SUPREME COURT STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT MAY - 4 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**▲ Case No. 10 SA 100
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OPENING BRIEF OF TITLE BOARD

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William A. Hobbs, Dan Domenico, and Dan Cartin, as members of the Title Board, hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

1. Whether Initiative #45 contains more than one subject.

2. Whether Board lost jurisdiction over the proposed initiative due to a statement allegedly made in the debate over the motion for rehearing.

3. Whether the measure is merely administrative in nature, and if so, whether that deprives the Board of jurisdiction to set a title.[1]

4. Whether the ballot title is prejudicial.

5. Whether the ballot title is inaccurate.

STATEMENT OF THE CASE

The Board adopts the statement of the case set forth in the Petition for Review.

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[1] The Board understands that while this issue was raised in the Petition, Petitioners no longer intend to press it. The Board therefore will not brief the issue, but simply notes that it continues to believe that the argument was properly rejected at rehearing because the measure is not, in fact, the sort of administrative action that is not fit for the initiative process, and even if it were, the Board has no authority to reject a proposal on that basis.

STATEMENT OF THE FACTS

Initiative #45 seeks to amend the Colorado Constitution by establishing a "right of all persons to health care choice" that would be protected by prohibiting any State law that requires individuals to participate in any health insurance plan or that prohibits them from making or receiving "direct payments for any lawful healthcare services."

The Board set the following title:

> An amendment to the Colorado Constitution concerning the right of all persons to health care choice, and, in connection therewith, prohibiting the state independently or at the instance of the United States from adopting or enforcing any statute, regulation, resolution, or policy that requires a person to participate in a public or private health insurance or coverage plan or that denies, restricts, or penalizes the right or ability of a person to make or receive direct payments for lawful health care services; and exempting from the effects of the amendment emergency medical treatment required to be provided by hospitals, health facilities, and health care providers or health benefits provided under workers' compensation or similar insurance.

SUMMARY OF THE ARGUMENT

The measure includes only one subject: preserving individuals' right to make choices about how to pay for health care. The title accurately reflects all of the material aspects of the measure and does not contain any impermissible catch phrases.

ARGUMENT

I. The measure contains only one subject: preserving individuals' right to make choices about how to pay for health care without government interference.

Petitioners claim that the initiative violates Article V, § 1(5.5) of the Colorado Constitution, which forbids submitting measures containing more than one subject. To "run afoul of [this] requirement, the text of a measure must have at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 352 (Colo. 2009) (quotation omitted). A proposed initiative that "tends to effect or to carry out one general objective or purpose presents only one subject." *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule must be liberally construed to avoid the imposition of undue restrictions on initiative proponents, *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002), and this Court "will engage in all legitimate presumptions in favor of the propriety of the Board's actions." *#24*, 218 P.3d at 353 (quotation omitted).

Initiative #45 has only one subject: preserving individuals' rights to choose their own health care arrangements. All of the measure relates to this subject. Section 1 declares that all persons have the right to health care choice and prohibits any law or regulation that interferes with that right by either requiring individuals to purchase a particular health care plan or forbidding the paying or receiving of direct payment for lawful health care services. Section 2 states that the measure does not apply to certain mandatory services or workers' compensation benefits. Section 3 defines "lawful health care services." Section 4 declares the measure's intent to reflect powers reserved to the State and to the people in the United States Constitution. Sections 5 and 6 are common provisions regarding implementation and severability of the measure.

The Petitioners assert that the initiative deals with three subjects: (1) the applicability of state or federal mandates to participate in any health care plan, (2) preservation of individuals' ability to personally pay health care providers, and (3) "a new constitutional 'right' of 'choice' that, according to the Proponents at the rehearing, applies to every aspect of health care." Pet. at 4.

The Board and this Court may reject a measure only if it "has at least two distinct and separate purposes that are not dependent upon or connected with each other." In re Title, Ballot Title and Submission Clause for 2005-2006 #55, 138 P3d 273, 277-78 (Colo. 2006). The Court's analysis is guided by the purpose of the rule, which is to "protect" against proponents that might seek to secure an initiative's passage by joining together unrelated or even conflicting purposes and pushing voters into an all or nothing decision. *#24*, 218 P.3d at 353.

The Board was correct to recognize that the Petitioners cannot plausibly establish that forbidding the State from requiring individuals to purchase particular health care insurance plans and from banning the purchase or sale of health care products are not connected with each other. Both quite clearly seek to protect individual choice about health care by limiting the State's ability to interfere in how they arrange to pay for their health care; in the title's language, they seek to protect individuals' right to health care choice. These two provisions reinforce one another: without one, the State could evade the measure's goal of preserving individual choice by creating a different sort of mandate. These limits on government discretion work in concert; certainly they

cannot be said to be unrelated or conflicting. They therefore fit within the single subject rule.

The basis for the third alleged subject is not entirely clear, but what is clear is that it is not based on anything in the measure or the title. The Petition instead states that "at the rehearing" the proponents declared their intent to create "a new constitutional 'right' of 'choice' that . . . applies to every aspect of health care." Pet. at 4. This appears to be based on the allegation that "in the debate over the Petitioners' motion for rehearing, the Proponents made a substantial change in the measure by broadening its stated applicability (i.e., its single subject) from choice in health care payment systems (which had been their position prior to rehearing) to include choice in all aspects of health care as a guaranteed constitutional right." *Id.* at 5.

Petitioners are asking the court to determine the measure's efficacy, construction, and future application, a task the Court does not perform until the voters have approved the measure. *In re Title, Ballot Title and Submission Clause 1999-2000 #258(A)*, 4 P.3d 1094, 1097-98 (Colo. 2000). This argument may be rejected in much the same way the Court rejected the argument in *In re Title, Ballot Title and Submission*

Clause 2007-2008 #62, 184 P3d 52 (Colo. 2008). There, the Court held, "Petitioner speculates about the effects of the measure, postulating that if the measure is interpreted in a way that fits his conclusions, then the measure will have multiple effects. This approach is erroneous." *#62,* 184 P.3d at 59; *see also #24,* 218 P.3d at 353 (proper single-subject analysis requires that an initiative be "reviewed as a whole rather than piecemeal, and individual statements are examined in light of their context"). Since, as explained in section II below, the Petitioners' reading of #45 is even more of a reach than that put forward in *#62,* the Court can reject this single-subject challenge without addressing whether a "right of choice in all aspects of health care" would actually be an additional subject.

II. Neither the proponents nor the Board made a substantial change in the measure during the debate over the motion for rehearing.

The measure was not changed, substantially or otherwise, during the debate over Petitioners' motion for rehearing. The best evidence for this is that the measure itself was precisely the same after the hearing as it was before – that is, contrary to the Petitioners' statement, the measure was not changed during the hearing. *See* App. A. If more

evidence than this is necessary to reject this argument, the Court can look to the titles set by the Board to see if some substantial change in the understanding of the measures took place at the rehearing. *See #24*, 218 P.3d at 354 (titles "reflect contextual understanding" of the measures). Yet, like the measure itself, the titles were left unchanged at the rehearing. *See* App. B. Since neither the text nor the contextual understanding of the measures that will be presented to voters were changed in any way, let alone substantially, during the rehearing, this argument has no merit.[2]

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[2] If the Court reviews the recording of the rehearing, it will note that this argument appears to be based on the colloquy between the Board and the representative of the Proponents regarding the interaction of paragraphs (1)(b) and (3) of the measure. The Board quite properly recognized that the proponent's point was that under the measure, the State could not limit individuals' choices about how to pay for treatments that remain legal, but it would *maintain* its authority to ban particular medical treatments under paragraph (3) – essentially the opposite of what the Petition suggests. Even if the Petition's characterization of a particular statement were accurate, however, a single, off-the-cuff comment at the Board's hearings and rehearings cannot be dispositive of intent. Instead, the entire discussion must be reviewed and analyzed. See *Johnson v. Dep't of Treasury*, 700 F.2d 971, 980 n.24 (5th Cir. 1983); *Church of Scientology of California v. United States Dep't of Justice*, 612 F.2d 417, 425 (9th Cir. 1979) (grammatical formalities not always observed during course of Senate debate) If individual statements in the text of a measure itself must be "examined in light of their context" in the titles and otherwise to determine their meaning, *#24*, 218 P.3d at 353, then individual statements made orally by a proponent at a Board hearing cannot be viewed as the source of "substantial changes" in a measure without that change being reflected in the measure or titles. In the absence of any change to either the measure or titles at the rehearing, the Court should hold that whatever may have been said during the discussion there, it did not cause a "substantial change in the measure."

III. The title is clear, fair, and does not contain an impermissible catch phrase.

A. "Right of all persons to health care choice" is not an impermissible catch phrase.

Petitioners cannot meet their burden of showing by convincing evidence that "the right of all persons to health care choice" is a catch phrase. "Catch phrases are words that . . . draw" attention to themselves and trigger" a favorable response[, generating] support for a proposal that hinges not on the content of the proposal but merely on the wording of the catch phrase." *#258(A)*, 4 P.3d at 1100.

The title is not prejudicial or misleading. The measure's subject is, undoubtedly, preservation of individual choice in health care – or, as the Board put it, "the right of all persons to health care choice."[3] The phrase is a highly generic phrase – if it is susceptible of criticism, it should be that it is overly generic.[4] It is, on its face, less weighted with

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[3] The Petitioners might plausibly argue that a more specific description of the subject would narrow the description to choice of health care financing or something similar. Whether the Court might believe more specific language would be preferable does not warrant its overturning the contrary decision of the Board. See *#62*, 184 P.3d at 58 ("[W]e will not rewrite the titles or submission clause for the Board, and we will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.")

[4] Indeed, the Petitioners themselves even admitted at one point at rehearing that the phrase might be better described as meaningless.

meaning than many the Court has previously approved: "just cause," "mediation," *see* #62; "criminal conduct," *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008); "protect the environment and human health"; *In re Proposed Initiative 1997-1998 #112*, 962 P.2d 255, 256 (Colo. 1998); "management of growth," *In re Proposed Initiative 1999-2000 #256*, 12 P.3d 246, 257 (Colo. 2000).

To bolster their argument that "right of all persons to health care choice" is nevertheless a politically charged catch phrase, the Petitioners submit, as they did to the Board, a number of articles and memoranda highlighting that proponents and like-minded groups have recommended emphasizing "choice" when discussing health care reform proposals. This cannot turn an innocuous phrase into a catch phrase.

The reason for the catch phrase prohibition is to prevent confusion and prejudice; it is not to forbid the use of language that proponents might also use in their campaigns. Such a prohibition would make the Board's job effectively impossible. The Petitioners' evidence does show that voters might prefer to hear about health care choice than about "the right to spend my own money for my own healthcare." See first page of Exhibit 10. This does not show that either phrase is an

impermissible catch phrase – it simply shows that some phrases poll better than others. Surely the same would be true of "just cause," "mediation," "criminal conduct," "protect the environment and human health"; "management of growth," and many others this Court has previously approved. Can there be any doubt, to take but one example, that Frank Luntz, had he been interested in the issue, would have recommended using "protect the environment and human health" over other alternatives?

This Court's precedents show that it is not enough to argue that the title uses words that Petitioners or their supporters might favor.[5] The burden on petitioners claiming the Board has used a catch phrase must be to show that the phrase is misleading or prejudicial. These Petitioners have failed to do so.

The phrase is hardly the sort of phrase that the Court has found to be an "appeal to emotion," *#258(A)*, 4. P.3d at 1100, that is weighed down with pre-existing understandings that obscure the true purpose of

[5] This might show that Frank Luntz or others might wish to make it a catch phrase by encouraging like-minded people to use it; but there is no evidence he has succeeded in doing so at this point.

an initiative. *See id.*, *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008). It is therefore not a catch phrase.

B. The title accurately reflects the restrictions the measure would put on state government.

The Petition's last argument is that the title is inaccurate because the measure would not in fact prohibit the State from adopting any laws "or even address the legislative authority of the General Assembly or the rulemaking or policymaking authority of the executive branch of state government; it merely limits the implementation of any adopted measures" that address (a) mandated insurance or (b) restrictions on direct payment. Pet. at 5-6. This assertion is without merit.

The operative language of the measure is that "No statute, regulation, resolution, or policy adopted or enforced by the State of Colorado, its departments and agencies . . . shall" do (a) or (b). The relevant language of the title is that the measure "prohibit[s] the State . . . from adopting or enforcing any statute, regulation, resolution, or policy that" does (a) or (b).

It is the legislature and the executive branch that "adopt or enforce" "statutes, regulations, resolutions, or policies." Under any

reasonable reading, the two statements say the same thing: the measure would prohibit any State effort to do (a) or (b). The different grammatical requirements of writing the measure and writing the title and submission clause mandate slightly different sentence structure, but the meanings are identical.

CONCLUSION

The actions of the Board should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by FedEx overnight, at Denver, Colorado, this 4th day of May, 2010 addressed as follows:

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