

COLORADO TITLE SETTING BOARD

**IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION
CLAUSE FOR PROPOSED INITIATIVE 2023-2024 #228**

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #228

On behalf of Julie Whitacre, registered elector of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2023-2024 #228 (“Initiative #228”) and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT APRIL 3, 2024 HEARING

On April 3, 2024, the Title Board set the following ballot title and submission clause for Initiative #228:

A change to the Colorado Revised Statutes expanding a patient’s right to obtain records, information, or communications related to an adverse medical incident, and, in connection therewith, allowing patient access to any record, information, or communication made or received by a health-care provider or health-care institution including staff, management, or board of directors about any act or omission that caused or could have caused injury or death to the patient and creating exceptions for certain records that are privileged or confidential under Colorado or federal law.

II. GROUNDS FOR REHEARING**The Ballot Title and Submission Clause Is Misleading and Does Not Correctly and Fairly Express Its True Intent and Meaning.**

The title of the Initiative is misleading and does not correctly and fairly express the initiative’s true intent and meaning. The title “must fairly reflect the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶24. Although they need not include “every detail of an initiative,” the “titles must be fair, clear, accurate and complete.” *In re Title, Ballot Title & Submission Clause, & Summary for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008).

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 Title, Ballot Title & Submission Clause for Proposed 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 Title for Initiative #228 erroneously states that the initiative "expands" a patient's right to obtain records, information, or communications related to an adverse medical incident." The measure, in fact, decreases a patient's right to this information from what current law requires by exempting laws that currently allow a patient to access these records. The use of the term "expanding" in the title will mislead voters into thinking this measure grants greater access to information when it does the opposite.

Initiative #228 carves out as not included in a patient's right to know any "communication that is privileged or confidential" under *all* of the following statutes and broad topics:

- (a) Sections 12-30-201 to 12-30-209, concerning professional review of health-care providers;
- (b) The "Dental Practice Act", article 220 of title 12;
- (c) The "Colorado Medical Practice Act", article 240 of title 12;
- (d) Section 13-21-110, concerning confidentiality of information, data, reports, and records made available to a utilization review committee of a hospital or other healthcare facility, as required by state or federal law;
- (e) Section 13-90-107, concerning the examination of a physician, surgeon, or registered professional nurse without the patient's consent;
- (f) Section 25-1-124, concerning reports by health-care facilities of occurrences relating to quality of care and patient safety;
- (g) Section 25-3-109, concerning quality management functions;
- (h) Section 25-3.5-904, concerning quality management programs;
- (i) The "Colorado Candor Act", article 51 of this title 25;

- (j) attorney-client privilege;
- (k) attorney work product; and
- (l) federal law

These are broad swaths of entire statutory sections without any discussion of the limited exceptions that fall within those statutes. The Initiative carves out as privileged or confidential anything under “federal law” which is so broad, it could apply to nearly anything. If a health-care institution or professional withholds information from a patient, this statute would allow that entity or individual to claim “federal law” or “the Colorado Medical Practice Act” or “the Dental Practice Act” as a basis for withholding the information. Further, the Initiative does not clearly explain or define what constitutes “privileged” or “confidential”. The Initiative does not limit purported privileges or confidentiality rights to only those narrowly applicable to medical records and information, which could allow for any privilege or confidentiality right to be invoked to withhold a patient’s information, including trade secrets, proprietary information, the physician-patient privilege, the spousal privilege, etc.

The Initiative purportedly permits patients to gain access to “adverse medical incidents”, but under the current statutory provisions of Colorado and federal law, patients are never given access without court intervention to *any* information or documentation related to adverse medical incidents, unless they are required to be reported to the Colorado Department of Public Health and the Environment or the Joint Commission, in which case only some, limited facts become publicly reported and available. Health-care institutions withhold adverse incident information by claiming it all falls under the umbrella of quality management, quality assurance, peer review, confidentiality provisions related to mandatory government reporting requirements under statute, etc.

Finally, the Title for #228 conflicts with another title set for the 2024 election. Initiative #149 is another measure similar to #228, but where #228 decreases a patient’s right to medical information, #149 does indeed expand patients’ rights to access medical information. Initiative #149 was initially heard by the Title Board on March 6, 2024, and a rehearing occurred on March 20, 2024. Petitioner Morgan, one of the designated representatives for Initiative #228, submitted the measure to the Office of Legislative Legal Services in early March, and to the Title Board on March 22, 2024. Petitioner Morgan is the named objector in the Motion for Rehearing on proposed initiative 2023-3024 #149. Her Motion for Rehearing was granted on March 20, 2024, and the Title Board found that #149 contained multiple subjects. Initiative #149’s proponents have filed new proposed initiatives 2023-2024 #274 and #275, which also expand a patient’s right to obtain medical records but eliminate the items causing single subject concerns for the Title Board. “In setting a title, the title board shall consider the public confusion that

might be caused by misleading titles” and shall not [set a title that] conflict[s] with those selected for any petition previously filed for the same election.” §1-40-106, (3)(b), C.R.S. Here, the proponents of #228 seek to confuse the electorate by proposing a measure that purports to expand access to information, when what it really does is create additional barriers to access. The title for #228 as currently set is misleading to voters, and conflicts with the initial title for #149, and will likely conflict with the titles for proposed initiatives #274 and #275.

“[T]he clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative’s intended purpose.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶11. Here, the title for Initiative #228 does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

III. CONCLUSION

Based on the foregoing, Julie Whitacre requests a rehearing of the Title Board for Initiative 2023-2024 #228, because the title is misleading to voters, and it fails to fairly express the initiative’s true meaning and intent.

Respectfully submitted this 10th day of April, 2024.

TIERNEY LAWRENCE STILES LLC

By: /s/ Martha M. Tierney
Martha M. Tierney, Atty Reg. No. 27521
Tierney Lawrence Stiles LLC
225 E. 16th Avenue, Suite 350
Denver, Colorado 80203
Phone Number: (303) 356-4870
E-mail: mtierney@tls.legal

**ATTORNEYS FOR OBJECTOR JULIE
WHITACRE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of April 2024, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #228** was filed and served on Proponents Alethia Morgan and Jean Martin, via email to their counsel of record as follows:

Benjamin Larson
Thomas Downey
William Hobbs
Ireland Stapleton Pryor & Pascoe PC
1660 Lincoln Street, Suite 3000
Denver, CO 80264
blarson@irelandstapleton.com
tdowney@irelandstapleton.com

Attorneys for Proponents Alethia Morgan and Jean Martin

/s/ Martha M. Tierney
