



<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>STEVEN WARD, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF COLORADO, by and through JARED S. POLIS, in his official capacity as Governor of Colorado, et al.,</p> <p>Defendants.</p>	<p>^ COURT USE ONLY ^</p>
<p>PHILIP J. WEISER, Attorney General RUSSELL D. JOHNSON, Sr. Assistant Attorney General* SHELBY A. KRANTZ, Assistant Attorney General* REED MORGAN, Assistant Attorney General* DANNY RHEINER, Assistant Attorney General* JEREMY JOHNSTON, Assistant Attorney General* SKYE WALKER, Assistant Attorney General Fellow* YOU NA HAN, Assistant Attorney General Fellow* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8th Floor Denver, CO 80203 Telephone: 720-508-6351 (Johnson); x6437 (Krantz); x6335 (Morgan); x6570 (Rheiner); x6345 (Johnston); x6767 (Walker); x 6392 (Han) FAX: 720-508-6038 E-Mail: russell.johnson@coag.gov; shelby.krantz@coag.gov; reed.morgan@coag.gov; danny.rheiner@coag.gov; jeremy.johnston@coag.gov; skye.walker@coag.gov; youna.han@coag.gov Registration Numbers: 48482 (Johnson); 53866 (Krantz); 40972 (Morgan); 48821 (Rheiner); 54424 (Johnston); 58330 (Walker); 57881 (Han) *Counsel of Record</p>	<p>Case No. 2023CV31432</p>
<p>JOINT MOTION TO EXCLUDE EXPERT TESTIMONY OF SETH MASKET</p>	

Defendant State of Colorado, by and through Jared S. Polis, in his official capacity as Governor of Colorado, and Jena Griswold, in her official capacity as Secretary of State¹ (collectively, “the State”), respectfully submit this Motion to Exclude Expert Testimony of Dr. Seth Masket (“Motion”).

C.R.C.P. 121 § 1-15(8) Certification. Counsel for the State have conferred with counsel for Plaintiffs via email regarding this Motion. Although Plaintiffs provided a second expert disclosure during conferral, the State disagrees that such disclosure cured the deficiencies in the initial expert disclosure. Plaintiffs also asserted that Dr. Masket would not testify regarding ultimate conclusions of law; as argued below, the State disagrees. For these reasons, the parties were unable to reach a resolution. Plaintiffs oppose the Motion.

INTRODUCTION

On May 15, 2023, Plaintiffs filed a complaint under section 1-11-203.5, C.R.S., challenging whether SB23-303 (“SB303”) and Proposition HH, the Referred Measure within SB303, contain a single subject and a clear title. The parties submitted simultaneous opening briefs on May 30, 2023, and will submit simultaneous response briefs by June 5, 2023. The statute requires the district court to “adjudicate [the matter] within ten days of the date of filing of the answer”—here, June 9, 2023.

¹ As detailed in her opening brief, the Secretary of State takes no position on the merits of Plaintiffs’ claims. *See* Sec’y of State’s Op. Br. (May 31, 2023). But for the reasons stated in Parts II and III of the Argument below—and in particular because allowing expert testimony of the sort proposed here would negatively impact the title setting process for the Title Board, which the Secretary of State is responsible for convening, *see* § 1-40-106(1), C.R.S.—the Secretary joins this Motion.

On May 30, Plaintiffs served a disclosure of expert testimony for Dr. Seth Masket under C.R.C.P. 26(a)(2)(B)(II). *See* Ex. A. Dr. Masket is the Director of the Center on American Politics and a Professor of Political Science at the University of Denver. Plaintiffs assert that Dr. Masket will testify “regarding voter behavior and the adequacy of the proposed ballot language.” Ex. A at 2. The disclosure also identified Toby Damisch, a second expert to testify “regarding the adequacy of the proposed ballot language,” but Plaintiffs have withdrawn Mr. Damisch. *Id.*

On May 31, the State conferred with Plaintiffs regarding the May 30 expert disclosure. The State noted that the disclosure was insufficient and did not comply with C.R.C.P. 26(a)(2)(B)(II). The State requested that Plaintiffs supplement the disclosure by close of business on June 1 with the missing components—a “complete description of all opinions to be expressed and the basis and reasons therefor” and “copies of any exhibits to be used as a summary of or support for the opinions.” *See* Ex. B. The State also submitted an informal discovery request for “[a]ll documents, opinions, memoranda, correspondence, including email, prepared or received by Dr. Seth Masket or Toby Damisch, including from any attorney for Plaintiffs, considered or relied upon by Dr. Seth Masket or Toby Damisch, relating to their opinions or testimony in this case.” *See id.*²

On June 1, Plaintiffs filed and served a second disclosure of expert testimony under C.R.C.P. 26(a)(2)(B)(II). *See* Ex. C. The disclosure states that Plaintiffs will call Dr. Masket to “review past ballot titles related to taxation questions which are in the possession of the state[,]” and to “testify on voter behavior[,] [which] will support the claims made in the Complaint

² These materials are discoverable pursuant to *Gall v. Jamison*, 44 P.3d 233, 239 (Colo. 2002).

regarding the inadequacy of the ballot titles.” Ex. C. The disclosure says nothing else about Dr. Masket’s opinions or the bases for them.

On June 2, Plaintiffs sent the State a report titled “Colorado Political Climate Survey” (Dec. 10, 2021). Ex. D. It is unclear what relationship this document has to Dr. Masket’s opinions, if any.

The State asks the Court to exclude the expert testimony of Dr. Masket for three reasons. First, Plaintiffs’ disclosures are legally deficient under C.R.C.P. 26(a)(2)(B)(II), and such deficiencies will cause prejudice to the Governor if Dr. Masket is permitted to testify because the Governor is not able to adequately prepare for hearing or trial. Second, although it is impossible for the State to assess in light of Plaintiffs’ deficient disclosures, it appears that Dr. Masket will testify about the legal adequacy of the proposed ballot title, which is an ultimate issue of law for this Court, not Dr. Masket, to decide, and Dr. Masket’s testimony is seemingly speculative. Finally, experts are not permitted to opine on the adequacy of a ballot title as a question of law and allowing them to do so here would complicate the initiative title-setting process.

LEGAL STANDARD

“Trial courts have broad discretion to determine the admissibility of expert testimony[.]” *Estate of Ford v. Eicher*, 220 P.3d 939, 942 (Colo. App. 2008). “The admission of ... expert testimony is governed by CRE 702.” *Id.* Under that rule, an expert may testify as to their opinions “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” C.R.E. 702.

Anyone who will be called as an expert witness must be disclosed under C.R.C.P. 26(a)(2)(B). Plaintiffs have disclosed Dr. Masket as a nonretained expert, so their disclosure

must include, among other things, “a complete description of all opinions to be expressed and the basis and reasons therefor.” C.R.C.P. 26(a)(2)(B)(II)(a). A failure to provide an adequate disclosure requires exclusion of the expert testimony, unless the failure is harmless. *See* C.R.C.P. 37(c)(1).

ARGUMENT

I. Dr. Masket’s testimony should be excluded because Plaintiffs’ disclosures are legally deficient and prejudicial to the Governor.

Failure to timely disclose information required under C.R.C.P. 26(a) may prejudice the opposing party by robbing them of the ability to adequately prepare for trial or hearing and to fully cross-examine the expert witness. *Clements v. Davies*, 217 P.3d 912, 916 (Colo. App. 2009). The party that fails to timely disclose its expert bears the burden “to establish that its failure to disclose was substantially justified or harmless, or that excluding the evidence would be disproportionate to the harm caused by the nondisclosure.” *Gravina Siding & Windows Co. v. Gravina*, 516 P.3d 37, 49 (Colo. App. 2022).

Plaintiffs’ cursory expert disclosures do not even come close to complying with the requirements of C.R.C.P. 26(a)(2)(B)(II). In their expert disclosure, Plaintiffs disclosed broad and vague categories of topics. *See generally* Exs. A and C. The Governor only knows that Dr. Masket will “review past ballot titles related to taxation questions,” “testify regarding voter behavior,” and provide commentary on and support for Plaintiffs’ claims regarding the “adequacy of the proposed ballot language.” *Id.* Plaintiffs have failed to provide the Governor with a “complete description of all opinions to be expressed and the basis and reasons therefore.” C.R.C.P. 26(a)(2)(B)(II)(a). Plaintiffs also did not disclose “copies of any exhibits to be used as a

summary of or support for the opinions,” to the extent there are any. *See* C.R.C.P.

26(a)(2)(B)(II)(c). Plaintiffs’ expert disclosure is simply not a meaningful disclosure. Essential details are missing. For example:

- What ballot titles Dr. Masket reviewed;
- What opinions he has about “voter behavior”;
- What he relied on to form his opinions about voter behavior;
- What opinions he has about the “inadequacy of the ballot titles”;
- What he relied on to form his opinions about the “inadequacy of the ballot titles”; or
- Which ballot titles he has opinions about.

Plaintiffs’ inadequate disclosures are especially grave in light of the expedited and compressed nature of proceedings under section 1-11-203.5, C.R.S. While courts can excuse untimely disclosures if the other party has a fair opportunity to respond to the disclosure, *see Berry v. Keltner*, 208 P.3d 247, 250 (Colo. 2009), the Governor here has no such opportunity. The Governor is working diligently to meet the expedited deadlines imposed by section 1-11-203.5 and does not have the necessary information to adequately prepare for Dr. Masket’s expert witness appearance. As such, Dr. Masket’s testimony must be excluded as unduly prejudicial.

II. Dr. Masket’s testimony should be excluded because his opinions appear to consist entirely of legal conclusions and speculation.

Plaintiffs propose that Dr. Masket will “review past ballot titles” and “support the claims made in the Complaint regarding the inadequacy of the ballot titles.” *See* Ex. C at 2. But the adequacy of the ballot titles is the exact question the Court must ultimately answer. At the heart of this litigation is whether the titles of SB303 and/or the Referred Measure violate the single

subject and clear expression requirements enumerated in the Colorado Constitution. No expert can tell the Court how to rule on those questions.

While C.R.E. 704 permits expert witnesses to give opinions on ultimate issues of fact, this rule does not permit expert witnesses to offer testimony on ultimate issues of law. *People v. Collins*, 730 P.2d 293, 306 (Colo. 1986); *Johnson v. Dept. of Safety*, 503 P.3d 918, 925 (Colo. App. 2021) (“[E]xpert witnesses may not testify as to ultimate conclusions of law.”). Put simply, an expert cannot tell the finder of fact what results to reach. *People v. Gaffney*, 769 P.2d 1081, 1087 (Colo. 1989) (quoting Fed. R. Evid. 704 Advisory Committee’s Note).

Dr. Masket’s testimony regarding the proposed ballot language will not “assist the trier of fact to understand the evidence or to determine a fact in issue.” C.R.E. 702. Rather, it will offer commentary on the precise legal question central to this case and squarely before this Court—whether the bill and ballot title meet constitutional standards. This is not a permitted use of expert testimony and should therefore be excluded.

Dr. Masket’s proposed testimony on “voter behavior” also fails to comply with C.R.E. 702. While Plaintiffs’ inadequate disclosures again make it unclear what testimony Dr. Masket will offer on “voter behavior,” it seems as though any such testimony would necessarily be speculative. For expert testimony to be admissible under C.R.E. 702, it must be both reliable and relevant, *Farmland Mut. Ins. Companies v. Chief Indus., Inc.*, 170 P.3d 832, 835 (Colo. App. 2007), and must be “grounded in the methods and procedures of science, not on a subjective belief or unsupported speculation.” *People ex rel. M.M., Jr.*, 215 P.3d 1237, 1250 (Colo. App. 2009).

How voters will react to the bill or the ballot title is necessarily speculative, and fundamentally irrelevant because the clarity of a ballot title is an inherent question of law for the Court to decide based on the title's wording. *See, e.g., In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 9 (“[W]e must examine [a proposed initiative’s] wording to determine whether the initiatives and their titles comport with the single subject and clear title requirements.”). Plaintiffs have failed to disclose any additional information that would suggest Dr. Masket’s opinions are nonspeculative, relevant, and otherwise admissible.

III. Dr. Masket’s testimony should be excluded because the Supreme Court frequently rules on ballot title disputes without experts opining on the legal questions in those disputes.

The Supreme Court hears dozens of ballot title disputes every year. In the 2021-2022 election cycle, for example, the Court heard 53 appeals from the Title Board. *See 2021/2022 Ballot Initiatives*, Colo. Judicial Branch (June 2, 2003), <https://tinyurl.com/3smhdvj3>. Every proponent and opponent of an initiative who appeared before the Title Board has a direct and immediate right of review of the Board’s decisions to the Colorado Supreme Court. *See* § 1-40-107(2). That review, like the review Plaintiffs seek here, “is limited” to two questions of law: “whether [the measure] comports with the single-subject requirement and whether the title as a whole is fair, clear, and accurate.” *In re Title, Ballot Title, & Submission Clause for 2015-2016 #63*, 2016 CO 34, ¶ 7.

The title’s accuracy and the adequacy or “inadequacy of the ballot titles” is therefore a legal determination the Court must make. As argued above, that is not a factual question for an expert. For example, in a prior measure before the Title Board, individuals objecting to the term “open mining” used in a title presented polling data showing that voters were confused by the

term. See *In re Title, Ballot Title & Submission Clause for 1999-2000 #215*, 3 P.3d 11, 14-15 (Colo. 2000). But the Supreme Court did not credit that polling data, or any other factual testimony, and instead made the legal determination that the term did “not render the titles misleading to the voters.” See *id.* at 15; see also *In re Title, Ballot Title, & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 650 (Colo. 2010) (“The standard cannot be that a phrase becomes a catch phrase if the petitioner proves that it polls with the public better than other phrases.”). The Court makes its own determinations as to whether voters would be confused by a ballot title without resort to expert testimony. See, e.g., *In re Title, Ballot Title, & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶ 13 (“We conclude that the title set for Initiative #156 does not satisfy the clear title requirement because it is ... inherently confusing.”); *In re Title, Ballot Title, & Submission Clause for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999) (“[N]o voter confusion or surprise would ensue because the summary is phrased in a non-legalistic and accurate fashion.”). Courts resolve the legal question of whether a measure is misleading based on the text of the measure itself, not how the measure compares to an undefined, untested model of “voter behavior.” See, e.g., *In re 2013-2014 #90*, 2014 CO 63, ¶ 9.

Finally, if the Court accepts Dr. Masket’s expert testimony, it could open the door to similar testimony being presented to the Title Board and the Supreme Court. Dueling expert witnesses may soon become the expected norm. The initiative process already asks proponents to devote significant time and resources to see an initiative through the process and onto the ballot. Adding an expectation of obtaining expert testimony to opine—either affirmatively or to rebut a well-financed opponent of the initiative—about the inadequacy of the title would be detrimental

to Coloradans' "fundamental right" of initiative. *See Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994).

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court strike Dr. Masket's expert disclosure and exclude Dr. Masket from providing written or oral testimony in this litigation.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **JOINT MOTION TO EXCLUDE EXPERT TESTIMONY OF SETH MASKET** upon all parties herein by Colorado Courts E-Filing, this 5th day of June 2023, addressed as follows:

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