Section 1(d) of Initiative #71. There is no proof that gender affirming care causes a minor to drive erratically under the influence or contract lung cancer. But by invoking social ills and linking them to gender affirming care outside of statute, Proponents seek to develop a narrative for future litigation that is unauthorized.

Given failures to meet these standards, Initiative #71 was not properly filed with the Board, and as such, it lacks jurisdiction to set titles.

II. The ballot title is misleading, unfair, and inaccurate.

A. The titles omit "prescribe" as an act that would trigger a violation of Initiative #71.

As addressed above, Initiative #71 prohibits any person "from prescribing" any treatment resulting in or from surgery. The title only states that the measure addresses performing, administering, and providing such surgery. If the issue of prescription was notable enough for Proponents to include it in their measure, it's worthy of stating explicitly in the title – particularly given the way in which prescribing treatment surreptitiously expands this initiative.

B. The titles omit reference to the many non-surgical personnel who, by their mere professional status, have the potential for violating Initiative #71.

As addressed above, Initiative #71 expressly covers professions that have nothing to do with services rendered in a surgical theatre. Clarity about this fact is missing from the titles, as reference to "health care professionals" is insufficient. Similarly, the titles do not refer to persons engaged in the "healing arts" which is extremely broad in its usage, as established above. This extraordinary breadth, written into Initiative #71, should be reflected in the titles.

C. The titles omit reference to out-of-state health care professionals who also have the potential for violating Initiative #71.

Proponents seek to do to gender affirming care what the state of Texas sought to do to abortion rights: prohibit in-state residents from seeking out-of-state health care.¹⁴ Initiative #71 defines “health care professional” as one “licensed in this state **or any other state.**” Proposed Section 12-30-125(2)(a) (emphasis added). Thus, #71 seeks to regulate Coloradans’ access to non-Colorado health care professionals. Not only is this a single subject problem as noted above, but the title’s failure to even address this aspect of the initiative will mislead voters. Voters should certainly know they are being asked to prohibit access to health care professionals, no matter where they are located in the country or even the world.

D. The title’s use of “prohibiting surgery” in the single subject statement is inaccurate and misleading.

As noted above, the breadth of the measure goes beyond prohibiting surgical acts. Initiative #71 also prohibits discussion of such surgery since one cannot “prescribe” and thus cannot “designate” such surgery. Therefore, this is a misleading phrase to reflect the entire measure. Initiative #71 also prohibits mental health professionals, pharmacists, and physical therapists from providing care, pre- or post-surgery.

Finally, the Board’s use of “prohibiting” in this introductory phrase, rather than “concerning,” simply magnifies this voter confusion. This measure doesn’t just prohibit surgery. And the limitation on the reimbursement to medical providers is not a prohibition since it does not prevent private payment for such a procedure. Nor is it an enforcement mechanism. It is really just political bait to induce voters to think that restricting health care and related services in this manner is good for their pocketbooks.

Therefore, “concerning” is the more appropriate reference after the single subject statement.

WHEREFORE, in light of the arguments and legal precedent cited above, the Title Board should dismiss Initiative #71 for lack of jurisdiction, and if it does not do so, it should revise the titles so that they are at least more fair, more accurate, and not misleading.

¹⁴ *Interstate travel becomes a target for the anti-abortion movement with Texas filing*, National Public Radio (May 17, 2024); <https://www.npr.org/2024/05/17/12s52218618/interstate-travel-becomes-a-target-for-the-anti-abortion-movement-with-texas-fil> (last viewed May 26, 2025).

RESPECTFULLY SUBMITTED this 28th day of May, 2025.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2025-2026 #71** was sent this day, May 28, 2025, via email to counsel for the proponents at:

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