CASE NO. 23-1282
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADVANCE COLORADO, *et al*.,

Plaintiff - Appellants,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant - Appellee.

On Appeal from the United States District Court For the District of Colorado
(Case No. Case No. 1:23-CV-01999-PAB-SKC (Brimmer, J.))

OPENING BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED.

CORPORATE DISCLOSURE STATEMENT

Advance Colorado is a non-profit organization. It has no stock or parent corporation. As such, no public company owns 10 percent or more of its stock.

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STATEMENT OF RELATED CASES

There are no prior or related cases.

JURISDICTIONAL STATEMENT

This is an appeal from denial of a motion for preliminary injunction appealable on an interlocutory basis per 28 U.S.C. § 1292(a)(1). The federal courts have jurisdiction pursuant to 28 U.S. Code § 1331 because the claims arise under the Constitution of the United States.

STATEMENT OF THE ISSUE

May the State of Colorado require parties seeking to place a citizen initiative on the ballot to use a ballot title that mischaracterizes their initiative and includes knowingly false statements of fact?

STATEMENT OF THE CASE

This challenge is brought under the First Amendment to the United States Constitution. The State of Colorado has mandated that all citizen-initiated ballot measures that reduce state revenue must include at the beginning of the ballot title that the initiative "will reduce funding for state expenditures that include but are not limited to health and human services programs, K-12 education, and corrections and judicial operations." *See* Ballot Measure Fiscal Transparency Act of 2021, H-B 21-1321, codified at C.R.S. § 1-40-106(e) ("H-B 21-1321"). This legislation mandates that the ballot title "***must begin***" with this language and that it must state that the tax change "***will reduce funding***" for these specified programs. *Id*. (emphasis added). Not, "may reduce funding," but "***will reduce funding***." *Id*. (emphasis added). The only exception is if the measure includes cuts to specific identified programs. *Id*.

It is unconstitutional to require people to include in their own political speech a "title" that purports to be a summary of their own position but that does not accord with the message that they intend to send. The government may not "compel a

person to speak its message when he would prefer to remain silent" or "force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). It would be unconstitutional even if the message the government wished to include were perfectly true and accurate – and merely different from the message chosen by the private speaker. "[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley v. Irish-American Gay, Lesbian Bisexual Group*, 515 U.S. 557, 575 (1995). This case, however, is particularly straightforward because the compelled speech mandated by Colorado is not only unchosen, but also untrue. There is no need for the Court to draw difficult lines regarding the State's legitimate interest in administering elections and providing information to voters because there is no legitimate state interest whatsoever in mandating inaccurate compelled speech. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Compelled disclosures must be "purely factual and uncontroversial information," *id*., entailing "only an accurate statement." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

This mandatory language is false, both on its face and as applied to the initiatives currently being sponsored by Plaintiff-Appellant Advance Colorado. It is

the Colorado General Assembly that determines the level of funding for these programs, subject to extensive budgeting restrictions that allocate mandatory funds for the programs identified, so the statement that any specific revenue measure definitely "will" reduce funding for these programs is inaccurate. And, as further detailed below, the particular initiatives sponsored by Advance Colorado are vanishingly unlikely to reduce funding for these programs. This is clear from State's official, bipartisan fiscal summaries for the measures and was admitted by its own public finance expert. App. 232; 242.

The District Court denied Advance Colorado's Motion for Preliminary Injunction on August 20, 2023, after a full day evidentiary hearing ("Hearing"), finding that the challenged language, although circulated by citizens and purporting to summarize the contents of their proposed initiative, was pure government speech not subject to the protections of the First Amendment. Because the injunction was denied on those grounds, the District Court did not reach the other injunction factors or other matters briefed by the parties.

This Court should reverse on two separate grounds. First, the ballot title is not properly characterized as pure government speech because it is a "title" and summarizes – or purports to summarize – the content of the initiative proponent's speech, which is not determined by the State and which the State is forbidden to alter

or amend without consent and does not express the views of the government itself. Colo. Const. art. V, § 1. Second, even if the ballot title were pure government speech, initiative proponents are required by H-B 21-1321 – as a condition for exercising their state constitutional rights – to mingle provably false government speech with their own speech in a format that is misleading to the general public as to the identity of the speaker and the content of the private speech being presented.

A. Facts

i. The initiative process in Colorado.

The Colorado Constitution reserves to the people "the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly." Colo. Const. art. V, § 1. "Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure." *Id*.

It is private citizens who speak and act through the initiative process, not the government of Colorado. Private citizens chose their desired change of law, draft the language of the initiative, and take the petition to registered voters in search of signatures. Far from being "government speech," as the District Court held, the

initiative process is an explicit check on the power of the Colorado General Assembly.

Although the Office of Legislative Counsel reviews proposed citizen petitions and provides feedback, a valuable service for individuals attempting to write proposed laws themselves, it cannot require any changes to the content or wording of the initiative. App. 506, Testimony of Katelyn Roberts at 29:12-18; Colo. Const. art. V, § 5.[1] In practice, most citizens and groups seeking to place an initiative on the ballot do extensive preparatory work, conducting opinion analysis on different potential concepts and drafting text with the assistance of their own privately retained legal counsel. *Id*. at 25:20-26:14. Then the proposed initiative goes to the Colorado Ballot Title Board ("Title Board") for review.

The Colorado Constitution provides that "[n]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." Colo. Const. art. V, § 1. "The title for the proposed law or constitutional amendment . . . shall correctly and fairly express the true intent and meaning thereof." C.R.S. 1-40-106(3)(b). The purpose of this title is "to capture, in short form, the proposal in plain, understandable, accurate language enabling informed

[1] Ms. Roberts is an experienced political consultant who has shepherded more than a dozen petitions through the petition process. App. 502, Transcript at 25:13-19.

voter choice." *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999). "Although the titles need not state every detail of an initiative or restate the obvious, they must not mislead the voters or promote voter confusion." *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000). Voters understandably have a strong preference for simple, straightforward language that plainly states what the initiative entails. App. 541, Testimony of Dawn Nieland at 64:4-16.[2]

A hearing before the Title Board generally begins with a brief presentation by the sponsors of the initiative, who explain its contents and intent, after which the Title Board issues an initial draft title; general discussion then ensues with the proponents providing clarifying language using their own words and phrases. App. 505 – 07, Testimony of Roberts at 29:23 – 30:10. The use of a particular word or phrase can become contentious, but Ms. Roberts testified that, except as mandated by H-B 21-1321, in the hundreds of hours of Title Board hearings in which she has attended on behalf of clients, "I have never seen the Title Board misstate the proponent's intent in the title." App. 505, Testimony of Roberts at 28:13-17. The

[2] Ms. Nieland is professional petition circulator with more than a decade of experience and who now trains and manages a team of circulators. *Id*. at 59:8-18, App. 536.

Defendants' political expert concurred. App. 581-82, Testimony of Wasserman at 104:14 -105:2.

Proponents then take the complete petition packet – including the title, initiative language, fiscal summary, and voter instructions – and circulate them among registered voters. *See* App. 231-250 (the petition packets for the two initiatives that are the subject of this litigation). Petition circulators explain the contents of the petition in their own language, usually a simple, short sentence, and then provide the petition. App. 539, Testimony of Nieland at 62:1-8.

Of the total number of registered voters who stop and engage with petition circulators in front of Colorado grocery stores and in other public venues, slightly more than half (55 percent) stop will read the ballot title. *Id*. at 62:10-12, App. 539. Of these voters, about 40 percent will proceed to read the entire ballot language. *Id*. at 62:12-14. "[W]hat I will say definitively is that it is very rare for someone casting their signature not to verify that what they are signing is what you have told them they [are] signing." App. 532, Testimony of Roberts at 55:20-23. So, in practice, when a voter decides whether to sign a citizen petition, it is the ballot title language itself that is the most important communication with voters – the critical information

on which voters primarily rely to understand the change of law that the proponents are seeking to place on the ballot.

Poor title language is an enormous barrier to communication with voters. For example, Ms. Roberts testified that when she assisted with a sports-betting petition referred by the Colorado General Assembly, polling indicated a 20-percent difference in favorability among voters between what she described as the confusing and technical legal language written by the Legislature and the same concept reframed more simply. App. 504, Testimony of Roberts at 27:3-7.

Similarly, Ms. Nieland described the difficulties that she encountered when circulating a petition for Proposition 113, a ballot initiative providing that Presidential election results in Colorado be determined by the national popular vote instead of the electoral college – a proposition that proponents sought to place on the ballot in the hopes that it would be defeated, overturning recently adopted legislation enacted by the Colorado General Assembly. App. 539-40, 553-54, Testimony of Nieland at 62:23-63:17; 76:15-77:10. This notion – placing an initiative on the statewide ballot with the intent by its proponents that voters would defeat it in the November elections – was extremely difficult to explain to potential signatories. Ms. Nieland testified that "I had numerous people that [sic] told me that was not the

intent of what we were doing, that they did not believe me." *Id*. at 63:12-13, App. 540.

When there is a conflict between how the initiative is explained by petition circulator and its ballot title, citizens usually conclude that the title itself reflects the actual intent of the petition. *Id*. at 64:17-20, App. 541 (Question: "And do citizens believe you when you have to explain [that] the title of the measure does [not] fully reflect the intent of the measure?" Answer: "No, they do not.")

Not surprisingly, given this background, legislation mandating that Colorado ballot titles must include specific language that inaccurately characterizes the contents of a given petition make it difficult, if not impossible, for petition proponents to communicate the contents of their own initiatives: Voters will read the petition title and assume that you are lying to them. *Id*.

ii. Initiatives 21 and 22

Advance Colorado is currently the sponsor of Colorado Proposed Initiative 2023-2024 #22 ("Initiative 22") and Colorado Proposed Initiative 2023-2024 #21 ("Initiative 21").[3] After hearing and rehearing, the Title Board set the title for Initiative 22 as follows:

[3] Because Colorado law requires two registered voters to act as proponents of an initiative, the listed proponents on the measure are Suzanne Taheri, acting as legal counsel for Advance Colorado, along with Plaintiff Steven Ward.

> Shall there be a reduction to the state sales and use tax rate by 0.61 percent, thereby reducing state revenue, ***which will reduce funding for state expenditures that include but are not limited to education, health care policy and financing***, and higher education by an estimated $101.9 million in tax revenue, by a change to the Colorado Revised Statutes concerning a reduction in state sales and use taxes, and, in connection therewith, reducing the state sales and use tax rate from 2.90 percent to 2.89 percent from July 1, 2024. through June 29, 2025, and eliminating the state sales and use tax for one day on June 30, 2025?

App. 232 (emphasis added).[4]

The language in bolded italics is mandated by H-B 21-1321 and is completely false and inaccurate. Initiative 22 is a *de minimus*, 0.01 percent sales tax cut that would only be in effect for a single year, and that year is projected to have tax revenue high enough to trigger a substantial refund under the Taxpayer's Bill of Rights, Colo. Const. art X, § 20. ("TABOR"). App. 232-34.

TABOR is provision of the Colorado Constitution that requires the State to refund to taxpayers all revenues collected over a certain revenue limit, colloquially called the "TABOR cap," which has itself been modified by a subsequent constitutional requirement passed by voters in 2005, and known as Referendum C, that allows the State to retain certain revenues above the original TABOR cap. *Id.*

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[4] In its Complaint and the briefing on the Motion for Preliminary Injunction Plaintiff-Appellant Advance Colorado explained how it exhausted its remedies through the state administrative appeals process, but the District Court did not reach the issue. App. 14-15; 214-19; 667-82 (Decision of the Court).

Current projections are for revenues to substantially exceed the TABOR cap, so that any modest reduction in revenue collected would only serve to reduce the refund to Colorado taxpayers, not the actual general fund revenue available to be spent by the Colorado General Assembly for any legislative purpose. The Colorado Council of Legislative Staff, Economic and Revenue Forecast, June 2023, https://leg.colorado.gov/sites/default/files/images/june2023forecast_1.pdf at 19 (accessed November 21, 2023) ("In the current FY 2022-23, revenue is expected to exceed the Referendum C cap by $3.31 billion before exceeding the cap by $2.06 billion in FY 2023-24 and by $1.97 billion in FY 2024-25, even with high 2022 inflation resulting in a doubling of the growth rate used to calculate the FY 2023-24 Referendum C cap.")

The official Fiscal Summary for Initiative 22 acknowledges this: "Based on current forecasts, the measure is expected to reduce the amount of revenue required to be refunded to taxpayers under TABOR, with no net impact on the amount available for the budget." App. 232.

These are, of course, projections, not guarantees, and the precise numbers are unimportant. What is important is that proponents are required by H-B 21-1321 to label their own initiative in a manner that is inconsistent not only with the speaker's own intent and the way that it would prefer to frame the issues, but with the State's

own best official estimate of the initiative's actual effect.[5] Put more directly, the Colorado General Assembly has mandated that intentionally false speech be placed on the statewide ballot, regardless of petitioners' purposes in bringing these measures to the Title Board for review, and petitioners' work, at their own time and expense, to place them on the ballot for consideration by Colorado voters.

At the Hearing, the Defendants' own budgeting expert confirmed that under the State's best current budget estimates, and barring an unrelated change in law, Initiative 22 would not result in any decrease in funding for the programs listed in the ballot title. App. 572-75, Testimony of Henry Sobanet at 95:12-98:18. "My understanding is the recent forecast is currently projecting rebates [due to TABOR] for that year, yes." *Id*. at 95:12-13, App. 572. Therefore, "if [it is] money that was going to be rebated and there will be less money and you [do not] go below the line, [the tax change] [would not] affect the traditional operating budget." *Id*. at 96:12-14, App. 573. In addition, there are state and federal laws that make it difficult to reduce baseline funding for education, healthcare and higher education – the

[5] Advance Colorado has previously criticized the Fiscal Summaries for their failure to conduct "dynamic scoring" – that is, to take into account the ways in which changes in tax rates result in changes in economic behavior so that they systematically overestimate the revenue collected from tax increases and lost from tax cuts. However, these summaries represent the State's official projection of the likely effects of these proposed changes in revenue.

programs listed – in the absence of specific circumstances and intervention by the Colorado General Assembly. *Id*. at 96:15-98:10, App. 573-75.

Even if this were not a surplus year requiring TABOR refunds, there is nothing in Initiative 22 that would necessarily cut spending for education. The language mandated by H-B 21-1321, C.R.S. § 1-40-106(e), is expressed with a degree of clarity and certainty that is completely at odds with the reality of the budgeting process, which entrusts to the Colorado General Assembly the responsibility for allocation discretionary funds between competing objectives. H-B 21-1321 is therefore unconstitutional not just as applied to this particular measure, but on its face.

The mandatory language in H-B 21-1321 asks voters whether they wish to support a measure "which will reduce funding for state expenditures that include but are not limited to education, health care policy and financing." *Id*., App. 232. There is no ambiguity in this language; it says that the measure "will" result in a reduction in education spending. *Id*. Similarly, the phrase "including but limited to" generally means that the items enumerated are actually and definitely included but are not an exhaustive list. *See* Black's Law Dictionary, 7th ed. (defining "include" as "to contain as part of something" or "a partial list."); *see also, State v. Thompson*, 92 Ohio St. 3d 584, 587 (Ohio 2001)(finding that the phrase "including but not limited

to" specifies items that "must" be included without limiting the list to those specific items). The term "may include" would be more appropriate when providing illustrative examples that do not necessarily apply.

Similarly, Initiative 21, which is also being circulated by Advance Colorado, does not cut taxes at all. Instead it caps the *growth* in property taxes paid on a particular parcel to 3 percent per year unless there have been substantial physical improvements to the property. App. 242-44. Initiative 21 was drafted in response to the large increases in their property appraisals that many Colorado landowners have faced in recent years, which have outstripped income growth and present serious challenges to elderly homeowners living on fixed pensions. The official title of Initiative 21 prominently states that:

> Funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes shall be impacted by a reduction of $2.2 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a 3% annual limit on property tax increases . . .

Id. This is inaccurate because there is no reduction in revenue, only a reduction in the growth of revenue, and because any outsized growth in property tax revenue cause by skyrocketing real estate prices would ultimately be subject to the cap on revenue growth imposed by TABOR.

iii. The Decision Below.

At the conclusion of the Hearing, Chief Judge Brimmer denied the Motion for Preliminary Injunction from the bench. He found that the injunction sought by Plaintiff-Appellants was a disfavored injunction because they "are seeking an injunction that [does not] stop someone from doing things, but rather orders someone to do something, namely to order the Secretary of State to convene the Title Board," App. 668, Hearing Transcript at 191:17-21, but that this was unimportant his final ruling did not turn on the weighing of factors but on a question of law, *id*. at 202:3-9, App. 679.

The Chief Judge held that "[P]laintiffs have failed to show that the speech at issue here is, in fact, compelled speech of them as opposed to simply being government speech." App. 676, Hearing Transcript at 202:6-7. The Court also stated that, "[t]he First Amendment free speech clause restricts the government regulation of private speech[,] [but] [i]t [does not] apply to government speech." *Id*. App. 675, Hearing Transcript at 198:2-4.

The Parties also agreed to put aside, for the purposes of the Preliminary Injunction, the question of whether Plaintiff-Appellants could assert claims against Governor Polis and whether the state law claims were barred by sovereign immunity.

Plaintiff-Appellants have subsequently filed an Amended Complaint removing these claims. App. 461, Dkt. 43.

SUMMARY OF ARGUMENT

"To state a compelled-speech claim, a plaintiff must establish three elements: (1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action." *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019). There is no room for dispute that H.B. 21-1321 compels specific speech, which is directly laid out in the text of the statute, or that Plaintiff-Appellants object to this speech. So, the key legal issue is whether there is "speech" by Plaintiff-Appellants that is being compelled or restricted in violation of the First Amendment.

"The First Amendment undoubtedly protects the political speech that typically attends an initiative campaign, just as it does speech intended to influence other political decisions." *Initiative Referendum Institute v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006). The District Court erred by focusing too narrowly on the title itself, which has some elements of government speech, rather than the circulation of a petition taken as a whole, which is indisputably private speech protected by the First Amendment, even though the petition form itself is approved by the Colorado Secretary of State. It is the private parties seeking a change in law who choose the

purpose and subject matter of their initiative, draft its language, and devote their time and energy to place it on the ballot by circulating petitions throughout the State.

"Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 642 (1994). It is irrelevant whether the State of Colorado is requiring Advance Colorado to speak – by mandating incorrect language for the ballot title – or requiring to it distribute false and objectionable government speech along with its message; both are compelled speech under the First Amendment. *See, e.g.*, *Zauderer*, 471 U.S. at 651; *Pacific Gas Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10 n.6 (1986). It is well-established that even in circumstances where the government can appropriately require a private party to include government information, the "government must carry the burden of demonstrating that its disclosure requirement is purely factual and uncontroversial, not unduly burdensome, and reasonably related to a substantial government interest." *Am. Beverage Ass'n v. City of S.F.*, 871 F.3d 884, 895 (9th Cir. 2017), *affirmed en banc*, 916 F.3d 749, 753 (9th Cir. 2019).

The title of Advance Colorado's own initiative, which it created, proposed and drafted, and which it intends to circulate to registered voters throughout Colorado using the citizens' initiative process, cannot be accurately characterized as

"simply . . . government speech." App. 679; Hearing Transcript at 202:6-7. The government does not "bear[] the ultimate responsibility for the content of the [speech]," *Wells v. City and County of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001)," a right which is instead reserved to the proponents of the petition. If the government, or, more specifically, the Colorado General Assembly, wishes to speak to the voters, the Legislature can introduce its own referred measures for voter approval, as already provided by the Colorado constitution. These are, after all, *citizen* initiatives. Advance Colorado is speaking to the voters. The Title Board's review, while essential to the process of placing a citizen-initiated measure on the statewide ballot, cannot empower the State to dictate the content of citizens' initiatives without violating the First Amendment rights of Advance Colorado and others who speak to voters by availing themselves of this process.

STANDARD OF REVIEW

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. *Davis v. Mineta*, 302 F.3d 1104, 1110-11 (10th Cir. 2002). "In order to receive a preliminary injunction, the plaintiff must establish the following factors: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction,

if issued, will not adversely affect the public interest." *Id*. at 1111 (quotation omitted).

"A district court abuses its discretion when it commits an error of law or relies upon a clearly erroneous factual finding." *McDonnell v. City & Cnty. of Denver*, 878 F.3d 1247, 1252 (10th Cir. 2018)(quotation omitted). This Court examines "the district court's underlying factual findings for clear error, and its legal determinations *de novo*." Davis, 302 F.3d at 1111.

This appeal presents a legal issue: Whether Advance Colorado can be compelled to dilute its own message with false and inaccurate government speech simply because the Title Board reviews Advance Colorado's initiative before it is placed on the statewide ballot. Because this is a question of law, it is reviewed *de novo*.

ARGUMENT

The United States Supreme Court has held that "the circulation of a [citizen-initiated] petition involves the type of interactive communication concerning political change that is appropriately described as core political speech." *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)(quotation omitted). It "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id*. at 421. Plaintiff-Appellants "seek by petition to achieve

political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Id*.

The initiative process is a creature of state law, but "the power to ban initiatives entirely [does not] include[] the power to limit discussion of political issues raised in initiative petitions." *Id*. at 425. Instead, this is "an area in which the importance of First Amendment protections is at its zenith." *Id*. (quotation omitted). "*Meyer* and *Buckley* thus establish that, where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment." *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1212 (10th Cir. 2002).

A. H-B 21-1321 requires Advance Colorado to summarize and title its message with a false statement that reflects neither its own views nor the content of its speech.

It is blackletter law that parties have "a First Amendment right to present their message undiluted by views they [do] not share." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). Here, Advance Colorado is seeking to advance a view – to propose a very modest temporary sales tax cut that would mostly likely come out of the TABOR refund, and the State wishes to tack on a "title" that inaccurately summarizes the contents of its petition.

The State does not seriously pretend that the language mandated by H-B 21-1321 is a true and accurate characterization of Advance Colorado's initiatives – a

position that would be very difficult to defend in light of its own official Fiscal Summaries. App. 232, 242. Instead it asserts the bare right to require Advance Colorado to circulate knowingly false material on the ground that it can draft whatever ballot title it pleases.

The facts are neither subtle nor in reasonable dispute. The approved petition package for the circulation of Initiative 22 was presented to the Court as the Parties Stipulated Exhibit 2C, App. 231. It includes, at the top of the second page, a ballot question: "Shall there be a reduction to the state sales and use tax rate by 0.61 percent, thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to education, health care policy and financing, and higher education by an estimated $101.9 million in tax revenue, by a change to the Colorado Revised Statutes concerning a reduction in state sales and use taxes, and, in connection therewith, reducing the state sales and use tax rate from 2.90 percent to 2.89 percent from July 1, 2024, through June 29, 2025, and eliminating the state sales and use tax for one day on June 30, 2025?" App. 232. This question appears on the top of each subsequent page.

On the second page, below the ballot question, a "fiscal summary, prepared by the nonpartisan Director of Research of the Legislative Council, contains a preliminary assessment of the measure's fiscal impact." *Id*. For Initiative 22, this

Fiscal Summary states "[b]ased on current forecasts, the measure is expected to reduce the amount of revenue required to be refunded to taxpayers under TABOR, with no net impact on the amount available for the budget." *Id*. Thus, the State admits in its own non-partisan budget analysis that the measure is unlikely to actually "reduce funding for state expenditures that include but are not limited to education, health care policy and financing, and higher education." *Id*.

The question that Advance Colorado is required to circulate to voters, as mandated by H-B 21-1321, asks whether voters want the statewide ballot to include a citizen-initiated measure "which will reduce funding for state expenditures that include but are not limited to education, health care policy and financing, and higher education." *Id*. Initiative 22 does no such thing.

Advance Colorado cannot legally communicate with prospective signatories regarding its proposed change of law without including this inaccurate question. H-B 21-1321, C.R.S. § 1-40-106(e). Testimony from an experienced petition circulator establishes that voters do, in fact, read the ballot title and question and will likely believe it over and above the speech of the person circulating the petition. App. 541; Testimony of Nieland at 64:17-20. This is not because voters are ignorant or uniformed; it is because Colorado ballot titles have a long history of being consistently accurate and avoiding blatant partisanship, a track record attested to by

witnesses from both sides. App. 205; Testimony of Roberts at 28:15-19; App. 581-82, Testimony of Wasserman at 104:14 - 105:2.[6]

The uncontested testimony adduced in the Hearing shows that the architects of H-B 21-1321 were motivated to provide voters considering tax cuts with a message that it is contrary to the views and beliefs of Advance Colorado as the proponent of these citizen initiatives. Scott Wasserman, one of the authors and primary proponents of H-B 21-1321, testified on behalf of Defendants and described how he and his colleagues were frustrated by the requirement that all tax increases state the dollar amount of the expected increase in taxes, which he felt was misleading to the many voters who pay very little tax, "[a]nd I think it was at that time[,] inspired by TABOR that we started to say, well, don't voters kind of deserve to understand the implications of what may occur if this [tax reduction] passes?" Testimony of Wasserman at 109:22-110:2. Somehow, a desire to communicate "the implications" what "may occur" became a blanket requirement that all tax reductions

[6] The Hearing testimony also indicates that there is a general perception that the ballot title process has become more politicized over time, in keeping with a broader trend in society which prioritizes ideology and political advantage over democratic norms of mutual respect and polite discourse. Prior to the recent enactment of H-B 21-1321, however, factual accuracy was a line that was never crossed, and Plaintiff-Appellants do not ask for a broader ruling from this Court.

state in their title that they "will" cut spending for education. H-B 21-1321, C.R.S. § 1-40-106(e).

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "Thus, the Supreme Court, starting with *Barnette*, has consistently "prohibit[ed] the government from telling people what they must say." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015), quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61, (2006). "Generally, too, the government may not compel a person to speak its own preferred messages." *303 Creative LLC*, 600 U.S. at 586.

This "freedom of speech" is protected "'both as an end and as a means.'" *Id.*, slip op. at 12, quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). "[T]he freedom to think and speak is among our inalienable human rights," and it is also "'indispensable to the discovery and spread of political truth.'" *303 Creative LLC*, 600 U.S. 584, quoting *Whitney*, 274 U.S., at 375 (Brandeis, J., concurring). Requiring that parties seeking to place a citizen measure on the ballot to label that measure with an inaccurate title is about as clear and obvious an impediment to the "discovery and spread of political truth" as can reasonably be imagined. Not only is Advance Colorado deprived of its right "to present [its]

message undiluted by views they did not share," *id*. slip. op. at 14, but the voters are actively deceived about the measure that they are being asked to support.

B. There is no doubt that the Petition itself is private speech, and that Advance Colorado is being required to include a viewpoint that it disagrees with – a false statement of fact – with its own speech in a manner that is closely calculated to mislead voters regarding its own message.

Whether or not the District Court was correct in finding that the ballot title itself is government speech, the Petition document viewed as a whole is a communication from the petition proponent to the voters of Colorado regarding their proposed change in law. It includes elements that are clearly governmental in nature, such as instructions for signatories and a warning that signatories must be Colorado citizens and registered voters. App. 231-50. These instructions and warnings serve "[t]he State's interest in protecting the integrity of the initiative process." *Meyer*, 486 U.S. at 426. In addition, there is a Fiscal Summary was "prepared by the nonpartisan Director of Research of the Legislative Council." App. 232, 242. At the end of the day, however, it is sponsors of the petition – the citizens who conceived of the legal change, researched and drafted it, submitted it for Title Board review, and who will walk up and down the 16th Street Mall and set up tables outside of grocery stores to communicate with voters so voters can consider their proposed change of law.

The government does not have an unlimited right to insert its own speech into other people's communications. Compelled speech applies both when a party is required to speak and when he is required to distribute another party's message. *Turner Broadcasting System, Inc.*, 512 U.S. at 642 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny."). "Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC*, 600 U.S. at 586.

This issue arises frequently in the context of commercial advertising, where the Supreme Court has held that the state may require an advertiser to "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." *Zauderer*, 471 U.S. at 651. These requirements "implicate" the speaker's First Amendment rights but are permissible "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

For example, the U.S. Court of Appeals for the Ninth Circuit recently struck down a disclosure requirement by the City of San Francisco on the grounds that it was factually inaccurate and inappropriately polemical, on facts closely analogous

to those presented here. *Am. Beverage Ass'n v. City of S.F.*, 871 F.3d 884, 891 (9th Cir. 2017). This disclosure stated: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." *Id*. at 888, quoting S.F. Health Code § 4203(a).

Notably, the fact that this warning was clearly labeled "*a message from the City and County of San Francisco*," was drafted by a government body, and was located in separate box with black borders did not place it outside the scope of the First Amendment when it was incorporated into private advertising.

Unlike political speech, which is subject to strict scrutiny, "[a] commercial speaker's constitutionally protected interest in refraining from providing consumers with additional information is minimal if a required disclosure is 'purely factual and uncontroversial' and is not 'unjustified or unduly burdensome' so as to chill protected speech." *Id*. at 892, quoting *Zauderer*, 471 U.S. at 651. But it does have to be factual and uncontroversial. "A disclosure requirement may also be unduly burdensome and chill commercial speech if the disclosure promotes policies or views that are one-sided or 'are biased against or are expressly contrary to the corporation's views.'" *Am. Beverage Ass'n*, 871 F.3d at 894, quoting *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 15 n.12, (1986) (plurality opinion). Regulations applied to the circulation of a petition, of course, are subject to a higher

standard – not a lower standard – than those applied to commercial speech. *Meyer*, 486 U.S. at 421-22.

"A compelled disclosure that requires speakers 'to use their own property to convey an antagonistic ideological message,' or 'to respond to a hostile message when they would prefer to remain silent,' or 'to be publicly identified or associated with another's message,' cannot withstand First Amendment scrutiny." *Am. Beverage Ass'n*, 871 F.3d at 894, quoting *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997).

The Ninth Circuit found that the statement that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay," was "at a minimum, controversial" because it was "contrary to statements by the FDA that added sugars are 'generally recognized as safe,' 21 C.F.R. § 184.1866, and 'can be a part of a healthy dietary pattern when not consumed in excess amounts,' 81 Fed. Reg. 33,742, 33,760 (May 27, 2016)." *Am. Beverage Ass'n*, 871 F.3d at 895. The details and context of compelled disclosures are important and much be strictly accurate. "Because San Francisco's warning does not state that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay, the accuracy of the warning is in reasonable dispute." *Id*. Similarly, as

an *en banc* panel of the Ninth Circuit held earlier this month, "saying that something is carcinogenic or has serious deleterious health effects - without a strong scientific consensus that it does - remains controversial" and cannot be mandated on private advertising. *Nat'l Ass'n of Wheat Growers v. Bonta*, No. 20-16758, at *30 (9th Cir. Nov. 7, 2023)(striking down as unconstitutional compelled speech a warning that "[t]he State of California has determined that glyphosate is known to cause cancer under Proposition 65 because the International Agency for Research on Cancer has classified it as a carcinogen, concluding that there is sufficient evidence of carcinogenicity from studies in experimental animals and limited evidence in humans, and that it is probably carcinogenic to humans," on the grounds that the State of California's position on glyphosate contradicted that of every other expert regulatory agency on the planet).

The language mandated by H-B 21-1321 is controversial in much the same way. It makes an assertion that might be true in certain circumstances, with appropriate caveats, but states it in an overly broad manner with an altogether inappropriate and inaccurate degree of certitude. Although it may be true in a very general sense that measures that reduce taxes leave less money available for other government programs, it is not necessarily true that a particular measure will reduce funding for these programs at this time.

Similarly, the U.S. Court of Appeals for the D.C. Circuit struck down a disclosure requirement for "conflict minerals" on the grounds that "the description at issue—whether a product is 'conflict free' or 'not conflict free'—was hardly factual and non-ideological." *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n*, 800 F.3d 518, 530 (D.C. Cir. 2015). "Under the First Amendment, … the government cannot rest on speculation or conjecture." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 526. There must be more than "a loose fit" "between the compelled disclosure at issue and the purported ills identified by the government." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 112 (4th Cir. 2018).

The warning label addressed by the Ninth Circuit in *American Beverage Associatio*n was also misleading because it was underinclusive, "required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products with equal or greater amounts of added sugars and calories." *Id*. "By focusing on a single product, the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to obesity, diabetes, and tooth decay than other foods" which "is deceptive in light of the current state of research on this issue." *Id*.

The mandatory language in H-B 21-1321 is similarly underinclusive and misleading. Most obviously, the Colorado General Assembly excluded its own referred measures from this poison-pill language. H-B 21-1321 only applies to citizen initiatives, not to initiatives referred to the voters by the Legislature. Colo. Rev. Stat. § 1-40-106(i) (II) (defining "tax change" for the purposes of these provisions as an "any initiated ballot issue or initiated ballot question that has a primary purpose of lowering or increasing tax revenues collected by a district" but not a "referred measure" with the same purpose.) The Colorado General Assembly did, in fact, refer a measure to the ballot that would have been subject to the mandatory language if it had been a citizen initiative without including the language required by H-B 21-1321. *See* Senate Bill 23-303, § 3 (May 8, 2023). The Legislature's decision to exempt its own measures from the language in H-B 21-1321 also makes it impossible for the State to argue that the language serves a compelling government interest.

The language is also misleadingly underinclusive because it does not apply to measures that mandate spending on other priorities, even though this would have the same effect on the amount of money remaining in the general fund budget to be spent on education and health care spending as a reduction in tax revenue would. *See* App. 565; Testimony of Sobanet at 88:15-20. The phrasing of H-B 21-1321 is clearly

drafted to create the impression – in fact to state in plain English – that *this particular measure* will cut spending for education, not to generally educate the public about the inevitable tradeoffs of budgeting and public finance. And even if it were a public education measure, the government cannot bootstrap general public education messages on lawful, non-deceptive private communications unless they are "inherently tied" to the content of the private communication. *Tillman v. Miller*, 133 F.3d 1402, 1403 (11th Cir. 1998).

The State cannot require Advance Colorado to bundle a false and misleading communication – purporting to be a title of its own ballot measure – with its speech and circulate it to voters. Nor can it condition Advance Colorado's exercise of its own speech rights on including such false and misleading speech.

C. The District Court was wrong to conclude that the ballot title was government speech.

The District Court ruled against Advance Colorado on the grounds that the ballet title was government speech, not private speech, and that the First Amendment thus imposed no restrictions on the content of the speech. "[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1587 (2022). The Court applied the three factor test laid out in *Shurtleff.* App. 675; Transcript at 198: 8-19.

In *Shurtleff* the City of Boston had a practice of allowing private groups to request to use its flagpole for flags of their own choosing, but denied a flag request from a particular group. *Shurtleff*, 142 S. Ct. at 1588. The Court observed that "[t]he boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program," and proceeded to "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id*. at 1589. As part of that inquiry, the Court looked at "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Shurtleff*, 142 S. Ct. at 1589-90 (2022).

Before applying these factors, it is important to note that this case is not closely analogous to *Shurtleff* and other similar cases. While *Shurtleff* dealt with private parties that had been invited onto to government property and permitted to participate in what is normally a government activity – flying a flag at a public courthouse – the petition process in Colorado was instituted in the State constitution as a formal check on the power of the Colorado General Assembly. Colo. Const. art. V, § 1. ("The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people,

but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.")

When they choose to participate in the initiative process, Colorado citizens are not acting as government invitees; instead they are exercising their own constitutional right of self-government, a right solemnly reserved to the people and carved out from legislative control. "Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure." *Id*. If we were to compare this situation to the flying of flags in *Shurtleff*, it would be as if the City of Boston were trying to fly its flag on private property, not the other way around. And, in fact, the Eleventh Circuit recently held that it is unconstitutional compelled speech to require persons to place public safety messages, clearly labeled as such, on private property. *McClendon v. Long*, 22 F.4th 1330, 1337 (11th Cir. 2022) ("The Sheriff's yard signs are compelled government speech, and their placement in a homeowner's yard is unconstitutional unless the signs are a narrowly tailored means of serving a compelling government interest.").

There is significant government involvement in the initiative process, but fundamentally this forum belongs to the people, not to the state.

"[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 208 (2015). "In doing so, it represents its citizens and it carries out its duties on their behalf." *Id*. This case, however, does not concern speech by the government "to promote a program, to espouse a policy, or to take a position," *Walker*, 576 U.S. at 208.

Instead the speech at issue is ballet title that purports to speak for Advance Colorado and summarize the contents of *its* citizen initiative – an initiative which is, in fact, opposed by the political party that currently controls all three branches of Colorado state government. Far from advocating its own governmental position, the State of Colorado is impersonating its political opponents for the purposes of avoiding accountability at the ballet box, which is normally the primary check on the government's abuse of its own speech. "The Constitution … relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff*, 142 S. Ct. at 1589.

The District Court found that all three *Shurtleff* factors favored a finding that this was government speech. First, the Court found that the history of the expression

and the extent to which the government shaped the expression supported a finding that it was government speech because the Title Board was entrusted with the responsibility under C.R.S. § 1-40-106(1) to set a title. App. 675-76, Hearing Transcript at 198:20 – 199:17.

In fact, although historically the Title Board has had considerable discretion in reviewing the wording of the ballot title, it has enjoyed no discretion at all regarding the subject matter and content of the measure proposed by the citizens who initiated it. Instead, the subject matter and content are dictated by the petition itself. See C.R.S. § 1-40-106; App. 505, Testimony of Roberts at 28:11-19 ("I would say I've say through . . . hundreds of hours of Title Board meetings[,] [and] . . . I have never seen the Title Board misstate the proponent's intent in the title."). It is certainly not entrusted conveying the government's own chosen message.

Second, the Court found that the public perception of who was speaking to be unclear. "[T]he only testimony that we really had was from Ms. Nieland[,] who testified that they don't have a clue who wrote it, but not that it was perceived[,] or likely to be perceived[,] as the language of a private person." App. 678, Hearing Transcript at 201:15-18. And the Petition itself states that the ballot title was set by the Ballot Title Setting Review Board. *Id*. at 201:21-23.

The public perception of the ballot title-setting process may be imprecise, but largely accurate and in keeping in keeping with Colorado law and historic practice prior to H-B 21-1321, as Ms. Nieland testified. App. 541-42, Testimony of Nieland 64:4 – 65:9. The public understands that these are not ideas created by the government or supported by the party currently in power, but that the title itself is – or purports to be – a relatively neutral and official description of ideas that originated with the petition proponents, reflecting the understanding that these are citizen initiatives.

The challenged speech is compelled private speech, not government speech, because it is presented as a "title" to a proposal that was conceived, drafted and sponsored by Advance Colorado. It is Advance Colorado and its supporters who will be circulating their own speech to the voters of Colorado, not agents of the State.

This is not unregulated speech. The ballot title must "correctly and fairly express the true intent and meaning thereof," C.R.S. 1-40-106(3) (b), an obligation that certainly does not apply to private speech in all contexts. However, this restriction is viewpoint neutral and appropriate to the purpose of the speech – to communicate to potential signatories and voters a proposed change in law. It is perfectly appropriate that Colorado law requires citizen initiatives to include a title

that "correctly and fairly express[es] the true intent and meaning thereof," C.R.S. 1-40-106(3) (b), but it is not permissible to mandate specific language that highlights the arguments of partisan opponents of the resolution, particularly when that language is not truthful and accurate. The fact that the speech in this case is highly regulated actually aggravates the First Amendment violation because citizens of Colorado have come to expect ballot titles to accurately reflect the contents of an initiative, and they carry an imprimatur of official regularity that the General Assembly hijacked by enacting H-B 21-1321. Its coerced political speech mandate, explicitly aimed by the architects of H-B 21-1321 to reduce the likelihood that tax cut measures will make the ballot and be approved by voters, is having its desired effect by making it much more difficult, if not impossible, for Plaintiff-Appellants to communicate their proposal to voters. App. 542, Testimony of Nieland at 65: 7-9.

CONCLUSION

For the reasons stated above, we respectfully ask this Court to reverse the Decision Below and remand for further proceedings.

REASONS WHY ORAL ARGUMENT IS NECESSARY

This case raises important questions of Constitutional law that will have a significant effect on the circulation of political petitions in Colorado. Oral argument will assist the Court's decisional process.

Respectfully submitted this 1st day of December 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023 I electronically filed the foregoing **OPENING BRIEF OF APPELLANTS** using the court's CM/ECF system which will send notification of such filing to the following:

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