Supreme Court, State of Colorado Colorado State Judicial Building 2 East 14th Avenue, Suite 400 Denver, CO 80203	
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' OPENING 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 7,031 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.

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Mark G. Grueskin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUES PRESENTED

Whether Initiative 2009-2010 #45 addresses multiple subjects, as it deals with:

(a) the applicability of state or federal mandates to participate in any public or private health care plan or benefit;

(b) the preservation an individual's ability to personally pay health care providers; and

(c) a new constitutional "right" of "health care choice" that surfaced for the first time at the rehearing and applies to every aspect of health care.

Whether the Title Board lost jurisdiction when the Proponents made a substantial change in the asserted meaning of the measure by expanding it from choice in health care payment systems to the guaranteed constitutional right of choice in all aspects of health care.

Whether the ballot title is prejudicial because it contains a political catch phrase – "the right to health care choice" – that is intended to and will unfairly characterize the matter in voters' minds.

Whether the title is inaccurate, as the measure does not actually "prohibit… the state from adopting any statutes, regulations, resolutions, or policies…" but

merely limits the implementation of federal and state laws regarding insurance mandates and private payments for health care services.

STATEMENT OF THE FACTS

Gorman and Caldara (hereafter "Proponents") drafted Initiative 2009-2010 #40 relating to "Health Care Choice." This measure was reviewed by the directors of the Office of Legislative Council and the Office of Legislative Legal Services. Later, Proponents filed that measure with the Title Board, which considered it on March 3. The Board refused to set a title, however, because Proponents made a "substantial change" to the measure, prior to submission to the Board, a change that did not emanate from the review and comment process. *See* C.R.S. § 1-40-105(3). Specifically, before submitting to the Title Board, Proponents added "contract" to the list of legal measures – "statute, resolution, regulation, or policy" – affected by their proposal, even though this issue never was discussed with legislative staff.[1]

Proponents submitted a second version of their measure to the legislative offices, and it was designated Initiative 2009-2010 #45 (the measure before this Court in this appeal). This version omitted the term "contract" from the earlier

[1] Proponents had also deleted the measure's provisions allowing Coloradoans to purchase insurance policies approved in other states but not in this State, although but this issue had been raised during the review and comment process.

draft but modified the definition of "lawful health care services" to apply to those health care services not prohibited by Colorado law. The legislative offices deemed this revision to be non-substantial, and Proponents bypassed the review and comment process and submitted their final draft of #45 to the Title Board for the March 17 Title Board hearing.

Initiative #45 deals with consumer choice in health care payment systems under the rubric, "right of all persons to health care choice." It seeks to insulate residents of Colorado from federal health care reform legislation, on the one hand, and from any state legislation, rule, or policy that requires health insurance coverage, on the other. It also guarantees each person the ability to make direct payment for lawful health care services.

Proponents were always clear about this mission. They stated it in many forums and in many ways. First, Proponent Jon Caldara stated these objectives when he publicly announced the measure.

> In this -- in this addition to the Bill of Rights in Colorado, it guarantees that all persons shall have a **right of health care choice**. **What that means is that (neither) the State nor the Federal Government can mandate someone to purchase an insurance project -- product or to participate in any public or private health care plan or benefit**. Furthermore, it protects a private ability to buy health care services.

Hearing Ex. 1 and enclosed computer disc[2] (hereafter "hearing Ex. 1"); Apr. 7 Tr. 6:12-21 (emphasis added). Then, he made these goals clear when in presenting #45 to the Title Board on March 17. The single subject was said to be "quite simply… (the) issue of health care choice, the right of all Coloradans to be free from being forced into a public or private health care plan." Mar. 17 Transcript ("Tr.") at 5:8-12 (attached hereto).

In writing about the proposal within days of Caldara's announcement, Caldara's co-Proponent, Linda Gorman, agreed with this assessment. "The Initiative would prohibit Colorado government from requiring you to purchase health insurance." Hearing Ex. 4. She also stated, "You have the right to buy the best available insurance policy for you and your family…. The Health Care Choice Initiative would protect you from politicians who want to deprive you of choice and increase your insurance premiums and taxes." *Id.* The Proponents even broadcast this message on their "Defend Colorado from ObamaCare" fan page on Facebook,[3] and Caldara did the same on his organization's website.[4]

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[2] The computer disc submitted to the Board and the Court contains electronic formats of Hearing Exhibits 1-10. However, Hearing Ex. 1 can be viewed at *http://www.youtube.com/watch?v=jnnSymnbno0* or by using the following shortened web address: *http://tinyurl.com/A45rally*.

[3] "Independence Institute President Jon Caldara is calling for an amendment to the Colorado Constitution that would opt Colorado out (of) the onerous health

At the April 7 rehearing, Proponents were met with the Petitioners' (hereafter "Earnest") very thorough evidentiary presentation about the status of "the right of all persons to health care" as a prohibited catch phrase. In response, they conducted an abrupt about-face, maintaining at the rehearing that their measure was not limited to health care payment systems but really addressed every possible conception of "the right to health care choice."

> Let me make it very clear. This is about a right to our health care choices. And in connection therewith, we have taken two aspects of that and clarified. **That doesn't mean there are not other rights to health care choice. It means those other rights will be left for interpretation by the courts**, but that it is a basic right here in Colorado to do so.

Apr. 7 Tr. 49:5-12 (emphasis added) (attached hereto).

Immediately after the Proponents' eleventh hour announcement, the Board chair highlighted the uncertainty around the "right to health care choice,"

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insurance mandates coming out of Washington(,) D.C." On April 22, Gorman posted: "The proposed health care freedom of choice amendment says that Colorado government cannot make you buy health coverage." Exhibit 12 (attached hereto). *See In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 280-81 (Colo. 2006) (Court took note of proponents' website to determine the scope and single subject of a proposed ballot measure).

[4] Caldara's organization, The Independence Institute, has a website dedicated to this issue – Patient Power. There, he wrote, "As Obama Care becomes (sic) closer to reality, we in Colorado have the right to say 'No'…. [W[e will be introducing language to amend the Colorado Constitution to excempt (sic) Colorado from Obama Care." Exhibit 13 (attached hereto).

commenting, "whatever that may mean." *Id.* at 50:18-19. Another board member asked whether #45's new purpose also protected the right to abortion, and the Proponents indicated that it did since abortion is now a "legal medical practice" in Colorado. *Id.* at 51:19-52:2. Later, perhaps realizing the political baggage they had just taken on, the Proponents changed their minds, stating that of all elements of health care to which this new right of health care choice could apply, the right to choose an abortion was not among them. *Id.* at 61:4-17. The Proponents also said their measure implicates the right to choose one's own doctor, but whether such a right actually exists under #45 is uncertain and would ultimately be left up to the courts. *Id.* at 51:8-17; 52:8-12.

Earnest renewed his single subject challenged over the Proponent's radical change of course and the newly announced, broad-ranging, ill-defined nature of this measure. *Id.* at 57:5-59:24. The Board denied the renewed single subject motion and set a title.

Earnest raised several issues as to the wording of the ballot title. Recent television ads, newspaper op-ed pieces, and polling reports were submitted to demonstrate that "the right to health care choice" is a prohibited catch phrase. No contrary evidence was submitted to the Board. Despite its concerns and the alternative language proposed for the title, the Board retained this phrase. The

Proponents strongly urged the Board not to use any wording but "the right to health care choice" because their measure contains this phrase. *Id.* at 49:13-24.

Earnest objected that the ballot title misstated the actual working of #45. The measure itself does not "prohibit the adoption" of certain laws and policies; it only blocks their implementation. Despite the express wording of their measure, the Proponents insisted that their measure was a restriction on legislative powers. *Id.* at 53:24-55:3. The Board deferred to this interpretation and left the challenged language intact.

The title set by the board reads as follows:

> 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.

STATEMENT OF THE CASE

The Title Board met on March 17 and found Initiative #45 to comprise a single subject and set a ballot title. Earnest timely filed a motion for rehearing, which was heard on April 7. The Motion was denied, and this appeal followed.

SUMMARY

Confronted with an evidentiary showing at the Title Board rehearing about the political tilt in the phrase, "right to health care choice," Proponents transformed Initiative #45 and, before the Board, created an entirely new scope for their measure. For months, this proposal was designed to create Colorado as a "sanctuary state" from the federal health care reform package, recently adopted by Congress. In that federal battle, "the right to health care choice" emerged as an effective cudgel. Polls and television ads, presented to the Board, established that fact. Proponents had adapted that phrase to their own use, making "the right to health care choice" a way of describing the prevention of governmental mandates concerning health care payment systems. It was a politically calculated move to take advantage of effective political messaging over national issues.

At the Title Board rehearing, these polls and ads were placed in evidence, and the Proponents reconfigured their explanation of this measure to avoid the political catch phrase allegations made by Petitioners. To accomplish this, Proponents highlighted – for the first time – an amorphous "right to health care choice," one that reflects the same phrase in the initiative text but still is undefined except that it is asserted to provide "choice" in all elements of the health care – not just those dealing with payment for services. The Title Board agreed to this

recasting without understanding what the measure would, or was intended to, do. Having dodged the political catch phrase bullet, though, Proponents opened a new issue concerning their initiative's subject. The new "subject" of Initiative #45 was so general as to violate the single subject requirement, and the Board thus erred in setting a title. It evidently combines choice in payment systems, choice in treatment, choice in health care professionals, choice in facilities, and an untold number of other "choices." Actually, this change was so significant that Proponents should have been required to resubmit their measure to the legislative offices before it could be heard by the Title Board.

If a title was to be set, the Board erred by incorporating a political slogan as the very first words a petition signer or voter would see. No one on the Board disputed the political punch associated with "the right to health care choice." Yet, the Board members refused to use less inflammatory wording in the ballot title. This failure was also an error.

Finally, the Board incorrectly described a key element of the measure. The title states that the legislature is prohibited from enacting certain statutes. The initiative does no such thing. It merely limits the implementation of any health care law or regulation to prevent insurance mandates or changes to the private

payment of health care bills. Describing the measure as a change in law-making power, rather than as a hurdle to implementation of certain laws, was error.

For one or more of the stated reasons, the decision of the Title Board should be reversed.

LEGAL ARGUMENT

I. The Title Board lacked jurisdiction to set a ballot title.

A. The initiative violates the single subject requirement.

1. Standard of review in determining an initiative's single subject.

No title may be set for an initiative if that measure contains more than one subject. Colo. Const., art. V, sec. 1(5.5). This requirement ensures that ballot measures are not so convoluted that they conceal provisions that would come as a surprise to, or act as a fraud upon, voters who thought the measure addressed one basic topic, only to find later that it also achieved discrete objectives that were not dependent upon or necessarily connected with each other. *In re Title, Ballot Title and Submission Clause of 2007-2008 #17*, 172 P.3d 871, 873 (Colo. 2007) (hereafter *#17*). An overarching topic does not necessarily reflect multiple subjects, but the sheer breadth of a subject is an indicator that the measure may contain more than one subject. "At first glance, the concept of a single subject

seems straightforward; however, an initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms." *Id.*

This Court does not engage in an evaluation of the wisdom of the proposed policy. Nor does it construe the matter except as necessary to evaluate its compliance with the single subject requirement. *In re Title, Ballot Title and Submission Clause of 1999-2000 #258(a)*, 4 P.3d 1094, 1097 (Colo. 2000) (hereafter *#258(a)*). The purpose of this assessment is to "root out incongruous subjects." *#17* at 879 (Eid, J., dissenting).

The proponents of an initiative bear the "ultimate responsibility for formulating a clear and understandable proposal for the voters to consider." *In re Title, Ballot Title and Submission Clause for 1999-2000 #33*, 975 P.2d 175, 176 (Colo. 1999).

2. Initiative #45 represents multiple subjects.

There are at least three distinct subjects in #45: (1) precluding the state or federal government from mandating health insurance coverage: (2) preserving the ability of a person to pay for health care services directly with a provider; and (3) an overarching "right to health care choice."

The first subject deals with the ability of government to require that individuals carry health insurance of any sort. Taking the Proponents at their

word, this is a matter of placing a check on governmental authority over individual prerogatives. Proponents seek to allow persons to opt for their own preferred form of insurance – or no insurance at all. In other words, they seek to insulate any person in Colorado from federal or state insurance mandates.

In truth, of course, Proponents are focused on the recent health care reform package. All of their public statements reinforce this conclusion. Whether they can legally exclude Colorado from federal legislation is doubtful, but that issue is for another day. For purposes of this proceeding, Proponents clearly seek to limit government's role in establishing insurance mandates.

The second subject is purely an issue of private dealings between an individual and his or her health care provider. This subject does not address insurance or benefit plans. It addresses the private financial relationship between a patient and his or her doctor or hospital.[5]

The third issue is the Proponents' freshly minted, overarching "right to health care choice." There are several single subject issues with regard to such a "subject."

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[5] Proponents were clear about these separate goals in their announcement of the measure. "[T]his law does three very basic but important things." Exhibit 1; Apr. 7 Tr. at 6:12-13. At that time, their proposal also allowed Coloradans to buy insurance products that were approved in states other than Colorado, but that issue was dropped from the measure that has advanced to this state.

(a) An overly broad concept is not a single subject.

No one – including the Proponents – really knows what this newly created right means or will accomplish. The Board could not say, and the Proponents were likewise uncertain about what their measure would do (except to exclude the right of choice to one medical procedure, an abortion).

This level of generality violates the requirement that an initiative reflect a single subject. If the Proponents and the Title Board members cannot say with some precision what a measure addresses, its untold ramifications are certain to confuse or surprise voters. One major purpose of the single subject requirement is to "prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon the voters." C.R.S. § 1-40-106.5(1)(e)(II). This single subject concern about surreptitious provisions is in evidence where "voters cannot comprehend what is being proposed." *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 261 (Colo. 1999).

An overly general topic area is not a subject. "Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Initiative 1996-4*, 916 P.2d 528, 532

(Colo. 1996). An unduly broad measure has just such potential – to surprise voters because no one knows what the measure is to do.

Likewise, a measure that purports to regulate certain procedures (health care payment systems) but layers on top of that purpose one or more changes to fundamental constitutional rights (an all-encompassing "right to health care choice") cannot be one subject. *In re Title, Ballot Title and Submission Clause for Initiative 2001-2002 #43,* 46 P.3d 438, 448 (Colo. 2002). The Board erred in overlooking the effect of this amalgamation of disparate provisions.

(b) The Board did not actually agree on the nature of the single subject of #45.

The Title Board cannot set titles where it does not know what a measure is designed to accomplish. Here, the Board overlooked its primary responsibility – to first "reach a definitive conclusion as to whether the initiatives encompass multiple subjects." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25,* 974 P.2d 458, 468 (Colo. 1999). Key to that determination is the ability to actually enunciate the measure's one subject.

> [T]he Board has submitted to us titles for which the general understanding of **the effect of a "yes" or "no" vote will be unclear**…. In cases such as this one, **where the Board has acknowledged that it cannot comprehend the initiatives well enough to state their single subject in the titles,** we hold that the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent. When writing future titles, **the 'connection**

> **between the title and the initiative must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to understand it**…' Further, such connection should be within the comprehension of voters of average intelligence.

Id. at 469 (citations omitted).

Instead, the Board simply accepted the Proponents' rendition of the subject – "the right of all persons to health care choice" – even though its meaning was never really determined. The Board certainly did not reach a meeting of the minds about whether the "right to health care choice" meant anything in particular. One board member felt, and the Proponents agreed, that the overarching right was a key, substantive element that added rights to the insurance mandate/private payment elements of the measure.

> MR. HOBBS: But the first sentence (of the measure) carries with it more than what follows, that there really – you're intention as a proponent is to grant in the Bill of Rights a right to health care choice, whatever than may mean, and what follows are two applications, examples, whatever, but there's more in the measure than what is in the second part.
> MR. CALDARA: Absolutely. I can't imagine that not being clear by the words we've used here.

Apr. 7 Tr. 50:15-23.[6]

[6] Comments by the Board members are relevant in assessing the single subject of an initiative. *#43, supra*, 46 P.3d at 445 n.8 (Colo. 2002).

A second board member disagreed, insisting that the measure's first sentence was just a broad declaration and, as such, essentially meaningless, which he took to reflect the Proponents' comments.

> MR. DOMENICO: I actually don't view that (the sentence about a right to health care choice) as a central feature of the measure…. I think in our colloquy with Mr. Caldara it became fairly clear that this isn't meant to do much other than those two things (relating to preventing governmental insurance mandates or preventing private payments for health care)…. And if it does a lot, then (Earnest) may be right, that we have a problem with single subject or jurisdiction.

Id. at 69:3-4, 14-16, 19-21.

The third member felt that #45, after the Proponents' revelation about the breadth of "health care choice," was still a single subject. In his opinion, changes affecting health care payment systems could fall within the overall rubric of the "right to health care choice." *Id.* at 39: 6-8. But he did not decide whether this statement about a right of choice was substantive (as did one of his colleagues) or superfluous (as did the other).

> MR. CARTIN: I think (Earnest) has made some strong points in kind of reraising the single subject issue when the Board had rejected that. But I'm not persuaded that, based on (Earnest's) arguments, that that necessarily changes in my mind that the measure as written contains a single subject. I'll stop there.

Id. at 62:6-12.

What conclusion did the Board come to? Only that it would stand by its decision that the measure was a single subject. It did not reach resolution about the expanse of that newly illuminated subject. Given the morphing of the measure before it, the Board cannot be blamed for this split of opinion. But its failure to know determine the actual single subject of the measure was a jurisdictional stumbling block.

(c) The measure's restrictions on health care payment systems must be read in conjunction with the "right of health care choice."

If this measure is not parsed, sentence by sentence, and the measure is not stricken on single subject grounds attributable to the overarching "right to health care choice," the Proponents' statements are meaningless but the title is still flawed.

Initiative texts are typically "reviewed as a whole rather than piecemeal, and individual statements are examined in light of their context." *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009). If these Proponents and the Board are right that "the right to health care choice" went far beyond the next sentence that discussed health care payment systems, *#24* was wrongly decided. There, the first sentence, broadly worded to address the fundamental nature of a secret ballot, was alleged to have nothing to do with the next sentence that dealt with employee representation elections. *Id.* at 357. This Court rejected that allegation and held that successive sentences are read in light of

one another. "Here, although the first sentence of the Initiatives may initially appear to be broad in scope, the very next sentence confines its reach." *Id.* at 353, citing *In re Title, Ballot Title and Submission Clause for 1999-2000 #235(a),* 3 P.3d 1219, 1223 (Colo. 2000) (successive sentences under the initiative's general rubric of "Exclusions" provide limiting context for one another). There is no convincing reason for excluding #45 from this basic rule of interpretation. By declining to follow this rule, the Board erred, as the measure does not create, separate from its discussion of health care payment systems, an overarching "right of health care choice."

To the extent that this is so, it was error for the Board to craft a title in terms of this right when the issue really has always dealt with two unrelated aspects of health care compensation systems (insurance mandates and private payment rights). The title may be stricken because of the Board's misunderstanding of its supposed single subject. *See* pp. 14-17, *supra.* Or, if the Court agrees that the compensation provisions must be read together with the "right to health care choice," it should also recognize that this "right" was advanced only because the Proponents knew that their use of that phrase had been accurately revealed to be a political catch phrase. The title should be stricken on those grounds. *See* pp. 23-28, *infra.*

B. The Board lost jurisdiction when the proponents changed their interpretation of the measure to dramatically expand its scope and effect.

The Title Board has no jurisdiction over a measure that has not been at least preliminarily vetted by the directors of the Offices of Legislative Council and Legislative Legal Services. Having gone through that process, "[i]f any substantial amendment is made to the petition," the entire initiative review process must begin anew. C.R.S. § 1-40-105(2). Typically, this issue arises when proponents make a change before submitting their measure to the Title Board, one that was not prompted by the review and comment process. Here, for the first time, the Court is presented with the instance of proponents who altered their measure in the process of title setting, not before it.

These Proponents did so by giving a new meaning to their measure, one that had not been enunciated in any previous proceeding. One of the goals of the review and comment process is to "allow[] the public to understand the implications of a proposed initiative at an early stage in the process." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 # 256,* 12 P.3d 246, 251 (Colo. 2000). But it was not until the Title Board rehearing on April 7 that the public learned that this measure was not limited to health care payment systems. There, Proponents unveiled an alleged additional objective, the undefined right of health care choice. Certainly, this topic would have piqued the interest of the

legislative staff, the media, and the public, had Proponents asserted that this was their intent.

Proponents ought to be held to this standard, whether they change a printed word or the substantive reach of their measure through their interpretation at the Title Board. In both instances, the measure can apply in new ways that the public should be able to appreciate at the outset of the initiative process. But these Proponents deprived the public of this understanding, telling the world in so many ways that the measure was limited in effect, even though they may have thought otherwise.

Where there is no review and comment meeting at which substantial changes are aired, the Board lacks jurisdiction to set a title. *In re Title, Ballot Title and Submission Clause, and Summary for Proposed "Tax Reform" Initiative*, 797 P.2d 1283, 1288 (Colo. 1990). Proponents should not be permitted to do indirectly what they would be prohibited from doing directly. After all, they attempted to circumvent the process with their Initiative #40 by inserting language that had not been considered by the Board dealing with "contracts," and the Board refused to set a title for that measure. Now, with #45, they have attempted a similar end-run, and they should have to restart the process in order to proceed with their revamped

measure, one that has a meaning it did not have when their title was set on March 17. The Board erred by setting a title.

II. The ballot title is misleading and unfair.

A. "The right to health care choice" is a prohibited catch phrase.

1. Legal standards for evaluating a catch phrase.

In arriving at the wording for a ballot title, a motion for rehearing tests whether the title and submission clause "are unfair or… do not fairly express the true meaning and intent" of an initiative. C.R.S. § 1-40-107(1); *see* C.R.S. § 1-40-106(1) (Board directed to "designate and fix a proper fair title"); 106(3)(b) (ballot title "shall unambiguously state the principle" of the measure). A ballot title that prejudices the electorate because it contains politically charged language cannot be fair. For this reason, "[i]t is well established that the use of catch phrases or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995).

The concerns over a catch phrase are two-fold. First, such language can generate emotional appeal for the measure at the cost of voter understanding of its true intent and meaning.

> This rule (against the inclusion of catch phrases in ballot titles) recognizes that the particular words chosen by the Title Board should

> not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion. 'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, **catch phrases generate support for a proposal** that hinges not on the content of the proposal itself, but **merely on the wording of the catch phrase**.

#258(a), 4 P.3d at 1100 (emphasis added). Additionally, catch phrases become campaign tools, lending themselves to use in the proponents' political sloganeering.

> Catch phrases may also 'form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment,' thus further prejudicing voter understanding of the issues actually presented…. Slogans are catch phrases tailored for political campaigns – **brief striking phrases for use in advertising or promotion**. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposal's merits.

Id. (citations omitted) (emphasis added). In both ways, a catch phrase is a diversion from the fundamental purpose of the ballot title – to briefly but fairly encapsulate the proposal for petition signers and voters.

The fact that the ballot measure itself contains the words of a catch phrase is no defense for the Board's inclusion of it in the title. If anything, the proponents' use of politically loaded verbiage in the measure itself with the hopes (or as here, with the express request) that it should be included in the ballot title, is the very danger that the Board, in the discharge of its duties, is to protect against. "[T]he Title Board is not free to include this wording (from the initiative text) if, as here,

it constitutes a catch phrase." *Id.* When it does so, "the Title Board tips the substantive debate surrounding the issue to be submitted to the electorate." *Id.*

In order to establish the existence of a catch phrase, a party appearing before the Board must present evidence of that fact. This Court has recognized that its duty is "to recognize, but not create, catch phrases." *In re Title, Ballot Title and Submission Clause for 1997-1998 #105*, 961 P.2d 1092, 1100 (Colo. 1998). In that regard, the Court's evaluation of a possible slogan is framed by "the context of contemporary political debate." *#258(a)*, 4 P.3d at 1100.[7]

2. All evidence presented established that "the right to health care choice" is a prohibited catch phrase.

No conjecture is required to conclude that "the right to health care choice" is a prohibited slogan. The Board received a substantial evidentiary presentation – recent television ads using the phrase, a 2009 public opinion poll highlighting the political impact of the phrase in this debate, and internet and newspaper materials that were based entirely upon this phrase.

Advocacy groups opposing the national health care reform legislation, form around phrases like "health care choices." Hearing Ex. 2. "Health care choice" is

[7] Proponents disagreed with this standard. "[Y]our job is not to decide what ballot measures are described on (sic) depending on the (winds) of what's going on politically." Apr. 7. Tr. at 60:9-10.

the phrase that op-ed writers use to trigger attention – and presumably, the emotions – of their readers. Hearing Ex. 3 and 4.

Even more to the point, television ads in the national health care debate use phrase "health care choice" with explosive effect – almost literally. One TV ad featured the words, "**Health Care Choices**" in its opening visual. Then, a bulldozer steamed toward those words and obliterated them to warn watchers of the impact of national health care reform laws. The voice-over warns that such a law "could crush all your other choices," "leaving no choices in health insurance." Hearing Ex. 6 (including transcript that is included in Hearing Ex. 6 and the disc that was submitted with Earnest's Petition for Review); Apr. 7 Tr. 16:21-17:6. As the ad ends, viewers are told to oppose the federal bill so as to "Protect your health care choices." *Id.* [8] According to the neutral Annenberg Public Policy Center at the University of Pennsylvania, though, this ad was "More Health Care Scare." Hearing Ex. 7.

Another ad warns that government's role, when "applied to health care,… can mean taking away your choice." A few seconds later, viewers see a stamp that imprints the words "No Choice" and imploring voters to "Tell Congress, any plan

[8] Hearing Ex. 6 on the exhibit computer disc can be viewed at the listed web address, http://www.youtube.com/watch?v=i9UT9hRN8m0&feature=player_embedded, or by using the following shortened web address: *http://tinyurl.com/A45bulldozer*.

that takes away your choice in health care is not an option." Those same words – "Tell Congress, any plan that takes away your choice in health care is not an option." – appear on the screen to reinforce the message about "health care choice." Hearing Ex. 5 (including transcript that is included in Hearing Ex. 5 and the disc that was submitted with Earnest's Petition for Review); *see also* Apr. 7 Tr. 15:24-16:7.[9]

The ads' use of this strong language, advocating a particular position, was not coincidental. A month before these ads started to air, a memorandum, entitled "The Language of Health Care" and prepared by a well-known Washington D.C. pollster, was widely distributed and discussed. Hearing Ex. 8 and 9 (includes link to the polling report itself). This poll was crafted for congressmen and senators who opposed federal health care reform legislation. In boxes labeled "Never Say" and "Instead Say," it gave them language that would help sway opinion. For instance, in answering the question, "Which healthcare policy do you want the most?", a politically popular response was "I should have **the right to choose the healthcare** that's right for me." Hearing Ex. 10 at 28 (emphasis added). If asked "Which healthcare 'right' matters most?", the politically salable answer was "**The**

[9] Hearing Ex. 5 on the exhibit computer disc can be viewed at the listed web address, http://www.youtube.com/watch?v=i9UT9hRN8m0&feature=player_embedded , or by using the following shortened web address: *http://tinyurl.com/A45stamp*.

right to choose the doctor, hospital, and policy that fits your individual needs…." *Id*. (emphasis added).[10]

According to this pollster, his recommended language "captures not just what Americans want to see but exactly what they want to hear." *Id.* at 3. His "What to Say" boxes were not intended "to reach everyone…. **The primary message of this document is to focus on the persuadables** and generate support among wayward Republicans and conservatives." *Id.* (emphasis added). The language that appears in this document and resurfaces in the television ads discussed above reflects phrases that are intended to hit sensitive pressure points of voters who have not yet made up their minds. As such, these words are that "draw[] attention to themselves and trigger[] a favorable response… (so that) support for a proposal… hinges not on the content of the proposal itself, (but) merely on the wording of the catch phrase." *#258(a)*, 4 P.3d at 1100. Because they are framed to appeal to "persuadables" – a term used to describe voters who have not yet decided their position on an issue – they likewise "encourage

[10] Caldara maintained that he had no idea about any of this information. Tr. 48:13-18. Perhaps that is true, although Gorman co-authored an article with one of Caldara's employees, Brian Schwartz, using the title "Crazy about Health Care Choice." Hearing Ex. 4. Schwartz previously wrote a fairly extensive article about "The Language of Healthcare 2009" for the think-tank for which all three of them work. Hearing Ex. 11. Regardless, the court has never required a showing of intent on the part of the proponents; it is the language used by the Title Board that is at issue here.

prejudice in favor of the issue" and are likely to be used "in advertising on promotion." *Id.* This objective is appropriate for a pollster, particularly one who admits "I'm not a policy person. I'm a language person." Hearing Ex. 9. But it is far afield from the mission of the Title Board.

About the phrase "the right to health care choice," one Title Board member said "it will be used in the campaign without question." Apr. 7 Tr. 71:1. Another offered, "if I were a proponent of this measure, I would be very nervous about whether I could win that (catch phrase) argument in the Supreme Court." *Id.* at 65:12-15. And the third stated, "I do think the phrase is – there's a very persuasive phrase for a lot of people. And you know, it may be Proponents made their strategy behind it." *Id.* at 62:14-18.

As this terminology was understood to be a component of the Proponents' political advocacy toolbox, the Board should have omitted it or chosen less inflammatory language. And there were such options before the Board. For example, one member suggested that the Board replace the single subject statement, "concerning the right of all persons to health care choice," with the phrase, "concerning health care." *Id.* at 66:11-67:24. He noted that the Board's additional language (concerning a "right" to "choice" in health care) "doesn't help the voter in my view." *Id.* at 67:13-14. Similarly, Earnest had suggested that

"health care" could be used instead of the Proponents' political slogan, as could health care "payment systems." *Id.* at 40:18-23. Nevertheless, the Board defaulted to language in that was more appropriate for campaigning than it was for balanced voter information, and by so doing, it erred.

B. The ballot title mischaracterizes the measure.

The initiative provides, "No statute, regulation, resolution, or policy adopted or enforced by the State of Colorado, its departments and agencies, independently or at the instance of the United States shall" require a person to participate in a health insurance or comparable plan or limit one's ability to make direct payments for lawful health care services. Proposed Colo. Const., Art. II, sec. 32(1). In other words, the measure seeks to limit the reach of any adopted law, federal or state, to prevent such laws from having either of the two listed effects on health care payment systems. Of course, the measure was written in this manner because, the Supremacy Clause notwithstanding, the proponents purport to exempt Colorado from federal health care legislation. Apr. 7 Tr. at 6:5-8; *see* Hearing Ex. 1. As such, the initiative could not actually prohibit the enactment of such legislation – only its application to persons residing in Colorado through the State or its agencies or departments.

In contrast, the ballot title states that #45 "**prohibit[s] the state** independently or at the instance of the United States **from adopting** or enforcing any statute, regulation, resolution, or policy" that has either of the two effects noted above. (Emphasis added.) Thus, from the ballot title, voters would learn – incorrectly – that the measure limits the exercise of legislative authority of the state, namely, the General Assembly's enactment of statutes and resolutions and agency enactment of regulations and policies. Obviously, the measure does not constrain the enactment process; it only affects the extent to which such laws are implemented. Thus, the General Assembly may pass laws, and appropriate agencies may develop rules, that affect health care insurance. Conceivably, those enactments could even include mandates for certain types of coverage or prohibitions on certain types of direct payment for health care services. If #45 were to pass, though, such provisions might not be given legal effect to the extent they fall within the terms of this measure. Thus, it is not the law-making powers of the legislature and the state's administrative agencies that are affected by this measure; it is the executive branch's administration of these laws and the judicial branch's construction of them this is at issue.

Where the Board misstates the substantive provision that is before the voters, the title is misleading. This error is akin to the Board's error in *In re Title,*

Ballot Title and Submission Clause for 1999-2000 #215, 3 P.3d 11 (Colo. 2000), where the Board's language concerning an initiative about mining practices implied that the measure prohibited mine owners from expanding the physical operations of existing mines without regard for their existing permits. In fact, the measure only restricted modification of those mining permits. *Id.* at 16. This disparity was sufficiently important that the title became misleading, and the Board was directed to correct it.

So, too, should the Board be directed to clarify that the proposed measure will affect the implementation of certain laws, rules, and policies, not prohibit their enactment.

CONCLUSION

A title should not have been set for #45. Its topic is simply too broad to comprise a single subject. The "right to health care choice" was never more than, at best, a general declaration related to the "sanctuary state" objectives of the Proponents. If a title should have been set, it certainly should not have included political dynamite – a proven campaign slogan. And it should have been set in a way that accurately informed voters about the structural impact on the law-making processes of the state.

The Board's decision should be reversed.

Respectfully submitted this 4th day of May, 2010.

ISAACSON ROSENBAUM P.C.

By: _____
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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2010, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was hand-delivered or sent via overnight delivery to the following:

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