IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2025 -2026 #109 ("Male and Female Participation in School Sports")

Initiative Proponents: Michele Austin & Erin Lee

v.

Objector: Derek Haines

MOTION FOR REHEARING

By undersigned counsel, Derek Haines, a registered voter of Boulder County, objects to the titles set for Initiative #109, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On August 6, 2025, the Title Board set the following ballot title and submission clause for Initiative #109:

> *Shall there be a change to the Colorado Revised Statutes creating new law restricting participation in all K-12 and collegiate school sports based on the participant's sex as determined by certain aspects of their biological reproductive system, and, in connection therewith, requiring a school, institution of higher education, or athletic association to designate each school 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 or to compete on a coeducational team; creating an exception to allow a female to participate on a male-designated team or sport 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 #109.

A. The Proponents of Initiative #109 were functionally absent at their Review and Comment hearing, refusing to state their measure's single subject, and thus the Board lacks jurisdiction to set a title.

C.R.S. § 1-40-105 governs the requirements for review and comment hearings before legislative staff. Subsection (1.5) of that statute provides: "Both designated representatives of the proponents must **appear** at all review and comment meetings. If either designated representative fails to **attend** a meeting, the measure is considered withdrawn by the proponents." (Emphasis added.)

It is fundamental that when the legislature uses different terms in the same statute, they are presumed to have different meanings. "[T]he use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings. And we may not construe a statute so as to render any statutory words or phrases superfluous." *People v. Rediger*, 2018 CO 32, ¶22 (citations and internal quotation marks omitted).

A person "attends" a meeting simply by showing up. "Attend" means 'to be present at; to go to'" as in "to attend a meeting." *Attend*, Merriam-Webster Dictionary, https://perma.cc/TLZ8-3UXZ (last viewed on August 13, 2025), cited by *Henck v. Sombrero Stables, LLC*, 2023 Colo. App. LEXIS 3047, ¶43.

In contrast, a person "appears" at a meeting only by actually engaging with the public body conducting the hearing. In construing "appear," "the decisions of Colorado courts have uniformly relied on the defendant's communication with the court." *Plaza del Lago Townhomes Ass'n v. Highwood Builders, LL,* 148 P.3d 367, 371 (Colo. App. 2006) (citations omitted). This is not merely a "technical concept;" instead, if a party must "appear, then "communication with the court is required." *Id.*

Here, the designated representatives, through counsel, refused to communicate on a fundamental issue asked of all initiative proponents. Legislative staff asked them to state the single subject of their initiative. "Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?"[1] Their response was: "We will respectfully reserve that discussion for the Title Board hearing."[2]

It is no defense to say that the refusal to answer the question about a constitutionally mandated requirement is communication. "'Communication' means 'the act or action of

[1] Colorado Legislative Council and Office of Legislative Legal Services Review and Comment Memorandum on Initiative 2025-2026 #109 at 2, https://leg.colorado.gov/sites/default/files/initiatives/2025-2026%2520%2523109.002.pdf.

[2] https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20250812/72/17537 (10:09:44-51).

imparting or transmitting.'" *People v. Heywood*, 2014 COA 99, ¶28, citing Webster's Third International Dictionary 460 (2002). Refusing to answer a question neither imports nor transmits any information. *Cf. Markwell v. Cooke*, 2021 CO 17, ¶36 (unintelligible repetition of words is not a "reading" of bills under the Constitution).

Additionally, it is no defense to say that the Board incorporated the discussion of Initiative #70 as part of the hearing on #109. That comment provided no substantive information to the public of the asserted single subject of this measure (which was different than #70) by these proponents (who were also different, at least in part, from #70). At this late point in the process, a member of the public reviewing this record would have no idea what these two individuals believe the single subject of this measure, Initiative #109, is.

An initiative's single subject is a matter of constitutional import. Colo. Const. art. V, §1(5.5). As such, Proponents don't get to opt out of stating what their measure addresses because they would prefer not to be on the record or they think that it isn't timely to discuss the core purpose of their proposal.[3]

The review and comment hearing is intended to benefit proponents, but that is not its only goal. Voters who adopted this requirement and the courts that implement it recognize that informing the public is an equally significant priority in the review and comment process. According to the 1980 Blue Book discussion of the referred measure that opened the review and comment process to the public, "At present, very little information is available to persons signing petitions other than that provided by sponsors and circulators of the petitions. **Public disclosure from the beginning would enhance the likelihood of an informed electorate which is essential to a constructive initiative process.**" *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for an Initiative Pertaining to Tax Reform*, 797 P.2d 1283, 1288 (Colo. 1990) (citation omitted) (emphasis added).

Given failures to meet these standards, Initiative #109 was not properly filed with the Board, and as such, the Board lacks jurisdiction to set titles. "Since the proponents did not comply with the constitutionally required procedure for comments and review, the Board was without jurisdiction to set the (initiative's) title, ballot title and submission clause, and summary." *Id.* at 1288.

Therefore, the titles set for Initiative #109 are invalid, and the measure should be returned to its proponents.

[3] Notably, when asked by the Title Board to state the single subject, the designated representatives failed to answer the question again, stating only the ways in which they had altered Initiative 2025-2026 #70 to arrive at the initiative text of Initiative #109. Proponents offered that this measure was "substantively the same" even though it was "not exactly the same" as #70 and ticked through some of the grammatical and stylistic changes made. https://csos.granicus.com/player/clip/510?view_id=1&meta_id=18723&redirect=true (4:38:35-4:40:04). Thus, the designated representatives' "reservation" of the single subject topic "for the Title Board hearing" was much like Godot – it never appeared.

B. Initiative #109 contains a hidden element: the fact that there is no single process for determining an athlete's sex, leaving that determination to be made on a district-by-district or school/university-by-school/university basis.

Initiative #109 is silent on the key issue of how schools and universities will make the required determination about participants' sexes. As previously 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 #109 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 #109 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. #109's silence on this key issue is its Achilles heel.

This issue is particularly significant because another provision of Initiative #109, 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 at either of the other two types of schools, even though all the schools are similarly situated and compete against each other in team play. Giving school districts the ability to make these decisions in a way that is inconsistent with other districts – or even delegating that decision to individual schools or school executives within each district – is a subject in and of itself. It requires no imagination at all to foresee the campaign messages in certain school districts, promising to give them the power to use the most invasive, intimidating means possible to make these decisions. In other districts, the promise can be made that their schools will use something like an honor system.

Further, Initiative #109 imposes this prohibition on entertaining even a complaint on "a government entity" which necessarily includes the courts. Changing the jurisdiction of even one local jurisdiction's courts can be a subject unto itself. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29,* 972 P.2d 257, 264 (Colo. 1999).

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 from any complaint, wherever it is lodged, raises multiple subject concerns that should prevent title setting on this draft.

> C. Initiative #109 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 #109 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 allegations 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.

WHEREFORE, in light of the arguments and legal precedent cited above, the Title Board should reverse its August 6 title setting and return Initiative #109 to the designated representatives because it lacks jurisdiction to set title on this measure.

RESPECTFULLY SUBMITTED this 13th day of August, 2025.

RECHT KORNFELD, P.C.

s/ Mark Grueskin

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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 #109** was sent this day, August 13, 2025, via email to counsel for the proponents at:

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