

SUPREME COURT, STATE OF COLORADO
2 East 14th Ave., Denver, CO 80203

Original Proceeding Pursuant to § 1-40-107(2)
C.R.S. (2015)
Appeal from the Ballot Title Board

**In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2015-2016 #124**

ROBIN STEPHENS, RENEE WALBERT
Petitioners,

MICHELLE STANFORD, Petitioner

v.

HARLAN HIBBARD, JULIE SELSBERG
Respondents,

**SUZANNE STAIERT, FREDERICK YARGER,
AND JASON GELENDER**
Title Board.

Attorney or Party Without Attorney: (Name &
Address)

Carrie Ann Lucas, Disabled Parents Rights
1270 Automation Drive, Suite 2000, Windsor,
CO 80550

Phone: 970.460.6765

E-mail: clucas@disabledparentsrights.org

Fax: 970.460.9197 Atty. Reg #: 36620

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Case Number:
2016SA137

**OPENING BRIEF OF STEPHENS AND WALBERT IN SUPPORT
OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-
2016 #124 (“MEDICAL AID IN DYING”)**

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) because it contains 3732 words. The Petition on Appeal complies with C.A.R. 32 because it is prepared using Roman style font 14 point size including footnotes.

The brief complies with C.A.R. 28(k) because it contains under 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 where the issue was raised and ruled on.

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.

Dated this 11th day of May, 2015,

s/ Carrie Ann Lucas, #36620
Attorney for Petitioners Stephens and Walbert

TABLE OF CONTENTS

	Page
CERTIFICATE OF COMPLIANCE	ii
TABLE OF AUTHORITIES	v
Cases	v
Statutes	vi
Other Authorities	vii
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
I. Nature of the Measure	1
II. Course of the Proceedings and Disposition Below	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. Appellate Standard of Review	5
II. Preservation of Appeal	8
III. Under the Guise of “Medical Aid in Dying” the Initiative contains multiple and distinct Subjects	8
IV. The final title does not fairly and accurately inform voters	

of important aspects of the Initiative.....	11
A. The titles fail to correctly and properly identify the true intent and meaning of the Initiative, which is to promote physician-assisted suicide.....	13
B. The title fails to reflect that the measure requires death certificates to reflect a cause of death to be something other than suicide	14
CONCLUSION	17
CERTIFICATE OF WORD COUNT	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Proposed Initiative for 1997-1998 #84</i> , 961 P.2d 456, 458 (Colo. 1998)	5
<i>In re Proposed Initiative for 2011–2012 # 45</i> , 274 P.3d 576, 579 (Colo. 2012)	6
<i>In re Title, Ballot Title, Submission Clause, & Summary by the Title Board Pertaining to a Proposed Initiative on “Obscenity”</i> , 877 P.2d 848, 850 (Colo. 1994)	13
<i>In re Title, Ballot Title, & Submission Clause & Summary for 1999-2000 No. 29</i> , 972 P.2d 257, 260-61 (Colo. 1999).....	7
<i>In re Title, Ballot Title & Submission Clause, for 2007-2008, #17</i> , 172 P.3d 871, 873 (Colo. 2007)	6
<i>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)</i> , 4 P.3d 1094, 1098 (Colo. 2000).....	6, 7
<i>In re Title, Ballot Title, & Submission Clause for 2009-2010, #24</i> , 218 P.3d 350, 353 (Colo. 2009)	6

<i>In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45, 234</i> P.3d 642, 645 (Colo. 2010)	6
<i>Macurdy v. Faure</i> , 176 P.3d 880, 882 (Colo. App. 2007).....	10
<i>Matter of Proposed Election Reform Amendment</i> , 852 P.2d 28, 33-35 (Colo. 1993).....	16
<i>Matter of Title, Ballot Title & Submission Clause, & Summary for 1999- 2000 No. 25</i> , 974 P.2d 458, 465 (Colo. 1999).....	7
<i>Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 333 P.3d 76, 79 (Colo. 2014)	5, 6
<i>People ex rel. Kinsey v. Sumner</i> , 525 P.2d 512 (Colo. App. 1974)	10

Statutes

§ 1-40-102(10) C.R.S.	12
§ 1-40-106 C.R.S.	12
§ 1-40-106(3) C.R.S.	8
§ 1-40-106(3)(b) C.R.S.....	7, 12
§ 1-40-106.5 C.R.S.	5
§ 1-40-107(1) C.R.S.	2
§ 30-10-606(1), C.R.S.	9

Colo. Const. art. V, § 1(5.5) 5, 11

Other Authorities

The AMA Code of Medical Ethics, Opinion 2.211, Physician-Assisted
Suicide, June, 1994. [http://www.ama-assn.org/ama/pub/physician-
resources/medical-ethics/code-medical-ethics/opinion2211.page?](http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page) 15

ISSUES PRESENTED FOR REVIEW

A. The Title Board lacked jurisdiction to set title because the proposed initiative contains multiple, distinct, and not interdependent subjects under the single umbrella category of medical aid in dying.

B. The Title Board erred in setting a title and submission clause that are confusing, misleading, and fail to reflect the intent of the proposed initiative

STATEMENT OF THE CASE

I. Nature of the Case

If approved, proposed initiative 2015-2016 #124 (the “Proposed Initiative,” “Initiative,” or “Initiative #124” would legalize physician-assisted suicide, require falsification of death certificates, alter contracts, and void advanced directives, as well as render many portions of Title 18 unenforceable.

II. Course of the Proceedings and Disposition Below

On March 11, 2016, Harlan Hibbard and Julie Selsberg (collectively “Proponents”) filed the Proposed Initiative with the Office

of Legislative Council. The review and comment meeting was held under C.R.S. § 1-40-105(1) on March 25, 2016. Later that same day, Proponents submitted the original, amended, and final versions of the Initiative to the Secretary of State for title setting. On April 6, 2016, the Title Board set the Initiative's title. On April 13, 2016, Petitioners timely filed a Motion for Rehearing pursuant to § 1-40-107(1) C.R.S. on the basis that the title set by the Title Board failed to reflect the central features of the Initiative and that the Initiative violates the single subject rule. The Title Board held a rehearing on April 20, 2016 and denied the Petitioners' motion except to the extent that the Board amended the title.

The final title was designated as follows:

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.

The ballot title and submission clause was designated 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?

Petitioners Stephens and Walbert timely submitted this matter to the Court for review, as did Petitioner Stanford. *See* Petition for Review of Final Action of Title Setting Board Concerning Proposed Initiative 2015-2016 #124 (“Medical Aid In Dying”) filed by Petitioners Stephens

and Walbert, filed April 28, 2016, and Petition For Review of Final Action If Title Setting Board Concerning Proposed Initiative 2015-2016 #124 (“Medical Aid In Dying”) filed by Petitioner Stanford, filed April 27, 2016.

SUMMARY OF ARGUMENT

The Proposed Initiative contains multiple, unrelated subjects having no necessary or proper connection to the Initiative’s purported single subject: 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.” *See* Final Title. In addition to legalizing physician-assisted suicide, the measure also modifies unrelated statutes regarding coroner duties;

To the extent the Court finds that the Initiative includes only one subject, the Final Title is nevertheless confusing, misleading, and not reflective of the Proponents’ intent and, therefore, must not be

forwarded to the voters. The Final Title fails to reflect that the Proposed Initiative:

1. Fails to correctly and properly identify the true intent and meaning of the Initiative, which is to promote physician-assisted suicide; and
2. The title fails to reflect that the measure requires death certificates to reflect a cause of death to be something other than suicide.

ARGUMENT

I. Appellate Standard of Review

The Colorado Constitution requires that citizen-initiated measures contain only a single subject, which shall be clearly expressed in its title. Colo. Const. art. V, § 1(5.5); see also § 1-40-106.5 C.R.S. The single-subject requirement prevents proponents from combining multiple subjects to attract a “yes” vote from voters who might otherwise vote “no” on one or more of the subjects if proposed separately. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014) (citing *In re Proposed Initiative for 1997-1998 #84*, 961 P.2d 456, 458 (Colo. 1998)). Accordingly, an

initiative's subject matter "must be necessarily and properly connected rather than disconnected or incongruous." *Id.* (citing *In re Proposed Initiative for 2011–2012 # 45*, 274 P.3d 576, 579 (Colo. 2012)). Titles containing general "umbrella proposals" to unite separate subject are unconstitutional. *Id.*

When reviewing the Board's single-subject determination, the Court assumes legitimate presumptions in favor of the propriety of the Board's actions. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010) (citing *In re Title, Ballot Title, & Submission Clause for 2009-2010, #24*, 218 P.3d 350, 353 (Colo. 2009)). The Court does not consider the initiative's efficacy, construction, or future application. *Id.* When necessary, however, the Court "will characterize the proposal sufficiently to enable review of the Title Board's action." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). When construing an initiative, the Court applies the general rules of statutory construction. *In re Title, Ballot Title & Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 873 (Colo. 2007).

The Title Board is charged with setting a title that fully, fairly and accurately informs voters of the central elements of the measure, to enable them to make a thoughtful decision about its merits. § 1-40-106(3)(b) C.R.S.; *see also* *In re Title for 1999-2000 No. 258(A)*, 4 P.3d at 1098. The title must be sufficiently clear so voters “understand the principal features of what is being proposed” and because “a material omission can create misleading titles.” *Id.* The requirement of a fair and accurate title is intended to prevent “surreptitious measures,” and it tasks the Title Board with the duty to “apprise the people of the subject of each measure by the title” to prevent “surprise and fraud from being practiced upon voters.” *In re Title, Ballot Title, & Submission Clause & Summary for 1999-2000 No. 29*, 972 P.2d 257, 260-61 (Colo. 1999). If the Title Board cannot comprehend a proposed initiative sufficiently enough to state its single subject clearly in the title, the initiative cannot be forwarded to the voters. *Matter of Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 465 (Colo. 1999).

II. Preservation for Appeal

Petitioners, in their Motion for Rehearing, properly raised and preserved their challenge to the Initiative's failure to comply with the single-subject rule. *See* Motion for Rehearing at 2-3. The Title Board considered and denied the Petitioners' motion on this issue at the April 20, 2016 rehearing. *See* Final Title.

In their Motion for Rehearing, Petitioners properly raised and preserved their challenge regarding the Initiative's failure to comply with § 1-40-106(3) C.R.S. *See* Motion for Rehearing at 3-5. The Title Board considered and denied the Petitioners' motion on this issue at the April 20, 2016 rehearing. *See* Final Title.

III. Under The Guise of Medical Aid in Dying, the Initiative Contains Multiple and Distinct Subjects.

As reflected in the final title, the Proposed Initiative's purported single subject is 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.” *See* Final Title. In addition to legalizing physician-assisted suicide, the measure also modifies unrelated statutes regarding coroner duties.

Section 25-48-109 of the proposed initiative relieves a coroner of the requirement to undertake inquiry as to the cause and manner of death pursuant to § 30-10-606(1), C.R.S. Coroners are required to undertake inquiry to determine the cause and manner of death whenever a death is or may be unnatural as a result of external influences; Due to the influence of or the result of intoxication by alcohol, drugs, or poison; or when no physician is in attendance. *Id.*

The Proposed Initiative allows a coroner to avoid the necessity of a forensic autopsy on the word of the attending physician who attests that the person had received lethal medication under this statute. Since no official witness to the actual death is required, it is likely that the physician was not present at the time of the patient’s death, therefore the actual cause of death is speculation. There are any number of ways death can be encouraged, coerced, or deliberately caused to those who have received a lethal-dose prescription. The Proposed Initiative all but

guarantees that any perpetrator of coercion or homicide can get away with it as the coroner does not have to determine if the patient actually died of a lethal overdose or if they died without a struggle and apparently “self-administered” the drug. This circumvents the coroners function under the statute. “The coroners' function is to investigate and determine whether a decedent has died from violent, unexplained causes, or under suspicious circumstances.” *People ex rel. Kinsey v. Sumner*, 525 P.2d 512, 514 (Colo. App. 1974). *See also Macurdy v. Faure*, 176 P.3d 880, 882 (Colo. App. 2007).

If, for the purpose of argument, the Proposed Initiative only allow the patient to administer the lethal dose to himself or herself, the patient is still vulnerable to the actions of other people. This is because the Proposed Initiative does not require witnesses or even a doctor to be present when the lethal dose is administered. There is a complete lack of oversight at the death

This creates the opportunity for someone else to administer the lethal dose to the patient without his or her consent. If the patient struggles, who would know? The drugs used can be administered to a

sleeping or restrained person. They can also be hidden in drinks and food unbeknownst to the person who's ingesting the medication.

Without any oversight at the death, abuse and coercion are completely hidden.

The Proposed Initiative does not simply legalize physician-assisted suicide, but provides a mechanism to circumvent coroner duties and obligations in a way that is unrelated to the purpose of the Proposed Initiative. This is a separate and distinct purpose from physician-assisted suicide. Therefore, the Court should reverse the decision of the Title Board and find that the Proposed Initiative has multiple and distinct purposes in violation of article V, section 1(5.5) of the Colorado Constitution.

IV. The final title does not fairly and accurately inform voters of important aspects of the Initiative

To the extent the Court finds that the Initiative includes only one subject, the Final Title is nevertheless confusing, misleading, and not reflective of the Proponents' intent and, therefore, must not be

forwarded to the voters. The Proposed Initiatives represent a thinly-disguised effort to legalize physician-assisted suicide, including altering causes of death on death certificates. For this reason alone, the Titles violate the statutory requirement that titles must “correctly and fairly express the true intent” of initiatives. *See* § 1-40-106 C.R.S.

The Titles should be “a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative.” § 1-40-102(10) C.R.S. In setting titles, the 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.” § 1-40-106(3)(b) C.R.S. The Titles fail to meet these standards, because they describe The Proposed Initiative’s subject as permitting “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 improperly omit material provisions of the Proposed Initiative.

A. The titles fail to correctly and properly identify the true intent and meaning of the Initiative, which is to promote physician-assisted suicide.

The term “physician-assisted suicide” is commonly known and understood by the general public. The American Medical Association (AMA) defines physician-assisted suicide as occurring when “a physician facilitates a patient’s death by providing the necessary means and/or information to enable the patient to perform the life-ending act.” The AMA Code of Medical Ethics, Opinion 2.211, Physician-Assisted Suicide, June, 1994. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page>? (last accessed May 10, 2016).

The lengthy subject hides the true purpose of the Proposed Initiative in legalese, which will cause voter surprise about the true effect of the initiative. *See In re Title, Ballot Title, Submission Clause, & Summary by the Title Board Pertaining to a Proposed Initiative on “Obscenity”,* 877 P.2d 848, 850 (Colo. 1994) (“There may be situations, therefore, where the title and submission clause likely would create

public confusion or ambiguity about the effect of the initiative even though they merely repeat the language contained in the initiative itself”).

B. The title fails to reflect that the measure requires death certificates to reflect a cause of death to be something other than suicide.

The Proposed Initiative requires the death certificate to list the patient’s underlying terminal illness or condition as a cause of death. § 25-48-109. The significance of the lack of transparency and illegal inability to prosecute criminal behavior, for example, in the case of an outright murder for the money. In other words, with the cause of death pre-determined to be a terminal illness or condition, there can be no prosecution for murder as a matter of law. Perpetrators have little or no legal deterrent to curtail overreaching behavior. As discussed *supra*, this section allows a coroner to avoid the necessity of a forensic autopsy on the word of the attending physician who attests that the person had received lethal medication under this statute.

The language of the Proposed Initiative forbids acknowledgement of the reality of a patient's self-inflicted death by medical overdose, therefore the hands of coroners, medical examiners, doctors and others filling out official reports will reflect an untruth: that the patient died for reasons other than "suicide, assisted suicide, mercy killing or homicide." This forced legal deception will have many serious future repercussions, including skewed statistics about actual causes of death.¹

Any future attempt for investigators – criminal or otherwise – to uncover the cause and manner of death will be hindered by sealed, inaccurate medical records. Law enforcement will be obligated to undergo a lengthy, expensive subpoena process to view these inaccurate records. The listed cause of death will be the disease with no official witnesses, or physicians capable of verifying the truth.

Coroners are not required to verify with the attending physician that the proper process has been followed, and are prohibited from

¹ Accurate reporting on cause(s) and manner(s) of death are important for a wide range of reasons. National research on patients dying from and the rates of death related to these diseases will be inaccurately reported under this law. This false reporting will also have an effect on census data, and potentially funding for prevention and research programs.

reporting these deaths as related to assisted suicide. Inaccurate reporting will cause difficulty with enforcing contracts related to prohibitions on suicide – something that is not evident to the voters.

The titles as written would result in most voters not understanding that the Proposed Initiative might change coroner duties, or death certificate reporting. *See Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 33-35 (Colo. 1993) (finding the title for an election reform initiative insufficient, in part, because it identified that the initiative would revise procedural provisions of the initiative, referendum, and recall, but it failed to state that the initiative would revise substantive provisions of the same).

Therefore, and in the alternative, Petitioners request that the Court remand the matter to the Title Board with the instructions to amend the Final Title consistent with the concerns set forth herein

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioners respectfully request that the Court find that the Initiative does not contain a single subject and remand this matter to the Title Board with direction to return the Initiative to Proponents. In the alternative, Petitioners request that the Court remand the matter to the Title Board with the instructions to amend the title consistent with the concerns set forth above.

CERTIFICATE OF WORD COUNT

By my signature below, I certified that the number of words in the body of the final form of this petition as counted by Microsoft Office, is 3732.

Respectfully submitted this 11th day of May, 2016.

s/Carrie Ann Lucas
Carrie Ann Lucas, #36620
Attorney for Petitioners Stephens
and Walbert

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, a true and correct copy of the foregoing was served by the ICCES filing system and addressed to:

Mark G. Grueskin
1600 Stout Street, Suite 1000
Denver CO 80202
mark@rklawpc.com
Attorney for Respondents Harlan Hibbard and Julie Selsberg

LeeAnn Morrill
Matthew David Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Leann.morrill@state.co.us
Attorney for the Title Board

Thomas M. Rogers III
Hermine Kallman
Lewis Roca Rothgerber Christie LLP
1200 Seventeenth Street, Suite 3000
Denver, CO 80202
trogers@lrrc.com
hkallman@lrrc.com
Attorneys for Petitioner Sanford

s/Carrie Ann Lucas
Carrie Ann Lucas