

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Jamie Gentry-Cunningham, Jenna Lea Candraia Clinchard,
Jude Kacey Clinchard, Iris Halpern and Dr. Lora Melnicoe,
Objectors,

v.

Darcy Schoening and Wayne Goodall,
Proponents of Initiative 2023-2024 #175.

**MOTION FOR REHEARING ON
INITIATIVE 2023-2024 #175**

Through their legal counsel, Jamie Gentry-Cunningham, Jenna Lea Candraia Clinchard, and Jude Kacey Clinchard, registered electors of Boulder County, and Iris Halpern and Dr. Lora Melnicoe, registered electors of Denver County, hereby file this motion for rehearing on Initiative 2023-2024 #175.

On March 6, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #175:

Shall there be a change to the Colorado Revised Statutes prohibiting a healthcare provider from performing gender transitioning surgery on or providing medication to a minor under 18 years of age, and, in connection therewith, imposing liability on the healthcare provider that performed the procedure and any person who assisted until the minor is 48 years old or 10 years after their death; a healthcare provider is liable even if the minor and parent consented to the procedure; allowing any person to advise the state's attorney general of a prohibited procedure and requiring the attorney general to file a lawsuit against the provider and anyone that assisted for up to 20 years after the prohibited procedure occurred?

As set forth below, the Title Board erred in assuming jurisdiction over this measure and in its task of setting a clear ballot title.

I. The Title Board lacked jurisdiction to set titles.

A. This initiative contains multiple subjects.

This initiative purports to deal with only medical procedures (surgery and drugs) that change a person's sex assignment from the one assigned at the time of the person's birth. In fact, Initiative #175 goes a great deal further than that.

1. *Penalizing providers of health care, unrelated to gender affirming care procedures or medications.*

The tip-offs to the hidden-from-view breadth of this measure can be found in several places in the measure.

- “Health care provider” is defined to mean any “professional, establishment, or facility” that is licensed or permitted “**pursuant to this title**” (i.e., Title 12 of the Colorado Revised Statutes). Proposed Section 12-30-123(1)(b).
- The measure’s expanded regulatory provisions for professional “discipline pursuant to this title 12” apply whenever a covered person “**provides, prescribes, administers, or attempts a medical procedure**” that violates the measure. Proposed Section 12-30-123(9)(b).
- “Medical procedure” is defined to include “**prescribing, administering, or dispensing a drug or substance.**” Proposed Section 12-30-123(1)(d)(I).
- A medical procedure is prohibited if it “enabl[es] a minor to **identify with, or live as**” a person whose sex is “inconsistent with the minor’s sex.” Proposed Sections 12-30-123(2)(a)(I), (5)(a).
- A medical procedure is also prohibited if it “**treat[s]** purported **discomfort or distress** from a discordance between the minor’s sex and asserted identity.” Proposed Sections 12-30-123(2)(a)(II), (5)(b).
- Compensable injury includes “**a change to the... psychology** of an individual from a medical procedure... **irrespective of** whether the medical procedure was performed, provided, prescribed, administered, or attempted with the **intent to cause the change.**” Proposed Section 12-30-123(7)(b).

Thus, the goal of #175 isn’t just to limit physical changes to a minor. It aims to change how they “identify” or how they “live” and how certain professionals deliver the services they are licensed to provide. And this is not a hyper-technical reading of the initiative. This is what the substantive provisions state, as noted above, and those two provisions are restatements of the legislative declaration’s key contents:

- (2) Therefore, **it is the purpose** of this section to **prohibit medical procedures** from being administered to or performed on minors when the purpose of the medical procedure is to:
 - (a) Enable a minor to **identify with, or live as**, a purported identity **inconsistent with the minor’s sex**; or
 - (b) **Treat** purported **discomfort or distress from a discordance between the minor’s sex and asserted identity.**

Subsection 2 of Section 1 of Initiative #175.

Therefore, any medical professional who treats a minor-patient for, say, psychological concerns over that person's gender identity is subject to this measure. That means a health care provider who prescribes an antidepressant for someone assessing their gender identity is subject to the penalties and regulatory impositions of this measure. After all, such a prescription may enable a person to identify or live with a sex designation other than what is listed on their birth certificate. That same prescription may help "treat... discomfort or distress" for the inconsistency between identity and the gender assignment at birth.¹ Thus, it is not merely the administration of "a hormone or puberty blocker" that triggers this measure. Proposed Section 12-30-123(6). It is a wide variety of medicines that could be provided for very different purposes.

And it won't just be a minor's psychiatrist who is regulated by Article 240 of Title 12 ("Medical Practice"). The same is true for a psychiatric technician, regulated by Article 295 of Title 12, who can administer "selected treatments and selected medications prescribed by a licensed physician." C.R.S. §12-295-103(4). That person is also a "health care provider" under Initiative #175. So is the pharmacist, who also happens to be regulated under Article 280 of Title 12, who fills the prescription for antidepressants for that minor. C.R.S. §12-280-103(39). And so, too, is the "pharmacy technician" or "certificant," regulated under Article 280 of Title 12, as that person, too, provides services to the licensed pharmacist in order to make a prescription available to the patient. C.R.S. §§12-280-103(38), (38.5)(a). This is also true for a repackager of drugs, also regulated by Article 280 of Title 12. C.R.S. §12-280-103(46).

Also covered will be those persons who are the professionals who often get called in to help a person after a significant surgical procedure. For instance, any occupational therapist or physical therapist would work with someone who made the choice to access gender affirming care so they could "live as" the person they became. Both are regulated by Title 12 (Articles 270 and 285).

As noted above, "health care provider" is both the individual and the business that administers the "medical procedure." That means a hospital pharmacy, a hospital satellite pharmacy, a prescription drug outlet, and a telepharmacy outlet are all covered as facilities that are licensed under Title 12. C.R.S. §§12-280-103(10), (20), (43), (50).

Thus, if any of these drug dispensing professionals or entities fill a prescription for a minor who is experiencing this condition (who obtains gender affirming care before becoming 18 years of age), the pharmacies and pharmacists are liable under this measure. And each is liable "**irrespective** of whether the medical procedure was... provided, prescribed, [or] administered... attempted with **the intent to cause the change.**" Proposed Section 12-30-123(7)(b). Incredibly, civil liability and licensing discipline can be meted out without regard to the intent of these professionals and entities "to cause the change" at the time they provided their services.

¹ According to the American Journal of Psychiatry, transgender individuals in a recent study were found to "receive 3.4–3.9 times more prescriptions for antidepressants and anxiolytics than the general population, and even 10 years after gender-affirming surgeries, rates of mood and anxiety disorders remain elevated (21.1% for trans compared with 12.5% for cis people)." Mueller, S., *Mental Health Treatment Utilization in Transgender Persons: What We Know and What We Don't Know*, The American Journal of Psychiatry (Aug. 1, 2020) (last viewed March 11, 2024), <https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp.2019.19111151>.

This purpose is both hidden and, in reading the plain terms of this measure, ominous. If passed, #175 will chill, among others, mental health professionals who might treat minors who are outside of the gender binary and keep those in the pharmacy world from preparing and delivering medications to help them deal with their current condition.

A tangential, contingent relationship between actual health care delivery professionals (who prescribe puberty blocking medications or who perform surgeries) and your local drug store is not sufficient to meet the single subject requirement – any more than changes to overarching animal cruelty laws and to specific livestock regulations was a single subject. A change like that “would modify the standard of care for all animals by criminalizing new conduct, regardless of whether that conduct is directed at livestock or other animals.” *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶39. Here, this initiative would affect all persons who prescribe or provide certain drugs, regardless of whether the medication was provided with an intent to provide gender affirming care for minors.

Like other measures the Title Board has considered, Initiative #175 “run[s] the risk of surprising voters with a surreptitious change, because voters may focus on one change and overlook the other.” *Id.*, ¶39 (citations and internal quotation marks omitted). Given the repetition of #175’s provisions identifying the measure’s purposes and illegal acts (including acts that fall well short of procedures constituting gender affirming care), this measure violates the single subject requirement.

2. *Liability for any person’s “support” of a minor who accesses gender affirming care.*

Initiative #175 creates liability for any “health care provider, person, or other entity that supported” a “medical procedure” for a minor that violates #175’s terms. Proposed Section 12-30-123(7)(a). “Health care provider” applies not just to the doctors and nurses Proponents mentioned to the Title Board. There are at least 23 different types of health care providers covered by Title 12 of the Colorado Revised Statutes that care for humans under Title 12.

Here, anyone who “supports” the minor’s treatment is at risk. *Id.* “Support” means “to agree with and give encouragement to someone or something because you want him, her, or it to succeed.” *Support*, The Cambridge Dictionary (online version) <https://dictionary.cambridge.org/dictionary/english/support> (last viewed March 11, 2024).

Nothing in #175 requires that, in order to be liable, a health care worker, for one, must participate in the actual gender affirming medical care provided. Persons who “support” a minor’s gender medical procedure, as that term is broadly defined, face the prospect of being a defendant in a lawsuit authorized by #175. That list of health care professions covered is a long one and includes the following people who may be part of the minor’s world (either in a professional or a personal capacity), and it includes professions that are – and others that aren’t – typically considered to be health care providers:

- An athletic trainer (regulated by Article 205 of Title 12);
- A chiropractor (regulated by Article 215 of Title 12);
- A dentist or dental hygienist (regulated by Article 220 of Title 12);
- A massage therapist (regulated by Article 235 of Title 12);
- A mental health professional (regulated by Article 245 of Title 12);
- An optometrist (regulated by Article 275 of Title 12);
- An acupuncturist (regulated by Article 200 of Title 12).

These are only some of the persons and entities that are regulated by Article 12. Each person could face a crippling lawsuit, thirty years from the time they “support” a person confronting a difficult situation, even if there was consent to gender affirming care by the parents and the minor.

In fact, the measure is structured so all-encompassing that it is not limited to support of minors by persons in health care industries. Proposed Section 12-30-123(7)(a) authorizes litigation against a “health-care provider, **person**, or other entity” and states that a parent can sue “a health care provider or **another person**” even if consent was provided. In the former phrase, “provider” is modified by “health care,” “entity” is modified by “other,” but “person” is not modified at all. In the latter, “provider” is modified by “health care,” but “person” is modified by “another.”

Particularly this second reference makes clear that a “person” who can be sued does not need to be involved in the health care industry. When a statute uses different modifiers for each of a string of covered acts or actors, each modifier is given unique effect, applying only to the one modified noun. *People v. Duncan*, 2023 COA 122, ¶13 (each word given effect in a statute identifying “several different types of injuries, each with a different modifier”), citing *People v. Daniels*, 240 P.3d 409, 412 (Colo. App. 2009). Given this clear rule of statutory construction which builds off of the general rule that a legislative body “meant what it clear said,” *id.*, citing *People v. Ryan*, 2022 COA 136, ¶ 39, “another person” could be anyone.

The point is that voters would never know that Initiative #175 creates potential liability for a health care worker or other person who gives a niece a ride to the drug store or to the doctor’s office. Or gives a grandson a comforting audience about troubling issues in his life. Or provides an emotional buffer when family and peers turn away or worse in the midst of a personal crisis.

The array of persons who are regulated by Title 12 is extraordinarily broad. Like the concern addressed above, this measure’s expansive liability is a concealed provision that creates another layer of consequence for an innocent act. And that would certainly surprise voters and violate the single subject requirement.

B. This initiative was written to conceal a key change to the law – the elimination of all common law doctrines relating to medical decision making – violating the single subject requirement.

Proposed Section 12-30-123(5)(a). Initiative #175 supersedes “**all common law rules** regarding a minor’s ability to consent to a medical procedure” for the purpose of:

- a. Enabling the minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or
- b. Treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.

To date, Proponents of #175 have been silent about the meaning of this provision. But at minimum, this measure prevents a person from claiming two common law doctrines: (1) emancipation; and (2) the mature minor doctrine. "Emancipation is an ancient common law doctrine based on Roman law." *Bird v. Nystrom*, Order on Motion in Limine, 2014 Colo. Dist. LEXIS 3392, *15 (Weld Cty. Dist. Ct.) (Case No. 2012CV521), citing W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 131 (3rd ed 1963). This doctrine is a long-standing one in Colorado law, dating back at least to 1878. *Bird, supra*, at *15.

Likewise, "the common law doctrine of the 'mature minor'... recognize[s] that 'mature minors,' who may or may not be otherwise emancipated, may consent to their own medical treatment when the minor is sufficiently intelligent and mature enough to appreciate and understand the nature and consequences of the treatment." *Id.* at *20. This common law doctrine is "an avenue for the introduction of relevant evidence that (a minor) was emancipated for the purpose of making her own medical decisions." *Id.* at *21-22.

What other common law doctrines are superseded by Initiative #175? That's a good question. But neither the Title Board nor voters can know the answer because this measure was written using obscure references to hide key changes to the law. "The risk of uninformed voting caused by items concealed within a lengthy or complex proposal is what the single subject requirement seeks to avoid." *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998).

Even if Initiative #175 only suspends the emancipation doctrine and the mature minor doctrine, that change to the law is hidden from voters. Proponents do not get to use jargon (even legal jargon) to keep their changes out of plain view. Therefore, this violation of the single subject requirement is sufficient to require return of #175 to the Proponents.

C. The Title Board cannot set a title now for a measure that is not to be voted on until the 2026 general election.

Section 3 of the measure provides the effective date of the measure. "This initiative takes effect **if it is approved by the people at the next general election** and becomes law, and in such case, this takes effect upon the original declaration of the vote thereon by the governor."

The Title Board cannot set titles for measures in a future election cycle. If the Proponents want this measure to be considered by voters "at the next general election," they must wait until December of this year when the Board can consider such measures. C.R.S. § 1-40-106(1); *see In re Title, Ballot Title & Submission Clause, & Summary for # 26 Concerning Sch. Impact Fees*, 954 P.2d 586, 591 (Colo. 1998) (Board can only set title for the next election cycle after December of the current election cycle). Thus, the Board lacks jurisdiction to set titles for this measure now.

II. The title set by the Board is misleading to voters.

A. The title's single subject statement contains misleading references.

The single subject statement at the beginning of the title states that the measure “prohibit[s] a healthcare provider from performing gender transitioning surgery on or providing medication to a minor under 18 years of age.”

First, the reference to “providing medication to a minor under 18 years of age” is so broad that it could include any medication prescribed for any purpose. It applies to Tylenol used to remedy a headache. And as discussed above, the broad language used in the initiative makes it clear that the use of medications need not, by themselves, be the gender affirming care that is prohibited by the measure.

Second, the reference to “a minor under 18 years of age” is redundant. A minor is under 18 years of age. It would be more appropriate to say a “person under 18 years of age.”

B. The title's single subject statement contains a political catch phrase.

“Gender transitioning surgery” is a political catchphrase. It is not used as an operative term in the initiative.

As evidence of its uses only as a political motivator, one presidential candidate has promised to instruct every federal agency “to cease the promotion of sex or gender transition at any age.”² He also committed to using the Justice Department to look into whether hospitals and pharmaceutical companies use “sex transitions in order to get rich.”³ This political pitch has one purpose – to invigorate “his fervent base and the general electorate.”⁴ Therefore, the Title Board must refrain from using a phrase that is politically loaded and not even used in the measure.

C. The title fails to state that the measure will not be effective until sometime after the 2026 general election.

Section 3 of the measure provides the effective date of the measure. “This initiative takes effect if it is approved by the people **at the next general election** and becomes law, and in such case, this takes effect upon the original declaration **of the vote thereon** by the governor.”

² “Trump Says He’ll Ban Federal Government From Promoting Transgender Care at Any Age,” The Daily Beast (July 3, 2023); <https://www.thedailybeast.com/trump-says-hell-ban-federal-government-from-promoting-transgender-care-at-any-age> (last viewed March 11, 2024).

³ “Trump vows to 'stop' gender-affirming care for minors if re-elected president,” NBC News (Jan. 31, 2023) <https://www.nbcnews.com/politics/2024-election/trump-vows-stop-gender-affirming-care-minors-re-elected-president-rcna68461> (last viewed March 11, 2024).

⁴ D. Byer, “Trump is exploiting an anti-trans turn in public opinion,” Washington Post (Feb. 21, 2023) <https://www.washingtonpost.com/opinions/2023/02/21/trump-gender-lgbtq-identity/> (last viewed March 11, 2024).

If Initiative #175 were to make the 2024 ballot, “the next general election” would occur in November, 2026. The governor’s proclamation is typically issued at the end of the election year or in January of the follow year. Thus, by its terms, this measure will not take effect in 2024 or 2025. Voters should know that proponents crafted a time delay for the effective date so that they do not vote for it, thinking it would be immediately the law of the state.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #175 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading ballot title set.

Respectfully submitted this 13th day of March, 2024.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin

Mark Grueskin

David Beller

Nate Bruggeman

1600 Stout Street, Suite 1400

Denver, CO 80202

Phone: 303-573-1900

Email: mark@rklawpc.com

david@rklawpc.com

nate@rklawpc.com

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #175** was sent this day, the 13th day of March, 2024, via first-class mail, postage paid to:

Wayde Goodall
14359 Eagle Villa Grove
Colorado Springs, CO 80921

Darcy Schoening
15843 Bridle Ridge Dr
Monument CO, 80132

s/ Nathan Bruggeman