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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to C.R.S. §1-40-107(2),(2023) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for the Proposed Initiative 2023-2024 #142 ("Parental Notification of Gender Incongruence") **Petitioner:** Mary Elizabeth Childs, **v.** **Respondents:** Lori Gimelshteyn and Erin Lee and **Title Board:** T. Conley, J. Berry and K. Morrison.	**▲COURT USE ONLY▲**
Attorneys for Petitioner: Mark G. Grueskin, #14621 Nathan A. Bruggeman, #39621 David M. Beller, #35767 **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, david@rklawpc.com	Case Number: 2024SA63

PETITIONER'S 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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INTRODUCTION

Initiative #142 deputizes, and requires, any person "associated with public schools" to tell a child's "parents" (expansively defined in the measure) about information they've learned that the child is "experiencing gender incongruence." Assuming this measure goes to the ballot, voters will be asked if a child's inquiry into gender identity should, without the child's consent or even the child's knowledge, be broadcast to any person or entity that has legal custody of that child.

At bare minimum, the Title Board was obligated to provide voters with an understanding of two elements of Initiative #142. First, the title needed to accurately state who would be required to provide this notice. Due to the rehearing triggered by Objector's motion, the Board accomplished that by stating that notice must be provided by "any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school."

Second, the title needed to accurately state who was required to receive this notification. But here, despite Objector's motion for rehearing, the Board failed. It stated that the notice was to be given to "parents or legal guardians" when, under #142's terms, it would actually be required to be given to any person or entity that has legal custody of a child. It also failed by stating that the notice was to be given

to "parents or legal guardians" when #142 requires it to be given to the child's "parents" (plural), defined to mean any person who has legal custody of the child.

After rehearing, Proponents explored a slightly different route. They filed a new version of this measure, Initiative 2023-2024 #205, that changed provisions related to this appeal. Whatever their interest in pursuing this new proposal, there is no assurance that Initiative #205 isn't a political decoy and that Initiative #142 won't be the one that proceeds to petitioning. Thus, it is critical that the Court order the correction of Initiative #142's ballot title so that, if this more expansive and intrusive measure goes forward, voters are not misled about what this measure actually does.

Therefore, the title should be returned to the Board for correction, consistent with the grounds alleged here.

LEGAL ARGUMENT

I. The Title Board's inaccurate description of which persons must receive information that a child is said to be "experiencing gender incongruence" will mislead voters.

Initiative #142 requires that school representatives "shall notify the child's parents" within 48 hours if they have information that child is "experiencing gender incongruence." A person is a "parent" under #142 if he or she "has legal custody of a child." That definition states it includes (and thus is not limited to) natural parents,

adoptive parents, or legal guardians. But the titles misstate who is to receive notification by referring only to a child's "parents or legal guardians."

The Title Board justifies this misstatement by asserting that "the terms 'legal guardian' and 'person who has legal custody' of a child have the same meaning." Title Board Opening Brief at 3 ("Bd. Op. Br."). This is incorrect.

A. As a matter of law, the titles will mislead voters.

Based on Colorado statute, the Board errs by treating legal custody and legal guardianship as being interchangeable concepts. Under the Colorado Children's Code, "legal custody" has a very specific meaning, and it relates to the provision of functional care for a child.

> "Legal custody" means the right to the care, custody, and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, and discipline for a child and, in an emergency, to authorize surgery or other extraordinary care. "Legal custody" may be taken from a parent only by court action.

C.R.S. §19-1-103(94)(a). Thus, legal custody imbues a person or an institution with the right to determining a child's "care, custody and control" as well as the duty to provide for the day-to-day needs of a child ("food, clothing, shelter, ordinary medical care, education, and discipline").

In contrast, the Colorado Children's Code provides that a person who is a legal guardian has substantially greater authority over the child's legal status and only has the rights and duties of legal custody if they are not "vested in another person, agency, or institution."

> "Guardianship of the person" means the duty and authority vested by court action to make major decisions affecting a child, including but not limited to:
>
> (a) The authority to consent to marriage, to enlistment in the armed forces, and to medical or surgical treatment;
>
> (b) The authority to represent a child in legal actions and to make other decisions of substantial legal significance concerning the child;
>
> (c) The authority to consent to the adoption of a child when the parent-child legal relationship has been terminated by judicial decree; and
>
> (d) The rights and responsibilities of legal custody when legal custody has not been vested in another person, agency, or institution.

C.R.S. §19-1-103(75). Thus, a legal guardian can be, but is not necessarily, a legal custodian of a child.

The courts appropriately treat this statutory distinction as a substantive one. "Guardianship, **unlike legal custody**, vests its holder with the authority to make major decisions for the child." *People ex rel. E.M. v. L.G.M.*, 2016 COA 38M, ¶ 29; 417 P.3d 843, 849 (identifying adoption as one such major decision) (emphasis added), *aff'd sub nom People ex rel. L.M.*, 2018 CO 34, 416 P.3d 875. Thus, a court can and often does separate a child's legal custody and his or her guardianship. *See,*

e.g., In the Interest of R.W., 989 P.2d 240, 244 (Colo. App. 1999) (legal custody of a child was granted to Department of Human Services, and guardianship was granted to foster parents), *aff'd sub nom L.L. v. People*, 10 P.3d 1271 (Colo. 2000).

Clearly, "legal custodian" and "legal guardian" are not synonyms, as the Title Board contends. Statutes cited by both Objector and the Title Board use the alternative designations of parent, guardian "or" legal custodian. Objector's Opening Brief at 9; Bd. Op. Br. at 6. The fact that these terms are connected by "or" indicates that they are distinct from one another. "As we have long recognized, the use of the word 'or' in this fashion ordinarily demarcates different categories." *Kulmann v. Salazar*, 2022 CO 58, ¶33, 521 P.3d 649, 655. Notably, the Board does not argue that the rights and duties of one such person are the rights and duties of all. Thus, the Board effectively concedes that its use of these two terms is flawed.

B. In using a test of rough equivalency of terms, the Board threatens the future interpretation of this measure should it pass at the 2024 election.

By conflating these terms, the Board basically argues that voters will connect the dots to understand what this key provision of #142 does, even if the title does not correctly portray that legal change. There is real danger to that approach.

The ballot title and submission clause is one method of "ascertain[ing] the intent of the voters." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d

674, 682 (Colo. 2010). Its utility as a barometer of voter intent comes into play if there is any ambiguity in a voter-approved initiated ballot measure.

In construing and applying measures that have been adopted by the electorate, voters are "presumed to know the existing law at the time they amend or clarify that law." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). Thus, as to #142, voters would be presumed to know the difference between a "legal guardian" and a person who has "legal custody" of a child, including the different rights and duties of each. But a muddled ballot title for #142, referring to "legal guardians," is likely to frustrate any post-election attempt to discern voter intent about who must receive notification if a child is "experiencing gender incongruence."

Where the ballot title (as an indicator of what voters intended to achieve) is confused, the electorate's desired effect in passing such a measure is likely to be masked. Thus, a rounding error in language used to describe which persons will be notified of sensitive information about a child undermines the broader interest of faithful judicial interpretation after the election. For that reason, too, the Board's error cannot be overlooked.

C. The Board is wrong that voters do not need to know that "legal custody of a child" is the test used by Initiative #142 as its defining standard.

The Board states that the county agencies, placement services, and other persons who may have legal custody of a child are all "legal guardians." In support of that statement, the Board cites C.R.S. §19-1-115(1)(a). But that subsection states that any person or entity "vested by the court with legal custody of a child has the rights and dues defined in section 19-1-103." That statutory cross reference is for the definition of "legal custody" (the term that is used in C.R.S. §19-1-115(1)(a)), not the definition of "guardianship." And the case cited by the Board, *People v. S.M.D.*, 864 P.2d 1103 (Colo. 1994), addresses the ability of a guardian ad litem (the Department of Social Services) to give consent to waive the *Miranda* rights of a juvenile. It did not equate the legal capacity of a guardian with a person who has legal custody of the child.

Regardless, as addressed above, the Board's position is at odds with this Court's rule of construction that, when considering ballot measures, voters know the law they are amending. That awareness applies "when the voter initiative was adopted." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254 (voters credited with knowledge and understanding of U.S. Supreme Court and Colorado appellate decisions construing the phrase, "express

advocacy," used in campaign finance law). In other words, that voter awareness is effective during the time voters consider and rely upon the ballot title that is the subject of this appeal. As such, voters must be informed by the ballot title that the legal standard used by Initiative #142, "legal custody" of a child, is the determining factor for informing on children who are said to be "experiencing gender incongruence."

Therefore, the Title Board should be required to correct this title.

II. The Title Board's failure to state that the required notification must be given to persons qualifying as "parents *or* legal guardians" of a child will mislead voters.

The text of Initiative #142 is quite specific. A public school representative "shall notify the child's ***parents***" if that person gets any information that a child is "experiencing gender incongruence." The text is clear, using the plural, "parents," in specifying who must be told. And it does not say "some of parents" or anything of the sort. Notice is to go to ***all*** who qualify as the child's parents.

Yet, the title for #142 states that notice must be given to "the parents *or* legal guardians" of a child. As such, voters will not know that notices must be given to all of the natural or adoptive parents in a child's life and any legal guardians or any other person or entity having legal custody of that child.

Before this Court, the Board first argues that the question of whether it accurately portrayed who must receive the mandated notification is an "effect" of #142 that need not be described in the title. Bd. Op. Br. at 9. This assertion is incorrect.

The question of just how expansive the notice requirement is represents much more than an effect of this initiative. It is one of this measure's central tenets. As drafted, Initiative #142 seeks to amplify awareness about "information" a public school representative receives of a student's "experiencing" of gender incongruence. In imposing this requirement on anyone "associated with" the school, Proponents drafted this measure to be expansive, and voters should know that.

If the deliberate wording choice was not sufficiently evident from #142's text, Proponents' subsequent actions made this clear. Proponents redrafted their measure and filed it as Initiative #205. But there, the notice they mandated was only required to be given to "at least one of the child's parents."[1] And the Title Board, when it

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[1] https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/205Final.pdf (last viewed April 6, 2024) (Proposed Section 22-1-144(3).

considered this change and set the ballot title for Initiative #205, reflected this limitation, not found in Initiative #142, in Initiative #205's title. The title set for #205 states that the required notice must be given to "the child's parent."[2] Thus, Proponents narrowed their measure, and the title reflects that change in language.

If the Proponents can limit the scope of their initiative, and the Board can adjust the title to match this new scope, then the issue that was the cause for change is no mere detail or ancillary effect. It is a key aspect of Initiative #142 that needs to be accurately reflected in the title. And as this Court has long held, misstating those central features in an initiative requires that the Board correct the title set. *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 11, 14 (Colo. 2000). Thus, the Board cannot dismiss its error as an effect of the measure that never needed to be addressed in the first place.

Of particular note in this regard is this Court's holding in *In re Title, Ballot Title & Submission Clause for 2015-2016 #73,* 2016 CO 24, ¶ 35, 369 P.3d 565, 570. There, the Court evaluated the clarity of the ballot title for an initiative that changed

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[2] https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/205Final.pdf (last viewed April 6, 2024).

various procedures relating to the fundamental right of recall. One of those changes was to require that any official recalled from office not hold office for six years. The title did reflect that change. But it did not state that any official, subject to recall, who resigned from office was also prohibited from running for six years. The Board had made this clear title error "[b]ecause the title refers to only one category of people who would be barred from holding office for a period of time (i.e., recalled officials), but omits another category (i.e., those who resign during a recall process)." *Id*.

In the same way, Initiative #142's title glosses over the fact that anyone with legal custody of a child (i.e., every person or entity that qualifies as a "parent") must receive the notification required by this measure. As it was misleading for a title to fail to fully describe the categories of persons subject to the recall measure, it is misleading for this title to fail to correctly state the categories of persons who must be notified about a child's exploration of gender identity.

Accurate description is so important given the judicial recognition that "parents" with custody rights may disagree about the correct path for their child. But their differing viewpoints should not result in "conflicting decisions" that jeopardize the well-being of the child. *Sidman v. Sidman*, 249 P.3d 775, 783 (Colo. 2011). If

voters are going to approve the structure for conflicting directions to be applied to their child, the electorate should at least know that is a key aspect of the system they are being asked to approve.

The Board also argues, as an additional legal ground justifying the title language chosen, that "or" actually means "and." The Board relies primarily on the dissent in *Kulmann, supra*, and a footnote in a 40-year-old Court of Appeals decision. *See* Bd. Op. Br. at 10 (citing *In re Estate of Dodge*, 685 P.2d 260, 266 n.1 (Colo. App. 1984)).

On this question, this Court has been clear. "Or" is a disjunctive conjunction that identifies distinct, alternative elements of a statute. *Holliday v. Bestop, Inc*., 23 P.3d 700, 705, 707 (Colo. 2001) (applying "the rules of grammar and common usage," citing C.R.S. § 2-4-101). "The legislature's use of the disjunctive 'or' demarcates different categories." *Bloomer v. Bd. of Cty. Comm'rs*, 799 P.2d 942, 946 (Colo. 1990), *overruled on other grounds by Bertrand v. Bd. of Cnty. Comm'rs*, 872 P.2d 223 (Colo. 1994); *see People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009) (different groupings in statute separated by "or").

It is unreasonable to think that voters, seeing this question on a petition or on a ballot for the first time, will construe "or" to mean "and." That simply isn't the

common understanding of "or." Instead, it is generally known to be "used as a function word to indicate an alternative;… the equivalent or substitute character of two words or phrases."[3] To be succinct, "or" is "used to connect different possibilities."[4] Most voters in their own day-to-day use of "or" mean exactly that. Certainly, the Board did when it summarized the text of Initiative #142 in this title[5] and in legal argument in its Opening Brief.[6]

As such, this language choice falls into the category of a substantive misstatement of the initiative. This Court gives the Title Board a great deal of

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[3] Merriam-Webster Online Dictionary (defining "or"), https://www.merriam-webster.com/dictionary/or (last viewed April 6, 2024).

[4] Cambridge Dictionary Online (defining "or'), https://dictionary.cambridge.org/us/dictionary/english/or (last viewed April 6, 2024).

[5] For instance, when the Board stated in the title that the measure applies to any school "that receives state ***or*** federal funding," it did not mean any "school that receives state ***and*** federal funding,"

[6] One such example is when the Board looked to current statutes to support its argument about "legal custody" and assessed the "use of the same ***or*** similar terms throughout Colorado law." Clearly, the Board was not referring to the usage of the "same ***and*** similar terms" in statute. Bd. Op. Br. at 6.

leeway. But it doesn't, and shouldn't, extend that deference to failing to accurately represent the initiative in the title.

Therefore, this initiative must be returned to the Board so it may reverse its error before voters are asked to sign petitions and vote, based on this misrepresentation.

CONCLUSION

The Board needs to correct this ballot title so voters don't subject schools, staff, students, and families to a system of state-sanctioned gender town criers without understanding exactly what it is they are being asked to approve. This title should be sent back to the Title Board so that it can correct the titles set.

Respectfully submitted this 8th day of April, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, April 8, 2024, to the following:

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