

Supreme Court, State of Colorado  
Colorado State Judicial Building  
2 East 14<sup>th</sup> 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

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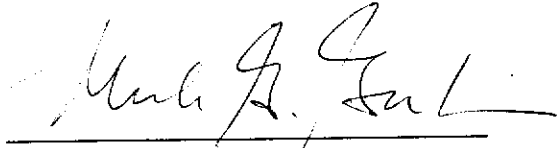
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Case Number:  
2010SA100

**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 contains 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

ISSUES PRESENTED .....	1
STATEMENT OF THE FACTS .....	2
STATEMENT OF THE CASE .....	7
SUMMARY .....	8
LEGAL ARGUMENT .....	10
I.    The Title Board lacked jurisdiction to set a ballot title .....	10
A.    The initiative violates the single subject requirement.....	10
1.    Standard of review in determining an initiative's single subject.....	10
2.    Initiative #45 represents multiple subjects.....	11
(a)    An overly broad concept is not a single subject..	13
(b)    The Board did not actually agree on the nature of the single subject of #45 .....	14
(c)    The measure's restrictions on health care payment systems must be read in conjunction with the "right of health care choice.....	17
B.    The Board lost jurisdiction when the proponents changed their interpretation of the measure to dramatically expand its scope and effect .....	19
II.   The ballot title is misleading and unfair .....	21
A.    "The right to health care choice" is a prohibited catch phrase.	21
1.    Legal standards for evaluating a catch phrase .....	21
2.    All evidence presented established that "the right to health care choice" is a prohibited catch phrase .....	23
B.    The ballot title mischaracterizes the measure .....	28
CONCLUSION .....	30

## TABLE OF AUTHORITIES

### Cases

<i>In re Amend Tabor No. 32,</i> 908 P.2d 125 (Colo. 1995).....	21
<i>In re Initiative 1996-4,</i> 916 P.2d 528 (Colo. 1996).....	14
<i>In re Title, Ballot Title and Submission Clause for 1997-1998 #105,</i> 961 P.2d 1092 (Colo. 1998).....	23
<i>In re Title, Ballot Title and Submission Clause for 1999-2000 #215,</i> 3 P.3d 11 (Colo. 2000).....	30
<i>In re Title, Ballot Title and Submission Clause for 1999-2000 #235(a),</i> 3 P.3d 1219 (Colo. 2000).....	18
<i>In re Title, Ballot Title and Submission Clause for 1999-2000 #33,</i> 975 P.2d 175 (Colo. 1999).....	11
<i>In re Title, Ballot Title and Submission Clause for 2005-2006 #55,</i> 138 P.3d 273 (Colo. 2006).....	5
<i>In re Title, Ballot Title and Submission Clause for Initiative 2001-2002 #43,</i> 46 P.3d 438 (Colo. 2002).....	14, 15
<i>In re Title, Ballot Title and Submission Clause of 1999-2000 #258(a),</i> 4 P.3d 1094 (Colo. 2000).....	11, 22, 23, 26, 27
<i>In re Title, Ballot Title and Submission Clause of 2007-2008 #17,</i> 172 P.3d 871 (Colo. 2007).....	10, 11
<i>In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 # 256,</i> 12 P.3d 246 (Colo. 2000).....	19
<i>In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29,</i> 972 P.2d 257 (Colo. 1999).....	13
<i>In re Title, Ballot Title and Submission Clause, and Summary for Proposed "Tax Reform" Initiative,</i> 797 P.2d 1283 (Colo. 1990).....	20
<i>In re Title, Ballot Title, and Submission Clause for 2009-2010 #24,</i> 218 P.3d 350 (Colo. 2009).....	17, 18
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25,</i> 974 P.2d 458 (Colo. 1999).....	14, 15

**Statutes**

Colorado Revised Statutes § 1-40-105(2) ..... 19  
Colorado Revised Statutes § 1-40-105(3) ..... 2  
Colorado Revised Statutes § 1-40-106(1) ..... 21  
Colorado Revised Statutes § 1-40-106(3)(b) ..... 21  
Colorado Revised Statutes § 1-40-106.5(1)(e)(II) ..... 13  
Colorado Revised Statutes § 1-40-107(1) ..... 21

**Constitutional Provisions**

Colo Constitution, Article V, sec. 1(5.5)..... 10

## 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.<sup>1</sup>

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

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<sup>1</sup> 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<sup>2</sup> (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,<sup>3</sup> and Caldara did the same on his organization's website.<sup>4</sup>

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<sup>2</sup> 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>.

<sup>3</sup> "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).

<sup>4</sup> 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 exempt (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.<sup>5</sup>

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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<sup>5</sup> 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 that 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.<sup>6</sup>

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<sup>6</sup> 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.<sup>7</sup>

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

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<sup>7</sup> 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.*<sup>8</sup> 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

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<sup>8</sup> 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](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.<sup>9</sup>

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**

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<sup>9</sup> 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](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).<sup>10</sup>

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

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<sup>10</sup> 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.

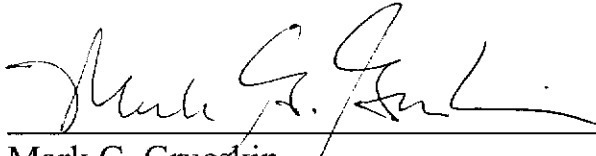
### CONCLUSION

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:   
Mark G. Grueskin

**ATTORNEYS FOR PETITIONERS**

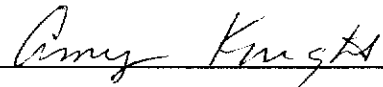
**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> 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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# **March 17, 2010 Transcript**

INITIATIVE TITLE SETTING REVIEW BOARD

2009-2010 #45 - "HEALTH CARE CHOICE"

Transcription taken from the Secretary of State's Website

www.sos.state.co.us

March 17, 2010 9:35 a.m.

March 17, 2010 9:37 a.m.

Single subject approved, staff draft amended, titles set

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 200

Denver, Colorado

THE BOARD:

WILLIAM A. HOBBS  
DAN DOMENICO  
DAN CARTIN

PROCEEDINGS

MR. HOBBS: Good morning. Let's begin. This is a meeting of the Title Setting Board pursuant to article 40 of title 1, Colorado Revised Statutes. And the date is March 17, 2010. The time is 9:31 a.m. We are meeting in the Secretary of State's Blue Spruce Conference Room, 1700 Broadway, Denver, Colorado.

The Title Setting Board today consists of the following: My name is Bill Hobbs. I'm Deputy Secretary of State, and I'm here on behalf of Secretary of State, Bernie Buescher. To my immediate right is Dan Domenico, Solicitor General, who is here on behalf of Attorney General John Suthers. And to my immediate left is Dan Cartin, Deputy Director of the Office of Legislative Legal Services, who is the designee of the Director of the Office of Legislative Legal Services, Charley Pike.

And Dan -- (The first recording ends, and the second recording begins.)

MR. HOBBS: -- has jurisdiction to set a title, and that necessarily requires determining whether the proposal complies with the single subject requirement.

And then third, if the Board determines that it does have jurisdiction to set a title, it will proceed

to work on setting the titles, typically using a staff-prepared draft. And staff drafts for each of the proposed measures today are on the table by the back door.

We are, of course, not concerned with the merits of any proposal, but just with the setting of fair and accurate titles. A decision is reached by two of the three members of the Board, and anyone who is dissatisfied with a decision of the Board may request a -- may file a motion for rehearing with the Secretary of State within seven calendar days.

So with that, I'd like to turn to the agenda. We do have two items on our agenda for this morning. When we complete those two items, we'll recess until 2:00 p.m. and consider the other two items that are on today's agenda.

So let's turn to 2009-2010 #45 - Health Care Choice.

Mr. Caldara, you've had a prior version before us. It may be helpful if, after you identify yourself for the record, it might be helpful just to explain how this measure is different from the prior measure.

So go ahead.

MR. CALDARA: Good morning, Mr. Hobbs. And might I say, that is a fine haircut. In the future I'll

be wearing just that style. I'm Jon Caldara, the Proponent for this proposed measure, ballot initiative 49 -- or excuse me -- 45. It is -- after coming here with -- a couple weeks ago I resubmitted the proposal as per your decision. And Office of Legislative Legal Services said they had no further questions, and I brought it here. And I'm here asking for (inaudible) title.

MR. HOBBS: It looked like there were a few minor changes, but I'm not sure. I mean I think the word "contract" was taken out and so forth. But was there anything really material that you want to point out?

MR. CALDARA: The only thing that's different from what's -- what you saw two weeks ago is the word "contract" was taken out, and also under subsection 3 we added the word "Colorado," "any provision of Colorado law."

MR. HOBBS: Any questions for Mr. Caldara? If not, then let's turn to consideration of single subject requirement. I don't have anyone else signed up to testify. So I don't have anyone else that I think would argue that the measure does not comply with the single subject requirement, so I'll turn it over to board discussion.

MR. CALDARA: Before you do that, let me just

remind the Title Board that two years ago you granted a single subject to something that was not quite identical to this, but it also had cross-state purchasing of insurance, health insurance and -- that. So if consistency is of record, please (inaudible).

MR. HOBBS: And thank you for pointing that out. And how would you describe the single subject?

MR. CALDARA: The single subject is quite simply that it is (inaudible) issue of health care choice, the right of all Coloradans to be able to be free from being forced into a public or private health care plan. Also (inaudible) choice to be able to pay directly for legal services.

MR. HOBBS: Discussion by the Board? Seems to me it's a single subject. I don't have any reason that -- if to -- at this point to believe that the subject is not essentially as Mr. Caldara stated and that it has to do with health care choice.

MR. DOMENICO: I agree.

MR. CARTIN: I agree.

MR. HOBBS: I guess I'm going to make a motion that the Board find that the measure comprises a single subject and would proceed to set titles.

BOARD MEMBER: Second.

MR. HOBBS: Further discussion?

1 If not, all those in favor say aye.  
 2 THE BOARD: Aye.  
 3 MR. HOBBS: All those opposed, no.  
 4 That motion carries three to zero.

5 Then let's turn to the staff-prepared draft of  
 6 the titles. Mr. Caldara, have you had a chance to look  
 7 at this staff draft and do you have any comments?

8 MR. CALDARA: I have, and I find this to be  
 9 the most bizarre part of the entire process, the  
 10 opposition by committee. And I hope you never write  
 11 poetry or novels (inaudible).

12 The only suggestion that I have is just for  
 13 economy of words. I guess I'm looking at the ballot  
 14 title, the second paragraph. I guess it's basically the  
 15 same.

16 But you have here, the staff draft of the  
 17 second line, line 11, Prohibiting the State from adopting  
 18 or enforcing the States -- any statute, regulation,  
 19 resolution, or policy that requires a person to -- and  
 20 then you repeat the exact same thing, line 14 and 13,  
 21 Prohibiting the state from adopting any such regulation.

22 I'm thinking that for an economy, you might be  
 23 able to strike that entire second phrase as you said it  
 24 previously.  
 25 (Inaudible.)

1 MR. HOBBS: Objections?  
 2 So the first clause says, Prohibiting the  
 3 State from adopting or enforcing any statute, regulation,  
 4 resolution, et cetera. And then later on, Prohibiting  
 5 the State from adopting, enforcing any statute,  
 6 regulation ...

7 Yeah, I don't -- I'm trying to glean what the  
 8 difference is or whether we can combine those. I think  
 9 you're right.

10 UNIDENTIFIED SPEAKER: Yeah. I just think  
 11 that just a semicolon could probably take care of it.

12 UNIDENTIFIED SPEAKER: Maybe.

13 MR. HOBBS: Any particular suggestion on how  
 14 to do that?

15 MR. CARTIN: Well, I think you could --

16 MR. HOBBS: Go ahead, Mr. Cartin.

17 MR. CARTIN: I think you could delete  
 18 everything -- essentially everything from "prohibiting,"  
 19 the second "prohibiting" through "policy" on the next  
 20 line.

21 And then put in an -- I guess then you'd have  
 22 to put back in an "or," because then what you have is you  
 23 have the first -- the first set of prohibitions against  
 24 the State are against adopting any of these things that  
 25 require people to participate in a plan. The second

1 clause res- -- prohibits the State from adopting any of  
 2 these things that deny or restrict or penalize people  
 3 from making direct payments. I don't think you can get  
 4 rid of restricts -- "denies, restricts or penalizes."  
 5 You might be able to get rid of some of them.

6 To me the part that's actually redundant is  
 7 just prohibiting the State from adopting these things.  
 8 The part that's a little bit different is what the  
 9 State's prohibited from doing.

10 And so I would say delete everything from  
 11 "prohibiting" through "policy" and add an "or" before  
 12 "denies" -- or before "that." Sorry. And I think you  
 13 would get rid of the semicolon after "plan."

14 MR. HOBBS: So then -- and Ms. Gomez is  
 15 showing that on the screen in the room. So then it would  
 16 read, "Prohibiting the State from adopting or enforcing  
 17 any statute, regulation, resolution, or policy that  
 18 requires a person to participate in a public or private  
 19 health insurance or coverage plan or that denies,  
 20 restricts or penalizes the right or ability of a person  
 21 to make or receive direct payments for lawful health care  
 22 services."

23 Mr. Caldara, does that work?

24 MR. CALDARA: I think so. Yes.

25 MR. HOBBS: I will move that change then.

1 BOARD MEMBER: Second.  
 2 MR. HOBBS: All those in favor say aye.  
 3 THE BOARD: Aye.

4 MR. HOBBS: All those opposed, no.  
 5 That motion carries three to zero.

6 Mr. Caldara, did you have any other  
 7 suggestions?

8 MR. CALDARA: I have no other suggestions.

9 MR. HOBBS: I guess one that I'm wondering  
 10 about, in the first line, the expression of the single  
 11 subject, which right now reads, "Concerning the right of  
 12 all persons to health care choice." I'm wondering about  
 13 the "of all persons," how necessary that is. I mean  
 14 would it -- we just simply said "concerning the right to  
 15 health care choice." Anything particularly significant  
 16 about "of all persons"?

17 MR. CALDARA: I think since in the first line  
 18 of the amendment itself it says "All persons shall have  
 19 the right to health care choice," I can understand why  
 20 the staff put in "the right of all persons to health care  
 21 choice." I prefer it in there. Wants to make sure this  
 22 is not for those people that might not be familiar that  
 23 (inaudible) Bill of Rights that this is (inaudible). It  
 24 was written to express that all persons have that right.

25 MR. HOBBS: Okay. Mr. Cartin.



1 MR. CARTIN: One question, Mr. Chair.  
 2 Mr. Caldara, the measure provides that "No  
 3 statute, regulation, resolution, or policy adopted or  
 4 enforced by the State of Colorado, its departments and  
 5 agencies, independently or at the instance of the United  
 6 States," and line 2 it says "prohibiting State from  
 7 adopting." So for example, it doesn't say prohibiting  
 8 the State independently or at the instance of the United  
 9 States from adopting. Are you okay with the omission of  
 10 "independently or at the instance of the United  
 11 States"?

12 MR. CALDARA: Actually, I think having  
 13 "independently or at the instance of the United States"  
 14 inside the ballot summary would be a more accurate  
 15 description. I'd like to see that in there.

16 MR. HOBBS: I'm wondering whether that would  
 17 be necessary. I mean if it's either independently or at  
 18 the instance, I mean it's -- if it's one or the other,  
 19 then I could see that that would be significant, but  
 20 since it's under all circumstances, I'm just wondering if  
 21 it really adds anything to add that to the titles.

22 MR. CARTIN: I would put it in there. I think  
 23 it's significant in that -- I mean as a technical, legal  
 24 matter, maybe it's true that as written it includes  
 25 both. But the title isn't supposed to be a technical,

1 the instance of the United States." Yes. And I would --  
 2 do you need a comma in there? I don't think so.

3 MR. HOBBS: You're not setting it off by  
 4 comas?

5 MR. CARTIN: No.

6 MR. HOBBS: Just from the State independently  
 7 or at the instance of the United States from adopting or  
 8 enforcing, et cetera.

9 BOARD MEMBER: Is that a motion?

10 BOARD MEMBER: Yes.

11 BOARD MEMBER: I'll second it.

12 MR. HOBBS: Any further discussion?

13 All those in favor say aye.

14 THE BOARD: Aye.

15 MR. HOBBS: All those opposed, no.

16 BOARD MEMBER: No.

17 MR. HOBBS: That motion carries two to one.

18 Any other suggested changes to the title?

19 It's understood, of course, that the -- any  
 20 changes we adopt in the title and what's now in lines 1  
 21 through 10, the same changes would be made in the ballot  
 22 title, the submission clause, which is the same, except  
 23 that the title's in the form of a question.

24 MR. DOMENICO: Can I make just one comment. I  
 25 was going to suggest changing the statement of the

1 legal document. And I think --

2 MR. DOMENICO: I don't know. I think your  
 3 average reader would be a little bit -- would be unlikely  
 4 to be thinking about reading the title as it is now, to  
 5 be thinking about how this would affect something passed  
 6 by the Federal Government.

7 Now, whether in the end that would turn out to  
 8 be material or not, as the person in charge of defending  
 9 this were it to pass, it would, I predict, be the most  
 10 material in terms of generating litigation, and in that  
 11 sense it's material.

12 So I think it's -- I think it would be -- I'm  
 13 not entirely sure I would -- I don't think it's  
 14 necessarily inaccurate to leave it out, but I think it's  
 15 better with it in there, I guess is what I'm saying.  
 16 It's more -- it gives information that I think a lot of  
 17 people would find -- wouldn't necessarily assume from  
 18 just reading it as is.

19 MR. HOBBS: Mr. Cartin.

20 MR. CARTIN: I think I agree with both of  
 21 you. And I think that -- but I think that since  
 22 Mr. Caldara, it's his Proponent's preference to have that  
 23 language inserted at this point, I think for the sake of  
 24 voting it up or down, I would offer that as an amendment  
 25 on line 2 after "State" inserting "independently or at

1 subject just to "Health care choice" to delete that whole  
 2 "The right of all persons to." I don't feel strongly  
 3 about it. I do think sometimes we make this harder on  
 4 ourselves and on voters by trying to write that subject  
 5 so narrowly, and I think "Health care choice" would do  
 6 what the single subject statement is supposed to do,  
 7 which is just give people some idea of what they're  
 8 looking at, and then they can read on if health care  
 9 choice is something they're interested in.

10 But we already talked about -- about that  
 11 part. So I'm not going to fight hard for it. But I just  
 12 think that that would be another option and something to  
 13 think about, whether we should go writing the single  
 14 subject as narrowly as we do sometimes.

15 MR. HOBBS: Okay. And I do agree. I mean I  
 16 do think a simple statement of the single subject is  
 17 going to be preferred. And "Health care choice" may be  
 18 fine. I -- personally, in this particular case lean to  
 19 including the word "right" because it's an addition to  
 20 the Bill of Rights. But I don't feel strongly about it.

21 Mr. Caldara.

22 MR. CALDARA: I feel strongly that the word  
 23 "right" needs to be in there, because this is a Bill of  
 24 Rights, and the term "of all persons to health care  
 25 choice," I suppose you could remove then "have the right

1 to health care choice" and I imagine most people would  
2 prefer it probably.

3 But I think for those who might not be  
4 initiated (inaudible) ballot box specifies, and I think  
5 (inaudible) that the Bill of Rights is about individual  
6 (inaudible).

7 It's my preference to keep it in there.

8 MR. HOBBS: Any further motions to amend the  
9 staff draft?

10 Is there a motion to adopt the staff draft as  
11 amended?

12 BOARD MEMBER: So moved.

13 BOARD MEMBER: Second.

14 MR. HOBBS: Any further discussion? Is there  
15 anybody else who wishes to testify? I will give one more  
16 opportunity.

17 Hearing none, then all those in favor of the  
18 motion say aye.

19 THE BOARD: Aye.

20 MR. HOBBS: All those opposed, no.

21 That motion carries three to zero.

22 And that concludes action on No. 45, and the  
23 time is 9:48 a.m. Thank you.

24 MR. CALDARA: Thank you.

25 (End of recording.)

1 CERTIFICATE

2 I, Deborah D. Mead, Certified Shorthand  
3 Reporter and Notary Public, do hereby certify that the  
4 said proceedings were taken in shorthand by me and were  
5 thereafter transcribed by me; that the same is a full,  
6 true, and correct transcription of my shorthand notes  
7 then and there taken, except where noted, and excluding  
8 speaker identification.

9 I further certify that I am not attorney, nor  
10 counsel, nor in any way connected with any attorney or  
11 counsel for any of the parties of said action, nor  
12 otherwise interested in the outcome of this action.

13 IN WITNESS WHEREOF, I have affixed my  
14 signature and seal this 29th day of April 2010.

15 My commission expires June 18, 2013.

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Deborah D. Mead  
Certified Shorthand Reporter

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# **April 7, 2010 Transcript**

INITIATIVE TITLE SETTING REVIEW BOARD  
2009-2010 #45 - "HEALTH CARE CHOICE"

Transcription taken from the Secretary of State's Website

www.sos.state.co.us

April 7, 2010 10:46 a.m.

Motion for Rehearing

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 200

Denver, Colorado

THE BOARD:

WILLIAM A. HOBBS  
DAN DOMENICO  
DAN CARTIN

INDEX	
EXHIBITS	INITIAL REFERENCE
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

1 work through yours one at a time and then go to the  
2 Proponents. So do you have a preference?  
3 MR. GRUESKIN: They're actually interlinked in  
4 a lot of different ways. So maybe just going through  
5 them all would be a more efficient way.  
6 MR. HOBBS: Okay.  
7 MR. GRUESKIN: So maybe we should do that.  
8 MR. HOBBS: Let's do that.  
9 MR. GRUESKIN: Before I get underway, let me  
10 -- if I could, hand the Board copies of the documents  
11 that I'm about to reference. Let me also hand them to  
12 the Proponent. And I'd like to provide copies for the  
13 record in addition so that in the odd chance that we end  
14 up at the Supreme Court, that there is a set of documents  
15 that was (inaudible) by the Board.  
16 MR. HOBBS: Okay. Thank you.  
17 MR. GRUESKIN: The initial argument made in  
18 the motion is that this initiative really addresses  
19 multiple subjects. We have listed in the motion the  
20 various subjects that we believe are addressed. And I  
21 know that you've read the motion. I'm not inclined  
22 necessarily to address each particular element.  
23 Let me say, though, that the stated single  
24 subject, "The right of all persons to health care  
25 choice," is one of those phrases that the court, in my

1 PROCEEDINGS  
2 MR. HOBBS: Okay. Let's resume. The time is  
3 10:40 a.m., and the next agenda item is 2009-2010 #45 -  
4 Health Care Choice. This is before the Board on a motion  
5 for rehearing.  
6 Mr. Grueskin, on behalf of the Movants for the  
7 Motion for Rehearing, if you'd like to come forward and  
8 identify yourself for the record and give us your  
9 arguments. We do have the benefit of your written  
10 arguments as well, of course.  
11 MR. GRUESKIN: Thank you, Mr. Chairman.  
12 My name is Mark Grueskin and I represent  
13 Dr. Mark Earnest and the other Movants in this motion.  
14 I am happy to address the specific issues. I  
15 have a number of documents to provide to the Board in  
16 support of the arguments that we're making and would be  
17 happy to either break it up in terms of the  
18 jurisdictional arguments and the accuracy arguments or do  
19 it all at once, whatever the Board's pleasure is.  
20 MR. HOBBS: I don't have any preference about  
21 it. If we want to go through them one by one, if you're  
22 prepared do that, I think that's what we'll do. And then  
23 I guess if we break that up, then I guess the question  
24 would be then do we discuss each one and provide the  
25 Proponents an opportunity to respond or whether we just

1 view, routinely addresses and criticizes as something  
2 that is simply too general a category to qualify as a  
3 single subject.  
4 Much like the issue of water in the water case  
5 or the judicial branch in the various judicial cases or  
6 government spending in the TABOR-related cases, "The  
7 right of health care choice" simply is too broad to be a  
8 single subject. It means different things to different  
9 people. Is "The right to health care choice" the right  
10 to A, choose your own physician; B, choose your own  
11 course of treatment; C, determine the contours and the  
12 parameters of an attorney -- excuse me -- a  
13 doctor-patient relationship; D, determine the payment  
14 system that will operate to account for your health  
15 care? Which among those or all of those is comprised by  
16 the phrase "Right to health care choice"?  
17 We think that this measure clearly deals with  
18 a variety of different types of health-care-related  
19 issues, not the least of which are the interrelationship  
20 of an individual with his or her insurance company or the  
21 requirement, frankly, that one have insurance and the  
22 relationship between a person and his or her health care  
23 provider, and under this measure, the right to address  
24 that on an individual basis.  
25 Now, we have a video that we'd like to play as

1 indicated under Exhibit No. 1. It's very brief. It is  
2 the second one that Ms. Gomez can show. And we're  
3 ready. Go ahead.

4 (Beginning of recording)

5 VOICE: It is time, I believe, for Colorado to  
6 stand up and defend herself against Obama Care, and it is  
7 our goal to make Colorado a sanctuary state for good  
8 health care.

9 What we're trying to do with this initiative  
10 is to blunt what is to be a likely attack on our state  
11 funds from D.C.

12 This initiative, this law does three very  
13 basic but important things. In this -- in this addition  
14 to the Bill of Rights in Colorado, it guaranties that all  
15 persons shall have a right of health care choice. What  
16 that means is that the State nor the Federal Government  
17 can mandate someone to purchase an insurance project --  
18 product or to participate in any public or private health  
19 care plan or benefit.

20 Furthermore, it protects a private ability to  
21 buy health care services. We want to have protection to  
22 make sure that Colorado, unlike providences in Canada, do  
23 outgrow sometime where cannot purchase private health  
24 care products and services. And thirdly, we want to open  
25 up the market for Coloradans.

1 So this initiative also opens up cross-state  
2 purchasing of insurance products from around the  
3 country.

4 (End of recording.)

5 MR. GRUESKIN: This is a candidate statement  
6 by the Proponents as to what the measure did.

7 Now, as we all know, that third element is no  
8 longer in this measure, but it does retain two elements,  
9 which are identified as succinct and not necessarily  
10 related by any sort of common theme other than the fact  
11 that they have something to do with health care, which is  
12 simply too general a relationship to allow this Board to  
13 set a title for this measure.

14 And oftentimes the statements of the  
15 Proponents are taken into consideration, both by the  
16 Board and by the courts, and we think it's appropriate  
17 here to acknowledge that, albeit in our motion we split  
18 up state and federal provisions as they are triggered by  
19 this measure, that there is an overarching desire to  
20 create, in the words of the video, Colorado as a  
21 sanctuary state, in other words, take Colorado out of the  
22 federal system.

23 The second and third elements are specific and  
24 they are different. And I don't know that I need to  
25 restate what's in the motion or what was said on the

1 video.

2 And we also believe that the expansion of what  
3 a lawful health care service is under this measure is a  
4 separate subject.

5 So we would ask you to determine that this is  
6 a multi-topic measure and that it cannot be set for title  
7 in light of the acknowledgment on the part of the  
8 Proponents that there are independent and not necessarily  
9 connected, fundamentally connected elements of the  
10 measure.

11 Second, the second jurisdictional issue, is  
12 the argument that I made, I believe, a couple title board  
13 meetings ago, and I'm not going to belabor it, but it's  
14 the fact that that very first purpose, taking some --  
15 taking any -- taking the state out of federal laws is not  
16 something that this -- what the initiative process is  
17 geared to do or what this board can set a title for. I'm  
18 not going to belabor it because you have considered that  
19 issue and rejected it. And in absence of epiphany over  
20 the last several weeks, I imagine that will be your  
21 decision here too.

22 Third, I think that paying close attention to  
23 what this measure does, actually does, is important,  
24 because the title, as we point out, is misleading. This  
25 doesn't limit legislative authority. This doesn't

1 constrain the general assembly or any department from  
2 enacting particular types of rules.

3 What this measure does is says that no  
4 statute, regulation, resolution, or policy adopted or  
5 enforced by Colorad- -- by the State of Colorado, its  
6 departments and agencies, independently or at the  
7 instance of the United States shall. So there's nothing  
8 here that prohibits the State of Colorado or any of its  
9 agencies from establishing these policies. It's simply a  
10 question of how they are applied, how they are  
11 administered, how they are implemented.

12 And administration of existing or potential  
13 policy even -- but we would certainly argue that this  
14 doesn't even address limitations on the adoption of new  
15 policies. The administration of any policy is outside of  
16 the initiative process. The courts have been very clear  
17 in Colorado that the legislative authority ends when the  
18 issue of implementing an already existing legislative  
19 policy begins.

20 And to the extent that that is exactly what  
21 this measure attempts to do, I would suggest that this  
22 board has no jurisdiction to set a title because this  
23 measure does not attempt to limit the adoption of  
24 policies that would have the effects that are complained  
25 of in the measure.

1 Fourth, the Board lacks jurisdiction where  
 2 legislative resolutions are at issue. The measure by its  
 3 express terminology states that it applies to, and I  
 4 quote, "statutes, regulations, resolutions, or  
 5 policies." The Colorado Supreme Court has addressed this  
 6 issue in the referendum context to say that Article V,  
 7 Section 1 doesn't apply to resolutions. It quoted the  
 8 Supreme Court of the State of Oregon, which had addressed  
 9 a similar issue, which had also said that their  
 10 initiative and referendum statutes and rights didn't  
 11 apply to resolutions.

12 And we think that by including resolutions  
 13 here, that was a choice that the Proponents made, but it  
 14 takes them outside of the initiative process. And much  
 15 like a single subject issue, you can have an initiative  
 16 that is 95 percent one subject, but if 5 percent of the  
 17 language is committed to a second subject, it violates  
 18 that requirement. And we think it violates that  
 19 requirement here.

20 Let me move into the accuracy and misleading  
 21 issues that are denominated in our motion.

22 First, we think that there are several  
 23 elements that require clarification in the title. No. 1,  
 24 "directly or indirectly" is a phrase that was added  
 25 after this was heard by legislative counsel. We think

1 I have no idea how this is ultimately going to  
 2 be lived out. But obviously it had been worded this way  
 3 because it was going after a federal law. That it was  
 4 worded this way ought to be accurately reflected in the  
 5 title, and it is not. And so we think that that is an  
 6 element that needs to be fixed.

7 Third, the right of all persons to health care  
 8 choice is misleading for two reasons, one of which I've  
 9 already mentioned; one of which is specifically  
 10 denominated here.

11 First of all, the right of all persons to  
 12 health care choice is unknowable in terms of what that  
 13 means. I've already suggested to you that it could mean  
 14 several different things. But secondly, it does not  
 15 preserve all choices. It preserves certain choices;  
 16 certain choices as to payment systems for health care,  
 17 and that's all it preserves.

18 And it doesn't even preserve all of the  
 19 choices available in payment systems. It simply  
 20 preserves two independent arrangements; one between the  
 21 government and an individual as to a mandate for health  
 22 insurance purchase, and the second between a health care  
 23 provider and a patient. It is misleading to use that  
 24 phrase, and we think that it ought to be struck in favor  
 25 of something that is more accurate.

1 that expands the nature of who is affected. We think  
 2 that it should be clear that it's any public or health --  
 3 or private health insurance plan. To make it clear just  
 4 how expansive this is, the term "or benefit" for some  
 5 reason was left out of the litany in the measure.

6 And finally, it -- the requirement that lawful  
 7 health care services be addressed is by law, and we just  
 8 think that -- or excuse me -- that the exception relating  
 9 to emergency medical treatment requires simply there in  
 10 the measure, and it's not clear whether it's required by  
 11 good medical practice or required by law or required by  
 12 insurance policy provisions or anything else. We think  
 13 that it is -- it ought to be clear in the title that the  
 14 requirement that will trigger the exception is one of  
 15 what is in the statutes, presumably regulations or  
 16 policies or some competent jurisdiction.

17 Second, as I suggested earlier, this title is  
 18 inaccurate. It reads that the measure, after the single  
 19 subject statement, prohibiting the state independently or  
 20 at the instance of the United States from adopting or  
 21 enforcing any statute. Well, there is no prohibition on  
 22 adoption or enforcement. It's just that the measure  
 23 can't be given the effect in the context of an adoption  
 24 or an enforcement. So it is a misnomer to say that there  
 25 is a limitation imposed upon the State.

1 Frankly, the bulk of what I'd like to present  
 2 to you in the next, I think, about three minutes relates  
 3 to the fourth argument that we've made. "The right of  
 4 all persons to health care choice" is a political slogan,  
 5 plain and simple, and it's a very effective political  
 6 slogan.

7 As you know, the Colorado Supreme Court, in  
 8 terms of citing whether or not something is a catch  
 9 phrase, holds that phrase up to the context of current  
 10 political engagement, current political debate.

11 And I would like to establish for you right  
 12 now that the right to health care choice is a slogan  
 13 infused with political weight; meaningless, but infused  
 14 with political weight. And I say it's meaningless  
 15 because this isn't really a measure that addresses all of  
 16 the possible health care choices that could be made.

17 Let's go to the pdfs. No. 2, in your packet  
 18 -- what I'd like you to do is go to the third one.  
 19 Thanks.

20 In the recent debate over health care reform,  
 21 many groups grew up in terms of both proponents and  
 22 opponents to this measure. One of the key opposing  
 23 groups used health care choice as the center of its name  
 24 and the center of its pitch, Consumers for Health Care  
 25 Choices.

1 I might note that all of these exhibits are  
2 taken off of the internet and the internet addresses have  
3 been provided on the cover page of that packet that is  
4 before you.

5 Let's go back to the second pdf. Let's go  
6 back to the pdfs. That phrase -- no, go to the  
7 next-to-the-last one. Thanks.

8 That phrase shown in Exhibit 3 is something  
9 that appears in this group's (inaudible) pieces, for  
10 instance. I mean it's not just what they pay for. It's  
11 what they put out to have -- help define the contours of  
12 political debate. This is an editorial by Mr. Ferrara  
13 that he entitled and then placed on their website and  
14 then got placed in various newspapers, Proposed overhaul  
15 would kill health care choice.

16 Now, this isn't an issue that's lost on at  
17 least one of the Proponents. And in the local press,  
18 this issue has also, this phrase has also been trotted  
19 out.

20 Go back to the menu, and the second one on  
21 your list. Linda Gorman, who is a Proponent of this  
22 measure, recently had printed in the Aurora Sentinel an  
23 article that is entitled by the paper, and then you can  
24 see in the first line, by the authors, Why we're crazy  
25 about health care choice.

1 Some of the governments offer a health  
2 insurance plan, but experts say a government plan could  
3 result in 119 million Americans coming off their existing  
4 coverage. They'd end up on a government-run plan,  
5 leaving no choice. And that's no joke.

6 Tell Congress any plan that takes away your  
7 choice of health care is not an option.

8 (End of recording.)

9 MR. GRUESKIN: Okay. The voice you hear, the  
10 dialogue, the monologue about choice, you see it's  
11 stamped up on the screen, and I've included that  
12 particular shot under Exhibit No. 5, as I've also  
13 included the transcript of that ad with the audio and  
14 visual.

15 It is clear that choice is a significant  
16 factor there, but nothing like the ad you're about to  
17 see.

18 If you'd click on the first one, which is  
19 indicated by Exhibit 6 in your packet.

20 (Beginning of recording.)

21 VOICE: There are hundreds of choices in  
22 health care plans today. But imagine this as the massive  
23 government-run insurance plan some in Congress want.  
24 This government-run plan could crush all your other  
25 choices, driving them out of existence, resulting in

1 "Health care choice" has political weight and  
2 it has political meaning. Oftentimes when you are asked  
3 to strike a particular phrase because of its political  
4 meaning, people say, I can tell you, you'll hear that in  
5 TV ads. Well, what if I could show you that this is  
6 exactly the kind of phrase that gets used in this debate  
7 in TV ads?

8 Let's go back, let's see, to the videos. The  
9 last one. This is an ad placed by a group called  
10 Conservatives for Patients' Rights more than --

11 (Beginning of recording.)

12 VOICE: It's all a joke. I'm for the  
13 government, and I'm here to help.

14 MR. GRUESKIN: Can you stop that, please.

15 (Recording is paused.)

16 MR. GRUESKIN: Thank you.

17 Printed news reports establish that each of  
18 the ads I'm about to show you had well over a million  
19 dollars behind them in terms of broadcast. This isn't  
20 some isolated do-it-yourself, do-it-at-home kind of  
21 undertaking.

22 Go ahead. Let's play this.

23 (Recording resumes.)

24 VOICE: -- care. It can mean taking away your  
25 choice.

1 119 million off their current insurance coverage, leaving  
2 no choices in health insurance and government in control  
3 of your health care.

4 It's not too late. Protect your health care  
5 choices. Tell Congress to say no to a government-run  
6 plan.

7 (End of recording.)

8 MR. GRUESKIN: All right. Now, maybe what  
9 we're talking about is simple serendipity. The  
10 Proponents decided to have a measure. They called it  
11 "Health care choice," and this particular political  
12 debate was defined by the issue of health care choice,  
13 which I would say for the record, but I think you could  
14 take notice of, the fact is is that this campaign was  
15 very effective because there was no public option as a  
16 result of public outcry after this particular campaign  
17 set in.

18 So are we talking about serendipity here? I  
19 don't think so. But before we get to that issue, let me  
20 just refer you to Exhibit 7. The neutral Annenberg  
21 Public Policy Center, associated with the University of  
22 Pennsylvania, analyzes ads political. And it took a look  
23 at the bulldozer ad you just saw, the one that crushes  
24 the words "Health Care Choices." And it's assessment of  
25 that ad is that it is, quote, "More Health Care Scare."



1 And it specifically points out, "The ad also  
2 falsely cites the New York Times as the source of the  
3 statement that what's being proposed would leave no  
4 consumer choices and government in control of your health  
5 care." New York Times didn't say that at all. The  
6 newspaper was just quoting claims made by insurance  
7 companies (inaudible).

8 The point is that is a very effective  
9 political tool, and it's not just me saying that, and  
10 it's not just your eyes and ears.

11 Let me suggest to you, though, that it isn't  
12 just serendipity here, that this campaign that you saw  
13 was determined by political pros much smarter than me.

14 You might recall in early May of last year,  
15 and it's reflected in Exhibit 8, there was a memo that  
16 was widely discussed in media by a well-regarded  
17 political pollster in Washington, Frank Luntz.

18 And what Luntz did is he took a look at all of  
19 the phrases that can be used in health care debate, and  
20 he advised congressional Republicans which ones to use  
21 and which ones not to use. And specifically Exhibit 8  
22 shows you where this was discussed publicly. Exhibit 9  
23 shows you where his particular poll was made available on  
24 the internet.

25 It was a conversation or it was an article

1 Care Glossary, words that work and what not to say. On  
2 page 28 he has "Never say" and "Instead say".

3 And if you look at the second level of boxes,  
4 he asks the question of various people in his polling  
5 technique, Which health care policy do you want the  
6 most? The first answer is inferentially about choice.  
7 The second one is clearly about choice. I should have  
8 the right to choose the health care that's right for me.

9 Then he asked people, Which health care  
10 statement do you agree with? The answer that polled the  
11 best, The freedom to choose the doctor, hospital and plan  
12 that's best for me.

13 And then he said, Which health care right  
14 matters most? Answer, The right to choose the doctor,  
15 hospital, policy that fits their individuals needs.

16 Now, again, what use was this put to, this  
17 document? Well, Mr. Luntz answers that question on  
18 page 3. And I'll read it to you so it's in the record.

19 Quote, "This document is based on polling  
20 results and instant response dial sessions conducted in  
21 April 2009. It captures not just what Americans want to  
22 see, but exactly what they want to hear. The 'words that  
23 work' boxes that follow are already being used by a few  
24 congressional senatorial Republicans. From today  
25 forward, they should be used by everyone, but don't

1 about Frank Luntz summing up his -- his approach and an  
2 interview that he had with the New York Times where, when  
3 asked about why he used the words he used or why he  
4 prioritized them, he said, Look, I'm not a policy person,  
5 I'm a language person.

6 Well, he used "language" for a reason, and  
7 I'll suggest to you that it was to affect the political  
8 debate.

9 Exhibit No. 10, which appears to have been, at  
10 least in some of the copies, it's like it's Hebrew, it  
11 reads from right to left, it starts at the back. You may  
12 have page 1 at the very end. You may have it at the  
13 beginning of Exhibit 10.

14 This document is what you can access if you  
15 use the link in Exhibit No. 9 where it talks about penned  
16 a health care messaging memo. This is that memo. This  
17 is Luntz's actual memo. It's entitled The Language of  
18 Health Care 2009, the ten rules for stopping the  
19 Washington takeover of health care.

20 And if you go to page 28 -- throughout the  
21 memo he analyzes various issues of what to say and what  
22 not to say. He has boxes that talk about words that  
23 work. Sprinkled through there is the word "choice."

24 But I want you to focus on his last several  
25 pages, what he calls, starting on page 26, the Health

1 expect to reach everyone. More than one quarter of the  
2 population will bat significant governmental involvement  
3 in health care and a third support universal care. This  
4 is what's important. The primary message of this  
5 document is to focus on the persuadables and generate  
6 support among wayward Republicans and conservatives.  
7 Here's how."

8 What this document is all about creating  
9 political leverage. What Mr. Luntz says. You saw the  
10 ads that emanate from this piece as we point out in our  
11 exhibits. Those are ads that appeared a month after this  
12 document was publicly available. And they highlight the  
13 hysteria over the use of the words "right to health care  
14 choice."

15 We think that this is a measure that, if it is  
16 one subject, and we doubt it is, but even if it is, it's  
17 certainly that subject isn't the right of all persons to  
18 health care choice. And we'd suggest that that phrase  
19 needs to be struck in its entirety from the title. It  
20 simply is, as you saw on the screen, an explosive  
21 phrase.

22 We have one other argument as to the accuracy  
23 of the title. It's an argument that I believe we made  
24 last time. We believe that there is a new and  
25 controversial legal standard for defining the lawful

1 health care choices to include not just things that are  
2 lawful here but things that are prohibited here, things  
3 that it would be a mistake to have a title that doesn't  
4 address that change and a standard that people pretty  
5 much have come to rely upon.

6 I thank you for the significant amount of time  
7 you have allotted to me, and if you've got questions I'll  
8 be happy to answer them.

9 MR. HOBBS: Any questions for Mr. Grueskin?

10 One thing that I want to ask about sort of  
11 goes to, I think, the heart of how to read the  
12 introductory portion of subsection (1), and I think it  
13 relates to maybe more than one issue that you raised,  
14 such as whether this is legislative or administrative in  
15 character and so forth.

16 But I was having some difficulty understanding  
17 the way you were reading that. I mean the way I see it  
18 -- I mean I think you were saying -- for example, you  
19 were saying it doesn't prohibit the Legislature from  
20 doing anything. And I'm having trouble following that.  
21 It basically says, No statute shall, A or B, no statute  
22 shall.

23 Now, you know, it also has regulation,  
24 resolution, et cetera. But focusing on the word  
25 "statute" for a moment, it's -- you know, there's some

1 adopting a statute that requires someone to participate  
2 in a public or private health insurance program. It  
3 doesn't stop them from doing it.

4 Now, it may not be able to be administered by  
5 the Department of Public Health, or whoever administers  
6 those statutes, in that manner, but it doesn't keep the  
7 Legislature from enacting that kind of a statute.

8 It may not be enforceable, I think is part of  
9 the argument that is being made. And if I grant you that  
10 argument, then we're at one on the issue that this is  
11 about how the statute is administered, how it's  
12 implemented, which means it's not a subject for the use  
13 of the initiative power.

14 MR. HOBBS: I'm still having trouble following  
15 it. I mean I'm -- granted, there's different ways to  
16 word this. But I guess what I'm looking at is, you know,  
17 this is something for the Bill of Rights, you know, and  
18 the first statement is granting the right for health care  
19 choice.

20 So by analogy if we were looking at another,  
21 say, the right of due process, you know, a Constitutional  
22 provision that says, All persons shall have the right of  
23 due process, and then if the measure went on, if the  
24 right -- the Constitutional right went on to say, you  
25 know, No statute adopted or enforced by the general

1 additional language that says that it's particular  
2 statutes. It's statutes that are adopted or enforced by  
3 the State of Colorado, and it's statutes that are done so  
4 either independently by the Legislature, for example, or  
5 perhaps because the Federal Government wants the  
6 Legislature to do that.

7 But basically it's saying, No statute shall.  
8 And it seems like that is a prohibition on the adoption  
9 of statutes and the enforcement of statutes. That's how  
10 I take that. And in that respect, it seems like the  
11 title is accurate.

12 But I hear you reading it differently.

13 MR. GRUESKIN: Right. I do read it  
14 differently. And I apologize for not being clear my  
15 first time through.

16 I don't think you can skip over the word  
17 "adopted." So it's not just "No statute shall," it's,  
18 "No statute adopted by the general assembly shall..."

19 So that means the Legislature can adopt  
20 certain statutes. They may not be administered such that  
21 they have this impact, but there's no limitation. This  
22 measure does not say, The general assembly shall not  
23 adopt a statute that, you know, 1 and 2 under the  
24 measure. And I think that's different. There's nothing  
25 to keep the general assembly under this measure from

1 assembly shall deprive people of blah, blah, blah, blah,  
2 blah, and it talks about a due process, well, of course,  
3 the general assembly can adopt statutes that violate  
4 that. But as you say, they'd be unenforceable.

5 So it operates as a prohibition. That's what  
6 I sort of see here as well. There's a right granted and  
7 no statute shall be adopted or enforced that violates  
8 certain principles.

9 MR. GRUESKIN: Well, let me just back up a  
10 little bit, because once the people act and then the  
11 Legislature acts, presumably the court's going to try to  
12 give effect to both enactments, right; this amendment and  
13 whatever the Legislature does? And only if there is an  
14 irreconcilable conflict will the statute in part  
15 potentially be struck. I suppose it could all be  
16 struck.

17 But the Legislature -- I mean it's a common  
18 rule of construction that the courts will give effect to  
19 what the Legislature's done. So there is nothing to keep  
20 the Legislature from adopting a statute to see how far  
21 the edge of that language goes. There is nothing on an  
22 institutional and structural basis where, if the bill got  
23 proposed to do this, it could not be enacted, that the  
24 Legislature could not be enacted, that the Legislature  
25 could not take the next step of putting it into play from

1 a policy point of view, and if someone wants to contest  
2 its applicability or its enforceability or its  
3 administration, they could do so.

4 But I just think this isn't a measure that  
5 actually prohibits that adoption. And you know what?  
6 You and I may just be taking a look at a very fine legal  
7 point from very different points of view. I accept  
8 that.

9 MR. HOBBS: Mr. Domenico.

10 MR. DOMENICO: Yeah, I mean I think -- I think  
11 I'm -- I think the limitation on the initiative process  
12 is not, I don't think, as sophisticated as the argument  
13 you're making. I mean the point of the initiative  
14 limitation is only things that the Legislature  
15 essentially could do are proper for initiative. I think  
16 we agree with that. That only things that -- it can't  
17 tell the Governor how to run his office or those sorts of  
18 purely executive things through the Legislature.

19 MR. GRUESKIN: I think the Legislature passes  
20 all sorts of administrative statutes, but you know --

21 MR. DOMENICO: Right.

22 MR. GRUESKIN: This being a building for  
23 instance. That's not something that you could undo by  
24 right of initiative and rename it to something else.

25 MR. DOMENICO: Hmm. Well, but I think the

1 MR. HOBBS: Mr. Cartin.

2 MR. CARTIN: Mr. Grueskin, again just  
3 focusing --

4 MR. HOBBS: Are you done?

5 MR. DOMENICO: I'm done yeah.

6 MR. CARTIN: I'm sorry.

7 MR. HOBBS: Mr. Grueskin, I didn't mean to cut  
8 you off.

9 MR. GRUESKIN: The truth is, I mean this is an  
10 issue that is, frankly, I think Mr. Knaizer will admit,  
11 this isn't one that the courts have looked at, so we  
12 don't really have a lot of instruction as to what its --  
13 you know, how it would address this issue. And so it  
14 will probably be, given the at least two to -- two to  
15 nothing or potentially three to nothing views being  
16 expressed by the Board so far, it will be an interesting  
17 issue for the courts to address. Because in the local  
18 context, it has been much more clear than in the  
19 state-wide context about the limitation on the right of  
20 initiative not going so far as to allow the  
21 administration.

22 But I hear your point. It's a valid --

23 MR. DOMENICO: Well, maybe I could make one  
24 suggestion. Because we could, I think, handle a few of  
25 Mr. Grueskin's objections as a group, which is the

1 Legislature could pass a law that prohibits the executive  
2 branch from enforcing certain types of policy decisions  
3 or something like that. Say there was a dispute between  
4 the Governor and the Legislature, and the Legislature, I  
5 think, could say, We think you're misinterpreting these  
6 laws and we don't want you to enforce laws this way.

7 I think outside of purely administrative  
8 stuff, the Legislature could do that. That's -- to the  
9 extent that this is similar to that, I think that that --  
10 that it's still within the right of initiative.

11 I'm not sure I understand why -- I mean I'm  
12 with Mr. Hobbs. Even if you -- I think I disagree on how  
13 this is read, first of all. It's written in this tense  
14 or mood, I think, because it's meant to be broadly  
15 interpreted to cover both future enactments by the  
16 Legislature or make sure that past laws aren't enforced,  
17 and certainly that's entirely proper for initiative in my  
18 view.

19 And I think that's all it does. I don't think  
20 it seeks to say the Legislature can do whatever it wants,  
21 but we're just going to say that the executive branch  
22 can't do certain things.

23 This seems right in line with both what  
24 legislatures do and with what's done in initiatives all  
25 the time.

1 arguments that we don't have jurisdiction over this  
2 because of some flaw in what it's seeking to do.

3 I guess what I'm saying is if this is a debate  
4 about how the title should be written, I'm maybe  
5 persuaded by what Mr. Grueskin said that maybe we could  
6 rewrite the title a little bit better.

7 But if we're debating whether we should be  
8 throwing this out as we don't have jurisdiction, then  
9 there's a step missing in all the cases that I saw cited  
10 to us in the motion, which is saying that the Title Board  
11 is the place to decide whether these are appropriate  
12 types of measures or not.

13 And if we all agree that whatever the merits  
14 of Mr. Grueskin's arguments there, that they're not  
15 properly addressed to us, then maybe we can move on  
16 without getting into the weeds any more than we already  
17 have.

18 MR. HOBBS: And actually, I think that's  
19 helpful and I agree with that. I mean I think the -- I  
20 think there's various issues that are raised that might  
21 go -- that might be raised if the measure passes, but I'm  
22 not sure that these are jurisdictional issues, that some  
23 of them are jurisdictional issues for the Title Board.

24 The single subject one I think is, but the  
25 others, you know, whether this violates the supremacy

1 clause, for example, I don't think that's something for  
2 the Title Board to decide. Realistically, probably not  
3 even whether something is legislative in character  
4 perhaps. That's something that I think probably would  
5 have to be argued later if the measure passes.

6 So I think that may be helpful to look at some  
7 of these as a group, because if we think those arguments  
8 don't relate to our jurisdiction, then probably we would  
9 not act on those.

10 I think that's -- I think Mr. Domenico is  
11 correct, there's still issues of whether the title is as  
12 good a job as we can do and whether there is a violation  
13 of single subject.

14 MR. DOMENICO: And I think Nos. 2, 3 and 4 of  
15 the Motion for Rehearing are what I had in mind as  
16 interesting arguments that I'm not prepared, I don't  
17 think, to address here, that I just don't -- I'm not  
18 aware of what obligation or authorization we have to make  
19 those sorts of decisions.

20 MR. GRUESKIN: Well, just for the record, your  
21 comment is absolutely accurate, Mr. Domenico, that these  
22 are not issues in which the Supreme Court has spoken  
23 yet. But I do think that, particularly in the  
24 administrative context, the Supreme Court has said that  
25 certain issues need not proceed to the ballot if they

1 the weight of the phrase "health care choice." I  
2 understand that that carries with it a lot. And I can  
3 understand that that might have -- there may be strong  
4 motivations, political motivations in choosing phrasing  
5 that might enlist support better than other phrasing.

6 But on the other side of it is Proponents --  
7 seems like they picked their words because this is how  
8 they interpret issues and they're framing issues the way  
9 they see them. And it seems to me that Proponents may  
10 just see their measure as an issue of health care choice,  
11 just as some proponents may see their measure about tax  
12 cuts or term limits.

13 We've had similar debates. I probably could  
14 come up with better examples, where there's phrases that  
15 have maybe political -- strong political support, but  
16 that's how proponents see their issues.

17 And in this case the operative words are "All  
18 persons shall have the right to health care choice." I  
19 mean that is a grant -- a right granted, if this measure  
20 were adopted, a right to be granted in the Bill of  
21 Rights. And understandably, it may not be perfectly  
22 clear what that means. Again, it might be like due  
23 process, the right to due process. I don't know exactly  
24 what it means.

25 But can Proponents propose that an addition to

1 are, in fact, administrative in nature.

2 Whether there would be an action for a  
3 declaratory judgment after someone went to the expense of  
4 getting something on the ballot or not, I don't know.  
5 But I do believe that the Board has this capacity. I  
6 understand that you probably don't agree, but I guess  
7 we'll find out.

8 MR. DOMENICO: Right. And I agree with that,  
9 that I'm not sure you necessarily need to wait until it's  
10 on the ballot for all these sorts of things. But just in  
11 the absence of either some clear direction from a court  
12 or some clarification in our authorizing statute that we  
13 are supposed to make that decision, I'm just  
14 uncomfortable doing it.

15 MR. HOBBS: I think there's a consensus here  
16 on that. But the focus being on that single subject,  
17 that leaves the focus on single subject and the title, I  
18 think. And while we still have Mr. Grueskin in front of  
19 us, before we turn to Mr. Caldara, I just want to find  
20 out if there's other questions or discussion that the  
21 Board wants to pursue.

22 I guess I -- I'll jump into something here at  
23 the sake of even trying to understand this a little  
24 better or get some further discussion.

25 You know, I think it's a difficult issue about

1 the Bill of Rights that would grant the right to health  
2 care choice? I'm reluctant to say they can't because  
3 that phrasing is either very broad or it carries  
4 political weight. I think it has meaning.

5 I think the measure goes on to prohibit  
6 certain things that A, require people to participate in  
7 plans, which is about choice; or B, deny people, you  
8 know, the ability to make or receive payments for  
9 services, which is about choice.

10 So it seems like the measure is about health  
11 care choice. Now, the fact that it doesn't expressly  
12 deal with other kinds of health care choices is, again,  
13 something it seems to me the Proponents can choose to do  
14 in their measure. They're not required to deal with  
15 every kind of health care choice.

16 So, you know, on the one hand I appreciate the  
17 arguments about the political weight of the phrase  
18 "health care choice," but it seems like that's what the  
19 measure fully intends, to grant that right of health care  
20 choice. As broad as it may be -- I don't think it's as  
21 broad as water or some other things, but I think that's  
22 what the measure is about; and I wouldn't know how to set  
23 a title otherwise, if we did not say what the measure  
24 does. It grants the right to health care choice.

25 So like I say, I'm not yet persuaded that

1 there's a single subject violation or that there's a  
2 catch phrase problem.

3 MR. GRUESKIN: Let me ask you this question:  
4 Let's say that there was a measure that had a -- well, as  
5 you know, the Supreme Court says just because it's in the  
6 measure doesn't mean you have to put it in the title.

7 MR. HOBBS: Yeah.

8 MR. GRUESKIN: So that's the starting point.  
9 The fact that the seed was planted for whatever reason,  
10 maybe there was a political design, perhaps not, doesn't  
11 really make any difference. What the Supreme Court  
12 requires is that there be evidence that there is a  
13 political slogan that is reflected by the language that  
14 you set. And that was the whole reason that we went  
15 through this exercise, in the event that it actually  
16 makes it up to the Supreme Court on this issue.

17 But let me ask you what you would do -- and  
18 this is a rhetorical question, obviously. But what if  
19 you had a case, an initiative that was comprised solely  
20 of something that the Supreme Court had already  
21 adjudicated to be a catch phrase, like in the English --  
22 I think there was an English only -- or emergent measure  
23 where there was some phrase in there about phrasing out  
24 bilingual education as expeditiously and efficiently as  
25 possible, something like that.

1 MR. HOBBS: And I think you raise a good  
2 question, and I do think that English education measure  
3 is troubling here, because from my view, the heart of the  
4 measure was that language that required the English  
5 language instruction to be as effective and efficient as  
6 possible or something.

7 But there was a lot more to that measure, and  
8 the Title Board was nevertheless able to rewrite the  
9 titles and still talk about the different features of the  
10 measure.

11 Following up on your rhetorical question, what  
12 if this measure only had the first sentence, "All persons  
13 shall have the right to health care choice"? What if  
14 that's all it said? And I think you would say we can't  
15 set a title, that that is a -- we can't -- I mean I would  
16 say we couldn't set a title because we can't use that  
17 phrase and we can't otherwise interpret it. So  
18 effectively, no proponent could propose a measure for the  
19 Bill of Rights that grants the right of health care  
20 choice.

21 MR. GRUESKIN: I'm not sure if I agree. I'm  
22 not sure that I disagree. But it seems to me that one of  
23 the issues that -- one of the procedures that inevitably  
24 is used is that you hear out proponents. What do you  
25 intend by this? I think that's the first question that

1 What if that was the nub of the measure and  
2 you knew it was a catch phrase? Would you set a title  
3 that incorporates the catch phrase because that's what it  
4 does? And that's effectively the set of handcuffs that  
5 the Proponents have put you in.

6 I would suggest to you that the Supreme Court  
7 has released you from those handcuffs. You are not bound  
8 to use the language that they use. That language will be  
9 in the Blue Book. That language we know will be on TV.  
10 They are free to use it however they see fit.

11 You are free to use whatever language  
12 accurately and in a nonprejudicial way describes this  
13 measure. And if you know something was -- a phrase is  
14 used solely for political reasons, it seems to me you  
15 cannot include it in the title. That you would allow the  
16 title to describe the two forms of legal change that will  
17 occur under this measure is absolute. And I absolutely  
18 talk about those two elements. But you don't have to  
19 color it by using "The right of all persons to health  
20 care choice."

21 And I think that the Proponents get to --  
22 Proponents are in front of you all the time and they've  
23 got little political nuggets buried for their own  
24 reasons. But that's not a constraint on your authority  
25 to use fair language.

1 you ask when you're trying to set a single subject, What  
2 are you trying to do here?

3 And it seems to me that unless the Proponents,  
4 you know, were mum on the question of what their intent  
5 was, you would have an idea of what the measure was  
6 intended to do.

7 Obviously, that would -- I mean it's obvious  
8 that would have to be a function of the language they  
9 used.

10 But yes, if you know that language is  
11 inherently prejudicial, intended or not, but nonetheless  
12 it's inherently prejudicial as to the process, then it  
13 seems to me that, you know, you can certainly recommend  
14 to the proponents that they rewrite.

15 But you don't have authority under the statute  
16 to set a title that you know is prejudicial. You are  
17 prohibited. You can only set titles that are fair and  
18 not misleading. And so if you are presented with  
19 language you know to be unfair and misleading, how in the  
20 world can you act under the statute?

21 And frankly, that's not your problem.  
22 Proponents, seems to me, have the choices available to  
23 them to include or not include these little language hand  
24 grenades. And once they choose to include one, whatever  
25 the consequence is, the consequence is.

1 I -- you know, frankly, you know I'm a big  
2 advocate of the process, but I don't really see that you  
3 have to hear the political designs of the Proponents.

4 MR. DOMENICO: And I think I'm generally in  
5 agreement with Mr. Grueskin, I think. I think we should  
6 hear from Mr. Caldara.

7 But I think the difference between a situation  
8 like this and if the measure simply -- if a measure is  
9 itself nothing but a catch phrase, is that in our case  
10 it's not written. The problem with catch phrases is that  
11 they are misleading, according to the Supreme Court, that  
12 they can cause people to vote for or against something  
13 without understanding really the rest of the measure,  
14 that it throws people off.

15 If the measure is nothing but a catch phrase,  
16 I think that problem generally would disappear, because  
17 peop- -- it wouldn't -- it would be almost by definition  
18 not misleading if all you're doing is voting for a catch  
19 phrase, to stick it in the Constitution, which is not  
20 unprecedented, efforts to do that.

21 So I'm a little -- I'm not sure I am as  
22 troubled as Mr. Grueskin, but I am troubled a little bit  
23 by the statement of the single subject that we have in  
24 the title. And I'm -- I'm not sure we can't do better.

25 MR. HOBBS: Mr. Cartin.

1 author of this phrase says that it's all about trying to  
2 gain political leverage.

3 I would tell you, it seems to me that if the  
4 issue of whether or not individuals have to accept an  
5 insurance mandate and can continue to pay their health  
6 care providers can be accurately described by reference  
7 to those elements, what does "The right to health care  
8 choice" add? If the right goes no farther than that,  
9 then that is simply an encapsulation, a political  
10 encapsulation, of the two elements that Mr. Caldara spoke  
11 of when this thing was first announced and that we all  
12 have acknowledged are the two central elements of this  
13 measure.

14 And so what does the political catch phrase,  
15 my (inaudible) here, what does that add to communicating  
16 the issue about a mandate and the right to private  
17 payment of health care? Nothing. It's just an add-on,  
18 but it's a big political add-on. And therefore, it skews  
19 the debate, and it suggests that just talking about  
20 payment systems or health care is not sufficient to sell  
21 the idea, because only those ideas, those two ideas, are  
22 at the heart of this measure, with the exception for  
23 emergency medical care.

24 So if -- maybe Mr. Caldara can enlighten us as  
25 to what the phrase means and how it adds to those two

1 MR. CARTIN: Just one question. And it  
2 appears -- and I want to go back to Mr. Hobbs' comments.  
3 The first, the Section 32 is entitled Right to Health  
4 Care Choice, and the first sentence of Subsection (1)  
5 says, "All persons shall have the right to health care  
6 choice." And I'm in agreement that the language that  
7 follows that particular sentence in Subsection (1) in (a)  
8 and (b) relates to the right to health care choice.

9 So what does the Title Board do if the  
10 arguably -- the language of the arguable catch phrase is  
11 embodied in the measure, and assuming that there's a  
12 connection between that phrase and the content of the  
13 measure, and we know that the phrase will be used in the  
14 political environment, or we're assuming that, does the  
15 case law say that -- what does the Title Board do then?  
16 Is it forbidden --

17 And your argument is that, notwithstanding the  
18 fact that the language is embodied in the measure and  
19 that there's a strong argument, and I know that you're  
20 not saying this, but that there's -- it seems as though  
21 it expresses a single subject, that it nonetheless can't  
22 be used, because potentially it could be construed as a  
23 catch phrase.

24 MR. GRUESKIN: Well, I'd argue with your use  
25 of the word "potentially." It seems to me that the

1 aspects. But short of that, it seems to me that by  
2 definition you recognize that it is political surplusage  
3 and therefore it's unnecessary.

4 MR. HOBBS: Mr. Domenico.

5 MR. DOMENICO: Can I just make a quick  
6 suggestion, I think partly in response to Mr. Cartin's  
7 question.

8 In my view, our analysis of this issue has to  
9 go first. We have to decide whether we think it is, in  
10 fact, a catch phrase. If it's not, then this problem  
11 largely goes away I think. If it is a catch phrase, then  
12 we have to decide what does that mean for us.

13 My view is, I think what the court has told us  
14 is if there's a catch phrase, we have to, if possible,  
15 not use the catch phrase in the title.

16 So I think first we have to decide, is this a  
17 prohibited catch phrase. And if it is, we have to think  
18 about can we write this title without it.

19 But I'm not -- before we get there, I'm going  
20 to make sure we have dealt with the No. 1 of the Motion  
21 for Rehearing, which is whether, in fact, this has a  
22 single subject, 'cause we're getting into how to write  
23 the title and I'm not sure we got past the first part of  
24 the motion, which is whether this is a single subject or  
25 not.

1 MR. HOBBS: Well, I'm speaking for myself.  
2 I'm not persuaded that it violates the single subject  
3 requirement, but ...

4 BOARD MEMBER: Just to agree with you on that,  
5 only one that partly troubles me is the -- what's in the  
6 motion as 1.(f), which is the allegation that this  
7 expands somehow what are lawful health care services. I  
8 think we discussed that either last time or the first  
9 time this came up. I think that's a -- overreads the  
10 measure. So I'm not sure I have to deal with that, with  
11 whether that would be a separate subject; if it were,  
12 whether this tries to basically make legal things that  
13 are illegal under federal law or in some other state. I  
14 don't think that's the way the measure has to be read. I  
15 think the Proponents told us that's not the intention.

16 So given that, I don't think we have to  
17 address whether if, in fact, it did do that it would be a  
18 single subject violation.

19 MR. GRUESKIN: Could I just opt in for just  
20 one clarification.

21 The Proponents add the word "Colorado" before  
22 "law," which addressed the issue that was raised last  
23 time that I think you're referring to. But I still  
24 believe that it has the concern that we've discussed, but  
25 I just wanted to make sure that that was part of your

1 to suggest something like that just as a way to limit  
2 what Mr. Caldara feels he has to respond to, which would  
3 be numbers --

4 MR. CALDARA: You don't have to limit me.  
5 MR. DOMENICO: I think we do.

6 Numbers 1 through 4 of the motion I think all  
7 go to our jurisdiction, and all of us, I think, were  
8 comfortable denying them.

9 Should I make a motion or just suggest that we  
10 turn to --

11 MR. HOBBS: Well, you know, one thing that  
12 occurs to me is that since we're not the final word on  
13 this, it may be that Mr. Caldara actually would like an  
14 opportunity to argue.

15 MR. CALDARA: Well, let's go ahead. If that's  
16 how you're going to rule, then I will just keep my  
17 comments to section 5 of this.

18 MR. HOBBS: Okay. Well, and if that's the  
19 preference, Mr. Domenico, if you want to go ahead and  
20 offer --

21 MR. DOMENICO: Well that's fine. Doesn't  
22 matter to me when we do it, just as long as he doesn't  
23 spend a lot of time arguing things that we agree with him  
24 on.

25 MR. HOBBS: So Mr. Caldara, you're comfortable

1 discussion so you knew. Thank you.

2 MR. HOBBS: So it sounds like there is a  
3 consensus on the single subject as well, which still  
4 leaves us with the title.

5 So I'm trying to simplify what Mr. Caldara  
6 needs to respond to. He's been chomping at the bit. But  
7 I think now we should hear from Proponents, and I think  
8 there are some questions.

9 Mr. Domenico.

10 MR. DOMENICO: Well, can we move, now that the  
11 -- can we make a motion that we have jurisdiction and  
12 then move on to -- are all our questions now about the  
13 title?

14 MR. HOBBS: I think so, although I think we  
15 can do a motion.

16 You know, one way I had anticipated maybe to  
17 just simply, once we're ready to vote, there could be a  
18 motion that the Motion for Rehearing be denied except to  
19 the extent that the -- for example, to the extent that  
20 the Board amended the titles.

21 If there's nothing but the title left that the  
22 Board might want to adopt, it would be to deny the Motion  
23 for Rehearing except to the extent that the Board amended  
24 titles.

25 MR. DOMENICO: Okay. Well, I was just going

1 limit -- you're planning --

2 MR. CALDARA: Yeah. I understand what you're  
3 trying to do, and I'm trying to be respectful of the  
4 time, by the way.

5 I was raised Catholic, and in school the nuns  
6 told me that if you're not really good, you go to  
7 Purgatory for some time and Purgatory is when you're  
8 sentenced to serve on the Title Board. So I understand  
9 very well what you're doing.

10 First of all, let me say, this is not a  
11 court. You are not judges. Your duty, and tell me if  
12 I'm wrong, is actually very, very specific. You have two  
13 things to do. One, decide if this meets a single  
14 subject. It certainly does. As many other things have  
15 come through here, I could name them ad nauseam that are  
16 single subjects, everything from campaign finance reform  
17 to ethics in government and all the rest are single  
18 subject, although they have many aspects.

19 And they also say that -- Mark's talking about  
20 a rehearing. Oh, no, no, no. You weren't here for the  
21 hearing, Mark. These were objections that could have  
22 been brought up at the actual hearing where you set title  
23 for this, and all these things could have been done at  
24 that point.

25 So I've got to wonder at a motion for

1 rehearing whether it's appropriate to be adding new  
2 evidence and new arguments that have not been held during  
3 the hearing. There was nobody here to make these  
4 claims. So that's why the Board put this this way. I  
5 imagine that's part of the legal strategy to tie this  
6 up.

7 When you heard this, there was no opposition;  
8 there was nobody saying, No, you shouldn't be using these  
9 terms when writing these -- writing this proposal.  
10 Instead, Mark decided to hang back, let you write what  
11 you wanted to, and then put together this counter.

12 So he was not involved in the process, which  
13 was too bad, because that's exactly what it's here for.  
14 So I'm wondering if it's Kosher that new legal arguments  
15 are brought into evidence, and I think that's very odd  
16 and regrettable.

17 But let me bring you back to this subject  
18 before. Let's remember that a couple years ago I brought  
19 a very similar measure here and did the same thing, the  
20 right to health care choice, and I believe that's how you  
21 put it into the language, and you certainly gave it  
22 single subject.

23 But let's go back to some of these things.  
24 Particularly when it comes to the right to health care  
25 choice, I wrote this initiative, and this initiative was

1 This Title Board, when bringing forward  
2 Amendment 27 that year, called it Shall there be an  
3 amendment to the Colorado Constitution concerning  
4 campaign finance, and in connection with therein, we did  
5 that. And the same way we've done things such as ethics  
6 in government. We have done things such as the ERA. How  
7 do you say Equal Rights Amendment without saying Equal  
8 Rights Amendment?

9 So just because these terminologies are being  
10 used in the political sphere, doesn't mean it doesn't  
11 accurately describe what this measure does.

12 And of course, people are talking about it in  
13 political circumstances. I want to thank Mark for doing  
14 some great research for me, because other than my press  
15 conference and what Linda, who works with me on the  
16 Independence Institute, wrote, I haven't seen any of this  
17 research or commentary.

18 This is the first time I've seen this. I'm  
19 not surprised that they're using the same terminology  
20 that I used, because that is the terminology of this  
21 initiative, to have health care choice.

22 So when it comes to -- and we can get into the  
23 bits and pieces, but I want to focus in on subsection (d)  
24 here, Right of all persons to have health care choice is  
25 a prohibited catch phrase. Well, they have right to due

1 about a right to health care choice. That's why it was  
2 in the title of this. We have 32 sections in our Bill of  
3 Rights here in Colorado, from right to due process to  
4 right to keep arms, to right to assembly, to right to  
5 expression. And this initiative adds one more, which is  
6 a right to health care choice.

7 I cannot tell you how future courts will  
8 interpret that right to health care choice, just as I  
9 could not -- I'm sure the founders of the State could not  
10 say what a right to free speech or a right to religious  
11 choice would be defined by courts of later generations.  
12 But it was clear that was the intent.

13 Let me be very certain. This is the intent of  
14 this initiative: to make it a right in Colorado under  
15 our Bill of Rights that individuals have a right to  
16 health care choice. If that is not plainly expressed in  
17 the title of this, you are not at all writing what is in  
18 plain words.

19 Let me go back a couple years. I remember  
20 when campaign finance reform was a large issue. As a  
21 matter of fact, it was a large issue when it was going  
22 through the Federal Government when it became final, and  
23 it was called campaign finance reform. This was an  
24 argument that was being bandied around and the term was  
25 campaign finance reform.

1 process is a prohibited catch phrase. Right to bear arms  
2 is a prohibited catch phrase, and you can go through so  
3 many other things in the Colorado Constitution, the  
4 Federal Constitution that are catch phrases.

5 Let me make it very clear. This is about a  
6 right to our health care choices.

7 And in connection therewith, we have taken two  
8 aspects of that and clarified. That doesn't mean there  
9 are no other rights to health care choice. It means  
10 those other rights will be left for interpretation by the  
11 courts, but that it is a basic right here in Colorado to  
12 do so.

13 I'm not asking you to vote for this. And  
14 we've got some -- you know, you can say whatever you  
15 like, but just because these terms are being used inside  
16 politics right now doesn't mean it doesn't accurately  
17 reflect what it does. Good God, it's right there. It's  
18 on the title of the bill. The first enabling piece of  
19 this, the very first primary phrase is that this is --  
20 that all persons have a right to health care choice.

21 We further define what that means in a couple  
22 sections, but that is the key of it. And for that not to  
23 be included in a title would misrepresent this  
24 completely.

25 And whether I paid guys, like Frank Luntz uses



1 those terms or not is inconsequential. This is not a  
2 court of law. This is not a court of public opinion.  
3 Your job here is to give this an accurate title, and I  
4 recommend and request that you do so.

5 Thank you.

6 MR. HOBBS: Questions for Mr. Caldara?

7 I think you answered an important question for  
8 me, but I just want to beat a dead horse maybe.

9 The first -- the measure can be divided into  
10 two parts in my mind. The first part is the first  
11 sentence, "All persons shall have the right to health  
12 care choice," and the second part is everything that  
13 follows. And I think I hear you saying is that that  
14 first sentence -- well, the second part is part of the  
15 first sentence. But the first sentence carries with it  
16 more than what follows, that there really -- your  
17 intention as a proponent is to grant in the Bill of  
18 Rights a right to health care choice, whatever that may  
19 mean, and what follows are two applications, examples  
20 whatever, but there's more to the measure than what is in  
21 the second part.

22 MR. CALDARA: Absolutely. I can't imagine  
23 that not being clear by the words that we've used here.

24 MR. HOBBS: Okay.

25 MR. CALDARA: Might be a right to expression,

1 make this clear. This doesn't change what are legal  
2 medical practices.

3 MR. DOMENICO: Okay. So the only limitations  
4 on the Legislature's authority are the ones specifically  
5 laid out in (a) and (b)?

6 MR. CALDARA: Specifically, yes. These are  
7 very specific.

8 MR. DOMENICO: Right. But so the Legislature  
9 could pass something that says, You don't have the right  
10 to choose your own doctor.

11 MR. CALDARA: And that would be up to a court  
12 to interpret.

13 MR. DOMENICO: Well, I'm just trying to figure  
14 out -- I mean it's true that there are much broader  
15 things in the Constitution, free speech, due process,  
16 right to bear arms. But they don't then come with --  
17 along with a short list of things that are specifically  
18 included and then also don't include this language about  
19 the -- that this doesn't cover anything not prohibited by  
20 law.

21 MR. CALDARA: That helps clarify, I believe,  
22 the first sentence of this.

23 MR. HOBBS: Mr. Cartin.

24 MR. CARTIN: One question, Mr. Caldara.

25 Mr. Grueskin's motion 5.(b), the assertion

1 the right to free speech, a right to religious choice. I  
2 don't have the State Constitution with me, but you go  
3 over many of those rights in the Bill of Rights, and if  
4 you were to -- those don't mean that it's cut and dried.  
5 We don't know how the courts will interpret limit --  
6 express that. But those are in the Bill of Rights, and  
7 this is another one.

8 MR. HOBBS: So there may be things that aren't  
9 specifically mentioned. There may be applications that  
10 aren't specifically mentioned. Mr. Grueskin, I think,  
11 raised the issue of choosing your doctor, for example.  
12 So that would be arguably granted by this measure. It's  
13 not specifically talked about, but if the courts were to  
14 find that the right to health care choice includes the  
15 right to choose your doctor, then that would become a  
16 State Constitutional right.

17 MR. CALDARA: Yes.

18 MR. HOBBS: Go ahead.

19 MR. DOMENICO: What about abortion? Is this  
20 going to guaranty people a right to abortion or anything  
21 else?

22 MR. CALDARA: That is why we put in a section  
23 here, when it comes to lawful health care services are  
24 not -- any service or treatment permitted or not  
25 prohibited by any provision of State law. We want to

1 that the title is inaccurate as the measure does not  
2 prohibit, et cetera, and focusing on the language of the  
3 measure, subsection (1) of Section 32 beginning, "No  
4 statute, regulation, resolution," et cetera, and the  
5 current language in the title after "and in connection  
6 therewith," "prohibiting the State independently or at  
7 the instance of the United States."

8 I guess my question is just generally, what's  
9 your response to that assertion, that the current  
10 language of the title, the phrase right after "in  
11 connection therewith," "prohibiting the State," that  
12 phrase, that that's inaccurate because the language of  
13 the measure doesn't prohibit, at least that's the  
14 assertion?

15 MR. CALDARA: I think the way the Board wrote  
16 the title -- and again, Mark was not here to add any of  
17 his comments at that time. I believe that's by choice.  
18 That's too bad, because that would have been an  
19 interesting discussion.

20 But right now you make it clear that this  
21 prohibits the State from adopting or enforcing these  
22 statutes. That is, I think, a fair reflection of this  
23 amendment.

24 MR. CARTIN: So the language that says, "No  
25 statute, regulation, resolution, or policy adopted or

1 enforced by the State of Colorado shall ..." that  
2 language prohibits the State of Colorado from adopting a  
3 statute, regulation, resolution, or policy.

4 MR. CALDARA: Unless we're getting into a law  
5 student debate over whether the State can pass something,  
6 the courts would just say you can't enforce it, I don't  
7 see any reason to go down that road here. It's  
8 interesting.

9 MR. CARTIN: I just wanted to see what your  
10 response was to that.

11 MR. CALDARA: But quite simply, it is -- in  
12 this it says that no statute -- no statute will do this.  
13 I think that prohibits, this most definitely prohibits  
14 the State from adopting or enforcing those policies,  
15 both. It's pretty clear, "No statute shall." I don't  
16 know how that could be any more clear that that is a  
17 prohibition, No statute shall do this.

18 Now, as far as the legal maneuvering, if the  
19 court says, All right, Well, it stays on the books, it's  
20 just not enforced, or if they yank of it off the books  
21 completely, that's for the courts to decide, I guess, how  
22 to handle it.

23 But yeah, it is a prohibition. I don't know  
24 how else you could read, No statute shall require a  
25 person directly or indirectly to participate in any

1 political debate, you have to decide whether or not  
2 something's a catch phrase. What happened in the past,  
3 if that wasn't a hot button issue is irrelevant if you  
4 know that it is today.

5 Third, well, I don't -- you know, I tried to  
6 go at some length to say that political motives weren't a  
7 part of your analysis. Mr. Caldara maintains that he'd  
8 never seen or heard of the Luntz memo or any of the  
9 controversy around that.

10 Let me hand you what I'd like the record to  
11 reflect as Exhibit No. 11, Patient Power is a project of  
12 the Independence Institute. It has a website, and the  
13 web address for the document I just handed you is  
14 indicated at the bottom of page 2.

15 Patient Power is a, as I said, a project that  
16 is staffed by people at the Independence Institute.  
17 Mr. Brian Schwartz wrote an article about two weeks after  
18 the Luntz memo became public about what he liked in the  
19 Luntz memo.

20 Now, who is Mr. Schwartz? Well, remember that  
21 Aurora Sentinel article that talked about health care  
22 choice? He and Ms. Gorman co-authored it. So is it  
23 possible that this whole issue, even though it was in a  
24 major public forum, was never on the radar screen of  
25 Mr. Caldara? I suppose. But it was on his website and

1 public or private health insurance plan. That's pretty  
2 clear. No statute, no regulation, no resolution, no  
3 policy shall do that. That is a prohibition.

4 MR. CARTIN: Thank you.

5 MR. HOBBS: Further questions for  
6 Mr. Caldara?

7 All right. Mr. Grueskin, any final word?

8 MR. GRUESKIN: Yes.

9 I will ask you to -- well, let me first deal  
10 with the technical issue.

11 The law is very clear that a motion for  
12 rehearing can be filed. It doesn't have to be filed by  
13 someone who was present or someone who made a  
14 presentation earlier.

15 In fact, my presence on No. 40, Mr. Caldara's  
16 first initiative I think, is a matter of record. The  
17 fact that I wasn't able to attend doesn't mean that  
18 there's any constraint on the ability to file a motion  
19 for rehearing. So I take what was kind of a technical,  
20 procedural motion and suggest to you that it is not  
21 relevant to your considerations here.

22 Likewise, the reference to Mr. Caldara's  
23 initiative from a couple years ago is relevant. Why?  
24 Because what the Supreme Court has said is that, based  
25 upon evidence and the context of current or contemporary

1 articles by his staffers were written about it. So if  
2 there is some sort of judicial determination that the  
3 Proponents had to have knowledge, it seems to me that  
4 here they had at least constructive knowledge.

5 The issue I guess I want to close with is  
6 this: Mr. Caldara has been through a review and comment  
7 hearing and now three title board hearings. He's been  
8 through four hearings. He also made a very public  
9 statement about what his measure was about. And today  
10 for the first time you hear that Right to health care  
11 choice really isn't about Obama Care or insurance  
12 mandates. It's about a bigger, broader piece.

13 I would suggest to you that that is the  
14 commentary of the moment. It's not what Mr. Caldara has  
15 said about his measure from Day One. From Day One it's  
16 been about maintaining choice. He told you at both the  
17 hearing on No. 40 and the first one on No. 45 that it was  
18 about maintaining health care choice and creating options  
19 in terms of that choice for payment.

20 For him to now say the measure is really  
21 bigger and broader means you set a title on March 17  
22 without knowing what the measure was really about.

23 And likewise, I'd suggest to you that no one  
24 really knows what this is about. If either Mr. Caldara's  
25 rationalization is of the moment or if it's accurate,

1 then he didn't tell you when you set the ballot title  
2 what it was about. And I would suggest to you that, and  
3 I believe it was your comment, Mr. Hobbs, that if it's  
4 that broad a statement, you really don't know what this  
5 measure entails. And the Supreme Court has been very  
6 clear, you can't set a title if you don't know what the  
7 measure entails.

8 You granted -- excuse me. You denied the  
9 single subject motion on our part because you knew what  
10 it addressed. You knew that it addressed the issue of  
11 choice among payment options. If that's not right, then  
12 I move at this point that you revisit the determination  
13 on single subject and that you know, at least from the  
14 Proponents, what that single subject is, and that failure  
15 to revisit it at this point when the statements have been  
16 that a Right to health care choice is so broad-ranging  
17 that you couldn't possibly know its ramifications, is  
18 indicative that, frankly, this is not a single subject.  
19 Aah.

20 One way or the other, health care choice is  
21 either a damning political phrase that cannot be  
22 included, or it's such a broad, inherent phrase that the  
23 measure really is limitless, and it is communicated  
24 inappropriately by the title.

25 I would also suggest to you that all of the

1 other rights that Mr. Domenico, I think, had a very  
2 accurate analysis, none of the other rights are posed as  
3 this one is. None of the other ballot titles that you've  
4 had before you, notwithstanding phrases campaign finance  
5 term limits, ethics in government, have been shown to you  
6 to be used for specific purposes in political ways, and  
7 therefore, none of them are binding upon you.

8 And the fact that you know that it deals with  
9 abortion now and the Supreme Court has said, particularly  
10 as to abortion, when you are affecting abortion rights,  
11 if you're changing a standard at all, you have to be  
12 clear in the title, you have to be clear about that in  
13 the title. And not just the least of which because  
14 there's been an admission on the record here, the word  
15 "choice" is heavily laden in contemporary political  
16 debate. And if "choice" applies in the way that  
17 Mr. Caldara says it does, you have to reflect that in the  
18 title.

19 So I would renew my single subject motion. I  
20 apologize for putting you through that, but I have to do  
21 that for the record, because you now know that the  
22 subject of this measure is not what you were told, and it  
23 is much more broad-ranging, and that the title is not,  
24 therefore, not what it was intended to be.

25 Thank you very much.

1 MR. HOBBS: Mr. Caldara, I'll give you  
2 briefly.

3 MR. CALDARA: Oh, absolutely. Let me respond  
4 to this, because it's very important.

5 First of all, when Mark says that two years  
6 ago that you might have used the term "right to health  
7 care choice" but you can't do it this time because other  
8 people now are using it in a political lexicon, your job  
9 is not to decide what ballot measures are described on  
10 depending on the whens of what's going on politically.  
11 Your job is to describe this accurately. And if you  
12 described it accurately two years ago, how possibly could  
13 it be inaccurate this year because Frank Luntz writes a  
14 memo on that?

15 On the issue of the website -- by the way, the  
16 Independence Institute runs, oh, at less a half a dozen  
17 to a dozen different blogs with different writers. I'm  
18 thrilled that the guy keeping an eye on peace and power  
19 was wise enough to keep that. I don't read our blogs  
20 regularly. But good for him. I'm glad he was on top of  
21 that. That doesn't mean I knew or I could list all  
22 nearly dozen different blogs and web pages that we host  
23 when different people are in charge of that, but that  
24 doesn't matter.

25 And by the way, the statements on those blogs,

1 even the statements that I make, are not as important as  
2 what is down on a piece of paper. What is down on this  
3 paper is, I believe, self-explanatory.

4 Let me make it very clear for the record. I'm  
5 not saying that this deals with abortion. This does not  
6 deal with abortion. I think any other thing to say would  
7 be a mischaracterization of my terms. I want to make  
8 that very clear so nobody runs with that and says  
9 ridiculous things. That's why we clarified this with  
10 Colorado law, that this right to health care choice does  
11 not include any medical procedure that is not currently  
12 legal by law, Colorado law. We specified Colorado law.

13 And make it really clear about that. That's  
14 what this law says, that's what this law means, that's  
15 what this does. It does not open up any other scare  
16 tactic. So at the risk of saying, of politicizing this  
17 process, I cannot allow that.

18 That being said, I ask you to deny Motion for  
19 Rehearing. I think the idea that nobody, none of these  
20 people who are objecting to this could have made it back  
21 two weeks ago to put in any of these complaints makes me  
22 very suspect that this is genuine. I'd be happy to --  
23 they needed to be here during that hearing. We were.

24 Thank you.

25 MR. HOBBS: So then I will turn it over for

1 board discussion and decision. Mr. Cartin.  
2 MR. CARTIN: I guess what I would say first is  
3 that, kind of in response to Mr. Hobbs' line of  
4 questioning on what exactly was meant by the phrase "All  
5 persons shall have the right to health care choice," and  
6 I think Mr. Grueskin has made some strong points in kind  
7 of reraising the single subject issue when I think the  
8 Board had rejected that.

9 But I'm not persuaded that, based on  
10 Mr. Grueskin's arguments, that that necessarily changes  
11 in my mind that the measure as written contains a single  
12 subject.

13 I'll stop there.

14 MR. HOBBS: I guess I feel similarly. You  
15 know, I do think the phrase is -- there's a very  
16 persuasive phrase for a lot of people. And you know, it  
17 may be Proponents made their strategy behind it. But I  
18 think that's perhaps the way the Proponents look at what  
19 their measure does.

20 In any event, you know, the measure, far from  
21 intentions or motivations or whatever, the measure  
22 explicitly grants the right to health care choice.  
23 That's the first sentence. And I think words have  
24 meaning. And I think if there's a defect in the title,  
25 arguably it's because the title doesn't say that the

1 But it seems to me that's what the measure does, and I  
2 wouldn't know how to phrase it any other way than what  
3 the measure says.

4 Mr. Grueskin is correct that if we don't  
5 understand a measure, we're prohibited from setting a  
6 title. But I think that line of cases is where the  
7 measure is so complex or the wording is so difficult that  
8 we don't know what a measure does. I don't think it's --  
9 to the contrary, I think there's also cases that say just  
10 because we don't know all of the effects or applications  
11 of the measure, that doesn't mean that we can't conclude  
12 that it's a single subject.

13 And I think there is a single subject, and it  
14 seems to me that the titles -- and there may be some  
15 refinement, but basically the title, I think, is  
16 accurate, and I would not be persuaded at this point that  
17 the phrase "health care choice" is a prohibited catch  
18 phrase.

19 Mr. Domenico.

20 MR. DOMENICO: I would agree that it's a  
21 single subject. I think Mr. Grueskin's reply to  
22 Mr. Caldara's answers to our questions overstated what he  
23 told us, what Mr. Caldara told us about the effect of  
24 this.

25 So I'm still in a position that this is -- I

1 measure grants the right to health care choice. It just  
2 says the subject is health care choice.

3 You know, when I review the -- my notes about  
4 catch phrases, I don't -- I'm not -- I think it may be a  
5 relatively close issue, but I'm still on the side of  
6 believing that this is not a catch phrase.

7 The particular measure that is -- the  
8 particular case that was most troublesome was 1999-2000  
9 No. 258(a), which was the English language education of  
10 public schools. And that's the case that was about the  
11 measure that -- where the mea- -- well, the title  
12 included a phrase, Requiring all children in Colorado  
13 public schools to be taught English as rapidly and  
14 effectively as possible, and that was language right out  
15 of the measure, and the court held that that was an  
16 impermissible catch phrase.

17 The court went on to say that catch phrases  
18 are words that work to a proposal's favor without  
19 contributing to voter understanding.

20 You know, it seems to me that, whether or not  
21 this works to the measure's favor, this is what the  
22 measure grants. It's a Constitutional right to health  
23 care choice.

24 I don't know necessarily what all the effects  
25 or applications of that Constitutional right would be.

1 don't have a problem with this on single subject purposes  
2 ever.

3 I'm still troubled about whether "The right of  
4 all persons to health care choice" is a catch phrase.  
5 And I appreciate Mr. Caldara's arguments. I don't think  
6 I disagree with much of what he said about that this is,  
7 in fact, the way this issue is discussed, not as a catch  
8 phrase, but as a way to inform people what you're talking  
9 about.

10 On the other hand, I think Mr. Grueskin is  
11 right, that the court has said that that fact alone  
12 doesn't save something for being a catch phrase. And if  
13 I were a proponent of this measure, I would be very  
14 nervous about whether I could win that argument in the  
15 Supreme Court, and would suggest we might be doing  
16 Mr. Caldara a favor by revising the statement of the  
17 single subject.

18 But maybe it makes sense first to make a  
19 motion on our jurisdiction now and move on to discussion  
20 of the title, since it sounds like we're all in agreement  
21 on single subject at least, so we don't all just discuss  
22 everything. Or --

23 MR. HOBBS: One thing I want to do, I guess,  
24 is a motion that would deny the Motion for Rehearing with  
25 respect to 1 through 4.

1 MR. DOMENICO: That's what I was going to  
2 propose to move. So I'll make that motion right now.

3 MR. CARTIN: Second.

4 MR. HOBBS: Any further discussion?  
5 All those in favor sigh aye.

6 THE BOARD: Aye.

7 MR. HOBBS: All those opposed, no.  
8 That motion carries three to zero.

9 So then with respect to the title.

10 Mr. Domenico.

11 MR. DOMENICO: Well, as I talked about with a  
12 number of measures lately, I think we tie ourselves in  
13 knots a little bit by trying to get too detailed in our  
14 statement of the single subject, and essentially try to  
15 capture everything important about the measure not only  
16 in the title but in the statement of the single subject.  
17 And I know that part of that is from core precedence that  
18 have knocked us around in all directions.

19 But I would start leaning towards, when we're  
20 struggling, writing a really broad statement of the  
21 subject, even if it's broader than what really is being  
22 done or what we would describe as the single subject in a  
23 discussion, and recognize that the statement of the  
24 subject really should be understood as intended just to  
25 give people an idea of what -- which of the many

1 detailed, I have some thoughts about that too. But if  
2 everyone else is comfortable that "The right of all  
3 persons to health care choice" is not a catch phrase,  
4 then I guess we don't need to get into any of that.

5 So maybe that's where we should start, is  
6 whether or not that's a catch phrase. I'm nervous that  
7 whether any of us think it is, that will be held to be  
8 one by the Supreme Court.

9 MR. HOBBS: Well, I think that could go either  
10 way. I think there's reasons to be nervous about whether  
11 or not it's a catch phrase. I don't think at this point  
12 that it is. And I -- if I knew of a way to duck that  
13 issue, I would like to do that.

14 My -- my concern about this particular case,  
15 my concern about broadening the subject to avoid the  
16 catch phrase problem is then that then that would leave  
17 us with a title that makes no reference to health care  
18 choice. And in other words, the first sentence of the  
19 measure would not appear in the title. There would be  
20 nothing in the title about the first sentence. And I  
21 think that may be the central provision is the  
22 Constitutional right to health care choice.

23 So if there were a way to avoid the potential  
24 catch phrase issue, that would be good, but I don't see  
25 how we can leave out something without the first

1 initiatives they might be about to read about.

2 So in this one I would say -- I would suggest  
3 we'd be fine saying "An amendment to the Colorado  
4 Constitution concerning health care." And then we get  
5 into what it has to do with health care later.

6 Now, I know if you tried to go into court and  
7 say the single subject of this is just health care, then  
8 you really would be running into the water and other  
9 judiciary difficulties.

10 But I'm not sure that necessarily the  
11 statement in the title of the single subject has to be so  
12 narrow as to fit within all those precedents, because I  
13 think it's just too hard and it doesn't help the voter in  
14 my view.

15 So that's where I would lean towards heading  
16 on that. I think that solves the catch phrase issue. I  
17 think it's accurate. I think that the rest of the title  
18 makes clear that this isn't trying to do with all sorts  
19 of disparate issues within health care. It's just a  
20 simple statement meant to give voters an idea of what is  
21 going to come. And then the rest of the language tells  
22 them, well, what are you doing about that subject, health  
23 care? And here is the couple of things that this affects  
24 when it comes to health care.

25 On the other hand, if we wanted to get more

1 sentence.

2 Mr. Domenico.

3 MR. DOMENICO: I actually don't view that as a  
4 central feature of the measure. I view it a bit more  
5 like the introduction to the second amendment that is  
6 sort of just an explanation of setting the stage of the  
7 action of the measure, which in the second amendment is  
8 the right to keep and bear arms. Here it's the right --  
9 well, here it's the prohibition on enforcing or adopting  
10 statutes that either force you to buy health insurance or  
11 prevent you from buying, from purchasing or selling your  
12 own health care services. That's what this does. It  
13 also says everyone has the right to health care choice.

14 I think in our colloquy with Mr. Caldara it  
15 became fairly clear that this isn't meant to do much  
16 other than those two things.

17 And so to me it's a statement -- it's an  
18 important statement to the Proponents. It doesn't do  
19 anything, I don't think. And if it does a lot, then  
20 Mr. Grueskin may be right, that we have a problem with  
21 single subject or with our jurisdiction.

22 MR. HOBBS: And I -- it may be that it doesn't  
23 do much. But I think it does something, and I think it's  
24 for the courts to decide whether it's much, whether it's  
25 a little bit, or a lot. And -- but I think I hear the

1 Proponent saying it does something more than what the  
2 rest of the measure provides. And I'm just concerned if  
3 we don't apprise the voter of that, that there's more to  
4 it than just what's talked about in the rest of the  
5 title, then we -- if the courts end up finding other  
6 applications of that first sentence, then we have omitted  
7 that, we would have omitted it from the title.

8 So I feel like whether it's a little bit or a  
9 lot, it's something that's potentially significant and it  
10 needs to be in there. But it's because I wasn't  
11 convinced that there was a lot to it that I was willing  
12 to not include an explicit statement that the measure  
13 grants a Constitutional right of health care choice.

14 Mr. Cartin.

15 MR. CARTIN: And I would agree with that. I  
16 think first of all I do -- first, as far as the catch  
17 phrase, the record that's been established here, I'm very  
18 appreciative to Mr. Grueskin for the information he  
19 provided in connection with the assertion that the  
20 language of the title currently is misleading or is a  
21 catch phrase.

22 I don't think it's a prohibited catch phrase,  
23 and again, I base that on some of the preceding case law  
24 that has addressed that issue. I think it is a central  
25 feature of the measure. It's embodied in the measure.

1 Mr. Domenico's point about how the Board writes titles is  
2 a good one and one worth considering.

3 But at this point I would suggest that we move  
4 forward with the language as it's written, subject to  
5 other possible revisions.

6 MR. HOBBS: Are there other changes to the  
7 title that the Board members would like to consider?

8 MR. DOMENICO: I think there are a couple of  
9 the -- of Mr. Grueskin's that are worth discussing listed  
10 in 5.(a), I think, and maybe 5.(b).

11 I don't know if -- we didn't discuss 5.(a)  
12 really at all. I thought that numbers 2, 3 and 4 at  
13 least were worth considering, didn't seem to -- I don't  
14 know if Mr. Caldara has a problem with any of those  
15 suggestions, but I didn't. I don't think I have a  
16 problem with any of them, and they seem not to hurt. I  
17 don't know if anyone else cares one way or the other  
18 about those.

19 I wasn't convinced that number 1 -- 5.(a)(I)  
20 was worth adding.

21 MR. HOBBS: I think personally Roman Numeral  
22 IV was the one that I thought might have the most merit.  
23 But ... and possibly Roman Numeral III, but I really  
24 hadn't thought that one through.

25 MR. DOMENICO: My view is that it's probably

1 It will be used in the campaign without question.

2 But I'm also -- I also want on give credence  
3 to Mr. Caldara's argument that simply because the phrase  
4 is used in a political environment does not automatically  
5 make it an impermissible slogan, especially when you're  
6 adding another right to the Bill of Rights that's  
7 entitled Right to health care choice that has a statement  
8 that all persons shall have a right to health care  
9 choice.

10 And again, I would say an adequate record has  
11 been established that it's -- there is -- it is  
12 foreseeable that this issue will be visited by the  
13 Supreme Court. And I think that it has been adequately  
14 addressed at this phrase.

15 Currently the measure says, "Concerning the  
16 right of all persons to health care choice," and I note  
17 that the measure speaks to the right to health care  
18 choice. I don't know whether the addition of "all  
19 persons" necessarily -- it's kind of substantive to  
20 whether or not that particular phrase should be changed.

21 But I guess I'm inclined to agree with  
22 Mr. Hobbs, I disagree with Mr. Grueskin, agree with  
23 Mr. Caldara, that as written, it expresses the single  
24 subject.

25 And I also want to say that I think

1 okay without making any of those changes, but that I  
2 didn't think it would hurt to make them either.

3 MR. CARTIN: And I'd agree with that,  
4 Mr. Chairman. Again, I noted that Mr. Caldara seems to  
5 be nodding that he doesn't have an issue with any of  
6 those changes, but I --

7 MR. CALDARA: I prefer it the way it is.

8 BOARD MEMBER: I don't feel strongly about any  
9 of them. I think the title we set in those senses is  
10 accurate, not misleading. I just thought that those were  
11 at least worth considering. If nobody else wants to make  
12 them, I'm not going to move.

13 So if nobody else wants to bother with them,  
14 I'm fine to move on to (b), which did generate some  
15 discussion. Again, I think I'm comfortable with it the  
16 way it is, I think it's accurate.

17 I think if we want to try to eliminate one  
18 potential area of dispute going forward, that could be  
19 rewritten, I think so line 2 after "in connection  
20 therewith" said something like "providing that the State  
21 shall not adopt or enforce any statute," et cetera. Then  
22 it would more closely track the tense or mood of the  
23 actual language in the measure. I'm not quite sure of  
24 which grammatical term I'm after there.

25 The one thing -- my view is that the way the

1 measure is written would cover past enactments of the  
2 Legislature, to the extent there are any. While the way  
3 it's written would suggest this is only about going  
4 forward, that prohibiting the State from enacting  
5 something is a prohibition on its taking some action,  
6 whereas saying the State shall -- no statute shall do  
7 these things, would apply to existing statutes, I think,  
8 and so it might be better.

9 I don't share Mr. Grueskin's view of what that  
10 means, but I do think it means something maybe slightly  
11 different than the way it's written in the measure.

12 MR. HOBBS: I don't feel strongly about it one  
13 way or the other. It struck me that the way the title is  
14 worded right now, it says it prohibits the State from  
15 enforcing any statute. I thought maybe that was  
16 sufficient to cover the preenacted measures, but I  
17 don't --

18 MR. DOMENICO: And I think it is, which is why  
19 I say I think it's accurate the way it's written, but, as  
20 Mr. Grueskin pointed out, it's written in a different --  
21 it is different, and if there's any question about it, it  
22 might be better to write it more closely tracking the  
23 actual language.

24 I don't -- I don't think it's misleading,  
25 because I share your view that whether it was written

1 from a drafting standpoint. Whether that improves it,  
2 whether that makes it more accurate is dubious. So ...

3 MR. DOMENICO: Yeah. I don't think it's  
4 misleading as it is, and if nobody else does, then I  
5 think we should leave it.

6 MR. HOBBS: Your motion.

7 MR. CARTIN: I don't -- I'm not persuaded on  
8 that one personally, but ...

9 MR. DOMENICO: No. I think that the concept  
10 of health care choices could be broader than what's  
11 actually going on here, as I said. I don't think that  
12 (c) fits within what a typical voter would consider a  
13 health care choice, meaning the option to have the  
14 government create some program. It's not what I think  
15 your typical voter -- but I guess I admit that may show  
16 my ideological bias.

17 But there are things that I think are  
18 troublesome about "health care choice," given the  
19 limitation -- given what actually happens here. As I  
20 said before, I don't think those are problematic.

21 BOARD MEMBER: (d) I think we've dealt with or  
22 discussed. (e), I --

23 MR. DOMENICO: Can I just say for the record  
24 on (d), I think I agree with you that this is -- should  
25 not be a prohibited catch phrase. It's, really what it

1 either way, it does the same thing, I think.

2 MR. HOBBS: Right.

3 MR. CARTIN: Right. I think that, and not to  
4 -- I think this is what we're saying, is that as  
5 written, it reaches the same outcome, basically, that the  
6 language as written states. Because I guess, you know,  
7 to stay true to the language, just going down the road,  
8 and again, I'm not advocating for this particular change,  
9 but to stay true to the language of the measure, although  
10 it may not -- again, the way that the language is  
11 currently stated is accurate, although it doesn't repeat  
12 the language of the measure verbatim.

13 The alternative way to do it it would seem is  
14 to say that after "in connection therewith," we just jump  
15 to "statute" and say "in connection therewith specifying  
16 that no statute, regulation, resolution, or policy  
17 adopted or enforced by the State independently or at the  
18 instance of the United States shall require a person ..."

19 So in other words, instead of kind of  
20 Mr. Domenico's point, instead of the language that says  
21 "prohibiting the state," you are more or less kind of  
22 repeating the idea that it specifies that if there is a  
23 statute or a regulation out there right now, there could  
24 be -- I'm kind of going in circles here.

25 But I guess that would be one way to do it

1 is, it's shorthand, and as I read those memos, they say,  
2 Use these words instead of these other words, which  
3 doesn't -- just 'cause politicians or campaigners are  
4 told to use certain words as opposed to others, doesn't  
5 make everything that they would put in the, Hey, use this  
6 language, a catch phrase.

7 I mean it's shorthand for a current debate,  
8 which I view as different, I think, than a prohibited  
9 catch phrase.

10 I just am nervous that it's close, and it  
11 certainly is something that will be used politically in  
12 the court, especially in certain types of measures has  
13 been -- has taken pretty seriously the catch phrase  
14 prohibition and read it fairly strictly, as Mr. Grueskin  
15 pointed out.

16 And so that's my only concern. I think  
17 "health care choice," everybody is correct, it does do  
18 that, it does state that. It is not inaccurate. It's  
19 not something that I think is misleading, and therefore  
20 it shouldn't be a catch phrase.

21 So I think I'm in agreement. I was just  
22 suggesting we could be extra careful if we wanted to be.

23 MR. HOBBS: Any motion with respect to  
24 paragraph (e), the assertion that there is a new  
25 controversial legal standard? I don't agree with that

1 one, but ...  
 2 MR. DOMENICO: Right. I think we've talked  
 3 about that.  
 4 MR. HOBBS: Well, then I think (inaudible) the  
 5 motion with respect to items 1 through 4 the Motion for  
 6 Rehearing. I think it would be in order to have a motion  
 7 with respect to item 5.  
 8 MR. CARTIN: I move that the Title Board deny  
 9 paragraph 5 of the Motion for Rehearing.  
 10 MR. DOMENICO: I'll second that.  
 11 MR. HOBBS: Any further discussion?  
 12 If not, all those in favor say aye.  
 13 THE BOARD: Aye.  
 14 MR. HOBBS: All those opposed, no.  
 15 That motion carries three to zero.  
 16 And that concludes action on the motion for  
 17 rehearing. The time is 12:31 p.m., and we will reconvene  
 18 at 1:30. Thank you.  
 19 (End of recording.)  
 20  
 21  
 22  
 23  
 24  
 25

1 CERTIFICATE  
 2 I, Deborah D. Mead, Certified Shorthand  
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 9 I further certify that I am not attorney, nor  
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 12 otherwise interested in the outcome of this action.  
 13 IN WITNESS WHEREOF, I have affixed my  
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 15 My commission expires June 18, 2013.  
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**Linda Gorman** Georgia health care choice law is on the governor's desk. Virginia, Idaho, and Arizona have already passed their own versions. The Florida legislature approved a November vote on a Health Care Freedom amendment to the Florida Constitution.

Yesterday at 3:07pm · Comment · Like · Report



**Norm Heidi Olsen** Need a FREE Premium Brake job and vehicle inspection in Denver, CO? Visit the Mastermind Enterprises page for more info. Here's the link - <http://www.facebook.com/MastermindEnterprises> Have a blessed day! :)



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April 30 at 9:48am · Comment · Like



**Brian Schwartz Correction. Debate is on Wednesday, CU Boulder, 7 PM.** See Independence

Institute Research Director Dave Kopel will be debating former Colorado Supreme Court Justice Jean Dubofsky on AG Suthers' Obama Care lawsuit. Details: <http://www.joncaldara.com/2010/04/27/correction-on-obama-care-constitutionality-debate/>

#### Independence Institute: Jon Caldara » Correction on Obama Care Constitutionality Debate

[www.joncaldara.com](http://www.joncaldara.com)

Jon Caldara takes on life, liberty, love and libations. Learn more about the freedom fighters at the Independence Institute. Learn more about iVoices podcasts, Independent Thinking, and liberty oriented YouTube videos.

April 27 at 6:34pm · Comment · Like



**David Timmons Right On, Bill!**

I was going to get a petition and stand out on the street somewhere.

April 24 at 1:31pm · Comment · Like · Report



**Linda Gorman Opponents:** The "right of all persons to health care choice" is misleading because it "prohibits certain "choices," such as the choices to have universal health care coverage or a single payer health care plan." The truth? Build the best health care plan, everyone joins, and voila, single payer. All the amendment requi...

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April 24 at 8:19am · Comment · Like · Report



**Brian Schwartz** No one has the right to "choose" to deprive other people of choices by force. My post on this:

<http://www.patientpowermov.org/2010/04/19/colorado-right-to-health-care-choice-re-hearing/>

April 26 at 9:31pm



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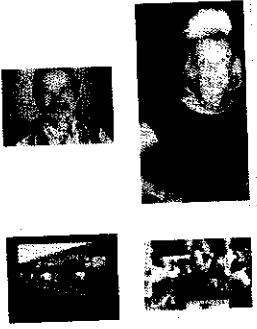
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\* The United States Constitution mandates the President of the United States must be a United States "natural born" Citizen - Article II, Section I;

April 22 at 12:09pm · Comment · Like

**Linda Gorman** The proposed health care freedom of choice amendment says that Colorado government cannot make you buy health coverage. In a petition to the Colorado Supreme Court, opponents say this "is merely a constraint on the way in which health care related statutes...and policies are applied by state departments and agencies." Guess they think that the US Constitution is "merely a constraint," too.

April 22 at 8:56am · Comment · Like · Report

**Linda Gorman** Who petitioned Colorado Supreme court to rule against health care choice? Mark Earnest, MD (CU Med School faculty); Peter Leibig (Clinica Family Health Services, Boulder); Albert Schnellbacher, Jr. (former AARP volunteer lobbyist); AARP Colorado; Colorado Community Health Network; Colorado Coalition for the Medically U...

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April 17 at 12:33pm · Comment · Like · Report

**Linda Gorman** Opponents of the Health Care Choice initiative have appealed to Colorado Supreme Court. Among other things, they claim that "the right to health care choice" is an "established political catchphrase" that will "unfairly characterize the matter in voters' minds." This is progress. They finally appear to be admitting tha...

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April 16 at 9:08am · Comment · Like · Report

**Linda Gorman** Congress calls the penalties for not having health insurance "shared responsibility penalties." The Colorado legislature calls hospital provider taxes "fees." Amending the Colorado Constitution with the health care choice amendment would prevent the legislature from having to come up with yet another word to call a tax...

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April 13 at 10:09am · Comment · Like · Report

**Richard Valeriani** When will you folks understand that you lost the election? President Obama is the president of the entire nation. That means he's YOUR president too.

April 10 at 7:08pm · Comment · Like · Report

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**David Timmons** Oh, so if the Obama regime wanted to re-institute slavery, it would be ok because he's my president, too?

April 23 at 11:27am

**Richard Valeriani** A little bit of an exaggeration. In case you forgot, slavery is illegal in all 50 states.

April 23 at 12:14pm

**Linda Gorman** Two reasons why amending the Colorado Constitution is important:

- 1) Under the ObamaCare law, state government can decide to impose involuntary single payer just by getting a waiver from HHS. The health care choice amendment prevents this.
- 2) If the courts rule that it is unconstitutional for the federal government to imp...

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April 10 at 9:53am · Comment · Like · Report



**Kevin Tebedo** How will a Constitutional amendment to the Colorado Constitution stop the feds from enforcing health care via the tax code for U.S. Citizens? Only a Governor and a like-minded Attorney General will be able to protect Colorado citizens. The Fed's will laugh at a state Constitutional Amendment because U.S. Citizens are...

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April 9 at 4:41pm · Comment · Like · Report

**Linda Gorman** Kevin, the mandate tax may not be Constitutional as the Constitution gives the feds only have the right to impose 3 kinds of tax. The mandate tax doesn't fit any of the three definitions. See Barnett, Stewart, and Gaziano "Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional" at the Heritage Foundation website.  
April 10 at 10:45am



**John Lefebvre** The North Suburban Republican Forum could help.  
April 9 at 1:50pm · Comment · Like · Report

**Linda Gorman** Terrific. Thank you! Link to provide contact information is on the PatientPowerNow web page, <http://www.patientpowernow.org/2010/03/21/defend-colorado-obama-care/>. Or call the Independence Institute directly.  
April 10 at 9:57am



**Linda Gorman** The determined opponents of the health care choice amendment have 5 days to appeal the Title Setting Board approval to the Colorado Supreme Court.  
April 8 at 12:24pm · Comment · Like · Report

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## Jan 19: Free our health care rally in Denver, Colorado

January 15th, 2010 | by Jon Caldara |

...It's good to remember that the states created the federal government and not the other way around. As Obama Care becomes closer to reality, we in Colorado have the right to say "No." This is a chance for freedom loving people from across the state to come together and send the Colorado General assembly a simple message: Defend Colorado against Obama Care in the legislature, or we the people will do it at the ballot...

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**Why:** To defend state's rights against Obama Care!

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[[updates here](#)]



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tags: [Colorado Right to Health Care Choice Initiative, rallies](#)

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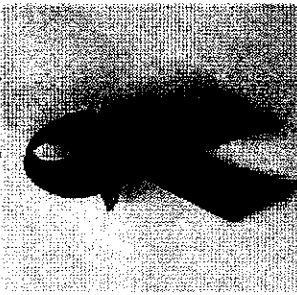


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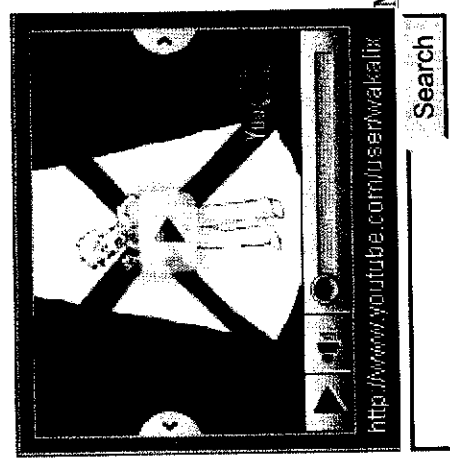
  

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