23-1282

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADVANCE COLORADO, et al.,

Plaintiffs - Appellants,

v.

JENA GRISWOLD, in her official capacity as Secretary of State of Colorado,

Defendant - Appellee.

On Appeal from the United States District Court, District of Colorado
The Honorable Phillip A. Brimmer
Chief District Judge

District Court Case No. 23-cv-01999-PAB-SKC

ANSWER BRIEF

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INTRODUCTION

Colorado enacts laws both through its elected representatives and through popular initiative. The people of Colorado have the right, established in their state constitution, to propose any initiated law. But that constitutional right, by its own terms, is subject to control by Colorado's legislature, which establishes the laws that govern the initiative process. And part of that state-law process requires state officials to provide an objective description of the initiative (called a "title") on certain government forms: the ballot, the ballot information booklet, and the petition form.

Advance Colorado and its co-appellants ("Advance Colorado") contend here that certain statutorily required language in a title is unconstitutional compelled speech. But Advance Colorado's argument cannot be sustained. Because a title appears only on government forms, it is government speech and does not affect Advance Colorado's First Amendment rights at all. Advance Colorado remains free to advocate for its measures in any manner, and using any language, it wishes (subject only to limitations on fraudulent speech). However, Colorado is allowed to choose the language that appears on Colorado forms to enact Colorado laws. Advance Colorado is therefore unlikely to succeed on the merits of its claims and the district court's order denying a preliminary injunction should be affirmed.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it denied Advance Colorado's motion for preliminary injunction after determining that the ballot title—which is only printed on Colorado's ballot, ballot information booklet, and petition forms—is government speech.

STATEMENT OF THE CASE

I. Colorado's initiative process.

"The legislative power of" Colorado is "vested in the general assembly," with the power of the initiative "reserved by the people." Colo. Const. art. V, § 1(1), (2). Colorado law imposes no limits on the substance of what citizens propose in an initiative. But the process of initiating laws is governed by state law and by state officials. The state constitution empowers the people to address their proposed legislation to the Secretary of State only "in such form as may be prescribed pursuant to law." *Id.* § 1(2).

A. Title setting.

Citizens wishing to initiate a new law or constitutional amendment begin by submitting their proposal to "the directors of the legislative council and the office of legislative legal services for review and comment." Colo. Rev. Stat. § 1-40-

105(1) (2023).[1] After the review and comment hearing, the proponents may, but are not required to, amend their petition in response to any of the comments they received. *Id.* § 1-40-105(2).

From there, the proponents submit their draft proposal to the Secretary of State, who convenes the Title Board. *Id.* §§ 1-40-105(4), -106(1). The Title Board was created in 1941. *See* 1941 Colo. Sess. Laws 480. In its current form, the Title Board consists of the Secretary of State, the Attorney General, and the Director of the Office of Legislative Legal Services, or their designees, each with an equal vote. Colo. Rev. Stat. § 1-40-106(1). The Board has two primary tasks: (1) determining whether the proposed initiative complies with Colorado's single-subject rule—which requires that "every constitutional amendment or law proposed by initiative . . . be limited to a single subject," *id.* § 1-40-106.5(1)(a) (citing Colo. Const. art. V, § 1(5.5))—and, if it does, (2) setting a short title that clearly expresses what the initiative does.[2] *Id.* § 1-40-106(3)(b). The Board does not consider the merits of the initiative. *See, e.g.*, *In re Title, Ballot Title &*

[1] All future citations are to the 2023 version of the Colorado Revised Statutes.

[2] There is a technical distinction between a "title" and a "ballot title." *See* Colo. Rev. Stat. § 1-40-102(2), (10). That distinction is not relevant here and the two terms are used interchangeably throughout this brief.

Submission Clause, & Summary for No. 26 Concerning School Impact Fees, 954 P.2d 586, 592 (Colo. 1998).

The ballot titles set by the Title Board are required in only three places: on the ballot itself (Colo. Rev. Stat. § 1-40-102(2)); in the official voter information booklet (often called the "Blue Book") that is prepared and published by the General Assembly's nonpartisan research staff and mailed to voters before an election (Colo. Const. art. V, § 1(7.5)); and on the petition form proponents use to gather signatures in support of placing their measure on the ballot (Colo. Rev. Stat. § 1-40-110(2)). Initiative proponents are not required to use or refer to the ballot title in any of their own printed materials, radio or television advertisements, or in any interactive communications with voters.

The Title Board, not the proponents, sets the language in ballot titles. Proponents may not even include a draft ballot title when submitting their proposal to the Secretary of State. *See id.* § 1-40-105(4). The Board "is vested with considerable discretion in setting the title." *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014). But state law requires specific language in the titles for certain tax measures, in three circumstances.

First, for measures that propose a tax increase, the title must begin: "SHALL [STATE OR DISTRICT] TAXES BE INCREASED (first, or if phased in, final,

full fiscal year dollar increase) ANNUALLY…?" Colo. Const. art. X, § 20(3)(c). The title then must continue: "in order to increase or improve levels of public services, including, but not limited to (the public service specified in the measure)…" Colo. Rev. Stat. § 1-40-106(3)(g).

Second, for measures that increase or decrease individual income tax rates, the title must include a table showing the effect of the rate change at different income levels. *Id.* § 1-40-106(3)(j).

Finally, for measures that reduce state tax revenue or local district property tax revenue through a "tax change" (as defined by statute), additional language is required. *Id.* § 1-40-106(3)(e), (f). This requirement, established by House Bill 21-1321 ("HB 21-1321"), is the target of Advance Colorado's challenge. The required language varies, depending on whether the tax change reduces state tax revenue or local district property tax revenue:

> *State revenue*: "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 . . . ?" *Id.* § 1-40-106(3)(e).
>
> *Local district property tax revenue*: "Shall funding available for counties, school districts, water districts, fire districts, and other

> districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue...?" *Id.* § 1-40-106(3)(f).

After the Title Board sets a title, any registered elector may file a motion for rehearing with the Board. *Id.* § 1-40-107(1). Any person heard at the rehearing may then file a petition with the Colorado Supreme Court to review the decisions made by the Title Board. *Id.* § 1-40-107(2). The Supreme Court must decide the matter "promptly, . . . either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions." *Id.* The Supreme Court will "reverse the Board's decision if the titles are insufficient, unfair, or misleading." *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 #73*, 135 P.3d 736, 740 (Colo. 2006).

B. Petitions.

Once the ballot title is final, the initiative proponents have six months to gather signatures. Colo. Rev. Stat. § 1-40-108. To place an initiative on the ballot the proponents must obtain valid signatures equal to 5% of the total votes cast in the last secretary of state race. Colo. Const. art. V, § 1(2). For 2024, initiative proponents must obtain 124,238 valid signatures. *See* Colo. Sec. of State, Signature Requirement for Statewide Initiative Petitions, https://tinyurl.com/tvzbscbb.

The petition is a government form. The Colorado Constitution provides that "the form of the initiative . . . petition may be prescribed pursuant to law." Colo. Const. art. V § 1(10); *accord id.*, § 1(2) (petitions shall be "in such form as may be prescribed pursuant to law"). "The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state[.]" *Id.* § 1(6). Pursuant to this authority, the Secretary of State has created a petition form proponents must use. Colo. Rev. Stat. § 1-40-113(1)(a); *see also* 8 Colo. Code Regs. § 1505-1, Rule 15.1.1(a), *available at* http://tinyurl.com/zztutm7b. Proponents cannot circulate their petition until the Secretary approves a proof of their form. Colo. Rev. Stat. § 1-40-113(1)(a).

The petition form consists of several pages stapled together and contains certain mandatory provisions. Every petition form must include the full text of the proposed constitutional amendment or statute. *See* Colo. Const. art. V, § 1(2); *see also* App. Vol. 2 at 233-34. It also must include the full fiscal summary of the measure. Colo. Rev. Stat. § 1-40-110(3); *see also* App. Vol. 2 at 232. Additionally, the top of every page of the petition form contains:

- A five-paragraph warning, in bold: advising potential signers of penalties for fraudulently signing the petition; "encourag[ing]" voters "to read the text or the title of the proposed initiative," as well as the

fiscal summary; and stating what year the measure will appear on the ballot, if qualified. Colo. Rev. Stat. § 1-40-110(1); *see* App. Vol. 2 at 232-40.

- Immediately following this warning, in bold: "The ballot title and submission clause as designated and fixed by the Initiative Title Setting Review Board is as follows:". App. Vol. 2 at 232-40; *see also* Colo. Rev. Stat. § 1-40-110(2).
- Immediately following this language, not in bold, is the ballot title itself. App. Vol. 2 at 232-40.

Initiative proponents have six months to gather signatures and must submit their signatures no later than 90 days before the election. Colo. Rev. Stat. § 1-40-108(1). The Secretary of State verifies the signatures by taking a random sample to determine whether sufficient valid signatures appear on the petition. *Id.* § 1-40-116. The Secretary then issues a statement of sufficiency or insufficiency. *Id.* § 1-40-117. Parties may attempt to cure invalid signatures, and may protest the Secretary's determination in state court. *See id.* §§ 1-40-117(4), -118.

C. The ballot and ballot information booklet.

Advance Colorado's opening brief focuses solely on the title's appearance on petition forms. But the injunction they seek is not targeted at petition forms, but

at ballot titles generally. Accordingly, it would also bar Colorado from using the language required by HB 21-1321 in the Blue Book and on the ballot itself.

The Colorado Constitution requires the General Assembly's nonpartisan legislative research staff to prepare a voter information booklet containing, among other things, the ballot titles and the text of all initiatives that will be voted on at the next election. Colo. Const. art. V, § 1(7.5)(a). All active, registered voters must be sent the Blue Book at least thirty days before an election. *Id.* § 1(7.5)(b); *see also* Colo. Rev. Stat. § 1-40-124.5.

Finally, the ballot title also appears on the ballot. The Secretary of State must certify the ballot order and content, including any initiatives that qualified to the ballot, 57 days before a general election. Colo. Rev. Stat. § 1-5-203(1)(a)(III). Only the ballot title, and not the full text of the initiative, appears on the ballot. *See id.* § 1-40-122(1).

II. Advance Colorado's initiatives.

Advance Colorado sponsored two initiatives for which it disputes the inclusion of HB 21-1321's language in the ballot titles. Plaintiff Steven Ward is a designated representative for both initiatives.[3]

[3] Initiative proponents must designate two representatives "who shall represent the proponents in all matters affecting the petition." Colo. Rev. Stat. § 1-40-104.

A. Proposed initiative 2023-2024 #21.

Proposed initiative 2023-2024 #21 would create a 3% annual limit on property tax increases, subject to certain exceptions. *See* App. Vol. 2 at 259. The measure also partially offsets the impact of this tax change on local governments by authorizing the state to spend up to $100 million annually to fund local governments for fire protection and exempting that money from Colorado's revenue limit. *Id.* Nonpartisan legislative council staff estimates this measure will reduce property tax revenue that would otherwise be collected by $2.2 billion in 2024, $2.9 billion in 2025, "and larger amounts in future years." *Id.* at 260.

The Title Board held its first hearing on #21 on April 5, 2023. *See id.* at 257. The Board concluded that the measure would "reduce local district property tax revenue through a tax change" within the meaning of § 1-40-106(3)(f), and so included the language required by HB 21-1321 in the title. *Id.* Ward and his co-designated representative filed a motion for rehearing, arguing that the measure was not a "tax change" and so should not include the language required by HB 21-1321. *Id.* at 262-63. The Board denied Ward's motion. *Id.* at 258.

No plaintiff filed a petition with the Colorado Supreme Court, challenging whether the title is misleading or any other aspect of the title. App. Vol. 3 at 491 (14:11-19). Another registered elector sought review on an unrelated issue, and the

Supreme Court affirmed the titles on May 19, 2023. App. Vol. 2 at 264. Advance Colorado had until November 20, 2023, to gather signatures, but testified at the hearing that it would not circulate the petition if it did not obtain the preliminary injunction. App. Vol. 3 at 490 (13:2-7).

B. Proposed initiative 2023-2024-#22.

Proposed initiative 2023-2024 #22 would lower the sales and use tax rate by .01% for one year from 2024-2025 and create a one-day sales tax holiday. App. Vol. 2 at 253-54. The measure is estimated to decrease state tax revenue by $101.9 million. *Id.* at 252.

The Title Board held its first hearing on #22 on April 5, 2023. *See id.* at 251. The Board concluded that the measure would "reduce state tax revenue through a tax change" within the meaning of § 1-40-106(3)(e), and so included the language required by HB 21-1321. *Id.* Ward and his co-designated representative moved for rehearing, arguing that the title was inaccurate based on current budget projections that state revenues will exceed the limit the state is permitted to keep under the Taxpayer Bill of Rights ("TABOR") in the 2024-2025 fiscal year. *Id.* at 255-56. The Board denied Ward's motion in its entirety. *Id.* at 251.

No party asked the Supreme Court to review whether the title was misleading. App Vol. 3 at 491 (14:20-25). The title was thus final on April 19,

2023, so the proponents had until October 19, 2023, to gather signatures. Again, they testified that they would not attempt to obtain signatures if they failed to obtain a preliminary injunction. App. Vol. 3 at 490 (13:2-7).

Although the titles for #21 and #22 were final on May 19 and April 19, 2023, respectively, Advance Colorado did not ask the Secretary to approve a proof for those petitions until August 4, 2023. *See* App. Vol. 2 at 347, 350.

III. The district court's order.

The next business day, Plaintiffs filed this lawsuit. They brought a facial challenge to HB 21-1321, an as-applied challenge as it relates to proposed initiatives 2023-2024 #21 and #22, and a claim under the Colorado constitution. App. Vol. 1 at 7-23. They moved for a preliminary injunction on August 16, and after the Secretary[4] filed a response, the court held a preliminary injunction hearing on August 30. *Id.* at 3-5.

The district court denied the preliminary injunction. Ruling from the bench, the court first held that Advance Colorado sought a disfavored mandatory

[4] Advance Colorado originally named the Governor and Secretary of State as defendants. App. Vol. 1 at 7. The Governor argued he was immune under the Eleventh Amendment, *id.* at 154, and Advance Colorado stated at the hearing that they sought the preliminary injunction only against the Secretary. App. Vol. 3 at 667 (190:16-17). The Governor is no longer a defendant in either the district court or this Court.

injunction because the requested injunction would "order the Secretary of State to convene the Title Board." App. Vol. 3 at 668 (191:17-21). The court proceeded to consider whether the ballot titles were government speech, applying the factors identified in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). The court found

> none of [the *Shurtleff* factors] weigh in favor of the plaintiffs. And as a result of that, I find that the plaintiffs have failed to show that the speech at issue here is, in fact, compelled speech of them as opposed to simply being government speech. And because plaintiffs have failed to do that, I find that plaintiffs have failed to make a strong showing of a likelihood of success on the standard of a disfavored type of injunction.

Id. at 679 (202:2-9). The court went on to note that even if it did not apply the heightened standard for a disfavored injunction, "the Court also finds that plaintiffs have failed to demonstrate a likelihood of success on the merits" on the normal preliminary injunction standard. *Id.* at 679 (202:9-13).

SUMMARY OF THE ARGUMENT

Proponents of a ballot initiative can use any language they want in their initiative. They can use any language they want when describing the initiative to potential signatories. They can use any language they want in convincing voters to support the initiative. They can use any language they want in advertisements. But when the initiative is described on official government forms, the state of Colorado can describe the initiative in its own words.

The district court did not abuse its discretion when it denied Advance Colorado's request for a disfavored mandatory injunction. The ballot title Advance Colorado seeks to enjoin is government speech. It has a long history of being controlled by the government, the government exercises complete control over it, and the public recognizes it as government speech. This is true when the ballot title appears on the petition forms, and is even more obviously true in the other places the ballot title is used—in the Blue Book and on the ballot itself. Advance Colorado has presented no evidence or argument that the ballot title could possibly be its speech, rather than the government's, when voters encounter it in the Blue Book or on the ballot. Accordingly, the ballot title is government speech, and Advance Colorado has no First Amendment right it can assert against the government's own speech.

Additionally, Advance Colorado's claim that HB 21-1321 constitutes compelled speech fails because the government is not compelling it to do anything. Advance Colorado faces no prospect of jail, fines, or administrative penalties as a result of HB 21-1321. Rather, Advance Colorado contends that including the HB 21-1321 language will make it harder to enact its initiatives. But this Court has rejected that "the failure of a ballot initiative" is an adverse governmental action that can support a claim for compelled speech. *Semple v. Griswold*, 934 F.3d 1134,

1145 (10th Cir. 2019). Even if the ballot title was Advance Colorado's speech rather than the government's speech, its compelled speech claim still fails.

Advance Colorado devotes much of its brief to arguing that the titles set for its initiatives are false. At the outset, Advance Colorado could have immediately made this claim in the Colorado Supreme Court—which reviews the titles to ensure their clarity—but it chose not to. In any event, the titles are not false. They accurately describe certain fiscal consequences of the revenue limitations imposed by Advance Colorado's initiatives. Furthermore, the truth of the ballot titles is not relevant to determining whether they are government speech or whether Advance Colorado faces any adverse governmental consequences from them.

Advance Colorado's First Amendment theory would have sweeping consequences for Colorado elections. If ballot titles constitute compelled speech, there is no longer any role for the Title Board to play—proponents must be allowed to set their own titles. The state then must print whatever titles the proponents choose on its ballots, on its petition forms, and in its voter information booklet. This would invalidate not only Colorado's chosen system of setting titles, but would cast doubt on seventeen other states who use state officials to set titles.

Finally, alternate grounds that were not ruled on below also support affirming the district court or abstaining from this matter altogether. Under the

Pullman abstention doctrine, abstention is appropriate because an unresolved issue of state law—how the HB 21-1321 language interacts with the Board's obligation to set a clear title when tax refunds are anticipated—may resolve the constitutional question altogether, and the matter is of significant importance to Colorado such that its state courts should be permitted to resolve those issues. And the other preliminary injunction factors also support affirmance because Advance Colorado cannot show irreparable harm and the public interest favors denying the injunction.

ARGUMENT

I. The district court did not abuse its discretion by denying the preliminary injunction.

A. The standard of review to overturn a district court's denial of a disfavored preliminary injunction is particularly high.

Plaintiffs face several heightened burdens to reverse the district court's denial of their preliminary injunction. First, the standard to obtain a preliminary injunction is high. A "preliminary injunction is an extraordinary remedy never awarded as of right," so the plaintiff "must make a clear and unequivocal showing it is entitled to such relief." *State v. U.S. EPA*, 989 F.3d 874, 883 (10th Cir. 2021) (quotations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, . . . and that an injunction is in the public

interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (the balance of equities and public interest factors "merge when the Government is the opposing party.").

Second, the district court here denied the preliminary injunction, and this Court "review[s] the denial of a preliminary injunction under an abuse of discretion standard." *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009). A district court abuses its discretion only if it "commits an error of law or makes clearly erroneous factual findings." *Id.* (quotations omitted). This Court's "review of a district court's exercise of discretion is narrow, and [it] consider[s] the merits of the case only as they affect that exercise of discretion." *Id.* at 776. An abuse of discretion is "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* (quotations omitted).

Third, certain injunctions are "disfavored" and require a movant to "make a strong showing both on the likelihood of success on the merits and on the balance of the harms." *EPA*, 989 F.3d at 884 (quotations omitted). The district court held Advance Colorado's requested injunction is disfavored because it is a mandatory injunction, seeking to compel the Secretary of State to convene the Title Board. App. Vol. 3 at 668 (191:17-21). Advance Colorado does not challenge that finding.

Fourth, Plaintiffs bring, in part, a facial challenge to HB 21-1321's constitutionality. "Facial challenges to statutes are generally disfavored as 'facial invalidation is, manifestly, strong medicine that has been employed by the Supreme Court sparingly and only as a last resort.'" *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). Accordingly, "plaintiffs bear a 'heavy burden' in raising a facial constitutional challenge." *Id.* (quoting *Finley*, 524 U.S. at 580).

This Court reviews the district court's factual findings for clear error and its legal conclusions de novo. *See Harmon v. City of Norman*, 981 F.3d 1141, 1146 (10th Cir. 2020) (citation omitted).

B. Colorado's use of ballot titles does not violate Advance Colorado's First Amendment rights.

To succeed on its claim that HB 21-1321 unconstitutionally compels its speech, Advance Colorado must establish three elements: "(1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action." *Semple*, 934 F.3d at 1143; *accord* Opening Br. 18. It cannot establish the first or third element. As the district court correctly held, ballot titles are not Advance Colorado's speech, but the government's speech, and Advance Colorado cannot assert any rights in the government's own speech. Nor has Advance Colorado

identified a government action that compels it to speak. Unlike most compelled speech cases where fines or other penalties are threatened, Advance Colorado's only alleged compulsion is that its initiative might not pass. But the Tenth Circuit has held that the possible failure of a ballot initiative is not an adverse governmental action that can support a compelled speech claim. For both of these reasons, the district court did not abuse its discretion when it found that Advance Colorado was not likely to succeed on the merits of its claims.

1. The district court correctly held that ballot titles are government speech.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say." *Shurtleff*, 596 U.S. at 251. Accordingly, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

The district court held that ballot titles are government speech based on the factors announced by the Supreme Court in *Shurtleff v. City of Boston*. Under *Shurtleff*, courts must "conduct a holistic inquiry to determine whether the government intends to speak for itself or to regulate private expression." *Shurtleff*, 596 U.S. at 252. This analysis is "not mechanical," but is instead "driven by a case's context." *Id.* The Court identified three, non-exclusive types of evidence to guide the analysis: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* Each of these factors strongly supports the district court's conclusion that the ballot title is government speech.

First, the history of ballot titles in Colorado shows a long understanding that titles come from the government. As the district court found, the proper focus is not just on HB 21-1321, but on the titles themselves. App. Vol. 3 at 675-76 (198:20-199:5). Since 1941, Colorado's ballot titles have been set by a board comprised of three state officials. *See* 1941 Colo. Sess. Laws 480. And since 1993, some titles have required mandatory speech—titles for measures containing tax increases have included a special notification about the effects of the measure that would not reasonably be understood to come from the proponents. *See* App. Vol. 3

at 583 (106:14-16) (proponent of measures involving tax increases describing the mandatory title language for tax increases as "frustrating").

Advance Colorado has not identified any other history showing that ballot titles have historically been set by private citizens. Instead, it states that the Title Board has not historically had any discretion "regarding the subject matter and content of the measure" itself. Opening Br. 38. That's true, but beside the point: citizens remain free under HB 21-1321 to propose whatever they want in an initiative. But ballot titles, as distinct from the initiatives themselves, have long been set by the government.

The third *Shurtleff* factor—the extent to which the government controls the expression—is similarly conclusive. Even Advance Colorado concedes that "the speech in this case is highly regulated." Opening Br. 40. The process for setting a title is controlled by the government from end to end. The Title Board, consisting of three government officials, sets the title. The Board resolves objections to the title through the rehearing process. The Colorado Supreme Court reviews the Board's decisions, if appealed. The Secretary of State approves a petition format for circulation and reviews the submitted signatures. And the Secretary of State certifies the ballot titles for initiatives that received enough signatures to the ballot.

This governmental control over the title-setting process differentiates that process from the initiative itself. Proponents have complete control over the initiative and the government can only make suggestions about changes (through the review and comment process). But for titles, the roles are reversed: the government controls what the title says—subject to certain language required by Colorado law—and proponents can only make suggestions about changes to the title. The government thus exercises complete control over the title.

Nor is it surprising that the government exercises this level of control over the initiative process, because that process is itself a function of government. When citizens engage in the initiative process, they are exercising part of Colorado's core governmental authority—its legislative function. "The legislative power of" Colorado is "vested in the general assembly," with the power of the initiative "reserved by the people." Colo. Const. art. V, § 1(1), (2). The same constitutional provision that reserves the power of the initiative to the people of Colorado also recognizes that "the form of the initiative . . . petition may be prescribed pursuant to law." Colo. Const. art. V, § 1(10); *see also id.* § 1(2) ("Initiative petitions . . . in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state[.]"); § 1(6) ("The petition shall consist of sheets having

such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state[.]").

Finally, the district court correctly determined that the second factor—the public's likely perception as to who is speaking—also favored the state. The court found that Advance Colorado had presented "no testimony that anyone would . . . tend to believe that the language of the [title] is that of the electors or the people who initiated the petition." App. Vol. 3 at 678 (201:10-14). The only testimony on the issue came from Advance Colorado's witness, Dawn Nieland, "who testified that [voters] don't have any clue who wrote it." *Id.* at 678 (201:15-17); *see also id.* at 541 (64:4-6) (voters "do [not] understand where the ballot title comes from and who writes it"). But, as the Court recognized, the petition form itself "would disabuse any close reader" of the notion that the title is the speech of the proponents. *Id.* at 678 (201:19-21). The form states, right above the title: "The ballot title and submission clause ***as designated by the Initiative Title Setting Review Board*** is as follows." App. Vol. 2 at 232-40 (emphasis added).

Further, Advance Colorado only discusses the public's likely perception of the ballot title as it appears on the petition form. But the ballot title also appears on the ballot and in the Blue Book. Advance Colorado offers no argument or evidence that the public, upon reviewing the Blue Book or looking at their ballot, believes

they are looking at Advance Colorado's speech. Both of those documents are sent by the government, not initiative proponents, directly to voters. It defies reason—and finds no support in the record—to think that the public believes the title comes from the initiative proponents when it appears on the ballot and in the Blue Book.

Advance Colorado does not dispute the district court's factual findings that the public does not think the title is written by the proponents, let alone argue that they amount to clear error. Instead, Advance Colorado argues that the "public understands that these are not ***ideas*** created by the government." Opening Br. 39 (emphasis added). But *Shurtleff* doesn't instruct courts to look to the source of the ideas underlying the speech, but to the speech itself. In *Walker*, for instance, the Sons of Confederate Veterans wanted Texas to offer a specialty license plate that featured a Confederate battle flag. 576 U.S. at 203. The Court concluded that Texas's license plates are government speech, and "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature" of the speech. *Id.* at 217. Here, too, Advance Colorado may have generated the ideas contained in the two initiatives, but that does not alter the fact that the titles—whether they appear on the ballot, in the Blue Book, or on the petition form—are the government's speech.

Advance Colorado also cites *Meyer v. Grant*, 486 U.S. 414 (1988), which invalidated Colorado's ban on paid petition circulators. But *Meyer* did not address language used on government forms. Instead, *Meyer* focused on the interactive communication between the petition circulator and potential signatory. *See id.* at 421-22 ("[t]he circulation of an initiative petition of necessity involves . . . a discussion"; "[t]his will in almost every case involve an explanation"; "the circulation of a petition involves . . . interactive communication.") But HB 21-1321 does not regulate those interactive communications, as Advance Colorado remains free to advocate for its initiatives in any manner it chooses. *Meyer* neither required nor restricted the use of any language on the government forms used in petitioning, let alone on the ballot or Blue Book.

The district court therefore correctly applied the *Shurtleff* factors and concluded that ballot titles are government speech. This conclusion is also bolstered by the recognition in government speech cases that the ballot box, rather than the courthouse, provides the best remedy to government speech to which one objects. "[I]t is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207; *accord Shurtleff*, 596 U.S. at 252 ("The Constitution . . . relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.").

This case clearly illustrates the relevance of that check. The title language to which Advance Colorado objects was enacted through the democratic process. It can be repealed or changed through that process.

Finally, recognizing the government forms at issue here as government speech is also consistent with how courts have treated other government forms. *See Fowler v. Stitt*, --- F. Supp. 3d ---, 2023 WL 4010694, at *7 (N.D. Okla. June 8, 2023) (birth certificate is government speech); *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804, at *16 (N.D. Cal. Sept. 23, 2016) ("The information contained in a passport is unquestionably government speech" because the government "controls every aspect of [its] issuance and appearance" and it "is a government-issued document"). With respect to ballots specifically, "[b]allots serve primarily to elect candidates" and enact initiatives, "not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); *see also Ohio Council 8 Am. Fed'n of State v. Brunner*, 24 F. Supp. 3d, 680, 687, 691 (S.D. Ohio 2014) ("an election ballot is not a vehicle for sending a private message," nor is it "a forum for [] candidates' speech"). Accordingly, the forms through which Colorado exercises its legislative function are core government speech and are not the speech of initiative proponents.

2. No government action compels Advance Colorado's speech.

Even if the ballot title was Advance Colorado's speech rather than government speech, Advance Colorado is still not entitled to a preliminary injunction because the speech is not "compelled by some governmental action." *Semple*, 934 F.3d at 1143. To show compulsion, "the governmental measure must punish, or threaten to punish, protected speech by governmental action that is regulatory, proscriptive, or compulsory in nature." *Id.* (quotations omitted). For example, in *303 Creative LLC v. Elenis*, relied on by Advance Colorado, the Supreme Court found compelled speech because "a variety of penalties can follow" a speaker's refusal to engage in the mandated speech, including fines, cease-and-desist orders, and participating in mandatory educational programs. 600 U.S. 570, 581 (2023). There is no such governmental action here.

In *Semple v. Griswold*, the Court rejected a First Amendment challenge to a Colorado requirement that initiatives seeking to amend the Colorado Constitution must, unlike other initiatives, obtain a threshold number of signatures in all state senate districts. 934 F.3d at 1137. Like Advance Colorado, plaintiffs in *Semple* argued that this requirement compelled them to speak. The adverse governmental action identified in *Semple* was "the failure of [plaintiff's] ballot initiative." *Id.* at 1143. But the Court rejected that "the failure of a ballot initiative is an adverse

governmental action that discourages or penalizes the exercise of First Amendment rights." *Id.*; *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) ("It does not follow . . . that constitutional provisions making the enactment of particular types of law more difficult are . . . restrictions of speech.").

Advance Colorado faces no punishment, or threat of punishment, because of HB 21-1321. Instead, like the plaintiffs in *Semple*, Advance Colorado complains that HB 21-1321 "reduce[s] the likelihood that tax cut measures will make the ballot and be approved by voters." Opening Br. 40. But the potential failure of their initiatives is not an "adverse governmental action that discourages or penalizes" Advance Colorado's exercise of First Amendment rights. *Semple*, 934 F.3d at 1143. "[T]aken to its logical end, Plaintiffs' approach would embroil the federal courts in nearly every procedural hurdle imposed by state legislatures on the citizen initiative process." *Id.* Accordingly, "the consequence of which [Advance Colorado] complain[s] is not the type of state-mandated penalty necessary to establish a compelled speech claim." *Id.*

Advance Colorado also contends that the ballot title is compelled speech because it appears on Advance Colorado's own private property. Opening Br. 36. According to Advance Colorado, "[a] compelled disclosure that requires speakers to use their own property to convey an antagonistic ideological message . . . cannot

withstand First Amendment scrutiny." Opening Br. 30 (quoting *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 871 F.3d 884, 894 (9th Cir. 2017)). But Colorado law does not require initiative proponents to include the ballot title on their own private property. Rather, Colorado requires the title only on government forms—the ballot, the Blue Book, and the petition form. And while Advance Colorado is responsible for printing the petition forms, those forms are highly regulated under Colorado law and are subject to approval by the Secretary of State. *See* Colo. Const. art. V, § 1(6); *see also* Colo. Rev. Stat. § 1-40-113(1)(a); 8 Colo. Code Regs. § 1505-1, Rule 15.1.1(a). Indeed, failure to use the Secretary of State-approved petition form invalidates any signatures on that form. *See* Colo. Rev. Stat. § 1-40-113(1)(a). Nor does the fact that initiative proponents are responsible for their own printing have any relevance to the compelled speech analysis because regardless of who pays, initiative proponents still do not face any threatened punishment from the government based on the inclusion of ballot titles on petitions, the Blue Book, and ballots.

3. The accuracy of the ballot titles is irrelevant to whether they are government or compelled speech, but in any event, the HB 21-1321 language is accurate.

Much of Advance Colorado's brief is based on its assertion that the ballot title language called for by HB 21-1321 is "false." This argument suffers from three fatal flaws.

First, the alleged falsity is irrelevant because falsity is not an element of a compelled-speech claim. *See, e.g.*, *Semple*, 934 F.3d at 1143. Nor is it relevant to a consideration of government speech. *See, e.g.*, *Shurtleff*, 596 U.S. at 252. The district court thus did not find it necessary to address the truth or falsity of any of the language contained in the titles, and this Court also need not wade into the effect of Advance Colorado's proposed initiatives on projected tax surpluses to resolve this case.

Advance Colorado cites cases requiring that any compelled speech be "purely factual and uncontroversial." *See, e.g.*, *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). But that requirement arises only when there is, in fact, compelled private speech. So in Advance Colorado's primary case, *American Beverage Association v. City & County of San Francisco*, the Ninth Circuit held that a city ordinance requiring beverage manufacturers to place health warnings on sugar-sweetened beverages, or else be subject to

administrative penalties, was unconstitutional compelled speech. 916 F.3d 749 (9th Cir. 2019).[5] There was no dispute there as to whether the government or the private party was the speaker, nor was there any question that the administrative penalties constituted adverse government action. So the court proceeded to consider "whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *Id.* at 756 (citation omitted). But here, there is no such compelled speech, both because the ballot title is government speech and because Advance Colorado is not subject to any adverse government action. The truth or falsity of the speech is thus irrelevant.

Second, the argument that HB 21-1321 mandates false or misleading language is the argument made in Advance Colorado's abandoned state law claim. Advance Colorado brought a claim that HB 21-1321 is unconstitutional under article V, section 1 of the Colorado Constitution because it is misleading. App. Vol. 1 at 21-22. But the district court agreed with the Secretary that federal courts lack jurisdiction under the Eleventh Amendment to order state officials to comply

[5] Advance Colorado cites the panel opinion instead of the en banc opinion. The Secretary cites the en banc opinion here because the panel opinion no longer has precedential value after the grant of en banc review. *See Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 880 F.3d 1019, 1020 (9th Cir. 2018).

with state law, and Advance Colorado ultimately abandoned that claim altogether. App. Vol. 3 at 679-80 (202:18-203:13). While the state courthouse doors generally remain open to claims that a title is false or misleading,[6] federal courts are not the proper forum to determine whether projected state tax refunds render state ballot titles misleading. The Court should thus reject Advance Colorado's attempt to bring in through the back door what it could not bring in through the front door.

And third, Advance Colorado is simply incorrect that the titles are false, and the district court made no factual findings that they were. The ballot title for proposed initiative #21 begins: "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of $2.2 billion in property tax revenue[?]" App. Vol. 2 at 257. Advance Colorado first objects that its proposed initiative calls for a reduction in the growth of revenue, not a reduction of revenue itself. Opening Br. 16. But this cuts things too finely. If enacted, the measure would cause an estimated $2.2 billion reduction in property tax revenue that would otherwise be collected by local districts, a point fairly captured by the title. *See*

[6] In the specific context of 2023-2024 #21 and #22, Advance Colorado never sought review by the Colorado Supreme Court under Colo. Rev. Stat. § 1-40-107, and thus has waived any state challenge to the titles for these two initiatives.

App. Vol. 2 at 260; *see also* Colo. Rev. Stat. § 1-40-106(3)(i)(II) (defining "tax change" to include initiatives with "a primary purpose of lowering . . . tax revenues collected by a district").

Advance Colorado also argues that "outsized growth in property tax revenue" would already be subject to the cap on revenue growth from TABOR and so its measure would not reduce spending. Opening Br. 16. But because this measure would affect local property tax districts, whether the property tax revenues exceeded the tax limits would vary on a district-by-district basis, as former director of the Colorado Office of State Planning and Budgeting, Henry Sobanet, testified. *See* App. Vol. 3 at 577 (100:10-17). Additionally, many districts have already authorized their local governments to retain excess revenue. *See id.* at 562-63 (85:8-86:20); *see also* Colo. Const. art. X, § 20(7)(b). And even if some of the revenue would ultimately be refunded to taxpayers, the title is still correct when it says that the measure will cause a reduction in property tax revenue.

The title for #22 is not false for similar reasons. Contrary to Advance Colorado's argument, the title does not guarantee that expenditures will be reduced if the measure is enacted. Instead, the title states that "funding *for* state expenditures" will be reduced if the measure is enacted. App. Vol. 2 at 251 (emphasis added). Because a tax cut reduces revenue, which reduces the funding

available for state expenditures, the language is accurate. Nor does the title state that the measure will definitely reduce education spending, as Advance Colorado argues. *See* Opening Br. 15. Instead, the title states that the measure "will reduce funding for state expenditures that include but are not limited to education." App. Vol. 2 at 251. In other words, the measure will reduce funding for state expenditures, and education is one of the largest state expenditures. Again, the language is not false.

Advance Colorado contends that because current projections anticipate a taxpayer refund under TABOR, actual expenditures won't be reduced. This is wrong, for three reasons. First, the title does not say that actual expenditures will be reduced, only that funding for expenditures will be. Second, Advance Colorado cannot state with certainty that the expenditures will remain constant. Economic conditions could change, or voters could authorize the state government to retain additional revenue such that #22's tax reduction would decrease state expenditures. *Accord* Opening Br. 13 ("These are, of course, projections, not guarantees[.]"). Third, as Mr. Sobanet testified, a TABOR refund is itself a state expenditure, and there is no question that #22's tax reduction would reduce the size of a TABOR refund if state revenues exceed state limits. App. Vol. 3 at 576 (99:5-25).

Accordingly, even if the Court had reason to consider the truth or falsity of the language required by HB 21-1321, that language is not false.[7]

C. Plaintiffs' argument that they should not be bound by ballot titles they dislike leads to absurd—and far-reaching—results.

Advance Colorado's theory that ballot titles are compelled private speech should also be rejected because it would produce absurd results. Courts should avoid a constitutional interpretation that "would lead to absurd results that the provision cannot have been meant to produce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019). Here, although Advance Colorado focuses in its brief on only HB 21-1321's language on a petition form, the relief it seeks would also exclude the government's chosen title language from the government-produced Blue Book and even the ballot. In other words, Advance Colorado seeks to prevent the state from describing measures on the state's own ballot in the language the state has chosen. Instead, the state would have to print

[7] For similar reasons, Advance Colorado is not entitled to facial relief. "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications" and affects the "breadth of the remedy" available to the prevailing plaintiff. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) (citation omitted). Advance Colorado cannot show that the language required by HB 21-1321 is false in all its applications—it even admits that the language "might be true in certain circumstances." Opening Br. 31. Accordingly, Advance Colorado is not entitled to facial relief.

the language chosen by the proponents of the initiative. Contrary to Advance Colorado's contentions, it has no constitutional right to choose its own language for the ballot. *See, e.g.*, *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression.").

At points in its brief, Advance Colorado attempts to cabin the breadth of the relief required by a finding in its favor by asserting that it seeks only to prohibit false or inaccurate language in the titles. *See* Opening Br. 4. But at other points, Advance Colorado concedes that its argument does not turn on whether the language required by HB 21-1321 is true or false, admitting that "[i]t would be unconstitutional even if the message the government wished to include were perfectly true and accurate—and merely different from the message chosen by the private speaker." *Id.* At a minimum, this argument would apply with equal force to TABOR's similar provision requiring mandatory language in initiatives that contain tax increases. *See* Colo. Const. art. X, § 20(3)(c). But this argument would also functionally abolish the Title Board. Any time an initiative proponent would prefer a title that is "merely different" from the title set by the Title Board, Advance Colorado's position would require Colorado to print that title on petitions, in Blue Books, and on the ballot. The First Amendment does not so restrict Colorado from controlling the forms used to exercise its legislative power.

Nor is Colorado the only state with ballot titles set by an official or body other than the proponents. *See* Alaska Stat. § 15.45.180(a) (lieutenant governor with assistance from attorney general); Ariz. Rev. Stat. § 19-125(D) (secretary of state, approved by attorney general); Cal. Const. art. 2, § 10(d) (attorney general); Idaho Code § 34-1809(2)(a) (attorney general); 21-A Me. Rev. Stat. Ann. §§ 901(4), 906(8) (secretary of state and attorney general); Mich. Comp. Laws § 168.32 (director of elections and board of state canvassers); Miss. Code Ann. § 23-17-9 (attorney general); Mo. Rev. Stat. § 116.025 (secretary of state, approved by attorney general); Neb. Rev. Stat. § 32-1410(1) (attorney general); Nev. Rev. Stat. § 293.250(5) (secretary of state, in consultation with attorney general); N.D. Cent. Code § 16.1-06-09(1) (secretary of state, in consultation with attorney general); Ohio Const. art. II, § 1g (title board); Or. Rev. Stat. § 250.065 (attorney general); S.D. Codified Laws § 12-13-25.1 (attorney general); Utah Code Ann. § 20A-7-209 (office of legislative research and general counsel); Wash. Rev. Code § 29A.72.050(7) (attorney general); Wyo. Stat. Ann. § 22-24-317(a) (secretary of state and attorney general). Under Advance Colorado's sweeping interpretation of the First Amendment, Colorado's, and all these states', systems for setting ballot titles would be unconstitutional.

II. Alternative grounds, argued below and apparent from the record, also support affirming the trial court or abstaining altogether.

The Court should affirm the district court's ruling that Plaintiffs are unlikely to succeed on the merits of their claim. But other grounds also support affirmance. "To prevent cases from needlessly bouncing back and forth between district and appellate courts, this court is entitled to affirm a district court on alternative grounds that court didn't consider if those grounds are adequate, apparent in the record, and sufficiently illuminated by counsel on appeal." *Walton v. Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016). Specifically, the doctrine of *Pullman* abstention prevents federal courts from providing Advance Colorado relief here. And the other preliminary injunction factors—which Advance Colorado must satisfy but did not address in its opening brief—also support affirming the district court's order. The Secretary raised these issues below, though the district court did not rule on them. *See* App. Vol. 1 at 154-56, 164-65.

A. Abstention under *Pullman* is appropriate.

The Court should affirm. But in the alternative, the Court should abstain under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). *Pullman* abstention "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). *Pullman* abstention requires three elements:

> (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies.

Caldara v. City of Boulder, 955 F.3d 1175, 1179 (10th Cir. 2020).

These elements are satisfied here. First, no court has addressed whether the mandatory language in HB 21-1321 is unconstitutionally misleading under the Colorado Constitution for being unfair or misleading when budget forecasts anticipate a TABOR surplus. Nor has any court addressed whether the definition of "tax change" in HB 21-1321 includes situations, like in #21, that limit future revenue growth. These unresolved questions of state law are inextricably intertwined with Advance Colorado's First Amendment claims. Second, these issues are not only amenable to state court interpretation, but an expedited process exists to ensure that Advance Colorado can obtain speedy resolution of these questions from the state's highest court. *See* Colo. Rev. Stat. § 1-40-107(2). Finally, federal resolution of these questions about HB 21-1321 could hinder

important state interests because HB 21-1321 regulates the state lawmaking power itself, as exercised through the people's right of initiative.

Pullman abstention is discretionary. *See Caldara*, 955 F.3d at 1179. Given the importance of the state interests implicated here, and the potential for the state constitutional issue to modify or resolve the federal constitutional issue, the Court should abstain under *Pullman* if it does not affirm.

B. The other preliminary injunction factors, not addressed by the district court, also support denying the preliminary injunction.

To obtain a preliminary injunction, a plaintiff must demonstrate not only a likelihood of success on the merits, but also an irreparable injury and that the injunction is in the public interest. *See Winter*, 555 U.S. at 20. Advance Colorado's opening brief does not argue that either of these factors are met here.

Advance Colorado cannot show irreparable harm because it delayed seeking relief for its supposed constitutional injury. A plaintiffs' delay in seeking relief indicates that the harm it alleges is neither irreparable nor severe. *See, e.g.*, *Kan. Health Care Assn., Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994). Such delay can "indicate an absence of the kind of irreparable harm required to support a preliminary injunction." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). This rule applies in First Amendment

cases, like this one. *See, e.g.*, *Doe v. Banos*, 713 F. Supp. 2d 404, 415 n.15 (D.N.J. 2010) (plaintiff's "lack of urgency . . . undermines his claim of immediate and irreparable harm to his First Amendment rights"); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1220–21 (D. Utah 2004) (plaintiffs' "delay in seeking an injunction undermines their argument that they will suffer irreparable harm if an injunction does not issue" in case concerning First Amendment rights).

Advance Colorado delayed seeking relief in two ways. First, Advance Colorado waited more than two years after HB 21-1321 took effect on July 7, 2021 to file this lawsuit, even though it had previously sponsored another initiative that contained the mandatory language about which it now complains. *See* App. Vol. 3 at 492 (15:12-17:1). Second, with respect to 2023-2024 #21 and #22 specifically, Advance Colorado did not seek judicial review of the titles and did not even seek approval to circulate those petitions until August 4, 2023, months after the titles had been approved. *See* App. Vol. 2 at 347, 350. Advance Colorado then filed this federal lawsuit the next business day. This sort of gamesmanship and delay deprives Advance Colorado of the ability to claim an irreparable injury that justifies the equitable and extraordinary remedy of a preliminary injunction.

Finally, the public interest also favors denying the preliminary injunction. The elected officials of Colorado are in a better position than Advance Colorado or

the Court to determine the public interest. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("our democratically elected representatives are in a better position than this Court to determine the public interest") (quotation omitted). That applies with special force here. Not only have Colorado's elected representatives determined HB 21-1321 is in the public interest, but Advance Colorado has not sought to change the law, and instead seeks relief from the Court under the First Amendment. But in cases like this, "[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*, 596 U.S. at 252.

CONCLUSION

The Court should affirm the district court's order denying a preliminary injunction.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because this appeal involves a constitutional challenge to a state statute. Oral argument has been set by the Court for March 19, 2024.

Dated January 17, 2024.

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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because this motion contains 9,481 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and 10th Cir. R. 32(A) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word Version 2309 in 13-point Times New Roman for the case caption and 14-point Times New Roman for the body of the motion.

Dated: January 17, 2024

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