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.))

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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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INTRODUCTION

In 2021, the Colorado General Assembly enacted the Ballot Measure Fiscal Transparency Act of 2021, H-B 21-1321, codified at C.R.S. § 1-40-106. ("H-B 21-1321"). Under this legislation,

> For measures that reduce state tax revenue through a tax change, the ballot title must begin "Shall there be a reduction to the (description of tax) by (the percentage by which the tax is reduced in the first full fiscal year that the measure reduces revenue) ***thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to (the three largest areas of program expenditure)*** by an estimated (projected dollar figure of revenue reduction to the state in the first full fiscal year that the measure reduces revenue) in tax revenue...?"

Colo. Rev. Stat. § 1-40-106(e)(emphasis added). This provision applies without regard to the actual impact that the tax change will have on the specified services.

For example, Initiative 22, proposed by Plaintiff-Appellant Advance Colorado, asks "[s]hall 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?" App. 232 (emphasis added). However, the accompanying Fiscal Summary, prepared by the nonpartisan Director of Research of the Legislative Council, takes the position that "[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." App. 232.

The State's public finance expert admitted as much during the hearing on the Motion for Preliminary Injunction, "[I]f [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." Testimony of Henry Sobanet at 96:12-14, App. 573. Similarly, "in the case where the money is above the line and would remain above the line notwithstanding the measure, you wouldn't expect an impact to the [Department of] Health Care Policy and Financing budget." *Id*. at 97:16-19, App. 574.

The language mandated by H-B 21-1321 is at best misleading, and at worst blatantly false.

Neither of the two measures proposed by Advance Colorado cuts education spending, or "funding for education" in any way. One of these two measures, Initiative 22, is a miniscule reduction in the sales tax that, based on the State's own estimate, will only modestly reduce the refund voters are projected to receive from TABOR. The other measure, Initiative 21, prevents property tax revenues from increasing more than 3% a year to protect voters who have been buffeted by large, unpredictable surges in property valuations over the last few years. It does not cut

taxes at all, and it certainly does not cut education spending, which is determined by the State legislature and protected by the State constitution.

Advance Colorado is compelled by State law not only to communicate the message that its ballot measures will cut "funding for education," but to place this message prominently on the top of its petition. The unwanted text is characterized as a "title" to the petition's message and is likely to be mistaken by readers for an accurate summary of the petition's contents. Testimony on the record demonstrates that this will significantly impair Advance Colorado's ability to communicate with registered voters.

ARGUMENT

"The First Amendment's safeguard against state action 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015), *quoting Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This is true whether the law "compel[s] speakers to utter" a message or simply to "distribute speech bearing a particular message." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 642 (1994). 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).

Advance Colorado "seek[s] by petition to achieve political change in Colorado; [and the] right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

A. The title of Advance Colorado's initiative is not government speech.

The fact that Advance Colorado's initiative is printed on an official government form does not make it government speech. It expresses Advance Colorado's own proposal to other citizens to change government. A citizen ballot initiative is not, as Defendant-Appellee argues, closely analogous to a birth certificate or passport. *See* Response Brief at 26. A better analogy would be a court filing – a structured, official opportunity to bring a citizen's concerns before the appropriate government bodies and ultimately the electorate. And, of course, Advance Colorado does not challenge the appropriateness of the routine sections of the initiative petition, such as the official instructions or designated spaces for the signatories' names and addresses.

More fundamentally, a public ballot is not and cannot be pure government speech as Defendant-Appellee asserts, because it serves as the ultimate and

fundamental check on the power of the state. In support of the proposition that an initiative petition and the ballot on which the proposed question will ultimately be printed are government speech, Defendant-Appellees quote *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), where the Supreme Court stated that "[b]allots serve ***primarily*** to elect candidates" and enact initiatives, "not as forums for political expression," Response Brief at 26 (emphasis added). But the Supreme Court did not go on to hold that ballots are free from First Amendment implications, just as a press release from the governor's office would be largely free from First Amendment implications. Instead, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 520 U.S. at 359.

"When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Id*. at 258. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," but "[l]esser burdens, however, trigger less exacting review." *Id*. (quotations omitted). And, in evaluating such regulations, courts should bear in mind that "the

State may not be a wholly independent or neutral arbiter as it is controlled by the political parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006)(quotation omitted).

The question of how constitutional speech and associational rights apply to ballot documents has been extensively litigated in the context of ballot access cases, which deal with the question of what restrictions may be placed on the rights of political parties to select their own nominees for public office. *See Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 191 (1999) ("Initiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access"). Although political parties do not have the right to an electoral system in which candidates are listed as nominees for a particular party, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 11 n.7 (2008), if the ballot is organized in this manner, then the parties have the right to choose their own candidates for themselves, and not have them chosen by individuals who are members of an opposition party. *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000). Listing a candidate as their nominee on a public ballot without the party's consent violates the First Amendment. *Id.*

"Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message." *Id*. at 581-82 (emphasis in original). Ballot regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 U.S., at 358. "We can think of no heavier burden" than that of directly "changing the parties' message." *California Democratic Party*, 530 U.S. at 582. "The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control." *Johanns v. Livestock Mtg. Assoc*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring).

What the Supreme Court did not hold in any of these cases is that the government can say whatever it wants about a candidate for public office or a citizen initiative because the ballot is pure government speech. Presumably this is why, rather than looking to precedents that deal with the First Amendment directly in the context of elections, Defendant-Appellees and the District Court rely on *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), a case about flying private flags in front of a private building. As the Court held in *Shurteff*, "[w]hen the government encourages diverse expression—say, by creating a forum for debate—the First Amendment

prevents it from discriminating against speakers based on their viewpoint." 596 U.S. at 247. "But when the government speaks for itself, the First Amendment does not demand airtime for all views." *Id*.

The petition process, however, taken as a whole, is indisputably private speech. It is a forum created, not by "the government," but by the people when they adopted a constitution for Colorado and imbued the government with certain limited and enumerated powers. As the Colorado constitution states, "[t]he 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." Colo. Const. art V, § 1 (emphasis added).

The General Assembly has taken upon itself the right to take a citizen initiative and place prominently in front of it a "title" which deliberately mischaracterizes and distorts the content of petition for the express purpose of replacing the intended message crafted by private citizens of Colorado with a different message crafted by the legislature. *See* App. 231-50 (copies of the official state petitions to be circulated by voters). But the initiatives themselves were written by Advance Colorado to be circulated to voters by Advance Colorado and describe

the change in law that it seeks to enact, taking advantage of the forum solemnly established in the State constitution for the citizens of Colorado.

Defendant-Appellees have made no effort to deny that the express purpose of HB-2131 is to communicate a different political message to voters than the one intended by initiative proponents and to insert that message into their opponents' primary form of communication with Colorado voters. Scott Wasserman, one of the authors of HB-2131, testified at the hearing on the Motion for Preliminary Injunction regarding the intent and purpose of the measure: "And 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 passes?" Testimony of Wasserman at 109:24 – 110:2, App. 586-87. "We [the Bell Policy Institute] believe that again tax cuts, no matter how small, do add up and over time have reduced our revenue base and do jeopardize many of the public services that people say they want to see." *Id*. at 610:12-15, App. 610.

The ballot box is not and cannot be pure government speech because, as the Court stated in *Shurtleff*, "[t]he Constitution ... relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff*, 1596 U.S. at 252; *see also*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 207 (2015) (The government's freedom

to speak for itself "reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech"). The ballot is a limitation of the legislature's power, not a forum for the legislature to express its own political views. Instead, "[w]hen deciding whether a state election law violates … [Constitutional] rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358. This is not government speech.

B. The government cannot require private citizens to include argumentative, speculative and inaccurate government speech with their own message.

Yet even if the mandatory language itself is pure government speech, that does not mean that the government can condition Advance Colorado's right to circulate a petition on its willingness to circulate such speech. There are "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context." *Doe v. Reed*, 561 U.S. 186, 196 (2010). "These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.'" *Id*. (collecting cases). "That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. (quotation omitted). "The simple interest in providing voters with additional relevant

information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

Although the ballot title is not a disclosure, it raises analogous concerns because it requires speakers to include with their own message either information selected by the state or a statement drafted by government officials. In fact, the First Amendment implications of the title are more problematic those presented by a simple disclosure. A title purports to represent an official and neutral summary of the content of the speaker's message. Evidence on the record demonstrates that the intended audience for the speech will believe the ballot title over and above any competing message from ballot circulators. App. 540-41; Testimony of Nieland at 63:12-64:20.

The basic and most fundamental requirement for any mandatory disclosure is that it must be "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. For example, the state cannot, under the First Amendment, require a business to label its product as "carcinogenic" in the absence of a "strong scientific consensus" that it causes cancer. *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1278 (9th Cir. 2023). This is true even if that disclosure is clearly identified as the opinion of the state and not the speaker's own belief. *See id*. (striking down

a label which states "[t]he State of California has determined that glyphosate is known to cause cancer").[1]

The cases upholding disclosure requirements in the context of political campaigns have dealt with simple, factual information that is readily verifiable, such as the identity of the speaker. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (upholding a requirement that electioneering communications must include a disclaimer that "_____ is responsible for the content of this advertising"). The state invariably justifies its regulations of election speech on the ground that it is "preventing fraud and libel," *McIntyre*, 514 U.S. at 349, or "to protect the integrity of the initiative process, specifically, [and] to deter fraud and diminish corruption." *Buckley*, 525 U.S. at 204-05. When it comes to political speech surrounding ballot initiatives, states are not permitted even to regulate allegedly false political speech, where "[t]he citizenry, not the government, should be the monitor of falseness in the political arena." *281 Care Comm. v.*

[1] In *National Association of Wheat Growers*, the label identified the author as the State of California. *Id*. But the initiative petition at issue here specifically states that the title language is set by "the Colorado State Title Board," without separately identifying the language that was drafted by Colorado State Legislature and imposed on the Colorado Ballot Title Board ("Title Board"). If the petition accurately identified the legislature as the true author of the ballot title, Advance Colorado would have fewer concerns because voters would know that it had been drafted by a political actor, not a neutral, non-partisan agency.

Arneson, 766 F.3d 774, 796 (8th Cir. 2014). It is absurd that the State should be permitted to mandate it.

Defendant-Appellees contest whether the mandatory speech is correctly characterized as false, claiming that this "cuts things too finely." Response Brief at 32. After all, even if the money is mostly refunded, the measure could still affect "local property tax districts, whether the property tax revenues exceeded the tax limits would vary on a district-by-district basis." *Id*. at 33. And the phrase "reduce funding for state expenditures that include but are not limited to education" is not precisely the same as "reduce education funding." *Id*. at 34. A TABOR refund, or even a tax cut, could be called a "state expenditure" in the arcane language of public finance. Testimony of Henry Sobenet, App. 565 ("So the word expenditures in the tax world is sometimes a term of art. And expenditures in an everyday situation, you know, might mean the regular budget, but in tax policy land tax expenditures, which is money you don't collect or money that gets allocated back and not retained in the government, are also called expenditures").

It seems obvious to Advance Colorado that the plain meaning of the phrase "which will reduce funding for state expenditures that include but are not limited to education" is that the initiative will actually reduce funding for education. But, no

matter how you squint at this language, it cannot be accurately characterized as "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651.

The Supreme Court has made it clear that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre* , 514 U.S. at 348. That is doubly true here because the State is not seeking simply to provide "additional information," but to make a political argument about the importance and uses of public revenue. "[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).

C. The government may not mandate unchosen speech as condition for exercising political rights.

In its Response Brief, Defendant-Appellees argue that Advance Colorado has not "identified a government action that compels it to speak." Response Brief at 27. Because, of course, Advance Colorado could simply refrain from seeking to place citizen initiatives cutting taxes on the ballot. They also argue that "[u]nlike most compelled speech cases where fines or other penalties are threatened, Advance Colorado's only alleged compulsion is that its initiative might not pass." Response Brief at 27.

This is incorrect. Advance Colorado cannot participate in the citizen initiative process at all, successfully or unsuccessfully, unless it is willing to circulate the offending language to registered Colorado voters. Any attempt to circulate the initiative petition without such language would result in the invalidation of the signatures collected and could give rise to criminal penalties for election fraud. *See* App. 231 (official instructions for petition circulators). The right Advance Colorado asserts is to speak truthfully and accurately to Colorado voters regarding the change of law that it seeks.

It is well-established that the State may not impose as a condition on Advance Colorado's exercise of its political rights – or any other rights – any act that the State could not directly mandate. "[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Washington*, 461 U. S. 540, 545 (1983). Instead, there is "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up" even when the government would otherwise have the right to take or withhold official action. *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604 (2013). The government cannot condition the grant of a valuable building permit on the surrender of property without compensation,

government employment on refraining from political speech, or public medical benefits on remaining in a particular residence rather than exercising the constitutional right to interstate migration. *Id*. And it cannot condition participation in the Colorado initiative process on speaking the government's preferred partisan political message or circulating it to voters.

There is no federal law that a requires a state to provide any sort of citizen initiative process. However, if a state does create an initiative process, it must respect the free speech rights of participating citizens. "[T]he power to ban initiatives entirely [does not] include[] the power to limit discussion of political issues raised in initiative petitions." *Meyer*, 486 U.S. at 425.

Nor is the unfettered ability to engage in political activities outside of the ballot a cure for a First Amendment violation in the form of a ballot that mischaracterizes a citizen initiative. *See California Democratic Party*, 530 U.S. at 581 (dealing with a party "nominee" that was not chosen by the actual political party). "We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in other traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns." *Id*.

In this case there is uncontroverted testimony on the record from experienced ballot circulators showing that the ability to talk separately with voters does not adequately compensate for a ballot "title" that mischaracterizes the initiative that it purports to summarize. App. 539-40, 553-54, Testimony of Nieland at 62:23-63:17; 76:15-77:10. As the Supreme Court said, "[w]e have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party*, 530 U.S. at 581.

D. Advance Colorado has exhausted its remedies in state court, and further deference would be unnecessary and inappropriate.

Contrary to the assertions of Defendant-Appellees, Advance Colorado took prompt action to challenge the legality of H-B 21-1321 in Colorado state court under Colorado law. It was only after the Colorado Supreme Court denied its challenge in a single sentence *per curiam* order that Advance Colorado came to federal court seeking relief for its federal constitutional claims. *See* App. 14-15 at ¶¶ 31-37 (alleging facts demonstrating that Advance Colorado exhausted its remedies through the state administrative appeals process).

Because of the very tight schedule of the Colorado electoral calendar, Advance Colorado chose to spread its efforts to seek court relief over two separate election cycles, using nearly identical ballot initiatives: Colorado Proposed Initiative

2021-2022 # 46 ("Initiative 46") during the 2021-2022 election cycle and Initial 22 for the current cycle. This significantly reduced the risk of the issue becoming moot while the litigation was still pending. Initiative 46, from the 2021-2022 ballot cycle, was the same as Initiative 22 at issue here, except that it would have cut sales taxes in a different fiscal year. App. 265.

Through Initiative 46, Advance Colorado challenged the application of H-B 21-1321 before the Title Board, both in the initial hearing and then again through the rehearing and administrative review process.[2] Upon rehearing, the Title Board was sympathetic to Advance Colorado's position that the measure was extremely unlikely to reducing funding to any of the specified programs, but did not believe that it had the authority to omit the mandatory language. The Title Board compromised by tacking some caveats to the end of the title, which stated in full:

> There shall be a reduction to the state sales and use tax rate by 0.34 percent, thereby reducing state revenue, which 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 by an estimated 14.6 million dollars in tax revenue in the first full fiscal year, or will reduce the amount of the taxpayer refund if a refund is required under TABOR, by a change to the Colorado Revised Statutes that reduces the state sales and use tax rate from 2.90

[2] For Initiatives 21 and 22, Advance Colorado also completed the administrative rehearing process before the Title Board but did not petition the Colorado Supreme Court for review. App. 251, 257.

> percent to 2.89 percent from January 1, 2023, through December 31, 2024.

App. 270. As Board Member Pelegrin stated orally when the Title Board conducted its rehearing:

> I also agree that obviously, we have to follow the statute. But I think, to the extent we can follow the statute and still try to make it clear, I think we should try to make it more clear ... I don't have a big problem with clarifying what the effect is the problem that we have, I think, is the fact that it is has to be based on last year's or the current year[']s spending as opposed to next year's spending.

App. 312, Audio of the October 20, 2021 Rehearing, Board Member Pelegrin at 30:23, quoted in Advance Colorado's Opening Brief to the Colorado Supreme Court. "But again, we have no choice." *Id*. at 31:31.

The sponsors timely petitioned for review in the Colorado Supreme Court pursuant to the process laid out in C.R.S. § 1-40-107(2) on the grounds that "[t]he title as set by the Board is inaccurate and does not correctly and fairly express the true intent and meaning of the proposed initiative." App. 273. This was the first appeal involving the application of H-B 21-1321 and was briefed by both parties. Sponsors of Initiative 46 argued that "the Title obfuscates the central feature and includes purely speculative and confusing effects in violation of clear title requirements." App. 308. In response, attorneys for Title Board relied, ironically, on a line of precedent according deference to the Title Board – even though the Title

Board did not choose the challenged language and made it clear that it would not have chosen such language. App. 288-89.

It is impossible to guess which arguments persuaded the Colorado Supreme Court because it affirmed *per curiam* stating "[u]pon consideration of the Petition for Review, together with the briefs filed herein, and now being sufficiently advised in the premises, IT IS ORDERED that the actions of the Title Board are AFFIRMED." App. 217.

Upon receipt of this order, Advance Colorado abandoned Initiative 46 and prepared a new, structurally identical initiative for the subsequent election cycle, to ensure that there would be time to fully litigate the federal constitutional question without the risk that the issue would become moot halfway through the litigation. They appealed the two titles at issue in a rehearing before the Title Board, App. 251, 257, but did not waste time on another round of fruitless litigation in the Colorado Supreme Court.

Defendant-Appellees have asked this court to exercise *Pullman* abstention, which "permits a federal court to stay its hand in those instances where a federal constitutional claim is premised on an unsettled question of state law, whose determination by the state court might avoid or modify the constitutional issue." *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981). Such abstention is not

appropriate here because the issue has already been litigated in state court and decided by the State's highest court through the proper, mandated procedure for ballot title challenges.

Plaintiff-Appellants wholeheartedly agree that this dispute should have been resolved in state court, under state law, avoiding novel federal constitutional problems. The Colorado Constitution requires the ballot titles of citizen initiatives to have a clear title which expresses the subject of the initiative. Colo. Const. art. V, § 1 ("No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title"), and there is a large body of precedent that has for decades insured that the titles of ballot initiatives are reasonably clear and accurate and reflect the contents of the actual proposed change in law. The purpose of the ballot title is "to capture, in short form, the proposal in plain, understandable, accurate language enabling informed 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). "Titles that contain a material and significant omission, misstatement, or misrepresentation cannot stand." *Id*. (quotation omitted). These requirements, scrupulously observed, are the reason why

the Colorado initiative process has been in place for more than a century without previously giving rise to a compelled speech claim in federal court, notwithstanding the obvious complexities involved in the public regulation of core political speech.

However, the Colorado Supreme Court did not adopt this interpretation of State law, making federal judicial review imperative. The highest court in the State having ruled, this Court must address the critical question of federal law presented to it. It is unconstitutional for the State to impose mandatory language on citizen ballot initiatives, purporting to be a "title," that mischaracterizes the contents of those petitions and require citizens to circulate and communicate a partisan message drafted by the current majority in the General Assembly.

CONCLUSION

The State may not "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, and that protection becomes more fundamental, not less, when the citizens speak formally through petitions and the ballot box in a manner that threatens the political power of incumbents.

The denial of Plaintiff-Appellants' Motion for Preliminary Injunction should be reversed, and the case remanded with further instructions.

Respectfully submitted this 7th day of February 2024.

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Dated: February 7, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024 I electronically filed the foregoing **REPLY BRIEF OF PLAINTIFF-APPELLANTS** using the Court's CM/ECF system which will send notification of such filing to the following:

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