DATE FILED: March 20, 2018 7:03 PM

SUPREME COURT, STATE OF COLORADO **2 East 14th Avenue** **Denver, Colorado 80203**	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
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	▲COURT USE ONLY▲
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	Case No.: 2018SA48

RESPONDENTS' 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. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 5596 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 Opening 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").

STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

1. Whether the Title Board erred in ruling that the Initiatives contain a single subject as required by Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-106.5 because the Initiative:

   a. in addition to requiring disclosures regarding prices, it also requires insurance carriers to make broad disclosures regarding all forms of remuneration derived from rebates or other forms of incentive received as the result of healthcare services or purchases of prescription drugs or medical devices. (Initiatives 2017-2018 #119 and #121).

[1] These issues are drawn, as best Respondents are able, from Petitioner's "Issues Presented for Review" in his Petition for Review and from the positions asserted by Petitioner in his Motion for Rehearing.

b. regulates insurance carriers, healthcare providers, and pharmacies, and requires three different regulatory agencies to promulgate rules for its implementation; (Initiatives 2017-2018 #121 and #123).

c. in addition to requiring disclosures regarding prices, it requires healthcare providers to publish a list of all persons that provide healthcare services. (Initiatives 2017-2018 #121, #122 and #123).

2. Whether the titles are misleading or do not reflect a central feature of the Initiatives in violation of C.R.S. § 1-40-106(3)(b) because they:

   a. fails to reflect that although the Initiative purports to regulate "healthcare providers," the Initiative also regulates professionals such as social workers that are not commonly regarded to be healthcare providers. (Initiatives 2017-2018 #119, #121, #122 and #123).

   b. fail to reflect that providers using the Centers for Medicare and Medicaid Services are subject to different requirements under the Initiative than other healthcare providers. (Initiatives 2017-2018 #121, #122 and #123).

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for Initiatives #119, #121, #122 and #123. On January 11, 2018, Proponents filed the Initiatives with the directors of the Legislative Council and the Office of Legislative Legal Services. Pursuant to C.R.S. 1-40-105(2), the Offices of Legislative Council and Legislative Legal Services conducted a review and comment hearing required by C.R.S. 1-40-105(1) on January 23, 2018.

Proponents filed the Initiatives with the Secretary of State's office on January 26, 2018. At the Title Board hearing on February 7, 2018, the Title Board found that each of the Initiatives contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and Section 1-40-106.5, C.R.S. (2017). The Title Board set Titles for each of the Initiatives.

On February 14, 2018, Petitioner Deborah Farrell filed a Motion for Rehearing. On February 21, 2018, the Title Board revised the Titles to their current form. Petitioner Deborah Farrell filed Petitions for Review with this Court for each of the Initiatives, pursuant to Section 1-40-107(2), C.R.S. (2017), on

February 28, 2018. On March 6, 2018, this Court entered Orders to consolidate the briefing for the four Initiatives into Case No. 2018SA48.[2]

STATEMENT OF FACTS

Initiative #119 amends the Colorado Revised Statutes to require transparency in health insurance carrier pricing. Initiative #122 amends the Colorado Revised Statutes to require disclosure of health care provider pricing information. Initiatives #121 and #123, almost identical in nature, amend the Colorado Revised Statutes to require disclosure of healthcare pricing information, including health insurance carrier pricing, health care provider pricing and prescription drug pricing. Each one of the Initiatives contain implementation details concerning enactment and enforcement.

The Titles set by the Title Board correctly and fairly expresses the true intent and meaning of each of the Initiatives and will not mislead the public. The Titles follow each of the Initiatives' structure, using similar, and often identical, language.

The Title for #119, as amended at the rehearing on February 21, 2018, reads:

> A change to the Colorado Revised Statutes concerning a requirement that health care insurers publish health insurance plan information, and, in connection therewith, requiring health insurers to publicly

[2]The four Initiatives – Nos. 119 (2018SA48), 121 (2018SA51), 122 (2018SA49), and 123 (2018SA50) were consolidated into Case No. 2018SA48.

> disclose: 1) the basis for determining payment or reimbursement amounts to a broad range of health care providers, 2) the items that appear as charges on an explanation of benefits that the insurer does not pay, 3) detailed coverage and negotiated payment information by plan type and provider, 4) prescription drug prices negotiated with providers, pharmacies, distributors, and manufacturers, and 5) all health care related rebates or other incentives received; authorizing penalties for violations; and prohibiting any contract between a health insurance plan and a health care provider from restricting the publication of the required health insurance plan information.
> The abstract is also clear and meets the requirements of the law.

The Title for #122, as amended at the rehearing on February 21, 2018, reads

> A change to the Colorado Revised Statutes concerning the disclosure of health care provider pricing information, and, in connection therewith, requiring a broad range of health care providers to publish fee schedules detailing the price charged for health care services, billing policies, and a list of health care professionals providing services; prohibiting noncomplying health care providers from billing for services; requiring health care providers to inform patients about the acceptance of and coverage of health care services under the patient's insurance; and prohibiting any contract between a health insurance plan and a health care provider from restricting publication of the required health care price information.

The Titles for #121 and #123, as amended at the rehearing on February 21, 2018, read identically as follows[3]:

> A change to the Colorado Revised Statutes concerning the disclosure of health care pricing information, and, in connection therewith,

[3] Initiatives #121 and #123 are identical with the exception of some added text in #121 related to pharmacy regulation. The Title Board determined that the minor difference is not a key component of either measure requiring inclusion in the Title. Proponents stated their intent at the Title Board hearings to circulate only one of the two measures.

> requiring health care providers, as broadly defined by the measure, to publish fee schedules detailing the price charged for health care services, billing policies, and a list of health care professionals providing services; prohibiting noncomplying health care providers from billing for services; requiring health insurers to publicly disclose coverage and payment information, including prescription drug prices, for each health coverage plan and information regarding incentives received by the insurer; requiring pharmacies to publish retail drug prices; authorizing penalties for violations; and prohibiting any contract between a health insurance plan and a health care provider from restricting publication of the required health care price information.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the titles for Initiatives #119, #121, #122 and #123. The Title Board unanimously found that each of the Initiatives contains 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), do not constitute separate subjects.

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). Finally, the Titles do not 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. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review.

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. (2017), provide that a proposed initiative must be limited to "a single subject which shall be clearly expressed in its title." "A proposed initiative violates this rule if its text relates to more than one subject and has at least two distinct and separate purposes not dependent upon or connected with each other." *In re Initiative for 2011-2012 #3,* 274 P.3d 562, 565 (Colo. 2012). When reviewing a challenge to the Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action." *Cordero v. Leahy (In re Initiative for 2013-2014 #90),* 328 P.3d 155, 158 (Colo. 2014). Because the Title Board "is vested with considerable discretion in setting the title," in reviewing actions of the Title Board, the Court "must liberally construe the single subject requirements for initiatives." *Cordero v. Leahy (In re Title, Ballot Title & Submission Clause for 2013-2014 #85)*, 328 P.3d 136, 142 (Colo. 2014). The Court will "only overturn the Title Board's finding that an

initiative contains a single subject in a clear case." *In re Initiative for 2013-2014 #90,* 328 P.3d at 158.

The right of initiative in Colorado is fundamental in character and self-executing. *See Colo. Const. art*. V, 1(10); *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). Legislation governing the initiative power must be liberally construed in favor of the right of the people to exercise that power. *See Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996); *Committee for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 893 (Colo. 1992).

B. The Single Subject of Each of the Initiatives.

1. Initiative 2017-2018 #119 Contains a Single Subject.

Initiative #119 contains a single subject: requiring health care insurers to publish health insurance plan information. The remaining parts of the measure set forth the type of information that insurance companies must disclose, including: 1) the basis for determining payment or reimbursement amounts to a broad range of health care providers, 2) the items that appear as charges on an explanation of benefits that the insurer does not pay, 3) detailed coverage and negotiated payment information by plan type and provider, 4) prescription drug prices negotiated with providers, pharmacies, distributors, and manufacturers, and 5) all health care related rebates or other incentives received. Initiative #119 authorizes penalties for

failure to comply with its provisions, and, prohibits any contract between a health insurance plan and a health care provider from restricting the publication of the required health insurance plan information. The Initiative also contains a legislative declaration, definitions of terms used in the measure, and authorization for relevant agencies to promulgate rules to effectuate its intent. These provisions are all congruous and related to the single subject of the measure. The text of Initiative #119 is not overly complicated, and its provisions are directly tied to the measure's central focus.

2. Initiative 2017-2018 #122 Contains a Single Subject.

The single subject of Initiative #122 is the disclosure of healthcare provider pricing information. The remaining parts of the measure set forth the type of information that healthcare providers must disclose, including: fee schedules detailing the price charged for health care services, billing policies, a list of health care professionals providing services; prohibiting noncomplying health care providers from billing for services; requiring health care providers to inform patients about the acceptance of and coverage of health care services under the patient's insurance; and prohibiting any contract between a health insurance plan and a health care provider from restricting publication of the health care price information that is required to be disclosed by the measure. The measure contains

a legislative declaration, defines terms used in the measure, and authorizes relevant agencies to promulgate rules to effectuate its intent. Each of these provisions flow from the single subject of the measure. The text of Initiative #122 is clear, and its provisions are directly tied to the measure's central focus.

3. Initiatives 2017-2018 #121 and #123 Contain a Single Subject.

The single subject of Initiatives #121 and #123 is the disclosure of health care pricing information. The remaining parts of the measures set forth the type of health care pricing information that must be disclosed, including: a requirement that health care providers publish fee schedules detailing the price charged for health care services, billing policies, and a list of health care professionals providing services; prohibit noncomplying health care providers from billing for services; require health insurers to publicly disclose coverage and payment information, including prescription drug prices, for each health coverage plan and information regarding incentives received by the insurer; require pharmacies to publish retail drug prices; authorize penalties for violations; and prohibit any contract between a health insurance plan and a health care provider from restricting publication of the required healthcare price information. The measures contain a legislative declaration, definitions of terms used in the measures, and rulemaking authorization for relevant agencies to effectuate the intent of the measures. These

provisions are connected to the single subject of the measures – disclosure of healthcare pricing information. The text of Initiatives #121 and #123 is not overly complicated, and the interrelated provisions of the measures are directly tied to the central focus and are necessary to effectuate the purpose of the measures.

C. <u>Purpose of the Single Subject Requirement</u>.

The single-subject requirement functions to prevent two dangers: (1) "logrolling," or the practice of "combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests—[in order to] lead to the enactment of measures that would fail on their own merits"; and (2) voter surprise and fraud caused by the "passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *In re Initiative for 2011-2012 #3*, 274 P.3d at 566; *see also* § 1-40-106.5(1)(e), C.R.S. Accordingly, the subject matter of a proposed initiative "must be necessarily and properly connected rather than disconnected or incongruous." *In re Initiative for 2013-2014 #90*, 328 P.3d at 159 (quoting *In re Initiative for 2011-2012 #3*, 274 P.3d at 565). But where a 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 Initiative for 2013-2014 #90*, 328 P.3d at 159.

Additionally, 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, so long as they are interrelated, such provisions "are properly included within [the initiative's] text." *Id.*; *see also Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 646 (Colo. 2010) ("An initiative may contain several purposes, but they must be interrelated . . .. Implementing provisions that are directly tied to the initiative's central focus are not separate subjects." (Citation omitted)). In reviewing the Title Board's actions, this Court construes the single-subject requirement liberally to avoid unduly restricting the initiative process. *In re Initiative for 2013-2014 #90*, 328 P.3d at 160.

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

Petitioner 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. To the contrary, this provision ensures price transparency by allowing consumers to understand the actual cost to the carrier of providing the coverage. One goal of price transparency here is to

create an environment in which consumers can make informed decisions when selecting their health insurance or their healthcare services, if they are uninsured, based, in part, on the value of the service provided in comparison to the price charged. One way to effectuate price transparency for consumers is to require disclosure of the net cost to the carrier of providing a service, so consumers can better assess their insurance carrier options. By requiring carriers to disclose payments they receive in the form of incentives or rebates, the measures effectuate their purpose to create transparency in health care pricing, including health insurance pricing.

The Title Board heard argument from counsel and from Designated Representative David Silverstein, and unanimously rejected the Petitioner's argument on this point, finding that these disclosure requirements were part and parcel of the single subject of the measures. *Transcript,* [4] *p. 18, l. 4 - p. 23, l. 10; p. 29, ll. 11-18; p. 70, l. 15 - p. 73, l. 21; p. 78, l. 18 -p. 81, l. 11; see also Exhibit B, Healthcare Billing Transparency.* Provisions in a measure that are necessary to effectuate its purpose do not create a separate subject. *See In re Initiative for 2013-*

[4] A certified transcript from the Title Board rehearing on 2017-2018 Initiatives #119, #121; #122 and #123 on February 21, 2018 is submitted herewith as Exhibit A.

2014 #90, 328 P.3d at 159. Even if they have separate purposes, when the provisions are interrelated, they are not separate subjects. *See Earnest v. Gorman,* 234 P.3d at 646.

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

Petitioner further contends that Initiatives #121 and #123 violate the single subject requirement because the measures require pricing transparency from insurance carriers, healthcare providers, and pharmacies, and authorize three different regulatory agencies to promulgate rules to effectuate the measures. The measures do give rulemaking authority to three different agencies, but implementation provisions, so long as they are tied to the single subject of the measures, as is the case here, do not violate the single subject requirement. *See In re Initiative for 2013-2014 #90*, 328 P.3d at 159. The Title Board agreed that the grant of rulemaking authority to effectuate the purpose of the measures is an implementation component and does not constitute a separate subject. *Transcript, p. 29, ll. 11-18; p. 38, l. 17- p. 39, l. 20; p. 44, ll. 12-18; p. 78, l. 18- p. 79, l. 15; p. 81, ll. 4-11; p. 84, ll. 11-17; p. 91, ll. 15-21; p. 95, ll. 10-16.*

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

Finally, Petitioner contends that Initiatives #121, #122 and #123 violate the single subject requirement because each contain proposed new statutory section 6-20-103(5), which requires a healthcare provider to publish a list of all persons that provide healthcare services, disclosing the nature of the relationship between the person and the healthcare provider, including whether the person is an employee, contractor, or has been granted privileges, and whether the healthcare provider contracts with a third party to supply particular providers to deliver services.

This disclosure of information, however, is critical to effectuate the transparency purposes embodied in the single subject of each measure. Understanding these relationships enables a patient to know who practices at the hospital, to ask questions about the price of the services if the provider is other than an employee, and to make informed decisions about their healthcare choices.

On this point, Initiatives #121, #122 and #123 do not present either of the dangers the single-subject requirement seeks to prevent. There is no threat of logrolling here because the proponents did not combine an array of unconnected subjects into the measures for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89,* 328 P.3d 172, 177 (Colo. 2014). Rather, each subsection, including proposed section 6-20-

103(5), C.R.S., is tied to the central purpose of the measure: the disclosure of healthcare pricing information (#121 and #123), or the disclosure of healthcare provider pricing information (#122). These initiatives will pass or fail on their merits and does not run the risk of garnering support from factions with different or conflicting goals. *See id.* at 178.

Initiatives #121, #122 and #123 also fail to trigger the second danger of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any provisions "coiled up in the folds" of the measures. *In re Initiative 2001-2002 #43,* 46 P.3d 438, 442-43 (Colo. 2002). No such surprise would occur should voters approve Initiatives #121, #122, and #123, because the plain language of the measures unambiguously mandates disclosure of healthcare pricing. The measures, while detailed, are not overly lengthy or complex, and their plain language is not confusing. *See In re Initiative for 2011-2012 #3,* 274 P.3d at 567.

The Title Board unanimously agreed that the disclosure requirement for persons providing health care services was part of the single subject of Initiatives #121, #122, and #123. *Transcript, p. 38, l. 17- p. 39, l. 20; p. 44, ll. 12-18; p. 78, l. 18- p. 79, l. 15; p. 81, ll. 4-11; p. 91, ll. 15-21; p. 95, ll. 10-16.*

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.

The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996). Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (*quoting In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.* 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 52, 58 (Colo. 2008).

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

1. The Titles for Initiatives #119, #121, #122, and #123 Appropriately Do Not List Out Every Person and Entity Contained in the Definition of Healthcare Provider.

The titles for the Initiatives are clear and do not mislead the voters. The Titles capture the measures' text in a clear and straightforward manner. "While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative." *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations omitted). The Titles succinctly capture the key features of the measures, are not likely to mislead voters as to the initiatives' purpose or effect, nor do the titles conceal some hidden intent.

The Petitioner argues that the titles set by the Title Board for Initiatives #119, #121, #122, and #123 are misleading because they 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 initiative clearly alerts the electorate that the measures apply to a "broad range of health care providers." In so doing, the Title Board accurately notifies petition signers and voters of the salient feature that the measure contains an expansive definition of healthcare provider, while avoiding the confusing effect of listing 56 separate healthcare providers in the Titles. "Titles are not required to include definitions of terms unless the terms "adopt a new or controversial legal standard which would be of significance to all concerned" with the Initiatives. *Id.* (Colorado Supreme Court found no error when Title Board did not include a definition of "gun show" in title of measure concerning background checks at gun shows).

To satisfy the requirement of brevity, and to avoid any confusion with a partial definition, the Title Board referred to the broad definition contained in the measures, which is not clearly misleading and was within the Title Board's discretion in setting the title. *See In re Initiative for 1999-2000 #255*, 4 P.3d at 497; *Transcript p. 38, ll. 17-25; p. 39, ll. 1-5; p. 41, ll. 12-21; p. 43, ll. 17-25; p. 44, ll. 1-18.* 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 for #121, #122, and #123 Need Not Distinguish Healthcare Providers Basing Their Fees on a Percentage of the Medicaid and Medicare Schedules.

Petitioner contends that the titles for Initiatives #121, #122, and #123 "fail to reflect that providers using the Centers for Medicare and Medicaid Services are subject to different requirements under the [Initiatives] that other healthcare providers." *Petitions*, p. 5.

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 succinctly and sufficiently capture the key features of the measures, are not likely to mislead voters as to the initiatives' purpose or effect, nor are the Titles unfair, or conceal some hidden intent. The Title Board determined that inclusion of the type of detail necessary to explain the distinction in pricing disclosure for healthcare providers using a percentage of the Medicaid and Medicare price list was not necessary and would merely confuse voters. *Transcript. P. 82, l.16 - p. 84, l.23; p. 88, l.1- p. 89, l.1.*

Only in a clear case should a title prepared by the Title Board be held invalid. *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 is not such a case.

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 20th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2018 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DATE FILED: March 20, 2018 7:03 PM
Exhibit A
2018SA48

1 SECRETARY OF STATE
2 TITLE SETTING BOARD HEARING
3 Aspen Room
4 1700 Broadway Street
5 Denver, Colorado
6
7 February 21, 2018
8 10:05 a.m.
9
10 Re: 2017-2018 #119 "Transparency in Healthcare Insurance Carrier Billing"
11
2017-2018 #121 "Transparency in Healthcare
12 Billing"
13 2017-2018 #122 "Transparency in Billing by Healthcare Providers"
14
2017-2018 #123 "Transparency in Healthcare
15 Billing"
16
17
18 TITLE SETTING BOARD:
19 Suzanne Staiert, Esq.
Deputy Secretary of State
20
Glenn Roper, Esq.
21 Colorado Attorney General's Office
22 Jason Gelender, Esq.
Office of Legislative Legal Services
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24
25

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12

13 Also Present:

14 David Silverstein

15 Andrew Graham

16 Steven Ward

17

18

19

20

21

22

23

24

25

1 MS. STAIERT: All right. Good morning.
2 This is a meeting of the Title Setting Board
3 pursuant to Article 40 of Title 1 C.R.S.
4 The time is 10:05. The date is Wednesday,
5 January --
6 STEVEN WARD: February 21st.
7 MS. STAIERT: February 21st, 2018. We're
8 meeting in the Secretary of State's Aspen Room,
9 1700 Broadway, Denver, Colorado.
10 The Title Setting Board today consists of
11 myself, Suzanne Staiert, Deputy Secretary of State
12 on behalf of Wayne Williams; Glenn Roper, Assistant
13 Solicitor General, designee of Attorney General
14 Cynthia Coffman; and Jason Gelender, designee of
15 Office of Legislative Legal Services.
16 There are two titles for each measure. One
17 is a statement and the other is a statement in the
18 form of a question.
19 Changes adopted by the Title Board to the
20 first Title in the staff draft will be considered
21 adopted for the other Title.
22 For anyone who wishes to testify there is a
23 sign-up sheet on the back table. And this hearing
24 is being broadcast over the internet from the
25 Secretary of State's website.

1 When the Title Board considers a proposed
2 initiative for the first time, the Board will follow
3 three steps.
4 First, Board Members may wish to ask
5 questions of the Proponents. This is to ensure the
6 Board understands the proposal.
7 Then the Board will determine if it has
8 jurisdiction to set a Title.
9 In particular, the Board must determine if
10 the measure complies with the single-subject rule
11 prescribed in Article 5, Section 1-5.5 of the
12 Colorado Constitution and Section 1-40-106.5,
13 Colorado Revised Statutes.
14 This is because the Board is prohibited
15 from setting a Title for a measure that contains
16 more than one subject.
17 If the measure is a constitutional change,
18 the Board will consider under C.R.S. 1-40-106(3.5)
19 whether the measure only repeals in whole or in part
20 a provision of the State Constitution.
21 If the Board determines it has jurisdiction
22 to set a Title, then the Board will use a
23 staff-prepared draft for discussion purposes. A
24 copy of the Staff draft is on the table.
25 Generally, we take all testimony first.

1 Then the Board will discuss and vote after all
2 testimony is complete. A decision is reached by two
3 of the three members of the Board.
4 Please take note we are not concerned with
5 the merits of any proposal here. We are only
6 concerned with the setting of Titles.
7 Furthermore, we are not concerned with
8 legal or constitutional objections to the measures,
9 except to the extent that such objections relate to
10 the jurisdiction of the Board to set Titles or to
11 the correctness of the Titles and summaries
12 themselves.
13 Anyone who is dissatisfied with the
14 decision of the Title Board may file for a rehearing
15 with the Secretary of State within seven calendar
16 days.
17 The first item on the agenda is a rehearing
18 on 2017-2018 No. 119, Transparency in Healthcare
19 Insurance Carrier Billing.
20 MR. ROGERS: Good morning, Madam Chair,
21 Thomas Rogers representing Objector, Deborah
22 Farrell.
23 MS. STAIERT: And are the Proponents
24 present? If you could come up and just identify
25 yourselves for the record, so that we know you're

1 here.

2 DAVID SILVERSTEIN: David Silverstein.

3 ANDREW GRAHAM: Andrew Graham.

4 MS. TIERNEY: And Martha Tierney, counsel

5 for the Proponents.

6 MS. STAIERT: Okay. All right. Mr.

7 Rogers, it's your motion, if you want to walk us

8 through it or if you have anything to add to it.

9 MR. ROGERS: Sure. Thank you, Madam Chair.

10 Ms. Farrell's motion outlines her position on 119.

11 I know that you've got a long agenda

12 today, so in the interest of efficiency, I'd like to

13 hit a few key points from the motion. Otherwise,

14 just stand on what we've submitted.

15 First, the penalty provision at Section

16 10-16-147.5 of the initiative was added after review

17 and comment. And that addition was not in response

18 to a comment made in the review and comment

19 memorandum.

20 The amendments are substantial because they

21 contemplate license revocation and civil fines of up

22 to $50,000 per violation.

23 Now while the review and comment memo on

24 119 did incorporate portions of the memorandum on

25 85, a previous and substantially similar measure,

1 these are changes that should have been made prior
2 to the initial submission of 119.
3 The amendment -- or the initiative 85
4 review and comment memo was released on December
5 19th. The original version of 119 wasn't filed
6 until mid-January.
7 So there was approximately a month there in
8 which the Proponents could have reviewed the
9 comments on 85 and made changes to their initiative.
10 They chose not to do so.
11 By failing to do so, they've deprived OLLS
12 and Leg Council of the opportunity to analyze and
13 comment on the changes that they ultimately did
14 make.
15 Unless there are questions on that
16 argument, I'm ready to move on to single subject.
17 MS. STAIERT: Any questions?
18 MR. ROGERS: Or do you want to do these --
19 how do you want --
20 MS. TIERNEY: You tell us.
21 MS. STAIERT: Well, why don't we just see.
22 I think there are some questions and then we'll --
23 yeah.
24 MR. GELENDER: Yeah, Mr. Rogers, my
25 question is, I mean, 85 is the review and comment

1 memorandum is fully incorporated into 119 and
2 appears to ask questions that address this issue of
3 enforcement.
4 I mean, I know there's a time gap. But is
5 there any case, is there any authority for your
6 proposition that that's actually a problem?
7 MR. ROGERS: Not that we've found. But it
8 is inconsistent with the purposes behind the statute
9 that prohibits substantial changes after review and
10 comment.
11 By waiting until the review and comment
12 period -- until after the review and comment period
13 on 119, the Proponents again deprived your office of
14 the opportunity to analyze and provide feedback on
15 those substantial changes.
16 That is simply inconsistent with the
17 purpose behind the statute that requires -- or that
18 prohibits those changes.
19 MR. GELENDER: But isn't that really the
20 same thing that happened if, instead of doing a new
21 similar initiative and a refiling, they just made
22 the changes to 85, the exact same changes and
23 brought them to us here?
24 MR. ROGERS: Well, it is. But the
25 difference here is they had an opportunity to fix

1 the problem. They had the memo on 85, could have
2 made those changes.
3 Instead, they chose to file a new
4 initiative without making changes, again depriving
5 you of the opportunity to analyze and comment and
6 ask questions about those changes.
7 So it's just conduct that shouldn't be
8 permitted. That's our point.
9 MR. ROPER: Really quick question. Is
10 there -- are you aware of any case law or anything
11 interpreting what makes something a substantial
12 amendment?
13 MR. ROGERS: I'm not. But again, here
14 we're talking about the addition of what I think is
15 unquestionably a substantial amendment.
16 The amendment provides for an impact on the
17 licensure of the covered healthcare providers and --
18 or the insurers, I should say, and also a
19 five-figure penalty. So, you know, if that's not
20 substantial, I don't know what is.
21 MR. ROPER: And do you have a view as to
22 what the proper interpretation of that term should
23 be?
24 MR. ROGERS: Sure. You know, there is case
25 law that says a grammatical change, a cleanup or

1 some minor amendment isn't substantial. So I guess
2 there is that case law.
3 You know, where that line is drawn, I
4 think, is fairly open to interpretation for this
5 Board. But again I simply can't imagine that the
6 kind of changes that we're dealing with here
7 wouldn't be considered either by this Board or the
8 Supreme Court to be substantial.
9 MR. ROPER: Thank you.
10 MR. GELENDER: One other question. Do you
11 believe that if these changes had been made to 85 as
12 opposed to a new initiative that they would be
13 directly responsive to the 85 memorandum?
14 MR. ROGERS: Yes. And I'll say that --
15 well, yes, as to 119, yes.
16 MR. GELENDER: Okay. Thank you.
17 MS. STAIERT: Ms. Tierney, go ahead.
18 MS. TIERNEY: I just want to make sure,
19 Madam Chair, do you want to take these arguments one
20 at a time or --
21 MS. STAIERT: Yeah, let's take this one and
22 then we'll take single subject.
23 MS. TIERNEY: It might be better for
24 clarity. So what Mr. Rogers doesn't mention and
25 what I would like to raise -- first of all, I'd like

1 to put the review and comment and the initiative for
2 85 into the record, if that's okay.
3 MS. STAIERT: Sure.
4 MS. TIERNEY: I have copies for Mr. Ward
5 here. And actually I have copies for Mr. Rogers
6 too.
7 STEVEN WARD: I just have a question. Is
8 this just the review and comment memo? Oh, this is
9 for 85. Got it.
10 MS. TIERNEY: Yep.
11 STEVEN WARD: Thank you.
12 MS. TIERNEY: And then you'll see in the
13 review and comment memo for 119 and for all of the
14 measures that you're hearing this morning on this
15 topic on rehearing, so 119 through 123, is that the
16 review and comment memos not only talk about
17 initiative 85, but at the top of page 2 also talk
18 about initiative 118.
19 118 was submitted to Leg Council at the
20 same time as 119 through 123 but was later
21 withdrawn. And because it was the first initiative
22 submitted in that packet, it has the most lengthy
23 review and comment memo.
24 MR. ROPER: Where are you looking at again?
25 Sorry.

1 MS. TIERNEY: Here. If you look at the
2 review and comment memo for 119 on the top of page
3 2, this initiative is one of a series identified as
4 initiatives 2017-2018, 118 to 122.
5 MR. ROPER: Thank you.
6 MS. TIERNEY: The memo for 118 is much
7 longer than the memos for 119 through 123 because it
8 goes through all the issues -- excuse me -- that the
9 Leg Council or Leg Council and Leg Legal Services
10 wanted to raise. And then they incorporated that
11 memo into 119 through 123.
12 If I might, I would also give these to Mr.
13 Ward to place into the record and to give to
14 (inaudible).
15 And that memo, in particular, at paragraphs
16 10 and 11 goes directly to the enforcement issue
17 that is at issue here in the change to 119.
18 MR. ROPER: Page 7?
19 MS. TIERNEY: Yes. So to the extent that
20 Mr. Rogers's argument is premised on this time gap,
21 that is certainly not the case.
22 This was again discussed with Leg Council
23 in more detail and Leg Legal Services in the review
24 and comments for 118 through 123, and that resulted
25 then in the change that you see in 119.

1 And you'll see that change in several of
2 the other measures you're going to see this morning
3 as well.
4 MS. STAIERT: Any questions?
5 MR. GELENDER: No.
6 MR. ROPER: Would you agree that it is a
7 substantial amendment? I understand your argument
8 as to it all being incorporated, but do you have a
9 view as to whether it would satisfy that language
10 from the statute?
11 MS. TIERNEY: Well, the language, as I
12 understand it, and the case law turns on whether the
13 amendment is made in direct response to a comment
14 from the Legislative Legal Services.
15 MR. ROPER: Say we determine that it was
16 not, would you consider this a substantial
17 amendment?
18 MS. TIERNEY: I think it imposes penalties
19 that flow directly from the primary subject of the
20 measure.
21 But I guess I probably wouldn't be standing
22 in front of you today if I didn't have comments 10
23 and 11 to back up the reason for why we changed the
24 initiative in direct response to that discussion.
25 MS. STAIERT: Anything else?

1 MR. GELENDER: No.
2 MS. STAIERT: Do you want to respond, Mr.
3 Rogers?
4 MR. ROGERS: Just one comment. The
5 amendments that were made after review and comment
6 specify penalties. And the two paragraphs of the
7 review and comment memo on 118 that Ms. Tierney has
8 referred you to, I would suggest that those -- that
9 adding penalties are not responsive to these
10 comments.
11 These two comments and questions concern
12 the rulemaking authority of the Commissioner of
13 Insurance and the Board of Pharmacy.
14 While there is kind of an oblique reference
15 to enforcement and penalties, it does not appear to
16 me that the amendments that were made to 119 could
17 have been made in response to paragraphs 10 and 11
18 of the 118 review and comment memo.
19 MS. STAIERT: Any discussion?
20 BOARD MEMBERS: (No response.)
21 MS. STAIERT: Let's vote on that one
22 separately.
23 MR. GELENDER: All right. Yeah, I believe
24 regardless of 118, I think that, notwithstanding the
25 time gap, these amendments which I believe are

1 substantial were made in direct response to comments
2 in No. 85 review and comment memo which was
3 incorporated into these.
4 So I would move that we deny the motion for
5 rehearing to the extent it alleges we don't have
6 jurisdiction due to substantial amendments being
7 made after the review and comment hearing.
8 MR. ROPER: Just really quickly, I don't
9 know if this is for Jason or Martha, where in the 85
10 memo specifically just so I can --
11 MR. GELENDER: Okay. On this one it would
12 be --
13 MR. ROGERS: Paragraphs 28 and 29 of the
14 substantial comment.
15 MR. ROPER: Thank you.
16 MR. GELENDER: Right, 28-E and 29.
17 MS. STAIERT: I'll second it. Any
18 discussion?
19 MR. GELENDER: No.
20 MS. STAIERT: All right. All those in
21 favor.
22 BOARD MEMBERS: Aye. (Unanimous.)
23 MS. STAIERT: Opposed? Okay. Mr. Rogers,
24 that takes us to single subject.
25 MR. ROGERS: Thank you, Madam Chair. The

1 initiative violates the single-subject requirement.
2 Again, Ms. Farrell's full argument is made in the
3 motion.
4 But I'd like to focus on the initiative's
5 requirements at 10-16-147.3 that requires insurers
6 to disclose, quote, all forms of remuneration
7 derived from rebates and other forms of incentives
8 received as the result of healthcare services or
9 prescription drugs or medical devices, close quote.
10 The stated single subject of 119 is
11 transparency in healthcare billing. This
12 requirement goes beyond the stated purpose.
13 While other provisions of 119 are designed
14 to help the consumer understand the cost of
15 healthcare services, this provision goes much
16 further.
17 It's designed to get to why the cost of
18 healthcare services are what they are, and it gets
19 into the insurer's profit and loss, business
20 methods, et cetera.
21 It is not merely concerning how much the
22 consumer is paying. Other provisions of this
23 measure help the consumer get to that transparency
24 in healthcare billing. This one simply does not,
25 and it is a separate subject that requires the Board

1 or deprives the Board of jurisdiction to set a Title
2 on this measure.
3 Otherwise, we'll stand on the arguments in
4 our motion with regard to single subject.
5 MS. STAIERT: Okay. Any questions?
6 BOARD MEMBERS: (No response.)
7 MS. STAIERT: Ms. Tierney, do you want to
8 respond?
9 MS. TIERNEY: Thank you, Madam Chair. I
10 think it's important to note that, you know, the
11 single-subject requirement is directed against two
12 specific evils: The act of log-rolling, that is,
13 increasing voting power by combining measures that
14 could not be carried on their individual merits, and
15 surprising voters by surreptitiously including
16 unknown and alien subjects coiled up in the folds of
17 the proposal.
18 The argument here does neither. In fact,
19 goes directly to fulfilling the single subject of
20 the measure which is transparency in healthcare
21 pricing.
22 And I'm going to have Mr. Silverstein talk
23 to you a little bit about this exact paragraph on
24 remuneration.
25 DAVID SILVERSTEIN: So the whole premise of

1 this Bill is not merely to help --
2 STEVEN WARD: At the microphone, if you
3 would. We're on the record.
4 DAVID SILVERSTEIN: The whole premise of
5 this Bill is that every healthcare transaction or
6 nearly every healthcare transaction actually
7 involves multiple parties, right, the patient, the
8 provider and the payer.
9 And we've created a system in which all
10 three of these parties are part of the transaction,
11 yet patients are responsible in one way or another
12 for the cost through some form of --
13 MS. STAIERT: Just for the record, since
14 we're only doing audio, we're all looking at an
15 exhibit that's titled "Healthcare Billing
16 Transparency." Go ahead.
17 DAVID SILVERSTEIN: And so within this Bill
18 is an understanding that you do not get to
19 transparency in billing practices by merely imposing
20 transparency on any one part of the system.
21 So within the bill there are a section
22 covering the pharmacies because they're licensed
23 differently, providers, and the insurance carriers.
24 They are involved in every transparency.
25 And those forms of remuneration go back to

1 insurance carriers are being paid by the patients.
2 So this is not a simple example of one-to-one
3 relationships where you buy a car from a dealer and
4 then there's some relationship between the dealer
5 and the automobile manufacturer.
6 There's actually three parties involved in
7 the transaction. Patients are led to believe that
8 insurance carriers are negotiating on their behalf,
9 and then there are other forms of remuneration going
10 on in that transaction that the patient does not
11 have transparency into.
12 So because there's three parties involved
13 in every transaction, and in many cases, the case of
14 self-employed -- self-funded employers, actually
15 four parties are involved in every transaction. The
16 only way we achieve the objectives of this goal,
17 which is true transparency in healthcare billing, is
18 we do have to unmask what happens at the top of the
19 triangle there.
20 So this is rather broad, but that's because
21 every price transparency measure that's ever been
22 tried anywhere in the country only addresses the
23 right side of this triangle. This measure is
24 intended to be comprehensive and actually affect the
25 system by giving patients what they need.

1 MR. GELENDER: Can you provide, Mr.
2 Silverstein, an example of how this provision
3 actually helps the patient? Like what can a patient
4 do -- what would they know that they don't otherwise
5 know, or how does this help a patient?
6 DAVID SILVERSTEIN: So, for example, there
7 is a medication that you buy every month and today
8 it costs $80 at Walgreens.
9 However, next year Walgreens and the
10 pharmaceutical company agree that every time you buy
11 that medication, Walgreens gets a $20 rebate from
12 your -- I'm sorry, from your insurance carrier. All
13 right?
14 But you're on a high deductible plan. So
15 you're paying the whole $100 now. They're charging
16 $100 instead of 80. You've paid the entire $100
17 because you haven't hit your deductible yet, and $20
18 is actually going back to the insurance carrier.
19 So even though you are paying it and it is
20 a component of that transaction, you don't have any
21 transparency into that, in which case you would
22 prefer to be paying cash perhaps for that rather
23 than buying it from Walgreens through your insurance
24 carrier. These are the kinds of things that are
25 going on behind the scenes.

1 But it's not just about consumer
2 protection. It is about transparency into the
3 billing and pricing process because you are the
4 responsible party but there is a negotiation that's
5 gone on between two other parties that you are not
6 privy to.
7 That only happens in healthcare.
8 Healthcare is indeed unique, but that is very much
9 an example.
10 Another example would be that a medication
11 that's very commoditized and only costs $2. You go
12 in and you pay $15 because your co-pay is $15. And
13 that $13 difference, that's going back very often
14 either to the insurance carrier or to the
15 prescription benefit manager. And you don't have
16 any transparency into that.
17 So it's not just about costs. This is what
18 you are paying, what you are effectively being
19 billed at the counter in that case by the pharmacy.
20 MS. STAIERT: But it doesn't affect your
21 bottom line cost; you still have to pay it?
22 DAVID SILVERSTEIN: It does. It also very
23 much affects the employer. So consider the fact
24 that 60, 65 percent of employers now are
25 self-funded. So it is not actually the insurance

1 company paying these costs.

2 The employer is paying these costs or the

3 patient is paying these costs if they're on a high

4 deductible plan. So it very much -- you do not have

5 transparency into the price that has ultimately been

6 negotiated. You don't have transparency into that

7 billed price.

8 MS. TIERNEY: Explain how that would change

9 your behavior if you did know.

10 DAVID SILVERSTEIN: So Martha has asked me

11 to explain how this will change the behavior of the

12 marketplace. For the consumer or for the employer,

13 having transparency into billing allows you to make

14 a set of comparisons.

15 And that is what is missing from the

16 marketplace is the pressure that comes from

17 different parties seeing prices and being able to

18 comparison shop. So, for example, an employer, when

19 evaluating two insurance carriers, can only evaluate

20 premiums today, the differences in premiums, the

21 difference in co-pays.

22 But they can't ask: What has been

23 negotiated with that pharmacy down the street from

24 my factory? Or what has been negotiated with the

25 hospital down the street from my factory? What is

1 my insurance company going to pay for those
2 services?
3 So we have a facade going on right now that
4 suggests that insurance carriers are negotiating for
5 and representing the best interest of the patients
6 and the employers, and it just turns out not to be
7 true.
8 MR. GELENDER: I'm done.
9 MS. STAIERT: Any other questions?
10 MR. GELENDER: Not on that one.
11 MS. STAIERT: Anything else you want to
12 add?
13 MS. TIERNEY: I'm assuming that I better
14 hit on the two other issues that Mr. Rogers
15 addressed in his brief, just briefly.
16 Both are provisions -- one is a provision
17 related to private contractual arrangements between
18 insurance carriers and healthcare providers. And
19 the other is provisions allowing for adverse
20 licensure action.
21 Both are intended to carry out the single
22 subject of the measure which is transparency here in
23 healthcare billing pricing so that if you understand
24 the contractual arrangements between the insurance
25 carrier and the healthcare provider, as Mr.

1 Silverstein was just explaining with that diagram,
2 then you will have full transparency as to what you
3 are actually being billed and will have to pay for a
4 particular service.
5 And the adverse licensure action, again, is
6 part of this penalty and enforcement provision
7 directly related to the single subject of the
8 measure.
9 MS. STAIERT: Mr. Rogers -- or any
10 questions?
11 BOARD MEMBERS: (No response.)
12 MS. STAIERT: Do you have a response?
13 MR. ROGERS: Madam Chair, so I listened
14 carefully to that explanation, and I didn't hear
15 anything that led me to believe that this provision
16 would provide any additional information to a
17 consumer about how much a particular healthcare
18 service or good costs.
19 I understand the argument to be, yes, but
20 it helps us understand why the cost may be higher or
21 lower. That is a second subject.
22 Every provision of this measure is focused
23 on transparency in healthcare billing, that is,
24 communicating to the consumer what the good or
25 service will cost, except this one.

1 This one delves now into why, not how much,
2 but why, and into the business of the relationship
3 between the insurance carrier and the provider.
4 It is simply inconsistent with transparency
5 in billing and violates the single-subject rule.
6 MR. ROPER: So you heard the explanation of
7 the Walgreens pharmacy and the other example. Is
8 there some other kind of payment that you were
9 contemplating in your objection here that we should
10 be aware of that could be captured in here and that
11 could be a concern?
12 MR. ROGERS: Yes. The language is very
13 broad. Rebates or incentives, you know, that could
14 be a government subsidy to an insurer for efficiency
15 in billing to the extent we've got, you know, a
16 public entity involved.
17 It could be reinsurance payments to a
18 primary insurer by another insurer. It could be
19 loyalty rebates and incentives offered by vendors
20 which I think is the issue that the Proponents are
21 focused on.
22 But, again, while those may impact the cost
23 to the consumer, this provision provides no
24 additional information to the consumer about what
25 they will pay.

1 The measure otherwise requires that
2 information. This is just an outlier. I get that
3 the Proponents want to know this information. I
4 suppose I'd like to know it too.
5 It simply just does not fit within the
6 single subject as articulated by the Proponents for
7 this measure.
8 MR. ROPER: So in our -- in the Title that
9 we set, we describe it as a requirement that
10 healthcare insurers publish health insurance plan
11 information. I mean, that was the language we used
12 as opposed to transparency in healthcare billing, if
13 I'm looking at the right page here.
14 MR. ROGERS: Right.
15 MR. ROPER: You think it still does not
16 fall under that description?
17 MR. ROGERS: Two points on that, Mr. Roper.
18 First, I also look at the way that the Proponents
19 have articulated single subject. And in the
20 recitals for this measure, they refer repeatedly to
21 transparency in healthcare billing.
22 The Board has set the single subject as
23 concerning a requirement that healthcare insurers
24 publish health insurance plan information. But when
25 you get into the guts of this, every one of these

1 requirements is about providing information to the
2 consumer about the price of healthcare.
3 So you start with the basis for determining
4 payment and reimbursement amounts, items that appear
5 as charges but that the insurer doesn't pay. That's
6 information about the cost. Detailed coverage and
7 negotiation payment information by plan, type and
8 provider, the same.
9 It's all the same until we get down to all
10 rebates or other incentives. That again has nothing
11 to do with providing the consumer with information
12 about what? How much the cost is, only about why it
13 may cost more in a particular instance.
14 MR. ROPER: Thank you.
15 MS. STAIERT: Go ahead, sure.
16 MS. TIERNEY: Thank you, Madam Chair. I
17 think the important -- couple things.
18 First of all, I think that the example and
19 the comments by Mr. Silverstein make clear that it
20 is then the consumer will have the information about
21 what they are being charged as opposed to what the
22 item is costing to make choices about where they
23 want to get their healthcare, or where they want to
24 get their drugs, or where they want to get their
25 insurance. So that is all part of the single

1 subject of the measure.

2 Another important point is that the measure

3 does allow for the Commissioner to promulgate rules

4 regarding these publications.

5 So it is not going to be something that the

6 providers or the carriers aren't going to know.

7 Like they're going to know what the Commissioner's

8 rules say what they're going to have to do to post

9 based on Section 3 there.

10 MR. ROPER: Mr. Rogers mentioned

11 reinsurance. Do you think reinsurance payments

12 would be captured under this provision?

13 MS. TIERNEY: No.

14 MR. ROPER: Okay.

15 MS. STAIERT: Anything else?

16 MR. ROPER: No.

17 MS. STAIERT: Okay. Thanks. Any

18 discussion?

19 BOARD MEMBERS: (No response.)

20 MS. STAIERT: I mean, I think our Title

21 still describes it. I don't think it was described

22 to us necessarily as being limited to just billing

23 but rather the publication of health insurance plan

24 information.

25 And I think that that's contained in the

1 single subject. I'm not sure that I see this as so
2 disconnected or unnecessary that it would be a
3 second subject.
4 MR. ROPER: And I agree as to all three of
5 the bullet points there. I think they're all -- you
6 know, the last two are sort of enforcement
7 mechanisms and making it effective.
8 And the first one, I think, is related to
9 the overall subject of the measure as far as
10 publishing health insurance information.
11 MR. GELENDER: Then without comment, I
12 would move that we deny the motion for rehearing on
13 this initiative 119 to the extent it alleges
14 multiple subjects and find that the Board has
15 jurisdiction to set a Title.
16 MR. ROPER: Second.
17 MS. STAIERT: All those in favor?
18 BOARD MEMBERS: Aye. (Unanimous.)
19 MS. STAIERT: So, Mr. Rogers, that takes us
20 to the Title language.
21 MR. ROGERS: Thank you, Madam Chair.
22 Again, Ms. Farrell's motion includes her complete
23 arguments, but I would like to highlight one in
24 particular.
25 The Title that you've drafted informs the

1 public that the measure requires disclosure of
2 payment amounts to healthcare providers. But it
3 fails to note the expansive definition of that term
4 used in the initiative.
5 I think the public would be shocked to
6 learn that healthcare provider, as defined in this
7 initiative, includes not just doctors and nurses but
8 folks like athletic trainers, massage therapists,
9 social workers. I think in the common parlance of
10 healthcare provider, these professions are simply
11 not included.
12 And so to give the voter, to give the
13 public a clear picture of what this measure does and
14 what it's regulating, the list of, you know, both
15 traditional healthcare providers and others that
16 would simply not be considered in common parlance
17 healthcare providers must be included in the title.
18 Otherwise, we'll stand on our submission
19 and happy to take any questions.
20 MS. STAIERT: But aren't many of those
21 categories covered by insurance? I guess I wouldn't
22 necessarily think they weren't healthcare providers.
23 What else are they?
24 MR. ROGERS: I don't know the answer to
25 that, but I would never consider a social worker --

1 just common definition of the term "healthcare
2 provider" I would never consider an athletic trainer
3 or a massage therapist or a social worker to be a
4 healthcare provider.
5 MS. STAIERT: Well, I think a lot of social
6 workers work in the psychology field. Social
7 workers are not necessarily just, you know -- I
8 mean, that's their degree.
9 They work in the schools, they work in the
10 -- you know, they're hired by Kaiser. I just, I
11 guess I'm not -- I mean, there are certain social
12 workers that I don't think would be healthcare
13 providers.
14 MR. ROGERS: I don't know. Under the
15 definition in the measure, I think a social worker
16 in a school may be covered by this initiative.
17 MS. STAIERT: Yeah, they're not billing,
18 but yeah.
19 MR. ROGERS: Well, you know, I'm sure that
20 if we thought about it for a minute we could come up
21 with -- I mean, look, an athletic trainer is someone
22 that may bill for their services.
23 When I go to the gym and see an athletic
24 trainer, I don't consider that healthcare -- I don't
25 consider that athletic trainer to be a healthcare

1 provider, yet that person is regulated by this
2 initiative. And I think that would be shocking to
3 the public.
4 You know, if I go for a massage and that
5 person charges me for those services, that seems to
6 be covered by the initiative. I think the public
7 would be shocked to know that, you know, the massage
8 therapist at the, you know, at the spa may be
9 covered by this initiative.
10 MR. ROPER: So would you think we would
11 need to list out all of the definition in the
12 initiative for what constitutes a healthcare
13 provider?
14 MR. ROGERS: I think that's right, Mr.
15 Roper. And if not listing all of them out, at least
16 listing some of those out that are farther afield
17 from the traditional definition of healthcare
18 provider.
19 MS. TIERNEY: If I might, Madam Chair?
20 MS. STAIERT: Yeah, go ahead.
21 MS. TIERNEY: So if you look at the
22 definition which is on page 2 of the measure
23 6-23-02.4(d), it makes clear that that list is only
24 persons who are licensed, certified or registered by
25 the State under Title 12 or Article 3.5 of Title 25

1 to provide healthcare services.
2 So it is when that massage therapist is
3 acting as a licensed healthcare provider that they
4 are covered by this. And usually when you go to the
5 massage parlor, they tell you what they're going to
6 charge you for a massage.
7 Sorry, I guess we don't usually call it a
8 parlor these days, do we?
9 MS. STAIERT: No, that's a whole different
10 -- oh, dear.
11 MS. TIERNEY: Same with an athletic
12 trainer, right? So you might get physical therapy
13 ordered that either is given by a physical therapist
14 or then they say you need to go and continue to do
15 this work, and that might be provided by an athletic
16 trainer.
17 But if they're just somebody you go to at
18 the gym, they're telling you what they charge you by
19 the hour. So it's not going to be different.
20 (Inaudible discussion.)
21 MS. TIERNEY: So one more thing for the
22 record, apparently Senate Bill 65, which became law
23 this year requires all of these folks listed in
24 subparagraph (d), subsection (d) to list their
25 pricing over a certain size. So this is consistent

1 with existing law.

2 Let me say one more thing about sort of

3 clear title. The cases are very clear that you do

4 not have to list every single nuance of a measure in

5 the Title.

6 And to suggest that we would need to list

7 all of these in the ballot title, I think, would not

8 be something that the Court would find clear or

9 helpful to the voter.

10 MS. STAIERT: I don't have Title 12 in

11 front of me. Does it list out the same list of

12 people?

13 Because I thought that massage therapists

14 were licensed by DORA or -- I mean, you know, for

15 general like they have to have a license, but maybe

16 it's different if they're a, quote, healthcare

17 provider versus --

18 MS. TIERNEY: Right. I think that is a key

19 distinction, that you might have a massage therapist

20 come to you, visit you in the hospital to give you

21 massage in the hospital. And the hospital is

22 saying, here is this massage therapist, we want you

23 to get this massage on your leg.

24 MS. STAIERT: Right.

25 MS. TIERNEY: And in that instance, that

1 massage therapist would be required to be publishing
2 their pricing so that you would know whether or not
3 that's in -- you know, they have a relationship with
4 the hospital or if that's going to be considered in
5 your network or out of your network or what it's
6 going to cost you.
7 So I think the definition makes clear that
8 it is only when those folks are acting in that
9 capacity as licensed healthcare providers
10 providing -- licensed to provide healthcare services
11 that they would be covered here.
12 MR. ROPER: So let me push back just a
13 little bit on that. Because it says a person who's
14 licensed under Title 12 to provide healthcare
15 services. Title 12 is very broad and, you know,
16 involves all sorts of different kinds of licensure
17 or registration.
18 And then when it says to provide healthcare
19 services, if you go down to paragraph 5, it defines
20 a healthcare service as a service delivered by a
21 healthcare provider. So you have kind of a circular
22 definition there where a healthcare provider is one
23 who provides a service; a service is one provided by
24 a healthcare provider.
25 So I'm not sure it's true that this

1 paragraph (d) wouldn't encompass everything that
2 these individuals do.
3 MS. TIERNEY: But if you think of the
4 example that Mr. Rogers was giving, like if you go
5 to a personal trainer, well, there you know what
6 you're paying.
7 Nobody signs up for a personal trainer
8 without understanding what the personal trainer is
9 going to charge them. So they are publishing their
10 pricing.
11 It's really in these situations where it is
12 ordered as a treatment, let's call it that, where
13 you aren't knowing upfront. It's not like you're
14 going to the gym and saying, all right, I want to go
15 to that trainer who's going to charge me 50 bucks a
16 session to train me.
17 It's different if you're being -- if your
18 doctor or the hospital is saying, this is the
19 service you need, and you have no idea what it's
20 going to cost because you're not signing up for it
21 in the regular sense like Mr. Rogers was indicating.
22 Same with, you know, my massage parlor example.
23 (Inaudible discussion.)
24 MS. STAIERT: Do you have any questions?
25 MR. GELENDER: No. How do you want to take

1 these? Do you want them to go through the rest of
2 the bullet points or just address this one?
3 MS. STAIERT: Sure. No, let's do all the
4 bullet points and then -- yeah. Or did you not want
5 to add anything else?
6 MR. ROGERS: I don't want to add anything
7 else on the remaining points of the motion. But I
8 did want to make one, maybe two points with regard
9 to Ms. Tierney's presentation.
10 First, the case law also tells us that the
11 Title must not be misleading. So that's the problem
12 here. Frankly, her argument that, gee, a massage
13 therapist or an athletic trainer already tells you
14 their price completely misses the point.
15 The point here is that the public would be
16 shocked, stunned and amazed to find that this
17 measure on transparency in healthcare billing is
18 going to regulate athletic trainers, massage
19 therapists, social workers as healthcare providers.
20 MS. STAIERT: Ms. Tierney, did you want to
21 add anything else of his other points on the clear
22 Title that he didn't --
23 MS. TIERNEY: Sure. The other two points
24 that are raised in the motion are explaining the
25 initiative delegate's rulemaking authority.

1 Many, many, many, many initiatives that
2 come before you have rulemaking authority, and I
3 don't think I've ever seen it in a Title. It is
4 more of an implementing feature that I don't think
5 needs to go in the Title.
6 And I believe that we've already hit on the
7 last argument in the sense that the Title at sub 3,
8 detailed coverage and negotiated payment information
9 by plan, type and provider, prescription drug prices
10 negotiated with providers, pharmacies, distributors
11 and manufacturers. So I think that that is getting
12 to the issues contained in the third bullet.
13 And, again, the Title gives the voter
14 sufficient information to understand what is in this
15 measure as written.
16 MS. STAIERT: Okay.
17 MR. GELENDER: Well, I think I'll start and
18 just say, first, where I would go is I think I would
19 deny the motion for rehearing on the broad range of
20 providers issue for a couple of reasons.
21 One, I don't think it's actively
22 misleading, notwithstanding what Mr. Rogers said. I
23 don't know that people would actually be shocked,
24 stunned or amazed that these people are included.
25 Also, I just don't see any way to list all

1 of these folks and comply with our brevity
2 requirements. And I don't see a very easy way to
3 distinguish how to choose which ones not to list if
4 we started adding some of those folks in.
5 On the issue of the remuneration, I didn't
6 hear any specific language suggestions. I don't
7 think we need to do anything.
8 I might consider in clause 5 of the Title
9 making it a little clearer by saying something like,
10 instead of "all rebates or other incentives" say
11 "all healthcare-related rebates or other incentives
12 received."
13 It goes back to insurance, insurers
14 publishing. And I think that makes it clear that
15 they're getting them, not giving them out, which I
16 think is consistent with the measure in that it's
17 related to healthcare.
18 And I wouldn't add anything regarding the
19 delegation of rulemaking authority issue. I think
20 we don't usually do that.
21 MS. STAIERT: I agree on the rulemaking.
22 I am still a little concerned about, in just looking
23 at Title 12, in 2014, it looks like just the one
24 example I was asking about, it looks like the
25 Legislature moved massage therapists into Title 12.

1 And I'm not sure how many of these other
2 categories are also in Title 12. I think that the
3 people in those occupations at least might be
4 surprised to know that they are subject to this.
5 And perhaps people in the public might be
6 a bit surprised to know that things that aren't
7 typically being billed through insurance would now
8 be subject to this; for instance, marriage and
9 family therapy.
10 There's some other categories that aren't
11 in here that are in Title 12. And it looks like all
12 of Title 12 would be included. And then the list
13 that they have is, you know, including these people.
14 So there's other things in Title 12 like
15 chiropractors are in there, but it looks like even
16 coroners and things like that, I don't know that
17 they bill but --
18 MR. GELENDER: It might be a little late
19 for healthcare.
20 MS. STAIERT: Yeah, it might be but they're
21 in here. So, you know, I don't know if there's
22 something associated with that and they're included
23 in Title 12 because they're licensed, does that mean
24 that they have to then disclose?
25 So maybe a category -- I don't think we

1 would have to list them all but maybe we should say
2 something about healthcare providers and other -- I
3 don't know what we would call it, but health-related
4 occupations or something like that so that at least
5 it triggers people to know that there is a list out
6 there of things they might not consider a, quote,
7 provider.
8 MS. TIERNEY: We don't have any problem
9 with adding a broad category like that. I think
10 adding, you know, 57 names is problematic. But if
11 you wanted to say a comprehensive list or --
12 MR. GELENDER: What I might suggest is
13 maybe in the current title right before the first
14 reference to healthcare providers on line 4 saying
15 -- the way we have it listed out, it's kind of
16 weird. I don't think we need to repeat it. Saying
17 something like "to a broad range of healthcare
18 providers as defined in the measure" or something
19 like that.
20 MS. STAIERT: Yeah, I mean, I think that
21 would be fine with me too.
22 MS. TIERNEY: We have no objection to that.
23 MS. STAIERT: Okay. All right. Mr.
24 Rogers, what do you think of that, or do you have
25 some other language you would propose? I think

1 we're not inclined to do the list, but we probably
2 are inclined to at least say this is not necessarily
3 people that bill your insurance.
4 MR. ROGERS: I'd sure like to see a list.
5 MS. STAIERT: Yeah, okay. All right.
6 What's your language?
7 MR. GELENDER: Okay. Steve, I think on
8 line 4 right before the first word, I would say "a
9 broad range of healthcare providers" -- and maybe
10 add, unless you think we need to do the "as defined
11 by the measure." I mean, that's more words.
12 MS. STAIERT: Yeah, I'm fine with that.
13 MR. GELENDER: Just leaving it where I had
14 it.
15 MS. STAIERT: That's fine. I'm okay with
16 that.
17 MR. ROPER: Yeah. I also like the
18 suggestion of bolstering the rebate language a
19 little bit to make sure that it -- to make clear
20 that it's rebates received by the insurer.
21 STEVEN WARD: The screen will come back on
22 shortly.
23 MS. STAIERT: We're having technical
24 difficulties.
25 STEVEN WARD: We will have IT do their

1 magic when we break for lunch.
2 MS. STAIERT: Okay.
3 MR. GELENDER: Okay, so --
4 STEVEN WARD: Yeah, I'm ready.
5 MR. GELENDER: So on line -- not line 5,
6 line 7, right after line 5, I think between "all"
7 and "rebates" I'd say put in "healthcare-related."
8 And then after "incentives" I would just add
9 "received."
10 MR. ROPER: Received by the insurer, or do
11 you think received is --
12 MR. GELENDER: Well, I feel like it says up
13 above "requiring health insurers to publicly
14 disclose" on line 3 before the colon, so I think it
15 relates back to that.
16 MR. ROPER: Okay.
17 MS. STAIERT: All right. So the way it
18 reads right now is: "A change to the Colorado
19 Revised Statutes concerning a requirement that
20 healthcare insurers publish health insurance plan
21 information and, in connection therewith, requiring
22 health insurers to publicly disclose, one, the basis
23 for determining payment or reimbursement amounts to
24 a broad range of healthcare providers; two, the
25 items that appear as charges on an explanation of

1 benefit that the insurer does not pay; three,
2 detailed coverage and negotiated payment information
3 by plan, type and provider for prescription drug
4 prices negotiated with providers, pharmacies,
5 distributors and manufacturers; and, five, all
6 healthcare-related rebates or other incentives
7 received, authorizing penalties for violations and
8 prohibiting any contract between a health insurance
9 plan and a healthcare provider from restricting the
10 publication of the required health insurance plan
11 information."
12 MR. GELENDER: All right. And I would move
13 that we deny the motion for rehearing, except to the
14 extent that we've amended the Title and adopt the
15 Title as it now appears on the screen.
16 MR. ROPER: Second.
17 MS. STAIERT: All those in favor?
18 (Unanimous.)
19 MS. STAIERT: All right.
20 (The portion of the hearing requested to be
21 transcribed regarding #119 on the agenda is
22 concluded.)
23 (The next measures on the agenda that were
24 requested to be transcribed are #121, #122, and
25 #123.)

1 MS. STAIERT: All right. That takes us to
2 proposed initiative 2017-2018 No. 121. All right.
3 MR. ROGERS: Madam Chair, Thomas Rogers for
4 the Objector, Deborah Farrell.
5 MS. TIERNEY: Madam Chair, members of the
6 Title Board, Martha Tierney, counsel for the
7 Proponents, David Silverstein and Andrew Graham, who
8 are present.
9 MS. STAIERT: All right. Go ahead, Mr.
10 Rogers.
11 MR. ROGERS: Madam Chair, first I'd like to
12 begin by incorporating argument on initiatives 119
13 and 120 with regard to the substantial amendments
14 made after review and comment. But I'd like to go
15 on to one additional point on that topic, and this
16 is an important one.
17 So the Proponents have argued that the
18 changes they made to the penalty section of 121, or
19 I suppose they will make this argument, that those
20 changes are responsive to questions 28 and 29 in the
21 review and comment memo for initiative 85. That
22 argument is wrong in this case.
23 First, the review and comment memo on 85
24 says that the comments in question in that memo are
25 incorporated, quote, to the extent applicable to

1 121. Well, in this case the comment is not
2 applicable to 121 as it was filed with Leg Council
3 and OLLS.
4 The comment in the 85 memo was, quote, the
5 proposal does not include penalties for violating
6 the requirements of the statute as amended, close
7 quote. The memo then asks if there should be
8 penalties for noncompliance.
9 Well, 121, as filed, did include penalties
10 for violating the requirements of the measure,
11 specifically that the provider can't bill a patient
12 if it has failed to publish its fee schedule as
13 required by the initiative. That's that.
14 Having responded by adding a penalty
15 section to 121 as filed, nothing further would be
16 responsive to that question, the question in the 85
17 memorandum. As a result, item 29 from the 85 review
18 and comment memo is simply not applicable in this
19 case, and no further changes may be made in response
20 to that question.
21 It is not, it cannot be the law that a
22 topic once raised in review and comment measure on
23 another similar measure simply by an incorporation
24 by reference gives the Proponents carte blanche to
25 make any changes they wish to the language about the

1 topic raised in the question.
2 If that were the law, it would again defeat
3 the purpose of 1-41-052 by depriving OLLS and Leg
4 Council of the opportunity to analyze and comment on
5 all substantive provisions of the measure before
6 filing with the Title Board.
7 121 must be sent back for another round of
8 review and comment.
9 MS. STAIERT: Any questions?
10 BOARD MEMBERS: (No response.)
11 MR. ROGERS: I just want to note this is a
12 substantially different argument than the one that
13 was made on 119 and 120.
14 MS. STAIERT: Okay. Ms. Tierney.
15 MS. TIERNEY: Thank you, Madam Chair,
16 members of the Title Board.
17 In response to Mr. Rogers's argument, I'd
18 like to point the members of the Title Board again
19 back to the review and comment memo for measure 118
20 and, in particular, to the substantive comments in
21 paragraphs 8 and 9 on page 7. Those comments go
22 directly to the change that was made in 121.
23 MS. STAIERT: Where are you looking?
24 MS. TIERNEY: The review and comment memo
25 for 118 on page 7, paragraphs 8 and 9.

1 (Inaudible discussion.)
2 MR. ROGERS: Related to the penalties?
3 MS. TIERNEY: Related to the hold harmless
4 provision that was eliminated.
5 MR. GELENDER: Are we there yet or are we
6 talking -- I think we were on the penalty argument
7 still, right? We're on the addition of the
8 penalties argument.
9 And I believe Mr. Rogers's argument is that
10 it's not responsive in this case for a different
11 reason in that a penalty was already included and,
12 therefore, any supplemental penalties being included
13 are essentially redundant and non-responsive. I
14 believe that's the argument, if I'm following it
15 right.
16 MS. TIERNEY: Okay. I would refer you back
17 to both measure 85 and the review and comment for 85
18 and the review and comment for 118, comments 10 and
19 11, where there was extensive conversation about
20 enforcement and penalties.
21 I apologize. I jumped ahead to bullet 3.
22 MR. GELENDER: Sure. The other questions,
23 I believe, Mr. Rogers only referenced question 29 in
24 the No. 85 memo, but there's also 28(e). Is there a
25 penalty associated with failing to publish? And it

1 seems like that's what was addressed in 121 before
2 making amendments.
3 And then the 29 is other penalty provisions
4 just in general for sort of the whole measure, and I
5 think that's what was addressed in response to that
6 question as an amendment. That's my understanding.
7 I know you're up here, but I think it's a
8 question for Mr. Rogers if he disagrees with that.
9 MR. ROGERS: So, Mr. Gelender, this is one
10 of the omnibus measures. So it includes all three
11 sections: Pharmacy, insurance and providers.
12 MR. GELENDER: Right.
13 MR. ROGERS: Question 28(e) deals with only
14 one of those categories. So the way I read this is
15 29 then says essentially: What about the other two
16 categories?
17 All of those references in 85, of all of
18 those references, the change we're focused on is in
19 103.7, which I believe is addressed, you're right,
20 by 28(e). But it is -- well, I think that answers
21 your question. I hope it does.
22 MR. GELENDER: Right, but I thought your
23 issue was that the provision in 10-16-147,
24 subsection 5 was not responsive in this one. And I
25 think it's still responsive in 29.

1 You were arguing that 29, question 29 in
2 No. 85 doesn't apply to 121. And I'm trying to
3 follow that, unless I've misunderstood your
4 argument.
5 MS. TIERNEY: I think Mr. Rogers is on
6 bullet 3.
7 MR. ROGERS: I think I was too. Okay. So
8 we're good on this bullet.
9 MS. TIERNEY: At least we are on the same
10 page.
11 MR. ROPER: Yeah.
12 MR. ROGERS: Let me just take a quick look
13 and make sure I'm -- yeah. Can we go through this
14 one more time? I'm sorry, I just make sure we are
15 on the same page.
16 So 28 and 29 address, between them, all
17 three of the topics of 121.
18 MR. GELENDER: Right.
19 MR. ROGERS: I believe that when 121 was
20 filed, it included additional penalty language on
21 all three of the topics: Pharmacy, insurance and
22 provider. So that is our complaint, that --
23 MR. GELENDER: I see.
24 MR. ROGERS: -- that 85 said you don't have
25 any penalties. When 121 was introduced, it had

1 penalties, I believe, in all three areas.
2 Then after review and comment, additional
3 changes were made and those were improper. Those
4 require additional review and comment.
5 MR. GELENDER: Because of the fact that it
6 had some penalties to begin with was essentially
7 responsive to the question, and you're saying that
8 somehow they can't supplement that response -- they
9 can't respond to that question again or something?
10 Or the question didn't apply to 121 because they had
11 already responded to it in the initial draft of 121?
12 MR. ROGERS: That's exactly it. The
13 question in the 85 memo was: Should there be
14 penalties? 121 is introduced, had penalties.
15 So the language, the incorporation language
16 that says 85 applies to the extent it's applicable,
17 well, it's simply not applicable. It's a
18 nonsensical question as to 121 because the penalty
19 provisions have been included.
20 MR. GELENDER: So they would have needed to
21 ask something like: Should there be more penalties?
22 MR. ROGERS: Should you change the
23 penalties? Are these the right penalties?
24 MR. GELENDER: How about in 29 where it
25 says: Have you considered the nature and severity

1 of the penalties?

2 MR. ROGERS: Well, sure. And they did

3 consider the nature and severity of the penalties

4 when they included a penalty provision or three

5 penalty provisions in 121 as introduced. So they

6 answered the question.

7 And Mr. Gelender is right, our position is

8 that the memo would have needed to ask another

9 question. Not should there be penalties or have you

10 considered what they should be, it would have had to

11 say again, well, we've looked at your penalty

12 provisions and now we have this question about them.

13 Can I go on? I don't want to cut off any

14 questions there may be on that point. I do want to

15 get on to the review and comment memo for 118, if

16 that's okay.

17 So, first, let me note that 118 was pulled

18 down prior to the review and comment hearing. So

19 when we go to the website, we don't find that this

20 letter was published. So, to be honest, I'm seeing

21 it for the first time today. It puts us at a

22 substantial disadvantage here.

23 That said, it appears that 9 doesn't really

24 have any impact here. So 9 regarded the use of the

25 term "hold harmless." And while that word is

1 struck, there's an entire sentence that's struck
2 here.
3 MR. ROPER: Are you on to the third bullet
4 point now?
5 MR. ROGERS: I am on to the 103.7 bullet
6 point which is the third bullet point, yes.
7 MR. ROPER: Yes. Okay. Thank you.
8 MR. ROGERS: So, yeah, I must say seeing
9 this for the first time, it does appear that there
10 was a question in the 118 memo that this change is
11 responsive to.
12 MS. STAIERT: Go ahead.
13 MS. TIERNEY: Thank you, Madam Chair,
14 members of the Title Board. I just wanted to
15 respond to this issue that I didn't respond to the
16 first time because I was on the wrong bullet point,
17 which is this notion that there was a penalty and
18 then the penalty was changed.
19 The discussion in the review and comment
20 for 118 also talks about how the Commissioner is
21 going to enforce and what enforcement is going to
22 look like in substantive comments 10 and 11.
23 And that language, it talks about
24 discipline. So that is where we came up with the
25 change to the penalties in addition to the language

1 from 85 and further discussion that was had in the
2 review and comment.
3 MR. GELENDER: Could I ask a quick
4 question?
5 MS. TIERNEY: Yeah.
6 MR. GELENDER: Unless I'm missing
7 something, in the introduced version or the original
8 version of 121, am I correct that there weren't
9 actually penalties -- the only thing that might be
10 classified as a penalty that was in that was the bit
11 about not billing the patient if you don't publish?
12 I mean, it looks to me like all the other
13 penalties were new language that was added after the
14 review and comment hearing. Am I missing that?
15 MS. TIERNEY: Agreed. No, that's right.
16 You'll see, if you look in the red line --
17 MR. ROPER: And I had that same question,
18 maybe it's for Mr. Rogers, as to what penalties he's
19 talking about with respect to measure 121 that were
20 in the original.
21 MR. ROGERS: So, Mr. Roper, those are the
22 penalties at 6-20-103.7 -- I'm sorry -- right,
23 103.7. So the original language was: If at the
24 time a patient receives a healthcare service from a
25 healthcare provider, the healthcare provider has

1 failed to publish its fee schedule or charge master
2 in accordance with this section, the healthcare
3 provider shall not bill the patient or third-party
4 payer for the healthcare services rendered to the
5 patient and the patient shall not be responsible for
6 paying the charges.
7 It goes on to say: The healthcare provider
8 may bill a carrier with which it has contracted
9 regardless of its compliance with this section.
10 However, the patient shall be held harmless by both
11 provider and carrier for any balance.
12 Then the changes that were made after
13 review and comment were that the last two sentences
14 were -- I'm sorry, the last sentence was struck. So
15 the sentence that reads "The healthcare provider may
16 bill," that was struck.
17 And there was an addition at the end of the
18 -- or an insertion. So after the last comment it
19 read "and the patient and third-party payer shall
20 not be responsible for paying the charges."
21 MR. ROPER: So the held harmless language
22 is what you were calling the penalty that was in the
23 original draft?
24 MR. ROGERS: Well, no, I think all of 7 is
25 a penalty.

1 MR. ROPER: Okay.
2 MR. ROGERS: The penalty is if you don't
3 publish your charges, you can't bill the patient.
4 MR. ROPER: Thank you.
5 MR. GELENDER: I think preliminarily on
6 that argument, my thought is, and I don't know,
7 that's certainly a disincentive and obviously could
8 cost a provider money, I don't know that I'd
9 consider it a penalty in sort of the traditional
10 sense.
11 You know, they're not being fined or
12 something or having some sort of license or action
13 against them or paying money to a government that's
14 enforcing this. So, to some extent, I'm not sure
15 that applies.
16 But more so, I feel like, and I'm still
17 relying on exclusively the review and comment memo
18 for 85, especially given the withdrawal of 118, I'm
19 not entirely sure if it's appropriate that we even
20 consider the 118 memo, although I guess it is
21 incorporated.
22 I just think that questions 28(e) went to
23 that provision 103.7. Question 29 still applies and
24 for the same reasons as in 119 and 120 and covers
25 the addition of the other penalties after the review

1 and comment hearing for 121.
2 And, I mean, the argument is interesting,
3 but I just think it's very hypertechnical to sort of
4 say that, well, there was a question and you tried
5 to respond to it when you initially resubmitted,
6 then you might have thought about it some more and
7 modified again, still thinking about the same
8 question.
9 I think given, you know, our charge to
10 effectuate the right of initiatives and things, that
11 that's an awfully hypertechnical construction to
12 engage in. And I'd be inclined to deny on that
13 basis.
14 MS. STAIERT: Go ahead, Mr. Rogers.
15 MR. ROGERS: Two points on that, Mr.
16 Gelender. First, it clearly is the penalty
17 provision. That was clearly the intent of the
18 Proponents.
19 When you look at 85 there is no 103.7. It
20 stops at 103.6. So the provision that was added was
21 7 which does impose a penalty.
22 Now it may be the right penalty or the
23 wrong penalty, but I believe Ms. Tierney has told us
24 that that was the response to the questions 28(e)
25 and 29. That's what they did.

1 MR. GELENDER: I guess my question for you,
2 Mr. Rogers, would be then: Assuming that's all
3 true, what's the basis for saying they can't
4 essentially supplement that response, that the
5 question doesn't continue to apply through the
6 review and comment hearing?
7 So, for example, you know, I could see they
8 put in this language that was in the original 121
9 about billing a carrier with which it has contracted
10 regardless of compliance, you know, in the last
11 sentence, and then they chose to take out
12 afterwards. I still think they're figuring out how
13 to respond to the same initial question.
14 MR. ROGERS: Well, with respect -- I don't
15 think that they are. The question was: Should
16 there be a penalty and have you thought about what
17 it should be?
18 And they answered that question
19 definitively by inserting item 7. They said, yep,
20 there should be a penalty in 121, here it is, here's
21 the penalty that we choose. They have answered the
22 question.
23 And the argument, the legal argument that
24 you're asking for is: In the review and comment
25 memo, it says that, for 85, it says this memo

1 applies to the new series to the extent applicable.
2 Well, where the question has been answered,
3 it's now a nonsensical question to ask. It's
4 nonsensical to say, well, look, I went back and
5 looked at the 85 memo and it said, do you think
6 there ought to be a penalty? Now I had inserted a
7 penalty, but in response to that, I wanted to make
8 some more changes and I thought that, gee, that was
9 just good enough.
10 I just fundamentally disagree with that.
11 Once the penalty provision has been inserted,
12 something more is required from the review and
13 comment memo to allow them to make further changes.
14 MR. GELENDER: Okay. Leaving that aside,
15 on the specific issue of the deletion of the last
16 sentence in 103.7, what about question 19 from the
17 No. 85 memo which talks about essentially resolving
18 the conflict between where a healthcare provider
19 cannot bill a third-party payer and if there were a
20 dispute between a healthcare provider and a patient
21 regarding responsibility for payment, how would this
22 dispute be resolved?
23 And then it goes on. But it seems to me
24 that at least that deletion part is responsive to
25 that question.

1 MR. ROPER: I'm sorry, Jason, just to make
2 sure I follow where -- were you in 85 still?
3 MR. GELENDER: 85, yes, question 19 on page
4 5, the last three sentences.
5 MR. ROPER: Thank you.
6 MR. ROGERS: That's a good question. It
7 doesn't appear to me to be -- that the change to 121
8 after review and comment does not appear to be
9 responsive to the question in '19.
10 The question asked there is: This
11 subsection does not state that a third-party payer
12 is not responsible for paying the charges, simply
13 that the healthcare provider cannot bill a
14 third-party payer.
15 Is that distinction intentional? I don't
16 think the amendment deals with that issue. The
17 amendment deals with resolving this conflict between
18 what a carrier is and what a third-party payer is.
19 So I don't see the amendment as being responsive to
20 this question.
21 MR. ROPER: Before you sit down, Mr.
22 Rogers, do you have a view as to whether we can look
23 at the 118 memo and consider that?
24 MR. ROGERS: I do. The review and comment
25 process was not completed as to 118. That

1 initiative was pulled down prior to the review and
2 comment hearing, so I would say it's a nullity.
3 If the process had been completed, I think
4 it would be a reasonable argument. But without a
5 hearing to complete the process, it shouldn't be
6 given any weight.
7 I mean, for those reasons in addition to
8 the reasons that it's simply not fair to ask us to
9 consider a letter on an initiative that was pulled
10 down and that was never available to us.
11 MS. TIERNEY: On that same point, though,
12 the Proponents -- 118 was the first in the series.
13 So 118 is, if you look at it, the lengthiest review
14 and comment memo. It is not for the Proponents to
15 have -- I mean, we used all of those comments in 118
16 to apply to all the measures.
17 And so you can't punish the Proponents
18 because -- unless Legislative Council didn't
19 incorporate those comments then into 119. They
20 incorporated them all everywhere.
21 DAVID SILVERSTEIN: And in the hearing,
22 even though it had been pulled, they referred to it.
23 MS. TIERNEY: Right. And in the review and
24 comment hearings, we discussed those comments in 118
25 as they applied to 119, 120, 121, 122 and 123.

1 MS. STAIERT: Anything?
2 MR. ROPER: I don't have anything more. I
3 think that, as Jason said, I think specifically the
4 memo in 85, No. 28(e) I think talks about the
5 failure to publish, that covers the subsection 7.
6 But I think 29 specifically talks about in
7 addition to a penalty for failure to publish and
8 goes on and talks about considering other penalties
9 including the nature and severity of them.
10 So I'm comfortable that that question,
11 specifically 29, would cover the first two bullet
12 points in the motion for rehearing.
13 As to the third bullet point, I'd be
14 comfortable reviewing and considering the memo for
15 118. I'm a little concerned if, as Mr. Rogers says,
16 it wasn't made available or there wasn't a way for
17 them to review it. I don't know if that's the case
18 or not.
19 But I do think that question 9 in the memo
20 for 118 does specifically go to this point and, as
21 to the third bullet point, that it was responsive to
22 that question in No. 118.
23 So I would be inclined to deny the
24 rehearing as to all three of those bullet points.
25 MS. STAIERT: I'm also concerned if the

1 memo is pulled down, but I don't think we can hold
2 that against a Proponent of an initiative. They
3 don't have any control over the publication of the
4 memo.
5 So, while I'm not quite sure what to do
6 with that, I'm pretty certain that we can't, you
7 know, attribute that issue back to the Proponent.
8 And based on the other arguments, I'm comfortable
9 that they're in response.
10 And I understand the argument that maybe
11 it's not applicable, but I think that that's a
12 pretty broad statement and I'm not sure it was
13 limited in the way that Mr. Rogers is arguing that
14 particular language. And so I'm comfortable finding
15 that we have jurisdiction.
16 MR. GELENDER: Then I would move that we
17 deny the motion for rehearing on proposed initiative
18 2017-18, No. 121, to the extent it alleges that we
19 lack jurisdiction to set a title due to substantial
20 amendments being made after a review and comment
21 hearing.
22 MR. ROPER: Second.
23 MS. STAIERT: All those in favor?
24 BOARD MEMBERS: Aye. (Unanimous.)
25 MS. STAIERT: All right, Mr. Rogers.

1 MR. ROGERS: All right, Madam Chair, I'd
2 like to go on to single subject for 121. And I'd
3 like to highlight several arguments from our motion.
4 First, I'd like to incorporate our earlier
5 argument with regard to 119 on single subject,
6 specifically with regard to the requirement that
7 insurers disclose all remuneration and rebates.
8 Second, with regard to Section 6-20-103.5
9 of the initiative, it requires healthcare providers
10 to publish a list of all persons that provide
11 healthcare services including their relationship
12 with the healthcare provider and other details that
13 would otherwise not be subject to public scrutiny.
14 This disclosure requirement is not related
15 to billing transparency. Instead, it requires a
16 broad disclosure related to personnel matters. For
17 a hospital, this could amount to hundreds, maybe
18 thousands of providers.
19 It adds nothing to transparency in
20 healthcare billing, especially in light of the
21 requirements of the Section 6-20-105 of the
22 initiative. That section is designed to give the
23 patient information about who is providing services,
24 whether those providers are in or out of network,
25 and how they will bill.

1 With that requirement in place, the
2 requirement that a healthcare provider publish a
3 list of all healthcare providers is not only
4 superfluous, it amounts to a second subject. It
5 violates the single-subject rule and deprives the
6 Board of jurisdiction to set Title.
7 Third, as you know, this measure is a
8 conglomeration of three separate measures, 119, 120
9 and 122 into a single measure. We've talked about
10 two of those already. We're going to talk about the
11 third a little later this morning.
12 Each of those three has its own single
13 subject defects. By combining them into a single
14 measure, 121 even more clearly violates single
15 subject.
16 This measure is broad. It impacts three
17 titles of C.R.S., the consumer title, the insurance
18 title and the public health title. It makes
19 substantial changes to the law governing insurers,
20 pharmaceuticals, pharmaceutical drugs and healthcare
21 providers.
22 It provides for rulemaking by three
23 rulemaking authorities. It stretches its purported
24 single subject, transparency in healthcare billing,
25 beyond the breaking point. And it must be rejected.

1 I'm happy to take any questions on single
2 subject.
3 MS. STAIERT: Anything?
4 MR. GELENDER: I guess I'll start. You
5 know, as you know, we have case law that says
6 things, you know, if multiple provisions are
7 directly connected and related to or are intended to
8 achieve the initiative's central purpose, the
9 provisions do not constitute separate subjects.
10 So, I mean, I certainly agree that this is
11 a broad measure and has a lot in it. But
12 specifically what isn't necessarily and properly
13 connected to, you know, what they're trying to do in
14 achieving essentially healthcare industry
15 transparency or, you know, their general purpose?
16 MR. ROGERS: Yeah, well, certainly the
17 requirement to list physicians by -- or to list
18 healthcare providers is beyond that title. It has
19 nothing to do with transparency in healthcare
20 billing.
21 The remuneration and rebates section again
22 has nothing to do with transparency in healthcare
23 billing.
24 MR. GELENDER: I'm sorry, let me be more
25 specific. I meant specifically just the argument

1 about it regulates, you know, three different
2 groups, three different industries, three different
3 titles, that part of it.
4 Is there anything specific you can point to
5 as to why that's a problem besides that it just does
6 a lot?
7 MR. ROGERS: Yeah, the umbrella is simply
8 too big. I mean, at some point there is a title --
9 you know, concerning Colorado law is a Title that
10 you would find too broad.
11 If we attacked three sections of -- or if
12 the Proponents attacked three sections, three Titles
13 of Colorado law under the purpose to amend Colorado
14 law, you would find that too broad.
15 So where is the line between something that
16 is an appropriate single subject and something that
17 is simply too broad?
18 Transparency in healthcare billing in a
19 measure that impacts the insurance industry is quite
20 different from a measure that impacts pharmaceutical
21 drugs and is quite different from a measure that
22 impacts healthcare providers.
23 You're mixing concepts under a single
24 subject that is simply too broad to withstand
25 scrutiny.

1 MR. GELENDER: Do you think there's a
2 realistic concern that you could have individuals
3 who would want to vote for one of these measures but
4 not the others?
5 MR. ROGERS: I do. And I think the
6 Proponents have that concern as well. I think
7 that's why they've given you 119, 120 and 122. And
8 then in an effort to avoid the use of those
9 individual topic measures is intended to avoid the
10 obvious single-subject problem that they've got.
11 There may be a voter who is quite concerned
12 about pharmaceutical drug prices but could care less
13 about their healthcare provider cost.
14 There could be a consumer that's very
15 concerned about their insurance premiums and about
16 the lack of transparency in statements of benefits
17 they receive from insurer, but that they don't
18 really think pharmaceuticals or providers are part
19 of the problem. So, absolutely.
20 MR. GELENDER: I'm done for now.
21 MS. STAIERT: All right. Okay. Thank you.
22 Ms. Tierney, do you want to respond?
23 MS. TIERNEY: Thank you, Madam Chair,
24 members of the Title Board. I too would like to
25 incorporate our comments from 119 and 120, both mine

1 and Mr. Silverstein's comments into the record for
2 121.
3 Four of the single-subject arguments raised
4 by Mr. Rogers were directly addressed in 119. The
5 one, two, three, four, five, sixth bullet point is a
6 different topic but the adverse licensure issue
7 which is an implementation and enforcement provision
8 directly tied to the single subject.
9 I do want to speak to the issue of the five
10 different measures that are before you today and Mr.
11 Rogers's comment that we must have single-subject
12 concerns because we brought you five different
13 measures. That's not the case.
14 What's happening is that there is a Bill
15 that is running its way through the Legislature and
16 it remains to be seen whether it will end up with
17 all three providers, carrier and Pharma in it. And
18 if it doesn't, then the Proponents may take the
19 piece that is left out to the voters.
20 But the Bill that is running its way or
21 will be running its way through the Legislature
22 contains all provisions of 121 and 123 very
23 similarly. So that is not why we submitted five
24 measures to you.
25 On the list of all persons that provide

1 healthcare services, out-of-network violations are
2 one primary complaint that consumers raise and that
3 comes up repeatedly in this healthcare transparency
4 debate.
5 So the reason to require healthcare
6 providers to publish a list of all persons that
7 provide healthcare services is so that patients know
8 whether the provider is going to be in network or
9 out of network.
10 It is not for any other purpose other than
11 to give the patient further transparency about what
12 they are going to be paying for the service that
13 will be provided.
14 (Inaudible discussion.)
15 MS. TIERNEY: And where to look to find
16 those prices.
17 Again, I think that the discussion and the
18 testimony or the statements here today from Mr.
19 Silverstein about the interconnectedness of the
20 providers, the carriers, pharmacy and patients
21 explains why the first bullet is not a single
22 subject.
23 They are all in this measure because this
24 is about transparency in healthcare billing and
25 pricing. And it cannot be achieved if you don't

1 have each of those prongs, and they all flow from
2 that single subject.
3 There's nothing in here, to your question,
4 Mr. Roper, that I emphatically disagree that a voter
5 is going to be for transparency in drug prices but
6 not for transparency in healthcare costs; that
7 someone who supports transparency in healthcare
8 pricing will support it in all three of these
9 facets, maybe unless they are an insurance company
10 or a Pharma owner.
11 MR. ROPER: Help me understand a little
12 bit, and this is going to the list of all persons.
13 You said that it's to help identify who's out of
14 network?
15 MS. TIERNEY: In network or out of network.
16 MR. ROPER: But this isn't talking about
17 insurance; this is talking about the healthcare
18 providers list.
19 DAVID SILVERSTEIN: Should I elaborate on
20 that?
21 MR. ROPER: And so maybe I'm just not
22 making that connection.
23 DAVID SILVERSTEIN: So when you go into a
24 hospital for surgery and you've scheduled that
25 surgery with your physician, if you've never had

1 surgery before and you don't know the system,
2 there's a very good chance there's an
3 anesthesiologist there who doesn't work for the
4 hospital, doesn't work for your surgeon, who you've
5 never talked to and you've never requested prices
6 from.
7 This is called surprise billing. It's
8 probably been the biggest hot topic in healthcare
9 price transparency for the last decade.
10 When you're in the hospital because a
11 60-year-old woman broke her hip and the doctor says,
12 you know, I think she might have broken her hip
13 because she's a drug addict, have the addiction
14 counselor come and see her. They call an addiction
15 counselor from down the street who doesn't work for
16 the hospital, who the patient hasn't chosen.
17 And the patient would have no idea they
18 should ask about their prices. It won't show up on
19 their hospital bill. When they get their bill a
20 month later, two months later, three months later,
21 they may not even remember they had seen an
22 addiction counselor who three months later they get
23 a bill from.
24 So when we go in for services, whether to
25 an outpatient surgical center, whether to a

1 hospital, we are often being sent healthcare
2 providers, whether it's a massage therapist,
3 somebody to do a physical therapy evaluation who
4 does not work for the hospital. And today they have
5 absolutely no obligation to disclose this
6 information to you.
7 When you call your local hospital and you
8 ask what does it cost to go to the emergency room,
9 you may get a price and you may get something from
10 your insurance carrier, but they won't tell you that
11 the emergency room physician is an independent
12 physician who doesn't work for the hospital.
13 So it didn't even occur to you to say, oh,
14 by the way, can you tell me what staffing service
15 you use for your ER so I can also call and get their
16 prices. I don't have an emergency right now but I
17 might next month and so I'd like to get those
18 prices.
19 So the hospitals, quite honestly, are all
20 in favor of this information coming out. They just
21 probably don't like having to put it out themselves.
22 MS. STAIERT: Go ahead. Did you have
23 anything else?
24 MS. TIERNEY: Do you have any other
25 questions for me?

1 MR. GELENDER: I don't think so.
2 MR. ROGERS: Madam Chair, I've just got a
3 couple of quick points. First, I appreciate Ms.
4 Tierney's explanation that the Proponents aren't
5 concerned about a single-subject defect. They're
6 really concerned about what's happening at the
7 Capitol.
8 And I would suggest that her explanation
9 about what's happening at the Capitol and her
10 concerns belies the problem with this measure.
11 The policymakers at the Legislature may
12 very well decide that it's a good policy to require
13 transparency for pharmaceuticals but not for
14 insurance companies and providers. Or they may
15 decide that insurance transparency is a good idea
16 but not pharmaceutical drug transparency.
17 This is the same analysis that the voters
18 are going to go through. So, the fact that the
19 Proponents are concerned about the policy decisions
20 that the Legislature will make, points you directly
21 to a single-subject problem. This is classic
22 log-rolling.
23 The Proponents are going to cater to, in
24 one instance, those who are concerned about
25 pharmaceutical drug prices. And they're going to,

1 in the bargain, get a vote from that voter for
2 transparency of insurance companies and healthcare
3 providers.
4 That's log-rolling. That's exactly what is
5 prohibited by the case law in the statute with
6 regard to single subject.
7 Second, with regard to the out-of-network
8 issue, there is no need for this list of doctors.
9 The reason is that 6-20-105(b) and (c) cover the
10 same topic.
11 So the healthcare provider, and that could
12 be a hospital, is required to provide information
13 about whether the healthcare services rendered by
14 the provider will be covered by the individual's
15 health insurance as an in-network or out-of-network
16 benefit.
17 And, if the individual will receive
18 healthcare services from an out-of-network provider
19 at an in-network facility, whether under 10-16-704
20 the provider is permitted the balance to bill the
21 individual pursuant to 10-16-704.
22 So it's Section 105(a), (b) and (c) that
23 give the consumer the transparency about in-network
24 and out-of-network and, if out-of-network, how
25 out-of-network will be billed.

1 The requirement for the healthcare
2 providers to publish their list of physicians
3 doesn't address that concern, or at least it does
4 not necessarily address that concern.
5 It is a separate subject, and that is
6 requiring information from the healthcare providers
7 that is not necessary for the consumer to have
8 transparency in billing. Thank you.
9 MS. TIERNEY: Thank you. If I might
10 respond to that last point? 6-20-105 is only about
11 providers. So, for example, the uninsured wouldn't
12 get any of that information.
13 The provider is only providing that if an
14 individual provides health insurance information to
15 a healthcare provider in connection with the
16 delivery of proposed services.
17 MR. ROPER: Although the uninsured also
18 isn't going to care whether they're in network or
19 out of network, right?
20 MS. TIERNEY: Well, maybe they would care
21 what relationship they've got to that hospital,
22 right, because if they --
23 DAVID SILVERSTEIN: They care more. Where
24 do they turn for prices? If they go to the hospital
25 and they're uninsured, they have no idea that they

1 should be getting prices from other providers that
2 they might see at that hospital that are
3 unaffiliated with the hospital. So, in many ways
4 the uninsured should care much more about this.
5 The self-insured, the cash-paying patient
6 thinks they're only going to see a bill from the
7 hospital and that they should only ask for prices
8 from the hospital. And they would have no idea that
9 they might see three, four, five other providers who
10 do not work for the hospital and whose pricing
11 doesn't come through the hospital.
12 MR. ROPER: Right. So your point is, it
13 goes beyond the in-network or out-of-network.
14 DAVID SILVERSTEIN: Yes.
15 MR. ROPER: It has to do with getting an
16 understanding of who all is providing the services
17 and where you may be getting a bill from.
18 DAVID SILVERSTEIN: Right. There's many
19 different situations covered.
20 MS. TIERNEY: And on the point of the
21 legislation, I tried not to laugh because we all
22 know what influences legislation and it's not single
23 subject. Maybe 99.9 percent of the time, it's
24 usually special interests and campaign
25 contributions. So let's not fool ourselves that

1 that's the reason this is not a single subject.
2 (Inaudible discussion.)
3 MS. STAIERT: Sure.
4 MR. ROGERS: With regard to the in-network,
5 out-of-network issue, I think, Mr. Roper, your back
6 and forth moved us down the road. Right, if you're
7 insured you care about in-network or out-of-network.
8 If you're not insured, then all of your
9 healthcare providers are going to be covered by this
10 initiative. So that anesthesiologist is regulated.
11 For that matter, your athletic trainer and your
12 massage therapist are covered.
13 So there is a mechanism for the consumer to
14 get the information, the pricing information, from
15 each of their providers. So, again, 5 is not
16 necessary to increase transparency in billing. It
17 is simply a separate subject.
18 MS. STAIERT: All right, I'll start. On
19 the single subject, I understand that these are kind
20 of graduated and taking a little bit more on each
21 initiative. But I still think that they are
22 connected, and I don't think it qualifies for what
23 we would describe as log-rolling.
24 There are commonly parts of an initiative
25 that a voter might not like. I mean, one typical

1 thing is, you know, just in the kind of enactment
2 clauses, there's commonly an administrative
3 rulemaking authority. I think there's probably lots
4 of voters out there that would like administrative
5 agencies to never be able to pass rules, and they
6 think it's overreach.
7 But I don't think it's log-rolling. I
8 think it's part of the implementation. And so when
9 a measure like this connects some things that I
10 think -- you know, there is a chance that a voter
11 likes one and doesn't like the other.
12 But I don't think the measure is in any way
13 surreptitious. It's not trying to have one very
14 popular thing log-roll into something unpopular.
15 They're all sort of in the same category.
16 And to the point of at what point does it
17 become too much, I mean, I would agree a title that
18 even says a change regarding healthcare, and then we
19 had pricing and then we also got into how that
20 affects the care that a hospital can give you, so if
21 you don't consent to the price or something they can
22 deny you service.
23 Or, you know -- I don't know. I mean, we
24 could go down the road of how it would actually
25 impact somebody's care and, you know, get into what

1 kind of care doctors are allowed to give or not
2 give, that may I think at that point be problematic.
3 But I don't think something that's limiting
4 itself to consumers obtaining information about
5 pricing, even though there are three different
6 categories, is two subjects.
7 I think, you know, Proponents commonly
8 bring a number of initiatives forward. Sometimes
9 it's because they want to go and poll and see
10 whether certain things are popular or not popular
11 before they decide what they're going to circulate.
12 So I'm not really concerned about multiple
13 titles. That seems to be quite commonplace these
14 days. So I'm comfortable with the single subject.
15 MR. GELENDER: I agree with Suzanne. As
16 for the list of all persons, I also don't think that
17 creates a second subject.
18 Mr. Rogers makes some good points as to why
19 it might not be necessary to achieve what Proponents
20 have described as the purpose of it. But I don't
21 think it constitutes a separate subject separate
22 from the rest of the measure.
23 And then as to the last four bullet points,
24 I think we've already addressed those with respect
25 to the earlier measures.

1 MR. ROPER: I don't have anything to add.
2 MS. STAIERT: Okay. Do you want to make a
3 motion then?
4 MR. GELENDER: Sure, I can do that. I move
5 that with respect to initiative 2017-18, No. 121,
6 that we deny the motion for rehearing to the extent
7 that it argues that the initiative contains
8 multiple, separate and distinct subjects.
9 MR. ROPER: Second.
10 MS. STAIERT: All those in favor?
11 BOARD MEMBERS: Aye. (Unanimous.)
12 MS. STAIERT: All right. Mr. Rogers, that
13 takes us to Title.
14 MR. ROGERS: Thank you, Madam Chair.
15 First, I'd like to incorporate arguments from 119 on
16 the broad range of healthcare providers regulated by
17 the measure.
18 Second, I'd refer you to the arguments in
19 the motion. I'd like to highlight just one of
20 those.
21 The initiative references the publication
22 of fee schedules, and the Title references the
23 publication of fee schedules but omits any reference
24 to the different requirement for healthcare
25 providers that are using the CMS fee schedules.

1 Those providers are able to simply state
2 what percentage of the fee schedule they will use.
3 That is different from publishing a list of prices,
4 and that should be pointed out in the Title.
5 And the omission of this difference is
6 fatal to the Title, or at least must be fixed, as it
7 fails to inform the public of this central feature
8 of the measure.
9 There is a lot of providers that would use
10 this alternative method and it ought to be
11 referenced in the Title to make it clear and not
12 misleading. Thank you.
13 MS. STAIERT: Any questions on that?
14 (No response.)
15 MS. STAIERT: All right. Ms. Tierney.
16 MS. TIERNEY: Thank you, Madam Chair,
17 members of the Title Board. I, too, will
18 incorporate my comments and Mr. Silverstein's
19 comments in regards to the Title from measures 119
20 and 120 into this discussion of the Title of 121.
21 The issue about the CMS schedule and
22 whether the provider is going with their own fee
23 schedule or a percentage of the CMS schedule, I
24 don't think the average voter would have any
25 understanding of what the difference there means.

1 Explaining to the voter that their fees
2 will be published is what, I think, needs to be
3 explained in this Title. And if we start getting
4 into charge masters and CMS and things like that,
5 you're going to lose the voter in about the first
6 sentence.
7 So I would suggest that the Title, as
8 written, is clear. It tells the voters what they
9 need to understand about what this measure is about.
10 And while it does not contain every nuance of the
11 measure, the case law is very clear that it does not
12 need to.
13 MR. GELENDER: Just understanding this
14 provision, so the purpose of allowing the use of the
15 Medicaid schedule is essentially a more
16 administratively easier alternative for providers
17 essentially?
18 DAVID SILVERSTEIN: Much easier. It's the
19 way most providers set their schedules today, both
20 physicians and hospitals in many cases. And so we
21 simply wanted to reduce as much burden as possible.
22 And once you know that various providers
23 reference the CMS fee schedule, all you have to know
24 is my doctor charges 150 percent and the other
25 doctor charges 160 percent of the CMS fee schedule.

1 And that's all they have to do is
2 reference, for example, that 27 CMS fee schedule, we
3 charge 150 percent. It makes it much easier for the
4 providers.
5 MR. GELENDER: And that fee schedule is
6 something that's pretty available --
7 DAVID SILVERSTEIN: That's public
8 information.
9 MR. ROPER: I don't have anything else.
10 MS. STAIERT: Nothing. Okay, thanks.
11 MR. GELENDER: Okay. So I guess I'll
12 start. I think, as we did for, you know, 119, we
13 should make those same changes we made there on the
14 broad range of providers and the remuneration.
15 Again, I don't think, as we decided before,
16 we need to talk about delegation of rulemaking
17 authority.
18 On the Medicaid fee schedule, I think I
19 agree with Ms. Tierney that doing anything about
20 that would likely cause more confusion than anything
21 else. I think the general point is that the
22 information is disclosed and the form is not
23 something that people need to be notified of.
24 On the issue of disclosure of carriers,
25 prescription drug prices negotiated, I don't think

1 we need to add anything.

2 I think in the measure, if we wanted to,

3 after "payment information," if I can find it, on

4 line 5, you know, I might consider at least doing a

5 clause that just says "including prescription drug

6 prices." I've got no objection to that. I don't

7 know that it's necessary.

8 MS. STAIERT: I'm fine with that. If it

9 makes you feel better, I can't log in my laptop

10 either.

11 MR. ROPER: Should we add in the changes

12 from 119 as well? Steven, do you remember those?

13 STEVEN WARD: So I wasn't clear on where we

14 would insert those changes.

15 MR. GELENDER: Oh, this one is a little --

16 is worded differently.

17 STEVEN WARD: I don't know if you want to

18 say "requiring a broad range of health providers."

19 MR. GELENDER: I hadn't paid attention

20 closely enough for how different this one is.

21 STEVEN WARD: I can put 119 up if you want

22 to take a look at what we did there.

23 MS. STAIERT: Sure.

24 STEVEN WARD: So this is the language in

25 clause 1.

1 MR. GELENDER: Okay. Go back now. In this
2 one maybe what I'd do is after "providers" is say
3 something like "as broadly defined by the measure."
4 MS. STAIERT: That's fine.
5 MR. GELENDER: You should probably set that
6 off with commas.
7 MS. TIERNEY: Madam Chair, if I could,
8 could I ask one question or make one clarification?
9 MS. STAIERT: Sure.
10 MS. TIERNEY: In the motion on page 3,
11 Section 3, bullet 2, Mr. Rogers makes the point that
12 the initiative specifically requires insurance
13 carriers to disclose prescription drug prices
14 negotiated with manufacturers. That is the primary
15 distinction between 121 and 123.
16 And when we talked about that last time,
17 the Title Board did not feel like we needed to
18 include that. But I want to raise that here because
19 we have no objection if you want to include a
20 reference to manufacturers in the Title to address
21 that concern.
22 I don't think it makes the Title
23 misleading. And the Proponents have no intention of
24 going forward with both 121 and 123, but I did want
25 to make a record about that and raise it.

1 MS. STAIERT: Okay. But that's something
2 we would do in 123? Or do it here?
3 MS. TIERNEY: It's not in 123. It is in
4 121.
5 MS. STAIERT: Oh, okay.
6 MR. GELENDER: Yeah, so that's just the
7 language I just put in, I believe, right, the
8 "including prescription drug prices."
9 MS. STAIERT: Oh, you got something else?
10 MS. TIERNEY: I was just going to say I'm
11 not sure it's necessarily necessary. You didn't
12 want to put it in the first time. But I just don't
13 want to leave that hanging.
14 MR. GELENDER: I might set that one off
15 with commas too, though, I think -- I mean, I don't
16 know. Your grammar might be better than mine.
17 MS. STAIERT: Did we have any other
18 changes?
19 MR. GELENDER: We had, regarding the
20 incentives, we had the language from 119. Well,
21 here it says --
22 MR. ROPER: I think our original Title with
23 121 talks about received by the insurer.
24 MS. STAIERT: So are we good?
25 MR. GELENDER: I think so.

1 MS. STAIERT: Okay. I'll read it. "It's a
2 change to the Colorado Revised Statutes concerning
3 the disclosure of healthcare pricing information
4 and, in connection therewith, requiring healthcare
5 providers, as broadly defined by the measure, to
6 publish fee schedules detailing the price charged
7 for healthcare services, billing policies and a list
8 of healthcare professionals providing services,
9 prohibiting noncomplying healthcare providers from
10 billing for services, requiring health insurers to
11 publicly disclose coverage and payment information,
12 including prescription drug prices, for each health
13 coverage plan and information regarding incentives
14 received by the insurer, requiring pharmacies to
15 publish retail drug prices, authorizing penalties
16 for violation, and prohibiting any contract between
17 a health insurance plan and a healthcare provider
18 from restricting publication of the required
19 healthcare pricing information."
20 MR. GELENDER: I would move that we deny
21 the motion for rehearing on proposed initiative
22 2017-18, No. 121, except to the extent that we have
23 amended the Title as was just read.
24 MR. ROPER: Second.
25 MS. STAIERT: All those in favor?

1 BOARD MEMBERS: Aye. (Unanimous.)
2 MS. STAIERT: All right. That takes us to
3 No. 122.
4 MS. TIERNEY: Thank you, Madam Chair,
5 members of the Title Board. Martha Tierney on
6 behalf of the Proponents, David Silverstein and
7 Andrew Graham, who are both present.
8 MS. STAIERT: Mr. Rogers.
9 MR. ROGERS: Madam Chair, Thomas Rogers for
10 the Objector, Deborah Farrell.
11 MS. STAIERT: And do you want to walk us
12 through your motion for rehearing?
13 MR. ROGERS: Thank you, Madam Chair. So
14 122 includes language that is a component of 121.
15 So I mention that because we have now been through
16 all of the arguments at least once.
17 So I'm simply going to incorporate prior
18 arguments here and leave it at that. So with regard
19 to the substantial changes after review and comment,
20 I would incorporate our arguments with regard to
21 121.
22 With regard to single subject, I would
23 incorporate our arguments from 121 on the
24 requirement that healthcare providers publish a list
25 of all persons that provide services.

1 Otherwise, we stand on our motion. But I
2 believe, again, with the exception of a different
3 rule maker for 122, all of the substance of those
4 points has been argued in the prior initiatives.
5 MS. STAIERT: Okay. Ms. Tierney, do you
6 have anything?
7 MS. TIERNEY: Thank you, Madam Chair.
8 Again, we would incorporate all of our comments from
9 all of the prior measures heard today on motion for
10 rehearing on 119, 120 and 121 into the comments here
11 on 122. That would be for both myself and Mr.
12 Silverstein.
13 And I concur with Mr. Rogers that the
14 arguments raised in the motion for rehearing have
15 each been already discussed in the prior motions for
16 rehearing.
17 MR. GELENDER: Okay. Looking at the Title,
18 I don't think I see anything that we've changed on
19 prior ones that we need to change here. But does
20 anyone think I'm missing anything there?
21 MS. STAIERT: Mr. Rogers?
22 MR. ROGERS: Mr. Gelender, we do have the
23 issue of the expansive definition of healthcare
24 provider as we addressed in 119?
25 MR. GELENDER: Oh, yes.

1 MR. ROGERS: And while I'm here on
2 language, let me just go ahead and finish that off,
3 if I could.
4 So, in addition to incorporating the
5 arguments on Title language from 119, we would also
6 incorporate argument from 121 on Title language,
7 specifically with respect to the alternate
8 requirements -- our suggestion that the Title should
9 include a reference to the CMS fee schedule users.
10 Otherwise, we stand on our motion.
11 MR. GELENDER: I think you've got it.
12 MS. STAIERT: So just with the addition on
13 line 2 "requiring a broad range of healthcare
14 providers." So do you want to make the motion?
15 MR. GELENDER: Yes. I move that we deny
16 the motion for rehearing on proposed initiative
17 2017-18, No. 122, except to the extent that we've
18 amended the Title as it now appears on the screen.
19 MR. ROPER: Second.
20 MS. STAIERT: All those in favor?
21 BOARD MEMBERS: Aye. (Unanimous.)
22 MS. STAIERT: All right. That takes us to
23 proposed initiative 2017-2018 No. 123.
24 MS. TIERNEY: Thank you, Madam Chair,
25 members of the Title Board. Martha Tierney on

1 behalf of the Proponents, David Silverstein and
2 Andrew Graham, who are present.
3 MR. ROGERS: Madam Chair, Thomas Rogers
4 representing the Objector, Deborah Farrell.
5 MS. STAIERT: And you want to go ahead and
6 start us off?
7 MR. ROGERS: You bet. Again, we have
8 covered the arguments made in our motion for
9 rehearing.
10 And so I would incorporate the substantive
11 changes after review and comment and the single
12 subject arguments from initiative 121. Let me also
13 incorporate, please, the language arguments that we
14 made with respect to 121.
15 Otherwise, we stand on the motion for all
16 three topics.
17 MS. STAIERT: Go ahead.
18 MS. TIERNEY: Thank you, Madam Chair. We
19 incorporate all of our comments for 119, 120, 121
20 and 122 into this motion for rehearing for No. 123,
21 my comments and Mr. Silverstein's comments.
22 And we agree that each of the issues raised
23 in the amendment arguments, the single-subject
24 arguments, and the titling arguments have already
25 been covered this morning.

1 MS. STAIERT: All right. So we've got a
2 couple of -- or one language change, at least.
3 MR. ROPER: I think we said "as broadly
4 defined in the measure" with 121.
5 MS. STAIERT: Yeah, we did.
6 MR. GELENDER: And then in this one, the
7 difference is that we do not need that, that we had
8 on the prescription drug prices.
9 MS. STAIERT: Right, because it doesn't --
10 MR. GELENDER: I can't remember, any other
11 change. We should probably look.
12 MS. STAIERT: I don't think we did.
13 MR. GELENDER: I think the prescription
14 drug prices was the only other change.
15 MR. ROPER: Are you saying we don't need
16 the prescription drug prices?
17 MS. STAIERT: Yeah, because that one's not
18 in here.
19 MR. GELENDER: That's the difference
20 between --
21 MS. STAIERT: 121 and 122.
22 MR. ROPER: I think the difference is just
23 that 121 includes manufacturers as -- you know,
24 negotiation with manufacturers as opposed to just
25 providers, pharmacies and distributors.

1 MS. STAIERT: That's correct. So I don't
2 think 123 requires any change because it's a
3 negative. I think if you wanted to make that
4 distinction, it would go in 121.
5 MR. GELENDER: Right. So we should have an
6 identical Title to 121 here probably.
7 MS. STAIERT: Yes. I mean, yeah.
8 MR. GELENDER: Yeah, I think so. All
9 right.
10 MS. STAIERT: All right. So then the two
11 changes will be -- well, I'll just read it.
12 MR. GELENDER: Yeah, just pull it in. The
13 line numbers aren't matching though.
14 MS. STAIERT: Oh, that's a problem. Okay.
15 So now it should be the same Title as 121 which is:
16 "A change to the Colorado Revised Statutes
17 concerning the disclosure of healthcare pricing
18 information and, in connection therewith, requiring
19 healthcare providers, as broadly defined by the
20 measure, to publish fee schedules detailing the
21 price charged for healthcare services, billing
22 policies and a list of healthcare professionals
23 providing services, prohibiting non-complying
24 healthcare providers from billing for services,
25 requiring health insurers to publicly disclose

1 coverage and payment information, including
2 prescription drug prices, for each healthcare
3 coverage plan and information regarding incentives
4 received by the insurer, requiring pharmacies to
5 publish retail drug prices, authorizing penalties
6 for violations and prohibiting any contract between
7 a health insurance plan and healthcare provider from
8 restricting publication of the required health price
9 information."
10 MR. GELENDER: I move that we deny the
11 motion for rehearing on proposed initiative 2017-18,
12 No. 123, except to the extent that we've amended the
13 Titles as was just read.
14 MR. ROPER: Second.
15 MS. STAIERT: All those in favor?
16 BOARD MEMBERS: Aye. (Unanimous.)
17 (The portion of the hearing requested to be
18 transcribed regarding Measures #119, #121, #122 and
19 #123 on the agenda are concluded.)
20
21
22
23
24
25

1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss.
3 COUNTY OF ADAMS)

4 I, Geneva T. Hansen, do hereby certify that
I am a Professional Shorthand Reporter and Notary
5 Public within the State of Colorado.

6 I further certify that the foregoing
transcript constitutes a true and correct transcript
7 to the best of my ability to hear and understand the
audio recording.
8
I further certify that I am not related to,
9 employed by, nor of counsel for any of the parties
or attorneys herein, nor otherwise interested in the
10 result of the within action.

11 IN WITNESS WHEREOF, I have affixed my

12 signature and seal this 16th day of March, 2018.

13

14 My commission expires 11-18-19.

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Exhibit B
2018SA48

DATE FILED: March 20, 2018 7:03 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

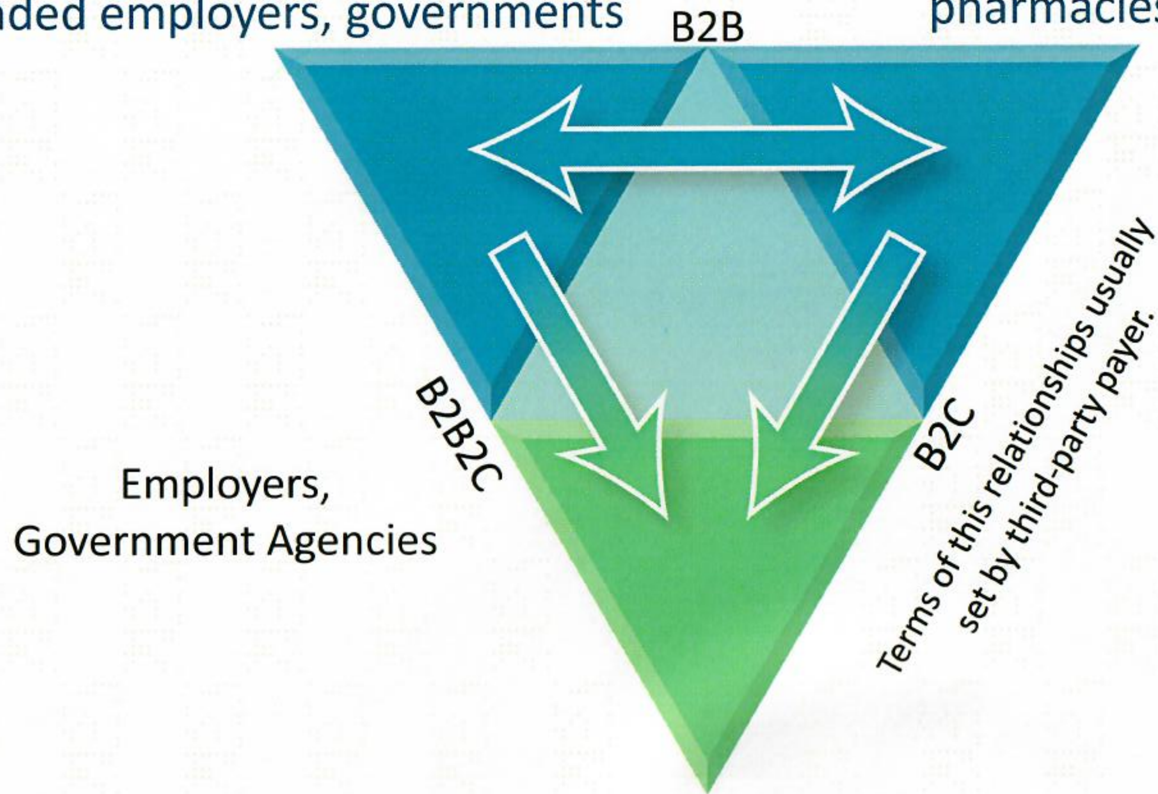
I, WAYNE W. WILLIAMS, Secretary of State of the State of Colorado, do hereby certify that:

the attached is a true and exact copy of the exhibit submitted to the Title Board by the proponents for Proposed Initiative "2017-2018 #119, #120, #121, #122, and #123"..

.... **IN TESTIMONY WHEREOF** I have unto set my hand ....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 20th day of March, 2018.

Wayne W. Williams

SECRETARY OF STATE


Payers
Individuals, insurance carriers, self-funded employers, governments
Providers
Physicians, hospitals, pharmacies; others
B2B
B2B2C
B2C
Employers, Government Agencies
Terms of this relationships usually set by third-party payer.
Patients
Patient cost sharing: premiums, copays, deductibles, HSAs, direct withdrawals by payers.