COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #276

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #276

Alethia Morgan ("Movant"), a registered elector of the City and County of Denver, Colorado, through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby files this Motion for Rehearing on Initiative 2023-2024 #276 ("Initiative #276").

On April 18, 2024, the Title Board set the Title for Initiative #276 as follows:

> An amendment to the Colorado constitution concerning the right of a patient to access all of the patient's medical information including the right to access, inspect, and copy any medical record, information, or communication concerning the patient's medical treatment, and, in connection therewith, eliminating statutory exclusions that prohibit the disclosure of certain records, information, or communication.

I. Summary

Initiative #276 violates the single subject rule because it is an exceedingly broad constitutional measure aimed at repealing or modifying dozens of existing healthcare laws in Colorado. Initiative #276 is very similar to Initiative #149, which the Board already determined had multiple subjects. The major differences are that Initiative #276 is constitutional and even broader than Initiative #149 because the records, information, and communications do not have to relate to an adverse medical incident. Additionally, the measure has no definitional limits or exceptions to its new absolute right to ***all*** medical records, information, and communications about the patient ***or about the treatment provided to the patient***. Further, the measure will give a right to obtain medical information from any source, not just from healthcare providers, which will open the door to access information maintained by the government, which is currently exempted from CORA and to which HIPAA does not apply.

Because the measure creates a right to information about treatment, healthcare providers would be constitutionally required to disclose all information about a particular type of treatment regardless of whether the information relates to the requesting patient. Otherwise, there would be no reason to include the following emphasized language: "concerning the patient ***or the patient's medical treatment***". If the measure was aimed at only patient-specific information, the first clause, "concerning the patient" would be sufficient. Accordingly, hidden within the measure—and identified nowhere in the title—is a second set of subjects aimed at eliminating, repealing, or modifying dozens of laws related to healthcare in Colorado, including, at a minimum, eliminating all privileges and confidentiality rights afforded to healthcare providers.

But as identified by Mr. Barry, the most problematic aspect of the measure is that it is impossible to understand everything the measure does because of its breadth and vagueness. In this cycle, there have been multiple measures that purport to create an amorphous affirmative "right", demonstrating that proponents are trying to dilute the single-subject requirement. For example, Initiative #272 proposed to create a right to a "healthy environment". The Board determined that it was too broad to set a title. Similarly, Initiatives ##149, 150, 274, 275, and 277 adopted the same strategy of creating an affirmative "right", with the measures admittedly intended to surreptitiously repeal various laws that conflict with the new right. The Title Board should reject these measures and let the Colorado Supreme Court determine whether the single subject requirement allows for these misleading measures that present significant risks of logrolling and fraud.

II. Initiative #276 Violates the Single Subject Requirement.

A. The Title Board Must Sufficiently Examine Initiative #276 to Determine Whether It Has Multiple Subjects.

At the March 18, 2024 hearing, the Board expressed confusion as to what Initiative #276 proposes to do. Specifically, Mr. Barry and Mr. Morrison were concerned about the vast reaches of the measure because it is constitutional (and would therefore override any conflicting statute) and because of its vagueness and breadth. Their concern is warranted because, as evidenced by Proponents' other measures, the intent of Initiative #276 is to repeal or override multiple different laws related to the provision of healthcare in Colorado without ever identifying those laws.

When faced with questions about this conundrum, Proponents' counsel deflected by asserting that courts will determine precisely what Initiative #276 does, although Proponents admitted that its intent is, at a minimum, to repeal any and all professional review and quality management privileges under Colorado law. April 18 Hearing Audio at 1:46:45.[1] Proponents' own uncertainty about what Initiative #276 does confirms that the measure is too broad to set a title.

As set forth in Movant's Motion for Rehearing on #149, which is incorporated herein by this reference, the Board must examine the measure to determine what it does and whether it has multiple subjects. That examination is effectively impossible in this case due to the breadth of Initiative #276, and a thus a fair and accurate title cannot be set. The measure creates a constitutional right to all medical records, information, and documents, with absolutely zero exceptions or wiggle room. Consequently, the breadth of the measure would dramatically alter healthcare law in Colorado and should be rejected as having multiple subjects.

B. Eliminating Long-Standing Professional and Peer Review Privileges Is a Separate Subject.

Peer review is defined as "a basic component of a quality assurance program in which the results of health care given to a specific patient population are evaluated according to health-wellness outcome criteria established by peers of the professionals delivering the care . . . . Review by peer groups is promoted by professional organizations as a means of maintaining standards of

[1] *Available* at https://csos.granicus.com/player/clip/451?view_id=1&redirect=true.

care. Retrospective review critically evaluates the results of work that has been completed; it is done for purposes of improving future practice."[2]

Colorado has codified peer and professional review privileges in various statutes. For instance, the Colorado Professional Review Act provides protections and privileges for state-sanctioned professional review boards to review the quality of care of licensed healthcare professionals. C.R.S. § 12-30-204(11)(a) (providing that "the records of an authorized entity, its professional review committee, and its governing board are not subject to subpoena or discovery and are not admissible in any civil suit"). The records subject to protection include, for example: interview transcripts, statements, reports, memoranda, and progress reports developed to assist in professional review activities. *Id.* at § 202(8).

Likewise, the Colorado Quality Management statute generally provides:

> [A]ny records, reports, or other information ***of a licensed or certified health-care facility*** that are part of a quality management program designed to identify, evaluate, and reduce the risk of patient or resident injury associated with care or to improve the quality of patient care shall be confidential information . . . [and] ***shall not be subject to subpoena or discoverable or admissible as evidence in any civil or administrative proceeding*** ….

C.R.S. § 25-3-109(3), (4) (emphasis added).

The General Assembly has expressly recognized these privileges as forming the foundation of the professional and peer review processes by allowing for candid internal review and analysis of patient care:

> The general assembly hereby finds and declares that the implementation of quality management functions to evaluate and improve patient and resident care ***is essential*** to the operation of health-care facilities licensed or certified by the department of public health and environment pursuant to section 25-1.5-103(1)(a). For this purpose, ***it is necessary*** that the collection of information and data by such licensed or certified health-care facilities be reasonably unfettered so a complete and thorough evaluation and improvement of the quality of patient and resident care can be accomplished.

C.R.S. § 25-3-109(1) (emphasis added); *see also* C.R.S. § 12-30-205 ("The quality and appropriateness of patient care rendered by [licensed healthcare providers] ***so influence the total quality of patient care*** that a review of care provided in a hospital is ineffective without concomitantly reviewing the overall competence of, professional conduct of, or the quality and appropriateness of care rendered by these persons.") (emphasis added).

[2] Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Seventh Edition (*available at* *https://medical-dictionary.thefreedictionary.com/peer+review*).

The Colorado Supreme Court has also recognized the important role of peer review in ensuring high-quality care in holding that the Medical Practice Act "protects the records of a professional review committee from all forms of subpoena or discovery." *Colorado Med. Bd. v. Office of Admin. Courts*, 2014 CO 51, ¶ 7. The court reasoned that state legislatures across the country, including in Colorado, "provide for confidentiality of professional review committee proceedings and records in order to ensure that committee members are able to openly, honestly, and objectively study and review the conduct of their peers. *Id.* at ¶ 13.

Various other Colorado statutes provide privileges or protections for healthcare providers' professional review records and communications. *See, e.g.*, Medical Practice Act, C.R.S. § 12-240-125(9), *et seq.* (protecting medical board investigations of healthcare professionals consistent with the terms of the Colorado Professional Review Act); *see also* Health-Care Facilities Consumer Information Reporting Statute, C.R.S. § 25-1-124 (requiring licensed healthcare facilities to report information regarding certain adverse incidents to CDPHE to compile data to facilitate consumer choice in medical care and protecting such reports from disclosure or subpoena).

Notably, the statues recognizing these privileges consider internal professional review records to be records "of" the healthcare provider, not personal records of the patient. C.R.S. § 12-30-204(11)(a) (privileging the records "***of an*** authorized entity, its professional review committee, and its governing board") (emphasis added); C.R.S. § 25-3-109(3), (4) (privileging "records, reports, or other information ***of a***" healthcare facility).

Further, ***none of these privileges prevents discovery or access to the original source patient records*** regarding their treatment, from which patients contemplating litigation or their attorneys can perform an evaluation of the quality of care. This is true even if the original source records are used in the professional review process. *See, e.g.*, C.R.S. § 12-30-204 (providing that "original source documents are not protected from subpoena, discovery, or use in any civil action merely because they were considered by or presented to a professional review committee").

Here, Proponents admitted at the initial hearing that the intent of Initiative #276 is to repeal all professional review and peer review privileges. *See* section II.A, *supra*. Like Initiative #149, which this Board rejected—and unlike Initiative #274—Initiative #276 has no exceptions. The magnitude of this is amplified because this measure is constitutional. Because there are no exceptions, the measure would create a right of access to ***all*** professional review and quality management records that are currently privileged under Colorado law.

Thus, Initiative #276 has nothing to do with protecting patients, but instead has everything to do with the incongruous purpose of eliminating the longstanding right of healthcare providers to conduct internal, privileged, ***post-care*** evaluations of patient care. Eliminating these privileges will harm patients across the state as evidenced by the General Assembly's myriad declarations that the professional review process—***including its associated privileges***—are integral to providing quality healthcare in Colorado.

Even a cursory examination of Initiative #276 reveals why Proponents are trying to hide its fundamental changes within a deceptively framed "patient rights" measure. Proponents could not pass a standalone measure expressly eliminating all professional review and quality

management privileges because voters would be able to understand such a measure and would reject it. This type of flagrant logrolling and fraud is barred by the single subject requirement.

Therefore, where, like here, a measure purports to do one thing, but separately eliminates rights or duties under existing law, the measure violates the single subject requirement. *See, e.g., In re Title, Ballot Title and Submission Clause for 2003-04 #32 and #33*, 76 p.3d 460, 462 (Colo. 2003) (reversing single subject finding where measures altered the petitioning process and also separately excluded all lawyers from participating in the title setting process); *In re Title, Ballot Title,& Submission Clause for Initiative 2015-16 #132 and #133*, 2016 CO 55 (finding a redistricting measure had a second subject because "coiled in the folds" of the measure were changes that impacted the duties of the Supreme Court nominating commission).

If Proponents want to eliminate all peer and professional review privileges to the detriment of healthcare patients in Colorado, they need to do so in a standalone measure that is comprehensible to the average voter.

C. Eliminating the Candor Act Privilege Is a Second Subject.

Similar to the body of law protecting professional review, the 2019 Colorado Candor Act allows healthcare providers to have candid "open discussion communications" with patients who have suffered an "adverse health-care incident". The Candor Act encourages healthcare providers and patients to have open discussions in an effort to fairly and effectively resolve past adverse-incidents short of litigation and to prevent such incidents from happening again. *See* C.R.S. § 25-51-103(4The privileges afforded to "open discussion communications" form the foundation of the Candor Act, which would be gutted without them. C.R.S. § 25-51-105. Doing away with the Candor Act has no possible connection to Initiative #149's purported patient-protection theme.

D. Overriding the Physician-Patient Privilege Is a Separate Subject.

As part of the professional review and quality assurance processes, healthcare providers typically collect records and information of similar adverse medical incidents as an important component in understanding risks and trends. In fact, CDPHE regulations require "quality management programs" for licensed health facilities, which include the review of negative patient outcomes, errors, and potential for errors reported by staff. 6 CCR 1011-1:2-4.1 (privileging reports created as part of a quality management program at 4.1.5).

Yet, even after such records are compiled into any collective report or memorandum, they would fall within the broad scope of Initiative #276 and be subject to any single patient's "right" to access those records. Nothing in the measure makes an exception for records otherwise protected by the physician-patient privilege. Indeed, the plain language of the measure reveals that it is intended to provide a right to any and all records, information, and communications about the treatment received by a patient, regardless of whether such documents are patient specific. *See* Proposed Colo. Const. art. XVIII, sec. 17 (providing an unlimited right to all of records, information, and communications "concerning the patient ***or the patient's medical treatment***").

So, for example, if a patient had a heart procedure, the patient would be entitled to all records, information, and communications concerning that type of procedure, regardless of whether those documents related to another patient. There is no other reason for the phrase, "or

the patient's medical treatment in the measure". If this phrase was meant to be patient specific, it would be covered by the first phrase, "concerning the patient."

In requiring the production of records that are not patient specific, Initiative #276 overrides the physician-patient privilege codified at C.R.S. § 13-90-107(1)(d). This privilege was "adopted to achieve the purpose of placing a patient in a position in which he or she would be more inclined to make a full disclosure to the doctor and to prevent the patient from being humiliated and embarrassed by disclosure of information about the patient by his or her doctor." *Cmty. Hosp. Ass'n v. Dist. Court In & For Boulder Cnty.*, 570 P.2d 243, 244 (Colo. 1977).

Consequently, Patient/Voter A would be surprised to learn that Initiative #276 requires the disclosure of her medical information to Patient/Voter B in contravention of the physician-patient privilege. Requiring such disclosure is not rationally related to the purported purpose of expanding patient "rights", and thus constitutes a separate subject.

E. Overriding the Attorney-Client Privilege and Work-Product Doctrine Is a Separate Subject.

As outlined in section II above, by providing a "right" to all "medical information" and "medical communications" about a patient, Initiative #276, on its face, overrides the attorney-client privilege because all communications about a patient's medical treatment must be disclosed. *See Proposed* C.R.S. § 25-1-804(2)(f), (g). Thus, under this measure, healthcare providers would be deprived of the "oldest of the privileges … known to the common law" and which is codified under Colorado law at C.R.S. § 13-90-107. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The United States Supreme Court has recognized that the attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure" *Id.* Accordingly, the attorney-client privilege is a centuries-old right, which Initiative #276 would upend with its unfettered "right" to access. As Mr. Barry noted, the fact that this measure is constitutional makes this result a certainty.

Similarly, Initiative #276 overrides the decades-old "work-product doctrine", which was recognized by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). The work-product doctrine generally protects trial preparation materials from discovery and is codified by Rule 26 of the Colorado Rules of Civil Procedure. These Rules of Civil Procedures are adopted by the Colorado Supreme Court, which, "as part of its inherent and plenary powers, ***has the exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public***." *Chessin v. Office of Attorney Regulation Counsel*, 2020 CO 9, ¶ 11 (emphasis added). Initiative #276's attempt to encroach on the jurisdiction of the Colorado Supreme Court is yet another reason why the measure has multiple subjects. *See* 2016 CO 55 (reversing the Title Board's single subject determination in part because changes to the Supreme Court Nominating Commission's duties encroached on the role of a separate branch of government).

But even aside from this jurisdictional issue, taking away the right of hospitals, physicians, nurses, dentists, and other healthcare providers to have privileged consultations with an attorney about a patient's care has nothing to do with expanding patient rights to medical records. A doctor's email with her lawyer about a patient's medical treatment cannot logically be connected to "patient rights".

Eliminating the attorney-client privilege in an opaquely disguised "patient rights" measure is another example of unabashed logrolling and an independent basis for determining Initiative #276 violates the single subject requirement.

III. The Title Is Unfair, Inaccurate, and Incomplete.

Ballot titles must clearly express a measure's single subject. Colo. Const. art. V, § 1; C.R.S. § 1-40-106.5. Titles must also:

> allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. Thus, in setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear.

Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73, 2016 CO 24, ¶ 22.

Here, the Title set for Initiative #276 highlights and exacerbates the problem with setting a ballot title for a measure that has multiple, distinct purposes hidden with its folds. The title states:

> An amendment to the Colorado constitution concerning the right of a patient to access all of the patient's medical information including the right to access, inspect, and copy any medical record, information, or communication concerning the patient's medical treatment, and, in connection therewith, eliminating statutory exclusions that prohibit the disclosure of certain records, information, or communication.

Like the measure itself, this title is so vague that it effectively tells the voter nothing, and instead reads as if voters are simply getting a new constitutional right. The Board knows from Proponents' own admissions and the analysis of Initiative #149 that this measure is aimed at eliminating healthcare providers' codified rights by requiring them to disclose: (1) their own privileged internal professional review and quality management records; (2) privileged "open discussion communications" with patients protected by the Candor Act; (3) physician-patient privileged information for other patients; and (4) privileged attorney-client and work-product legal communications.

The Title identifies none of this. Instead, the vague phrase, "eliminating statutory exclusions that prohibit the disclosure of certain records, information, or communication" makes it sound as if patients will now be getting access to information they otherwise should have been entitled to in the first place. This vague phrase fails to identify the specific statutory rights of others' that are being eliminated. Voters will have no way to balance whether this new

constitutional right is worth, for example, gutting existing laws aimed at ensuring high-quality patient care in Colorado. That is exactly what Proponents want because they could not pass their measure if voters understood the effects of a "yes" vote. While Movant appreciates the difficulty of setting a fair and accurate title for a measure as broad as this one, the answer cannot be to tell the voters nothing.

In a similar case, the Colorado Supreme Court said, "[T]he titles in this case create confusion and are misleading because they do not sufficiently inform the voters of the parental-waiver process and its virtual elimination of bilingual education as a viable parental and school district option. . . . Contrary to the title board's and proponents' position, we need not engage in the prediction of doubtful future effects to reach that conclusion." *In re Ballot Titles 2001-2002 #21 & #22 ("English Language Education")*, 44 P.3d 213 (Colo. 2002).

While Movant agrees with Mr. Morrison and Mr. Barry that it is effectively impossible to set a fair and accurate title for a measure as broad as this one, if the Board nevertheless proceeds with title setting, the title should, at a minimum:

- Sufficiently put voters on notice of their existing rights to their medical records;
- Identify that disclosure is required even if such records, information, and communications are privileged or confidential under various state laws providing for professional review and quality management programs;
- Identify that disclosure is required even if records, information, and communications are privileged under the Candor Act;
- Identify that disclosure is required even if records, information, and communications relate to the treatment of another patient and regardless of the application of the physician-patient privilege;
- Identify that the measure will apply to any entity maintaining medical information, including governmental entities, and not just to healthcare providers; and
- Identify that disclosure is required even if records, information, and communications are otherwise protected by healthcare providers' attorney-client privilege or the work product doctrine.

WHEREFORE, Movant respectfully requests that the Title Board reverse the title setting for Initiative #276 because it violates the single subject requirement, or, alternatively, correct the deficiencies with the title.

Dated: April 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #276** was sent this 25th day of April, 2024, via first class U.S. mail, postage pre-paid or email to:

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