IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2025 -2026 #70 ("Male and Female Participation in School Sports")

Initiative Proponents: Michele Austin & Rich Guggenheim

v.

Objector: Margaret Cook Bobb

MOTION FOR REHEARING

By undersigned counsel, Margaret Cook Bobb, a registered voter of the City and County of Denver, objects to the titles set for Initiative #70, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On May 9, 2025, the Title Board set the following ballot title and submission clause for Initiative #70:

> *Shall there be a change to the Colorado Revised Statutes concerning restricting participation in school sports based on the participant's sex as determined by their biological reproductive system, and, in connection therewith, requiring a school or athletic association to designate each interscholastic or intramural athletic team or sport as male, female, or coeducational; only allowing participants to compete on the team or sport of their designated sex; creating an exception to allow a female to participate on a team or in a sport designated for males if there is no female team available; prohibiting a government entity, licensing or accrediting organization, or athletic association from entertaining a complaint, opening an investigation, or taking other adverse action against a school for maintaining separate teams or sports for females; and providing the commissioner of education with the authority to enforce the proposed initiative for K-12 school districts?*

In so doing, the Board erred for the following reasons.

I. The Title Board lacks jurisdiction to set a ballot title for Initiative #70.

A. The Board lacks jurisdiction to set a ballot title for Initiative #70 because the measure, as drafted, contains a substantive legislative declaration that will affect the application of Initiative #70 but will not become part of Colorado statute.

As the Board observed in title setting, the "legislative declaration" in Section 1 was not drafted to be, and will not be, included in the Colorado Revised Statutes. When voters' declarations are included to address merely historical, procedural, or informational matters, the

fact that a "legislative declaration" isn't ultimately part of an adopted law is of no consequence in title setting. But where an initiative's legislative declaration has substantive impacts on its post-election application, and it was drafted with the clear awareness that it will be used in judicial interpretation of the measure, this "disappearing" declaration represents a jurisdictional defect in the initiative.

Here, "male" and "female" are defined in a way that is not readily understandable to most voters. A "female" is "a person whose biological reproductive system is organized around the production of ova." Proposed Section 25-60-102(3). A "male" is "a person whose biological reproductive system is organized around the production of sperm." Proposed Section 25-60-102(5). This obscure language relies on wording such as "reproductive system" and "organized around" to describe functioning of specific human organs at the time a person is born instead of directly saying so in the pertinent definitions.

Did Proponents have other options? In 2024, certain proponents filed multiple initiatives on this topic, such as Initiative 220. In those measures, Proponents made the reach of their measures crystal clear. The designation of sex to be used for scholastic and collegiate athletics was the sex assigned to the person at birth. "'Biological sex' means either **the female or male sex listed on the student's official birth certificate issued at or near the time of the student's birth**." https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/220Final.pdf (Proposed Section 22-32-116.6(a)) (emphasis added).

It is true that Initiative #70's "legislative declaration" connects these dots by communicating that a person's sex is the one that reaches back to conception and birth. "Males and females possess unique and **immutable biological differences that manifest prior to birth** and increase as they age and experience puberty." Initiative #70, section 1(1) (emphasis added.)

What is the impact of putting this in a section that isn't printed in the Revised Statutes? As the Board knows, the full initiative text is printed in the Blue Book, and the Blue Book is a source of insight that the courts use to interpret a voter-adopted initiative. Thus, without negotiating with legislative staff about whether a reference in the declaration deserves to be in the Blue Book, Proponents have the option to use obscure language in the measure itself. But here, they assure that their dot-connecting language will be repeated, without alteration, to guide judicial application of the initiative. *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999). It's a win/win for Proponents; their non-statutory language has legal effect without being part of Colorado law. As they stated to the Title Board, this legislative declaration "is not campaigning. What it is, is, it provides interpretative guidance for courts." https://csos.granicus.com/player/clip/498?view_id=1&meta_id=18056&redirect=true ("Board Hearing") (39:10-25). The proposed statute itself uses veiled terminology that may be easier to get voters to accept (whether they understand it or not).

Thus, voters will cast their ballots on a measure that contains a surreptitious element: this measure applies based on a person's sex when known at birth rather than at the time of athletic engagement. This obfuscation violates the constitutional requirement that the measure's subject be "clearly expressed" in the title. Colo. Const., art. V, sec. 1(5.5); *see* C.R.S. § 1-40-106.5(1)(a). The purpose for this mandate is clear. "The single-subject requirement is designed to protect

voters against fraud and surprise." *In re Title, Ballot Title & Submission Clause for Amendment Adding Section 2 to Article VII (Petitions)*, 907 P.2d 586, 589 (Colo. 1995).

This formulation of Initiative #70 also runs afoul of the statutory requirement that a measure "shall be worded with simplicity and clarity and so that the effect of the measure will not be misleading or likely to cause confusion among voters." C.R.S. § 1-40-105(3). To this end, the measure must not contain "a surreptitious provision coiled up in the folds" of the text that could contribute to "inadvertent passage" of the initiative. *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 440 (Colo. 2002) (quoting *In re Breene*, 24 P. 3, 4 (1890)). The measure at issue is the measure that will become the law of the State. *See, e.g.,* C.R.S. §§ 1-40-105(4) (proponents must submit "final draft that gives the **final language for printing**"); -123(2) (initiative passes if majority of voters, in casting ballots, "adopts any measure submitted for a **proposed law**") (emphasis added).

Given failures to meet these standards, Initiative #70 was not properly filed with the Board, and as such, it lacks jurisdiction to set titles.

B. Initiative #70 contains a second hidden element: the process for determining an athlete's sex is to be determined on a district-by-district or school/university-by-school/university basis.

Initiative #70 is silent on the key issue of how schools and universities will make the required determination about participants' sexes. As Proponents stated to the Board, they provided no "guidelines," "administrative systems" or "detailed administrative apparatus" for determining a person's sex under this measure. (Board Hearing at 56:40-58:10.) As such, there is no debate that #70 deliberately provided no single standard or methodology for making this critical, threshold decision.

The Supreme Court has previously held that the deliberate refusal of Proponents to include key definitions so that voters understand the reach of the measure they are considering is a single subject flaw, worthy of reversal of the Title Board decision to the contrary.

> [T]his Initiative's complexity and omnibus proportions are hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative fails to inform voters of the services its passage would affect…. In the absence of a definition for "services" or a description of the purposes effected by restricting non-emergency services, the additional purpose of restricting access to unrelated administrative services is hidden from the voter. Moreover, **the Initiative's failure to specify any definitions, services, effects, or purposes makes it impossible for a voter to be informed as to the consequences of his or her vote.** This facial vagueness not only complicates this court's attempt to understand the Initiative's subjects, but results in items being concealed within a complex proposal as prohibited by the single subject rule.

In re Title & Ballot Title & Submission Clause for 2005-2006 #55, 138 P.3d 273, 282 (Colo. 2006) (emphasis added).

In exactly the same way, voters considering Initiative #70 will not know what limits, if any, will restrict the officials in the neighborhood school or the university or community college their children attend. As such, it is "impossible for a voter to be informed as to the consequences of his or her vote when it comes to the on-campus privacy and security interests of those children. This measure's broad suspension of those interests violates the single subject requirement in the Constitution. #70's silence on this key issue is its Achilles heel.

This issue is particularly significant because another provision of Initiative #70, proposed Section 25-60-104(4) which prevents any complaint or investigation of a school district's manner of complying with this new requirement. (This provision is discussed in C. below.) Thus, one district might allow the participant to verbally state what his or her biological sex is. Another district might require presentation of that person's birth certificate. And a third district might mandate physical inspections of a student by school staff or coaches and/or invasive blood or other medical testing.

Without a clear standard for establishing eligibility to participate in covered athletics, no student in the third group of schools could complain or pursue judicial remedies in order to obtain equal treatment with athletes either of the other two types of schools, even though all the schools are similarly situated and compete against each other in team play. Initiative #70 imposes this prohibition on entertaining even a complaint on "a government entity" which necessarily includes the courts. The initiative's deliberate silence about how compliance is to occur, coupled with the blanket immunity for schools maintaining separate teams for female students and participants, raises multiple subject concerns that should prevent title setting on this draft.

C. Initiative #70 prevents government entities, licensing or accrediting organizations, and athletic associations from entertaining complaints, starting investigations, or taking "any… adverse action" if a school maintains separate teams for females, another hidden subject in this measure.

Government entities, licensing or accrediting organizations, and athletic organizations cannot entertain any complaints or open any investigations into a school's decision to "maintain" teams separated as a matter of participants' designation as "female." Proposed Section 25-60-104(4). These same groups are precluded from taking "any other adverse action" against a school for maintaining a separate female team.

First, the inclusion of "any other adverse action" in this immunity provision is a precise parallel to *#55*'s single subject holding as to designed ambiguity in a measure's key provisions. Initiative #70 uses blank check language about consequences for violations, the contours of which voters cannot know when signing a petition or casting a ballot. This is a page out of *#55*'s book, but it is one that virtually ensures voters cannot know what it is they are approving. "[T]he single subject requirement limits the voters to answering 'yes' or 'no' to a straightforward, single subject proposal." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶10. This initiative's purposeful drafting gaps mean that it cannot be the "straightforward"

proposal that the Constitution requires, and the Board is prevented from setting titles for it as a result.

Second, by preventing any government entity from entertaining any complaint or opening any investigation that pertains to maintaining the team composition mandated by measure, Proponents are providing absolute immunity against allegation that persons, engaged in physical inspections of students, then improperly touch a student or abuse their position of trust. *See generally* C.R.S. §§ 18-3-405, -405.3. This hidden absolution of such school officials and the schools on whose behalf they are acting is yet another subject in violation of the Constitution.

D. Initiative #70 gives new, virtually unlimited power to the Commissioner of Education to enforce its provisions by allowing that person to take whatever "appropriate remedial action" they deem necessary.

Where the Commissioner of Education determines that a "school district is not in compliance [with these provisions] and has not made a good-faith attempt to comply [with them], "the commissioner shall take appropriate remedial action within the commissioner's authority." Proposed Section 25-60-105(2).

As in *#55, supra,* the inability of voters to know what remedies the Commissioner could impose against their school districts to remedy alleged non-compliance is another subject. This measure expands the powers of the Commissioner beyond what they are in existing statute and does so in an unlimited way. Broad language that leaves voters hanging is the epitome of a surreptitious provision of this measure.

II. The fiscal summary is incomplete and misleading.

At title setting hearing, proponents' counsel acknowledged that the measure does not include enforcement mechanisms for any post-secondary (community college, college, graduate school, etc.) applications. Instead, it is to be enforced through the "original jurisdiction" of the state's district courts.

Pursuant to C.R.S. 1-40-105.5(1.5)(a)(I), the fiscal summary must provide "A description of the measure's fiscal impact, including a preliminary estimate of **any change** in state and local government revenues, expenditures, taxes, or fiscal liabilities if implemented." (Emphasis added.) An inadequate fiscal summary is a proper subject to raise in a motion for rehearing to the Title Board because it is misleading or prejudicial or because it does not comply with pertinent legal requirements in C.R.S. 1-40-105.5(1.5)(a)(I). *See* C.R.S. 1-40-107(1)(a)(II)(B), (C).

Given the prospect of additional trial and appellate caseloads stemming from disputes arising from this measure, there should be an acknowledgement that the workload of the judiciary – and thus the costs incurred by – the judiciary would increase. But this fact is not noted in the fiscal summary.

Likewise, while there is no "apparatus" for determining a person's biological sex provided in the measure, the schools and/or school districts will have to develop an

administrative and potentially a clinical process for making this assessment. Yet, no costs are associated with this process in the fiscal summary.

As such, increased costs that will need to be paid by the judicial branch and school districts or K-12 schools as well as post-secondary institutions should be noted in the fiscal statement.

III. The ballot title is misleading, unfair, and inaccurate.

The titles refer to "school" multiple times, including "school sports," "school or athletic association," "school," and "K-12 school districts." Yet, the measure defines "school broadly to include K-12 as well as "any… postsecondary education institution." Proposed Section 25-60-103(8). Thus, #70 applies to colleges, universities, community colleges, and the like. In this group, it includes undergraduate as well as graduate programs.

The titles are silent as to any postsecondary institutions or coverage. Accordingly, voters will not know they are imposing the same sets of restrictions and requirements on kindergartners as well competitive athletic programs at the university level and also intramural contests among MBA, Ph.D., and other graduate level students. This misstatement suggests a limited scope that is inconsistent with the express wording of this measure. It is misleading and should be corrected.

WHEREFORE, in light of the arguments and legal precedent cited above, the Title Board should dismiss Initiative #70 for lack of jurisdiction, and if it does not do so, it should revise the titles so that they are fair, accurate, and not misleading.

RESPECTFULLY SUBMITTED this 14th day of May, 2025.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2025-2026 #70** was sent this day, May 14, 2025, via email to counsel for the proponents at:

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And mailed first-class, postage prepaid to Proponents:

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