

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #124 (“Medical Aid in Dying”)</p> <p>Petitioners: Michelle Stanford, Robin Stephens and Renee Walbert v. Respondents: Harlan Hibbard and Julie Selsberg,</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER</p>	<p style="text-align: right;">DATE FILED: May 11, 2016 3:15 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">RESPONDENTS’ OPENING BRIEF</p>	

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).

Choose one:

It contains 2,629 words.

It does not exceed 30 pages.

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, 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.A.R. 32.

s/ Mark G. Grueskin

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ISSUES PRESENTED

- (1) Whether the Title Board correctly found that a comprehensive system for permitting a patient with a terminal illness to gain access to medical aid-in-dying medication is a single subject.
- (2) Whether the Title Board correctly refused to use Objectors' terminology, not found in the initiative text, that the single subject of this initiative is "physician-assisted suicide."
- (3) Whether the Title Board correctly found that the provision dealing with the stated cause of death in a death certificate for a patient who utilizes medical aid-in-dying medication is not a "central feature" of this measure.

STATEMENT OF THE CASE

A. Statement of Facts.

Initiative 2015-2016 #124 would amend Colorado statutes to add Article 45 to Title 25, the Colorado End-of-Life Options Act. Among its various provisions, this initiative:

- Authorizes an adult Colorado resident to receive a prescription for medical aid-in-dying medication if the individual's attending physician diagnoses the individual with a terminal illness with a prognosis of 6 months or less to live, that physician determines the individual has mental capacity, as defined in the measure, and the individual voluntarily expresses the wish to receive a

prescription for medical aid-in-dying medication, Proposed §§ 25-48-103, -108;

- Conditions this process upon confirmation by two licensed physicians of the patient's medical prognosis and receipt by the terminally ill patient of certain information about care and treatment options, Proposed §§ 25-48-106, -107;
- Requires an evaluation by a mental health professional if either of the two physicians believes the patient not to be mentally capable, Proposed § 25-48-108;
- Provides immunity from civil and criminal liability as well as professional disciplinary action to any person who, in good faith, assists in providing access to or is present when a patient administers his or her medical aid-in-dying medication, Proposed §§ 25-48-116, -121;
- Establishes criminal penalties for persons who knowingly violate pertinent statutes that authorize or regulate medical aid-in-dying medication, Proposed § 25-48-119;
- Specifies the form to be completed by the patient in order to request medical aid-in-dying medication and the conditions for witnessing and signing such form, Proposed §§ 25-48-104, -112; and
- Sets forth the means of safe disposal of unused medical aid-in-dying medications, Proposed § 25-48-120.

The measure also addresses the interplay of this new statute with certain related, existing statutes, including: the initiative's lack of effect on statutory advance medical directives for persons who receive medical aid-in-dying medication, Proposed § 25-48-121; the treatment of a request for medical aid-in-dying medication under a contract, will, or other agreement, Proposed § 25-48-114; the processing of death certificates and the possibility of post-mortem inquiries for those patients who self-administer medical aid-in-dying medication, Proposed § 25-48-109; and the actions taken by licensed mental health professionals who determine whether a person is mentally capable of making informed decisions as a pre-condition to receipt of a prescription for medical aid-in-dying medication. Proposed § 25-48-108.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

Julie Selsberg and Harlan Hibbard (hereafter "Proponents") proposed Initiative 2015-2016 #124 ("#124"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

A Title Board hearing was held on April 6, 2016 to establish the Proposed Initiative's single subject and set a title. On April 13, 2016, Renee Walbert and

Robin Stephens (“Walbert”) and Dr. Michelle Stanford (“Stanford”) filed Motions for Rehearing, alleging that the Board did not have jurisdiction to set a title, the title was misleading, did not fairly and correctly express the true meaning of the Proposed Initiative, and will lead to voter confusion. The rehearing was held on April 20, 2016, at which time the Title Board denied the Motions for Rehearing.

The Board’s title is as follows:

Shall there be a change to the Colorado revised statutes to permit any mentally capable adult Colorado resident who has a medical prognosis of death by terminal illness within six months to receive a prescription from a licensed physician for medication that can be self-administered to bring about death; and in connection therewith, requiring two licensed physicians to confirm the medical prognosis, that the terminally-ill patient has received information about other care and treatment options, and that the patient is making a voluntary and informed decision in requesting the medication; requiring evaluation by a licensed mental health professional if either physician believes the patient may not be mentally capable; granting immunity from civil and criminal liability and professional discipline to any person who in good faith assists in providing access to or is present when a patient self-administers the medication; and establishing criminal penalties for persons who knowingly violate statutes relating to the request for the medication?

SUMMARY OF ARGUMENT

Objectors are incorrect in alleging that the Title Board erred. Its decision about the single subject of this measure and the wording of the ballot title were correct and well within the Board’s broad discretion in addressing both matters.

The parsing of the various elements of a comprehensive ballot measure is not the functional equivalent of a finding of multiple subjects. Each of the alleged subjects related directly to the obtaining of a prescription and the consequences of obtaining a prescription of medical aid-in-dying medications. None could stand on its own as an independent initiative that could, alone, be proposed today as the sole measure advocated by Proponents.

The Board did not need, and properly decided not, to describe the measure as relating to “physician-assisted suicide” or to refer to the statement of the cause of death on death certificates. The measure’s central feature is the permission and provision of the means to self-administer medical aid-in-dying medication. The Board aptly described the initiative and thus properly acted within its discretion.

The decision of the Board should be upheld by this Court.

LEGAL ARGUMENT

I. The Title Board properly found that Initiative #124 contains a single subject.

A. Standard of review.

A proposed initiative must contain no more than one subject. Colo. Const., art. V, sec. 1(5.5). To violate this requirement, a measure must contain at least two distinct and separate purposes that are not dependent upon or connected with each other. *In re Title, Ballot Title, Submission Clause for Initiative 2011-2012 No. 3*,

274 P.3d 562, 565 (Colo. 2012) (citations omitted). The topics included in such an initiative will be incongruous rather than properly connected. *Id.*

In reviewing a challenge to the Title Board's decision, the Court will employ all legitimate presumptions in favor of the propriety of the Board's actions. *Id.* Further, the Board's finding that an initiative contains a single subject is overturned only “in a clear case.” *Id.* The single subject rule must be liberally construed to facilitate the fundamental right of initiative. *In re Proposed Initiative 1997–1998 #74*, 962 P.2d 927, 929 (Colo.1998).

The single subject analysis is not one that stretches a measure beyond its express wording or guesses about the way in which it may be applied. The problem with an unbounded single subject review is clear.

Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.

Id.

The same is true for speculation about the measure's operation after the election. “In determining whether a proposed initiative comports with the single subject requirement, “[w]e do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate.”” *In re Proposed Initiative for 1997–1998 # 64*, 960 P.2d 1192, 1197 (Colo. 1998).

B. Initiative #124 is a single subject.

Walbert argues that #124 “modifies a number of unrelated statutes affecting mental health treatment, coroner duties, and preventing some types of advanced directives, thereby violating the single subject rule.” *See* Walbert Petition for Review at 4, ¶2.

The Title Board correctly found that all legal modifications in the measure itself relate to making prescriptions for medical aid-in-dying medication possible for mentally capable, qualified adults. Thus, any of the purported additional subjects related directly to the single subject of this measure.

In any event, Walbert’s concern is far afield from the title-setting mission of the Board and the review by this Court. Rather than assessing each component of an initiative or hypothesizing about its projected effects, the Court will “confine our single subject review to the plain language of the proposed amendment.” *No. 3, supra*, 274 P.3d at 581 n.2. “The effects this measure could have on Colorado” law “are irrelevant to our review of whether [the Initiative] and its Titles contain a single subject.” *Id.*

In reviewing that actual language, the Court treats a proposed initiative as the integrated whole it was intended to be. “In order to determine whether an initiative carries out a single object or purpose, an initiative is reviewed as a whole rather than piecemeal.” *In re Title, Ballot Title and Submission Clause for 2009–*

2010 # 24, 218 P.3d 350, 353 (Colo. 2010). Given its task of encapsulating the entire measure, the Board correctly found #124 comprises a single subject.

II. The Title Board properly set clear and fair titles for #124.

A. Standard of review.

The Title Board has considerable discretion in setting the titles for a ballot initiative. *No. 3, supra*, 274 P.3d at 555 (citations omitted). This Court will only reverse the Board's designation if the titles are “insufficient, unfair, or misleading.” *Id.* To make that determination, the Court examines the titles as a whole to determine if they are fair, clear, accurate, and complete. *Id.* As such, the Court accords the language of the proposed initiative and the titles set by the Board their plain meaning. *Id.*

B. The Objectors incorrectly argue for a broader, less accurate title.

1. *This title would be inaccurate if it described #124 as authorizing “physician-assisted suicide.”*

Walbert and Stanford argue for a ballot title that does not reflect the actual wording of the measure but instead would portray the single subject of the measure as authorizing “physician-assisted suicide.” *See* Walbert Petition for Review at 4, ¶1; Stanford Petition for Review at 4, ¶1.

Suicide is a broad, non-specific term that, under the measure’s express wording, does not apply here. This measure provides, “Actions taken in

accordance with this article do not, for any purpose, constitute suicide [or] assisted suicide... under the ‘Colorado Criminal Code, as set forth in title 18, C.R.S.’”

Proposed § 25-48-121 (emphasis added). As such, the phrase advocated by objectors has no accurate meaning in the context of the legal change proposed by Initiative #124. Had the suggested language been incorporated in the title by the Board, that title would be inaccurate and require reversal. *In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 No. 215*, 3 P.3d 11, 16 (Colo. 2000) (ballot title was misleading where it misstated actual scope of initiative in terms of the mining operations it covered); *In re Title, Ballot Title & Submission Clause & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1289–90 (Colo. 1990) (initiative summary was misleading because it misstated the applicability of tax on certain foods).

In any event, physician-assisted suicide is the inaccurate characterization that the objectors use to oppose this initiative, not one that the Title Board would use to broaden voters’ understanding of the actual legal change that is proposed here. The purpose of the ballot title is to fairly describe the measure. The fact that the objectors take a different view about the merits of this proposal and view the use of medical aid-in-dying medication to be “suicide” is of no consequence to the Court. Although “the title, ballot title and submission clause, and summary may not reflect the petitioner’s preference of what the amendment should include,” the

purpose of the ballot title is to provide “a clear statement of the proponent’s initiative, reflecting its intent and fairly advising the voters of the import of the proposed law.” *In re Title Pertaining to Confidentiality of Adoption Records*, 832 P.2d 229, 232 (Colo. 1992). Here, the Title Board achieved just such a clear statement that fairly advises voters of the import of this proposed statute, and its decision should be upheld.

2. *The Board was not required to describe how a person’s death will be described on his or her death certificate.*

Walbert and Stanford argue that the ballot title should have stated that a person’s death certificate will not list suicide as the cause of death for a person who has used medical aid-in-dying medication. *See Walbert Petition for Review at 4, ¶3; Stanford Petition for Review at 4, ¶2.*

Where the Title Board omits a description of a provision in an initiative, that omission is problematic only if the provision reflects a “central feature” of the proposal and the ballot title is, as a result, “misleading.” *In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition for an Amendment Adding Section 2 to Article VII (“Petitions”)*, 907 P.2d 586, 592 n.6 (Colo. 1995). This is neither.

Objectors suggest that documentation of the cause of death on a death certificate is a central feature of the measure. On the contrary, the goal of this

measure is to give terminally ill patients some control over the manner of their deaths given the diagnosis and progress of a terminal disease. The measure deals with, albeit incidentally, a number of related issues, including the way in which such patients' deaths are described in death certificates. The Title Board "is given considerable discretion in resolving the interrelated problems of length, complexity, and clarity in designating a title and ballot title and submission clause." *In re the Title, Ballot Title and Submission Clause, and Summary Adopted February 19, 1992, Pertaining to the Proposed Tobacco Tax*, 830 P.2d 984, 988-89 (Colo. 1992). Here, the Board correctly found that inclusion of the death certificate language would not add materially to voter understanding of the essential objective of this measure and the means used to achieve that objective.

Further, the title is not misleading. A title becomes misleading when it incorrectly leads voters to believe that a description of a key provision of the ballot measure is complete and accurate when, in fact, that description is lacking in completeness and accuracy. In other words, where a central element of the measure is only partially described and thus misstates the actual expanse of an initiative, the title's description of the measure is "misleading." *See In re Title, Ballot Title & Submission Clause for 2015–2016 #73*, Case No. 16SA48 at ¶35 (April 25, 2016), citing *In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 #104*, 987 P.2d 249, 259 (Colo.1999) (title referred to an official's

recall from office, but incorrectly excluded any reference to that official's resignation from office, as triggering certain consequences). That is not the case here, given that the information included on death certificates is, at best, a side issue in voters' evaluation of the authorization for medical aid-in-dying medication.

The Title Board fulfilled its obligation to accurately and briefly describe Initiative #124, and its decision should be affirmed.

CONCLUSION

The decision of the Title Board complies with the Colorado Constitution's single subject requirement as well as the statutory directions that the ballot title be brief, fair, and reflective of the intent of Proponents. The grounds alleged for reversal of the Board's decision are lacking, and the appeal should be dismissed.

Respectfully submitted this 11th day of May, 2016.

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I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent this day, May 11, 2016, via ICCES to counsel for the Petitioners and to counsel for the Title Board at:

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