

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Ave. Denver, Colorado 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015- 2016 #124</p> <p>PETITIONERS: Robin Stephens; Renee Walbert; and Michelle Stanford,</p> <p>v.</p> <p>RESPONDENTS: Harlan Hibbard and Julie Selsberg,</p> <p>and</p> <p>TITLE BOARD: Suzanne Staiert; Frederick Yarger; and Jason Gelender.</p>	
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<p><b>THE TITLE BOARD'S OPENING BRIEF</b></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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,735 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

*s/ Grant T. Sullivan*

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Title Board members Suzanne Staiert, Frederick Yarger, and Jason Gelender (hereinafter “the Board”), by and through undersigned counsel, hereby submit the following Opening Brief.

### **STATEMENT OF THE ISSUES**

1) Whether Petitioners Stephens and Walbert’s petition for review was filed beyond the jurisdictional deadline contained in section 1-40-107(2), C.R.S.

2) Whether the title reflects the central features of the measure to accurately convey its true intent and meaning.

### **STATEMENT OF THE CASE AND FACTS**

Harlan Hibbard and Julie Selsberg (“Proponents”) seek to circulate Proposed Initiative 2015-2016 #124 (“#124”) to obtain the requisite number of signatures to place a measure on the ballot to add article 48 to Title 25 of the Colorado Revised Statutes, entitled the “Colorado End-of-Life Options Act.” According to the Proponents, the proposed initiative’s single subject is the provision of aid-in-dying medication by licensed physicians to mentally-capable adults. *Hearing*

*Before Title Board on Proposed Initiative 2015-2016 #124, Part II* (Apr. 6, 2016), available at <http://tinyurl.com/zar5zye>, at ~1:31:16 mins. (last visited May 10, 2016).

The Board conducted an initial public hearing on April 6, 2016. The Board unanimously concluded that #124 contains a single subject and therefore proceeded to set a title for #124. *See id.* at ~1:37:48 mins.

Two sets of objectors filed motions for rehearing on April 13, 2016: (1) Robin Stephens and Renee Walbert, and (2) Dr. Michelle Stanford. Stephens and Walbert's motion asserted that #124 violates the single subject rule and that the title as set by the Board does not express the true intent of the proposed measure. *Attachment to Stanford Petition*, pp. 37-41. Dr. Stanford's motion for rehearing similarly argued that the title does not fairly express the true meaning and intent of the proposed law, which she contends is physician-assisted suicide and dictating how the cause of death will be reflected on the person's death certificate. *See id.* at 42.

The Board conducted a rehearing on April 20, 2016. *Rehearing Before Title Board on Proposed Initiative 2015-2016 #124, Part I* (Apr.

20, 2016), available at <http://tinyurl.com/zar5zye>, at ~38:19 mins. (last visited May 10, 2016). The Board reaffirmed its prior conclusion that the single subject rule was satisfied, thus denying Stephens and Walbert's rehearing motion on that basis. The Board then proceeded to make certain modifications to the title's language that were requested by the objectors. It therefore granted in part and denied in part the objectors' rehearing motions to the extent the Board made changes to the title. *Attachment to Stanford Petition*, p. 45-47.

The title for #124 as set by the Board on rehearing is: "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.” *Attachment to Stanford Petition*, p. 46.

Dr. Stanford filed a timely petition for review with this Court on April 27, 2016, asserting substantially the same arguments she advanced before the Board. Stephens and Walbert filed a petition for review with this Court on April 28, 2016, one day past the jurisdictional deadline contained in section 1-40-107(2), C.R.S.

### **SUMMARY OF THE ARGUMENT**

The Board’s actions in setting a title for #124 should be affirmed. Stephens and Walbert’s petition for review was filed with this Court one day after the jurisdictional deadline contained in section 1-40-107(2), C.R.S. This Court therefore lacks jurisdiction to address Stephens and

Walbert's arguments, requiring dismissal of their petition. As to Dr. Stanford's arguments, the title as drafted by the Board complies with the clear title standard. The Board was not required to include in the title the phrases "physician-assisted suicide" or "suicide." Such phrases may constitute impermissible political catch phrases. Similarly, the Board properly declined to include in the title Dr. Stanford's requested language regarding death certificates. The provision regarding death certificates is not a central feature of #124.

## ARGUMENT

### **I. Stephens and Walbert's petition for review is untimely.**

#### **A. Standard of Review.**

Whether a petition for review is timely-filed is governed by section 1-40-107(2), C.R.S. and this Court's statutory interpretation in *Outcalt v. Schuck*, 961 P.2d 1077, 1080-81 (Colo. 1998). Statutory interpretation is a question of law subject to de novo review. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 328 P.3d 127, 129 (Colo. 2014).

**B. The petition for review was filed beyond the jurisdictional deadline in section 1-40-107(2), C.R.S.**

The statute governing judicial review of the Board's actions provides that any person "not satisfied" with the Board's ruling on a rehearing motion may seek judicial review in this Court. § 1-40-107(2), C.R.S. In that event, the statute states:

[T]he secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, together with a certified copy of the motion for rehearing and of the ruling thereon. If filed with the clerk of the supreme court *within seven days thereafter*, the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.

§ 1-40-107(2), C.R.S. (emphasis added). This Court interpreted this statute in *Outcalt v. Schuck*, 961 P.2d 1077, 1080-81 (Colo. 1998). There, the Court held that the period for filing an appeal (then five days) begins to run from the date the Board denies the rehearing motion, not the date the Secretary of State fulfills the request for certified

documents. *Id.* The Court explained that a contrary interpretation would “entirely defeat the legislative objectives of finality of Board action and an expedited procedure in the event of an appeal.” *Id.* at 1080. The Court reasoned that the statute places no time limit on the appellant to “request” the certified documents, and thus triggering the appeal deadline off that event could “indefinitely” delay the appeal process “at the instance of a party who has every incentive to favor delay and cause uncertainty.”<sup>1</sup> *Id.*

Applying this interpretation here, Stephens and Walbert’s petition for review is untimely. The Board ruled on their rehearing motion on April 20, 2016, triggering the seven-day appeal period which expired on April 27, 2016. *See* C.A.R. 26(a). Their petition for review was not filed until April 28, 2016, one day past the deadline.

Accordingly, this Court is without jurisdiction to consider Stephens and Walbert’s petition for review. *See Outcelt*, 961 P.2d at

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<sup>1</sup> In *Outcelt*, the Court ultimately accepted the appellant’s petition as timely-filed because the version of C.A.R. 26(a) then in effect excluded intermediate Saturdays, Sundays and legal holidays. 961 P.2d at 1081. Today, however, the rule states “every day shall be counted including holidays, Saturdays and Sundays.” C.A.R. 26(a).

1081. *See also Greenlaw v. United States*, 554 U.S. 237, 252 (2008) (stating “[t]he firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality.”); *Widener v. District Court*, 200 Colo. 398, 400, 615 P.2d 33, 34 (1980) (“Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits.”).

**II. The Board’s title for #124 is fair, clear, accurate, and complete.**

Dr. Stanford’s petition for review asserts that the title for #124 does not fairly express the true meaning and intent of the proposed law, which she contends is physician-assisted suicide and dictating how the cause of death will be reflected on the person’s death certificate. This Court should reject Dr. Stanford’s arguments.

**A. Standard of Review and Preservation.**

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). The Court grants great

deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the titles are insufficient, unfair, or misleading. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d at 648.

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Dr. Stanford preserved her arguments in her motion for rehearing. *Attachment to Stanford Petition*, p. 42.

**B. Clear title standards governing titles set by the Board.**

Section 1-40-106(3)(b), C.R.S. establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). The statute provides:

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. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed ... within two weeks after the first meeting of the title board. ... Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered “yes/for” (to vote in favor of the proposed law or constitutional amendment) or “no/against” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002). Rather, title-setting is about distilling the proposed initiative down to a “reasonably ascertainable expression of the initiative’s purpose.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) (citing *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009)). In setting titles the Board may not ascertain the measure’s efficacy, construction, or future application. *In re Title #45*, 234 P.3d at 645.

In addition, a title must not contain a political catch phrase that might mislead the electorate. A catch phrase consists of “words that work to a proposal’s favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). The

Board’s “task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal.” *Id.*

**C. The phrases “physician-assisted suicide” and “suicide” may constitute impermissible catch phrases.**

This Court should reject Dr. Stanford’s argument that the phrases “physician-assisted suicide” or “suicide” should appear in the title.<sup>2</sup>

The phrases “physician-assisted suicide” and “suicide” are potentially impermissible political catch phrases. Including them in the title could “provoke political emotion and impede voter understanding,” rather than contribute to it. *In re Title #258(A)*, 4 P.3d at 1100. Indeed, members of the Board expressed this exact concern during the rehearing. *See Rehearing Before Title Board on Proposed Initiative 2015-2016 #124, Part I* (Apr. 20, 2016), available at <http://tinyurl.com/zar5zye>, at ~57:35 mins (last visited May 11, 2016).

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<sup>2</sup> Dr. Stanford’s petition for review and motion for rehearing both state that #124’s *single subject* incorrectly fails to identify physician-assisted suicide as its true intent and meaning. *Attachment to Stanford Petition*, p. 42. The Board, however, interprets her argument to be that *the title* should mention physician-assisted suicide.

Instead of inserting these problematic phrases in the title, the Board appropriately exercised its drafting discretion to use phrases that are merely descriptive of the measure. *See In re Title #258(A)*, 4 P.3d at 1100 (stating phrases that “are merely descriptive of the proposal” are not political catch phrases). For example, in setting the title the Board properly used the language “to receive a prescription from a licensed physician for medication that can be self-administered to bring about death.” This neutral language is a highly accurate description of what #124 accomplishes, and it prevents any voter misunderstanding or emotion that may result from political catch phrases.

**D. The provision regarding death certificates is not a central feature.**

Dr. Stanford also asserts that the title fails to reflect that #124 dictates how the cause of death will be reflected on the person’s death certificate, or that it will be “something other than suicide.” *Stanford Petition for Review*, p. 4. This Court should reject these arguments.

“The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title and*

*Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶24 (Colo. 2014).

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002).

Here, the measure contains 23 different statutory sections that detail how #124's single subject is to be implemented. *Attachment to Stanford Petition*, pp. 25-36. They range from detailing how unused lethal medical prescriptions are to be disposed of (§ 25-48-120), to specifying the number of witnesses that must observe the patient's request for the medical protocol (§ 25-48-104(2)(a)(III)). Dr. Stanford believes that one of these statutory sections concerning death certificates (§ 25-48-109) should be mentioned in the title. That section provides that the cause of death "shall be listed as the underlying terminal illness . . . ." *Attachment to Stanford Petition*, p. 30.

However, the Board is not required, nor is it possible, to draft a title that captures each of these minor details. Ballot titles are to "be brief," § 1-40-106(3)(b), C.R.S., and "succinct." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d

1194, 1197 (Colo. 2000). The provision concerning death certificates is not a “central feature[ ]” of the measure. *In re Title #90*, 2014 CO 63, ¶24. As noted by one of the Board members in rejecting Dr. Stanford’s argument, the Board’s task is to craft a title that is “not sprawling.” *Rehearing Before Title Board on Proposed Initiative 2015-2016 #124, Part I* (Apr. 20, 2016), available at <http://tinyurl.com/zar5zye>, at ~1:08:30 mins.

Accordingly, because #124’s title as set by the Board satisfies the clear title standard, this Court should affirm.

## CONCLUSION

For the above-stated reasons, the Court should dismiss Stephens and Walbert’s petition for review and affirm the Board’s actions in setting the title for #124.

Respectfully submitted this 11th day of May, 2016.

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via ICCES and/or via U.S. first class mail at Denver, Colorado this 11<sup>th</sup> day of May, 2016 addressed as follows:

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