Supreme Court, State of Colorado Colorado State Judicial Building 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT MAY 24 2010 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2009) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2009-2010 #45 ("HEALTH CARE CHOICE")	
Petitioners: Dr. Mark Earnest, Peter Leibig, Albert Schnellbacher, Jr., AARP Colorado, the Colorado Community Health Network, the Colorado Coalition for the Medically Underserved, and the Colorado Consumer Health Initiative, **Respondents:** Linda Gorman and Jon Caldara, and **Title Board**: William A. Hobbs; Dan Domenico; and Dan Cartin	**▲COURT USE ONLY▲**
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PETITIONERS' ANSWER BRIEF	

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify that the brief complies with C.A.R. 28(g). It contains 2,965 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). It contain under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Mark G. Grueskin

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I. Initiative #45 contains multiple subjects.

That this measure contains multiple subjects is made clear by reviewing the Title Board's own recitation(s) of the measure's subject. In four places in the Opening Brief of the Title Board ("Op. Br."),[1] the Board states the initiative comprises one subject, but none of the descriptions of that one subject are the same:

- "preserving individuals' right to make choices about how to pay for health care";
- "preserving individuals' right to make choices about how to pay for health care without government interference";
- "preserving individuals' rights' to choose their own health care arrangements"; and
- "preservation of individual choice in health care – or , as the Board put it, 'the right of all persons to health care choice.'"

Opening Brief of the Title Board at 2, 3, 4, 9. The parallel between the first two descriptions is apparent; the emphasis of both is on choosing among health care payment options. The second of these two options is a tad suspect, given the qualifying phrase, "without government interference," but that is beside the point

[1] Only the Title Board filed an opening brief. Gorman and Caldara chose not to do so.

for purposes of this appeal as that phrase did not appear in the title. Both focus on allowing persons to have the right to choose how they will pay for their own health care.[2] The third option is too murky to be meaningful, as "arrangements" could mean almost anything that may be related to health care. And the fourth, which seeks to encapsulate the language that the Board did incorporate into the title, is inherently imprecise as an umbrella description that includes, but certainly is not limited to, heath care payment systems.

As noted in Petitioners' Opening Brief, the Board itself was uncertain about the nature of the measure when it set the title. There was never really consensus about whether the measure addressed choice about health care payment options, choice about everything related to health care, or something else. Petitioners' Opening Brief at 15-16. Frankly, the Board did not understand the measure well enough to set a single subject, much less agree that the initiative reflected one. That fault does not lie with the Board; the proponents crafted a measure that appears to be one subject (the right of choice about health care payment) cloaked as something else (the right of choice in all aspects of health care, as ultimately determined by the courts). As outlined above, the Board's descriptions of the measure's single subject betray a continuing uncertainty about the parameters of

[2] The prohibition against governmental mandates concerning insurance and preserving direct payments to health care providers are both geared to "limiting the State's ability to interfere in how they pay for their health care." Op. Br. at 5.

the single subject, or at least an acknowledgement that that subject is accurately described as dealing with heath care payment rather than the "right of health care choice." A measure that is written in such a manner as to challenge the voters' (or Title Board members') comprehension cannot proceed to the petitioning phase or the ballot. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999).

The Board's current position, reflected in its Opening Brief, requires this Court to make an either/or decision. *Either* the Proponents were correct that the measure addresses health care payment and every other possible choice to be made in the health care arena *or* the Board is correct that the measure actually only deals with health care payment. If the former is true, Initiative #45 violates the single subject requirement; if the latter is true, the title incorporated a not particularly relevant but extremely catchy political slogan and is thus misleading. The Board could not, however, be correct that the measure is limited to payment systems *and* that this topic is accurately and fairly described under the much broad rubric of "the right of all persons to health care choice." *See In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006) (an initiative grouping distinct purposes under a broad theme will not satisfy the single subject requirement).

Regardless of the right to health care choice as a separate subject, the Board argues that it is implausible to think that an initiative that both prohibits insurance mandates and also guarantees the option of private payment to health care vendors violates the single subject requirement. Op. Br. at 5. But, in that regard, this measure is not very different from the proposed initiative that violated the single subject requirement in *#55*. That proposal had the common theme of restricting government services to illegal immigrants, but one of its purposes was to decrease taxpayer expenditures associated with that targeted group and the other was to deny administrative services provided by government. *Id.* at 280. There, as here, some minor overlap existed as to the two subjects, but that overlap was restricted to the most general of themes (restricting non-emergency governmental services in *#55* and allowing choice in health care payments here). It simply is not true that, "without one (of the two payment provisions in the initiative), the State could evade the measure's goal of preserving individual choice by creating a different sort of mandate." Op. Br. at 5. Keeping government out of the insurance mandate business is not a necessary companion provision to preserving private payment options for health care consumers. To paraphrase this Court, the purpose of ensuring health care choice by prohibiting insurance mandates of any kind is not dependent on and clearly related to the purpose of preserving the option of personal payments to health care providers. *See #55* at 282.

II. "Right of health care choice" is a catch phrase.

The Board points to other terms and phrases that were determined not to be catch phrases – "just cause," "mediation," "criminal conduct," protect the environment and human health," and "management of growth." Op. Br. at 10. Yet, the Board does not mention one critical fact: in none of these cases did the objectors to the titles put any evidence on the record as to the political volatility of the language used by the Board. Not a shred. Without it, it is no surprise that the Court found that these words and phrases were "no more prejudicial in terms of voter perception" than any other phrases used in other ballot titles. *In re Title & Ballot Title & Submission Clause for 2007-2008 #78*, 184 P.3d 52, 61 (Colo. 2008).

That is clearly not the case "the right to health care choice."[3] There is ample evidence in this record that the phraseology upon which the proponents insisted was politically impactful and known to the proponents to be so. *See* Hearing Ex. 10 and 11 (health care language poll and evaluation of it that appeared on a website run by proponents). These were the words, recommended by a pollster and incorporated into one-sided TV ads that helped turn the national debate over the so-called public option in the health care reform. These were the words that

[3] The full phrase used in the measure and in the title is "the right of all persons to health care choice," but the "of all persons" language is largely superfluous, *see* Apr. 7 Tr. 71:15-20, and it is not routinely cited in Petitioners' argument as a result.

Gorman used in her op-ed to advocate the measure. These were words that were honed by a professional opinion shaper to achieve a single objective purpose – to attract "persuadables" and "generate support" by using convincing and evocative, rather than neutral, language. Hearing Ex. 10 at 3.

Further, the Board does not mention that the phrase "as rapidly and effectively as possible" has been deemed by this Court to have crossed the line of fairness as a political catch phrase. *In re Title, Ballot Title and Submission Clause of 1999-2000 #258(a)*, 4 P.3d 1094, 1100 (Colo. 2000). The Board is correct when it says that the goal behind prohibiting catch phrases is to avoid language that would be confusing, misleading, or prejudicial. Op. Br. at 10, 11. "As rapidly and effectively" was language that the Court felt was calculated to evoke a reaction that was unrelated to the fundamental, substantive legal assessment voters are asked to make. *#258(a)*, 4 P.3d at 1100. Given that, an overly broad phrase like "right to health care choice" will lead voters astray about the meaning of a measure that deals with health care payments and is an improper slogan as well.

It is difficult to understand why the Board did not follow its instincts, instincts that told the Board members the language the Proponents wanted was a politically opportunistic slogan. *See* Petitioners' Opening Brief at 27 (summarizing comments of Board members that this phrase "will be used in the campaign without question" and may well have been key part of the proponents' strategy).

Nor did they yield to the insight upon which the Board's legal defense of the title now rests – namely, that the measure deals with options for health care payment. The Board erroneously found that the use of the phrase, "right to health care choice," was neutral, informative, and fair. That decision should be reversed by this Court.

The Board chairman was concerned that to omit "the right of all persons to health care choice" would be problematic, as there would be no reference the measure's first sentence: "All persons shall have the right to health care choice." It appears he wanted to omit it if at all possible. "So if there were a way to avoid the potential catch phrase issue, that would be good, but I don't see how we can leave out something without the first sentence." Apr. 17 Tr. at 68:23-69:1. But leaving out a misleading, prejudicial reference did not trouble the Court in *#258(a)*. Nor should it have. There is no legal mandate that political dynamite must be detonated in a ballot title. And reading the measure so that this first sentence is a substantive element of the initiative requires a decoupling of the first sentence and the language that follows immediately thereafter. The Court has now ruled that such an approach is unwarranted; language contained within the same subsection must be read together, and the title must be crafted accordingly. *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009).

Finally, the Board's position is that the evidence in the record "simply shows that some phrases poll better than others." Op. Br. at 11. If a phrase goes to the core of a measure (which this one does not), the Board might have a point. But this measure is not about preserving the array of all health care choices – payment systems, medical professionals, medications including alternative medicines, experimental treatments, hospitals and surgical centers, long-term care, etc. It is, as the Board admits, about choice for the purpose of health care payments.

Using a phrase that may "poll better than others" has precisely the effect that goes to the core of judicial concerns about political catch phrases. This phrase will "generate support... merely on the wording of the catch phrase." *#258(a)* at 1100. *Compare* Exhibit 10 at 3 (Frank Luntz, the pollster, wrote that his recommended language was designed to "generate support" for a position against federal health care reform legislation). A phrase that polls well provides "[s]logans... tailored for political campaigns... for use in advertising or promotion," and when included in the ballot title, that language "tips the substantive debate surrounding the issue to be submitted to the electorate." *#258(a)* at 1100. This last point made by the Court in *#258(a)* is particularly telling. The Title Board violates its statutory duty where it "tips the substantive debate" by including a catch phrase or any prejudicial language in the title. C.R.S. §§ 1-40-106(1) (Board must set "a proper fair title"); 106(3)(b) (title must fairly and correctly state the true meaning of the initiative).

The phrase at issue here is proven to be effective in campaigns, given that ads using one or more iterations of it were part of the successful campaign to sway the national debate over a public health insurance option. Since the Board effectively admits that "right to health care choice" was not necessary to describing choice about health care payment systems, its use was misleading and prejudicial, and it should be stricken from this ballot title.[4]

III. The title is misleading in describing legislative authority in the health care field, should it pass.

The Board argues that there is no material difference between what Initiative #45's actually does (limiting the implementation or enforcement of legislative acts) and what the title says those changes are (prohibiting the adoption of certain laws).

As a general matter, the need for accurate ballot titles has never been greater.

> The initiative process in Colorado has proliferated, and accordingly, this court and the title board now deal with an increasing number of measures. More importantly, when the proposals acquire the requisite support to be placed on the ballot, the voters now deal with an increasing number of measures. **Particularly in this climate, we conclude that the fixing of an understandable title is of great importance.** We recognize that fixing a title in cases like this, where the measure is both detailed and internally circuitous, is a difficult task. However, the title board must nonetheless proceed. **We direct the board to begin the titles with a clear, general summary of the**

[4] A finding that the Board erred in setting a title that includes a catch phrase only requires that the Court revise the ballot title wording and that the Board employ it. *See, e.g., In re Title, Ballot Title and Submission Clause for 1999-2000 #215*, 3 P.3d 11, 16 (Colo. 2000). As a result, a finding that the title is misleading and/or contains a catch phrase does not have the irreversible effects of, say, a finding that the measure contains multiple subjects.

> **initiative**, followed by a brief description of the major elements of the initiative. **The titles, standing alone, should be** capable of being read and understood, and **capable of informing the voter of the major import of the proposal**, but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions.

In re Title, Ballot Title, and Submission Clause for Initiative 2001-2002 #21 and #22, 44 P.3d 213, 222 (Colo. 2002) (emphasis added).

Initiative #45 limits implementation of any statute, rule, or policy that would: (a) require insurance coverage; or (b) limit direct payment of health care providers. The title states that #45 prohibits the state from "adopting" any such change. The Board has thus blurred the difference between actual constraints on legislative authority and limits on the implementation or enforcement of laws, arguing that this is a mere "grammatical" distinction and that the effect of prohibiting adoption and constraining implementation is the same. In either event, the Board states, the State's hands would be tied as to (a) and (b) above. Op. Br. at 12-13. But it is not the job of the Title Board to portray a measure in terms of its effects; in fact, the Board is prohibited from doing so. *In re Title, Ballot Title & Submission Clause, and Summary for Petition on Political and Campaign Finance Reform*, 877 P.2d 311, 313 (Colo. 1994) (ballot title must describe an initiative's contents, not its effects).

Accuracy in describing a measure is paramount. Where the Title Board misstates a measure's affect on legislative authority, its work product is misleading and flawed. For instance, an initiative's summary addressed a measure's inclusion of services in the state's tax base. The Court found the Board's summary to be misleading because voters would think that no services were already being taxed (some were) and that the measure prohibited such taxation (when it merely conditioned taxation of services on a two-thirds vote of the legislature).

> We conclude that the summary's statement regarding taxation of services is untrue and misleading and likely to create prejudice among the voters. This is because, contrary to the statement in the summary, the proponents' proposal does not prohibit inclusion of services in the tax base, but rather only prohibits the addition of new service taxes to the tax base without the requisite legislative approval. Although the summary need not set out every detail and exception to the initiative, here brevity has been taken to the extreme.

In re Title, Ballot Title and Submission Clause, and Summary for "Tax Reform, 797 P.2d 1283, 1290 (Colo. 1990).

Thus, it is not enough to generally but inaccurately describe how a measure addresses the parameters of legislative power. The precise nature of the proposed change must be stated. Here, the Board could have stated that #45 has the purpose of "prohibiting the implementation and enforcement of any statute, rule, policy, or resolution" that requires insurance coverage or limits direct payment of health care providers. By incorrectly stating that the measure prohibits the adoption of certain laws, the Board erred. Just as in *Tax Reform*, the Board's handiwork must be

corrected so that voters are not confused about what it actually does when the measure is circulated for signature.

CONCLUSION

Initiative #45 violates the single subject requirement. The title set violates the requirements for a fair title, one that is not misleading. The Board erred, and this measure should be returned to the proponents (if there is a single subject violation) or the Board (if the title is prejudicial or inaccurate).

Respectfully submitted this 24th day of May, 2010.

ISAACSON ROSENBAUM P.C.

By: _____
Mark G. Grueskin

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2010, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was hand-delivered or sent via overnight delivery to the following:

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