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2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">DATE FILED: April 9, 2018 6:14 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2017-2018 #119, #121, #122 and #123

Petitioner: DEBORAH FARRELL,

v.

Respondents: DAVID SILVERSTEIN AND ANDREW GRAHAM

and

Title Board: SUZANNE STAIERT; JASON GELENDER; and GLENN ROPER</td></tr>
<tr><td>Attorneys for Respondents
Martha M. Tierney, No. 27521
Tierney Lawrence LLC
225 E.16TH AVE, SUITE 350
Denver, CO 80203
Phone: (720) 242-7577
E-mail: mtierney@tierneylawrence.com</td><td>Case No.: 2018SA48
& 2018SA49
& 2018SA50
& 2018SA51</td></tr>
<tr><td colspan="2">RESPONDENTS' ANSWER BRIEF IN SUPPORT OF INITIATIVES 2017-2018 #119, #121, #122 AND #123</td></tr>
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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. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 3181 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐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 (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.AR. 32.

By: s/Martha M. Tierney

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David Silverstein and Andrew Graham (jointly "Proponents" or "Respondents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the titles, ballot titles and submission clauses (jointly, the "Titles") that the Title Board set for Proposed Initiatives 2017-2018 #119, #121, #122, and #123 (collectively "Initiatives") and in response to the Opening Brief filed by Petitioner Deborah Farrell.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the titles for Initiatives #119, #121, #122 and #123. This Court should affirm the Title Board's determination that each measure contained a single subject. The measures differ in that #119 requires health insurers to disclose health insurance plan information; #122 requires disclosure of healthcare provider pricing information; and #121 and #123 require the disclosure of healthcare pricing information. The remaining provisions of each measure, including the definition of terms used in the measure, rulemaking authorizations for relevant agencies, and the establishment of penalties and enforcement mechanisms, all flow from each measure's single subject.

The Initiatives do not present either of the dangers attending omnibus measures - the proponents did not combine an array of disconnected subjects into the measures for the purpose of garnering support from various factions; and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. Petitioner's concerns about the Initiatives' rulemaking authorization (#121, #123), the obligation for healthcare providers to publish a list of all persons providing healthcare services (#121, #122, #123), and the requirement that insurance carriers disclose all forms of remuneration derived from rebates or incentives (#119, #121), are directly connected to and flow from the single subject of the measures.

The Titles satisfy Colorado law because they fairly and accurately set forth the major features of the Initiatives and are not misleading. The Titles need not include a 56-item list of the types of healthcare providers included in the measures' non-exhaustive definition of healthcare provider (#119, #121, #122, #123), nor do they need to explain that providers basing their pricing on a percentage of the publicly available Medicare and Medicaid price lists need only list that information (#121, #122, #123).

The Title Board is only obligated to fairly summarize the central points of a proposed measure, and, need not refer to every nuance and feature of the proposed

measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

Accordingly, there is no basis to set aside the Titles, and the unanimous decisions of the Title Board should be affirmed.

ARGUMENT

I. <u>The Initiative Complies with the Single Subject Requirement</u>.

A. <u>Standard of Review and Preservation</u>.

Petitioner errs in stating that de novo is the appropriate standard of review for this Court when reviewing the Title Board's decision on whether an initiative contains a single subject. Instead, when reviewing Title Board decisions, "[this Court] employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title & Submission Clause for 2011-2012 # 3*, 274 P.3d 562, 565 (Colo. 2012); *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*), 234 P.3d 642, 645 (Colo. 2010). The Court "will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re 2011-2012 # 3,* 274 P.3d at 565.

Proponents agree that Petitioner preserved the single subject argument presented in this appeal.

B. The Initiatives Contain a Single Subject.

1. Granting Rulemaking Authority to Three Agencies Does Not Violate the Single Subject Requirement.

Petitioner contends that Initiatives #121 and #123 violate the single subject requirement because the measures authorize three different regulatory agencies to promulgate rules to effectuate the price transparency that is required by the measures. Specifically, Petitioner contends that Proponents engaged in "logrolling" – combining various changes to the law into one "all-or-nothing" proposition to garner votes from differing factions of the electorate. *Pet. Op. Brf., p. 11.* It is quite difficult, however, to envision co-option of independent advocates of (a) transparency in pricing by health insurance carriers, (b) transparency in pricing of pharmaceuticals; and (c) transparency in pricing by health care providers. If a voter does not favor transparency in health care provider pricing, she will not vote for an initiative requiring health insurance carriers and pharmaceutical companies to disclose their pricing; if a voter does not favor transparency in health insurance carrier pricing, she will not vote for a measure that not only requires such transparency but also requires pharmacies and health care providers to disclose their prices.

Indeed, Petitioner provides no rationale for why different factions would be attracted to the policies embodied in Initiatives #121 and #123, and instead states

simply that Proponents' submission of Initiatives #119, #120 and #122 demonstrates that they are sensitive to the different constituencies affiliated with health care providers, pharmacies and health insurance carriers. *Id. at p. 12.* On this point, Petitioner alleges that Initiatives #121 and #123 must violate the single subject requirement (and that Proponents implicitly admit this) because Proponents submitted other variations on these two measures, some of which addressed only health insurance carriers (#119), or pharmacies (#120), or health care providers (#122). Petitioner then states that if Initiatives #121 and #123 contained a single subject, it would be impossible for Proponents to file Initiatives #119, #120 or #122 as standalone measures. *Id. at p. 10.*

Petitioner misconstrues the single subject requirement. The law does not require that all measures that could constitute a single subject must be combined into one measure, nor does it follow that a measure that is a single subject as a standalone measure may not properly be combined with other measures and still comply with the single subject requirement. So long as the proposed initiative "tends to effect or to carry out one general objective or purpose," it presents only one subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 253 (Colo. 2000); *accord In re Ballot Title and*

Submission Clause, and Summary for 2013-2014 #90, 328 P.3d 155, 159 (Colo. 2014).

At the rehearing, Proponents addressed this point and stated that they were still evaluating which measure(s) to take to the ballot. In part, Proponents advised the Title Board that the General Assembly may take up a bill containing some or all of these components during the 2018 legislative session, and if they do not pass a bill containing all of the aspects of health care pricing transparency addressed in #121 and #123, then the Proponents want to be able to move forward with a ballot measure that fills in the gaps. *Tr. 68:23-69:24.*[1] The Title Board noted that it is not uncommon for Proponents to move multiple measures through the titling process before deciding which measure to take to the voters and that this is not an admission that a measure contain more than one subject. *Tr. 78:18-80:17*.

Additionally, if the General Assembly were to take up less than all the healthcare pricing transparency provisions contained in #121 and #123, it does not mean that those measures contain more than one subject. If that were the case, then the General Assembly would not move forward with a bill that is substantially

[1] Proponents attached as Exhibit A to their Opening Brief a certified copy of a transcript of the February 21, 2018 rehearing on Initiatives 2017-2018 #119, #121, #122 and #123. Proponents will cite to that transcript herein as *Tr. Page number:line number.*

the same as #121 and #123. And yet, on April 4, 2018, the General Assembly introduced HB 18-1358, a bill that is substantially similar to #121 and #123, and contains health care pricing transparency requirements, including a grant of rulemaking authority to three separate agencies, with applicability to health insurance carriers, pharmacies, and health care providers.[2] The bill refutes Petitioner's argument that Proponents seek to bundle for the voters three subjects that the General Assembly would not include in one piece of legislation.

While Initiatives #121 and #123 give rulemaking authority to three agencies, this grant of rulemaking authority is necessary to effectuate the purpose of the measures. An initiative does not violate the single-subject requirement simply because it contains provisions necessary to effectuate its purpose. *See In re Initiative for 2013-2014 #90*, 328 P.3d at 159. Rather, such "implementing provisions that are directly tied to the initiative's central focus are not separate subjects." *Earnest v. Gorman,* 234 P.3d at 646.

This Court should affirm the Title Board's decision to find a single subject in Initiative's #121 and #123.

[2] https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_1358_01.pdf

2. Requiring Disclosure of Persons Providing Health Care Services Is Part of Price Transparency.

Petitioner next contends that Initiatives #121, #122 and #123 violate the single subject requirement because each requires a healthcare provider to disclose lists of persons providing healthcare services at the healthcare provider's facility. *Pet. Open. Brf., p. 13.* Petitioner suggests that this disclosure requirement will surprise voters because it is coiled up in the folds of the measures. *Id. at p. 14.*

To the contrary, this disclosure requirement furthers the healthcare pricing transparency purposes embodied in the single subject of each measure. Knowledge of the relationship between persons that work at a health care facility and the health care facility is part of the price transparency focus of the measures – it will enable patients to ask pertinent questions about the price of a service, and to make informed decisions about their healthcare choices. The information will allow patients to know which providers are in their insurance carrier networks, and which are not, and, that there may be other providers treating them (for e.g., patient is otherwise unaware when a surgeon arranges for an out-of-network anesthesiologist, who will send a separate bill).

Voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of the measures – the proviso requiring disclosure of persons providing healthcare services is plainly stated in the

measure, and clearly and prominently reflected in the Titles of #121, #122 and #123. These Initiatives will pass or fail on their own merits and do not run the risk of garnering support from factions with different or conflicting goals. *See In re Initiative for 2013-2014 #89,* 328 P.3d 172, 178 (Colo. 2014).

The Court should affirm the Title Board's unanimous determination that the disclosure requirement for persons providing health care services was part of the single subject of Initiatives #121, #122, and #123.

3. Requiring Insurance Carriers to Disclose Remuneration Derived from Rebates and Incentives Is Part of Price Transparency.

Petitioner finally contends that Initiatives #119 and #121 violate the single subject requirement because the measures require insurance carriers to disclose payments received in the form of rebates or other incentives. Petitioner claims that this disclosure requirement will surprise voters and result in uninformed voting. *Pet. Open Brf., at p. 16.*

Instead, this provision effectuates healthcare price transparency by giving consumers information about the actual price of services and pharmaceuticals. For example, patients (through payment of health insurance deductibles), and employers (who may have self-funded health insurance), are directly responsible for paying the price of healthcare services and have been led to believe that insurance carriers negotiate the best prices on their behalf. When insurance

carriers pocket rebates and incentives, while patients and employers are paying the charged price of healthcare services – there is not price transparency. One way these measures implement healthcare price transparency is to require disclosure of the rebates and incentives, so when armed with this actual price information for healthcare services and pharmaceuticals, consumers can make knowledgeable decisions about their healthcare. "Implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

The crux of Petitioner's argument on this point is really that the Initiatives are a bad idea because health insurance carriers do not want to disclose this pricing information to consumers. However, in determining whether a proposed initiative comports with the single subject requirement, this Court "does not address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate." *In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Whether a proposed initiative is a bad idea is not the test of whether it meets the single subject requirement.

Again here, voters and petition signers are not going to be surprised by the measures' inclusion of this price transparency disclosure requirement, because the mandate to disclose all forms of remuneration is plainly stated in the measure, and

clearly and prominently reflected in the Titles of #119 and #121. When, as here, the subject matter of an initiative is necessarily and properly connected rather than disconnected or incongruous, the measure contains a single subject. *See In re Initiative #3*, 274 P.3d at 565.

This Court should affirm the Title Board and find that the Initiatives comply with the single subject rule.

II. The Initiatives Titles Correctly and Fairly Express the True Intent and Meaning of the Measures.

A. Standard of Review and Preservation.

Petitioner mostly states the appropriate standard of review for evaluating whether a title fairly expresses the true intent and meaning of the measure or is misleading. Petitioner omits the important requirement that the Court is not to "consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title "fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *In re Initiative for 2007-2008 #62*, 184 P.3d at 58.

Proponents agree that Petitioner preserved the clear title argument presented in this appeal.

B. The Title and Submission Clauses Are Not Misleading and Do Reflect the Central Features of the Initiatives.

1. The Titles for Initiatives Need Not List Out Every Person and Entity Contained in the Definition of Healthcare Provider.

Petitioner claims that the Titles for all four Initiatives are unclear and misleading because the Titles do not include the list of approximately 56 different health care providers that are covered by the Initiatives in their non-exhaustive definition of healthcare provider. The Title Board, however, is "only obligated to fairly summarize the central points of a proposed measure and need not refer to every effect that the measure may have on the current statutory scheme." *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations omitted). "The titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure." *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 497 (Colo. 2000).

Here, the title for each of the four Initiatives clearly alerts the electorate that the measures apply to a "broad range of health care providers" (#119) or "health care providers, as broadly defined by the measure" (#121, #122, and #123). With this language, the Title Board notifies petition signers and voters that the measure contains an expansive definition of healthcare provider, and at the same time

satisfies the brevity requirement by declining to include in the Titles a list of the 56 healthcare providers covered by the measures.

Petitioner suggests that voters would be surprised by the measures' applicability to certain healthcare providers ("massage therapists, psychologists, social workers, athletic trainers"), *Pet. Op. Brf., p. 17,* but those providers and the other 52 covered providers are listed out in total in the text of each measure. The Title Board chose to abbreviate the list of providers with a descriptive term to satisfy the brevity requirement and to avoid any confusion with a partial definition or a partial list. *Tr. 38:17-39:4; see also In re Initiative for 1999-2000 #255*, 4 P.3d at 497.

Petitioner suggests that a person engaged in one of the 56 covered professions may be surprised to discover that the Initiatives require healthcare pricing transparency for their services when they are provided at a healthcare facility. The case cited by Petitioner, *In re Breene,* 14 Colo. 401 (1890), is readily distinguishable. In *Breene*, this Court found lacking a constitutional provision's one-line title regarding the assessment and collection of revenue, that had no reference to the impropriety of a state treasurer otherwise making loans. *Id.* at 406-7. There, the title mentioned only revenue and collection, but coiled up in the folds of the measure was a prohibition on lending by the state treasurer. *Id.* Here,

voters and petition-signers (including those that are also covered healthcare providers) will be on notice based on the wording of the Titles that the measure contains an expansive or broad definition of healthcare provider.

The Title Board was within its discretion when it did not include the non-exhaustive list of approximately 56 different healthcare providers in the titles for the Initiatives.

2. The Titles Need Not Distinguish Healthcare Providers Basing Their Fees on a Percentage of the Medicaid and Medicare Schedules.

Petitioner lastly contends that the titles for Initiatives #121, #122, and #123 "are problematic because they do not disclose how healthcare providers will be treated differently depending on whether they use the fee schedules published by the [Centers for Medicare and Medicaid Services] ("CMS")." *Pet. Op. Br., 19.* Petitioner asserts that the Titles must include a provision stating that those providers who base their services on a percentage of the publicly available CMS schedule must disclose this information. Absent this information in the Title, Petitioner asserts, voters and petition signers may not know that some providers have a reduced disclosure requirement. *Id.* This argument, however, is misplaced. The CMS is publicly available information. *Tr. 83:13-84:8.* By requiring providers to disclose the percentage of the publicly available CMS schedule, consumers will have access to the same information whether the provider uses the

CMS or has a unique pricing schedule. Omitting this level of detail from a title does not rise to the type of clear case wherein this Court has invalidated a title. *See In re Title, Ballot Title & Submission Clause Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982*, 649 P.2d 303, 306 (Colo. 1982).

This Court gives "great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles are insufficient, unfair, or misleading." *In re 2009-2010 #45*, 234 P.3d at 648. Here, the Titles of Initiatives # 121, #122, and #123 include the key features of the measures and do not mislead voters as to the initiatives' purpose or effect.

This Court should affirm the Title Board's determination that inclusion of the type of detail necessary to explain the distinction in pricing disclosure for healthcare providers using a percentage of the CMS price list was not necessary and would only confuse voters.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board regarding Proposed Initiatives 2017-2018 #119, #121, #122 and #123.

Respectfully submitted this 9th day of April, 2018.

TIERNEY LAWRENCE LLC

By: s/Martha M. Tierney
Martha M. Tierney, No. 27521
225 E 16th Ave., Suite 350
Denver, Colorado 80203
Phone Number: (720) 242-7577
E-mail: mtierney@tierneylawrence.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2018 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF IN SUPPORT OF INITIATIVES 2017-2018 #119, #121, #122 AND #123** was filed and served via the Colorado Courts E-Filing System to the following:

Thomas M. Rogers, Esq.
Dietrich C. Hoefner, Esq.
Lewis Roca Rothgerber Christie LLP
1200 17th Street, Suite 3000
Denver, CO 80202
Email: trogers@lrrc.com
dhoefner@lrrc.com
Attorneys for Petitioner Deborah Farrell

Matthew Grove, Esq.
Office of the Colorado Attorney General
Assistant Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
Email: matt.grove@coag.gov
Attorney for Title Board

s/Martha M. Tierney

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