

<p>COLORADO SUPREME COURT 2 East 14th 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 #100</p> <p>PETITIONERS: Anita Cameron and Julie Farrar,</p> <p>v.</p> <p>RESPONDENTS: Lance Wright and Mercedes Aponte,</p> <p>and</p> <p>TITLE BOARD: Suzanne Staiert; Frederick Yarger; and Sharon Eubanks.</p>	
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<p>THE TITLE BOARD'S 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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,872 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 Sharon Eubanks (hereinafter “the Board”), by and through undersigned counsel, hereby submit the following Opening Brief.

STATEMENT OF THE ISSUES

- 1) Whether the measure complies with the single subject requirement.
- 2) Whether the title reflects the true intent and meaning of the measure.

STATEMENT OF THE CASE AND FACTS

Lance Wright and Mercedes Aponte (“Proponents”) seek to circulate Proposed Initiative 2015-2016 #100 (“#100”) to obtain the requisite number of signatures to place a measure on the ballot to amend the Colorado Constitution to add section 28A in article II. The proposed initiative grants immunity from criminal prosecution, civil liability, or professional discipline to any person or group that assists a citizen in securing “a medical professional’s assistance in achieving a

peaceful death through the careful administration of a medical protocol.” *Attachment to Petition, 2015-2016 # 100 – Final, § 4(a)*.

The Board conducted an initial public hearing on April 6, 2016. The Board unanimously concluded that #100 contains a single subject and therefore proceeded to set a title for #100. *Hearing Before Title Board on Proposed Initiative 2015-2016 #100, Part I* (Apr. 6, 2016), available at <http://tinyurl.com/zar5zye>, at ~1:28:00 mins. (last visited May 6, 2016).

Petitioners/Objectors Anita Cameron and Julie Farrar (“Objectors”) filed a motion for rehearing on April 13, 2016, asserting the title as set violates the single subject rule and that it does not fairly describe the meaning and intent of the measure.

The Board conducted a rehearing on April 20, 2016. *Rehearing Before Title Board on Proposed Initiative 2015-2016 #100, Part I* (Apr. 20, 2016), available at <http://tinyurl.com/zar5zye>, at ~18:59 mins. (last visited May 6, 2016). The Board reaffirmed its prior conclusion that the single subject rule was satisfied, thus denying Objectors’ rehearing motion on that basis. With the exception of minor changes to the title’s

language that it approved, the Board also rejected Objectors' argument that the title failed to fairly describe the meaning or intent of the measure.

The Board thus set the following title for #100: "An amendment to the Colorado constitution establishing a right to assistance from a medical professional to achieve death through a medical protocol, and, in connection therewith, allowing a mentally competent adult to exercise the right or to enter into an agreement to exercise the right at a future time when the individual may no longer be mentally competent and the conditions specified in the agreement are met; and granting immunity from civil and criminal liability and professional discipline to any person who provides assistance to a person exercising the right."

Attachment to Petition for Review, p. 14.

Objectors filed a timely petition for review with this Court on April 27, 2016, asserting substantially the same arguments they advanced before the Board, with the exception of one new argument that was not preserved below. *See* Argument § II.A, *infra*.

SUMMARY OF THE ARGUMENT

The Board's actions in setting a title for #100 should be affirmed. The Board correctly determined that the measure satisfies the single subject rule because all of #100's provisions relate to the single subject of the right of mentally competent adults to receive help in achieving a peaceful death through the administration of a medical protocol. Similarly, the Board properly exercised its drafting discretion in setting a title that complies with the clear title rule. The Board appropriately declined to include in the title phrases such as "promoting euthanasia," "citizen-sovereigns" and "inalienable right." Besides possibly constituting impermissible political catch phrases, these phrases may lead to voter confusion and, at best, constitute unnecessary details that need not be included in the title.

ARGUMENT

I. The measure does not contain multiple subjects.

Objectors argue that #100 violates the single subject rule. They assert the measure advances several subjects, including creating a new class of persons called "citizen-sovereigns," establishing a new definition

of “mental competency,” and creating new inalienable rights of persons in defending their lives, in conflict with article II, section 3 of the state constitution. *Petition for Review*, pp. 4-5. This Court should reject Objectors’ single-subject argument.

A. Standard of Review and Preservation.

“In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.* Objectors preserved this argument by raising it in their motion for rehearing.

B. The Board correctly found that #100 satisfies the single subject rule.

The state constitution provides that “[n]o measure shall be proposed by petition containing more than one subject” COLO. CONST., art. V, § 1(5.5). The purpose of the single subject rule is to “prohibit the practice of putting together in one measure subjects

having ‘no necessary or proper connection,’ for the purposes of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I)). “In addition, the requirement seeks to prevent surreptitious measures, surprise and fraud upon the voters.” *Id.* “The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re Title #76*, 333 P.3d at 79.

“An initiative with a single, distinct purpose does not violate the single-subject requirement simply because it spells out details relating to its implementation. As long as the procedures specified have a necessary and proper relationship to the substance of the initiative, they are not a separate subject.” *In re Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998).

Here, the Board correctly determined that #100’s provisions all relate to the single subject of the right of a mentally competent adult to receive help in achieving a peaceful death through the administration of

a medical protocol. Indeed, that was the measure’s single subject as stated by Proponents. *Hearing Before Title Board on Proposed Initiative 2015-2016 #100, Part I* (Apr. 6, 2016), available at <http://tinyurl.com/zar5zye>, at ~1:15:30 mins. Each of the purported separate subjects identified by Objectors are either necessarily and properly connected to this single subject, or they mischaracterize what #100 accomplishes. Specifically, Objectors’ arguments fail because:

- The measure does not create a new class of persons called “citizen-sovereigns.” Rather, that defined term is merely used as a shorthand to identify the prerequisites that are necessary before the person may obtain the medical protocol—he or she must be a mentally competent adult who is a lawful resident of the United States.¹ *Attachment to Petition, 2015-2016 # 100 – Final, § 6(c)*. Spelling out the details relating to #100’s implementation, including those who qualify to exercise this

¹ See also *Hearing Before Title Board on Proposed Initiative 2015-2016 #100, Part I* (Apr. 6, 2016), available at <http://tinyurl.com/zar5zye>, at ~2:00:10 mins (Board discussion regarding omitting the term “citizen-sovereign” from the title because the term, by itself, does not contribute to voter understanding).

right, does not violate the single subject rule. *See In re Title #74*, 962 P.2d at 929.

- Similarly, including a definition of “mental competency” in the measure is not tantamount to a separate subject. It constitutes a mere detail of implementation. *See id.; Attachment to Petition, 2015-2016 # 100 – Final, § 6(h)*.
- The measure does not amend the “inalienable rights” provision in article II, section 3 of the state constitution. *See COLO. CONST. art. II, § 3* (stating all persons have “the right of enjoying and defending their lives and liberties”). Instead, the measure simply creates a new section (§ 28A) in article II. To the extent a future interpreting court may conclude that one provision affects the other, that constitutes an effect of the proposed measure, not a separate subject. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #90 & #93*, 328 P.3d 155, 160-61 (Colo. 2014).

Accordingly, this Court should affirm the Board’s finding that #100 satisfies the single subject rule.

II. The Board's title for #100 is fair, clear, accurate, and complete.

Objectors also assert #100's title does not properly identify the true intent and meaning of the measure, which they contend is promoting euthanasia. They also argue that the title fails to reflect that the measure creates a new class of "citizen-sovereigns" and new inalienable rights. *Petition for Review*, pp. 4-5. Objectors' euthanasia argument is unpreserved, and their remaining arguments should be rejected.

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).

Objectors failed to preserve their argument that promoting euthanasia is the measure’s true intent. Indeed, nowhere in their one-page motion for rehearing is the word “euthanasia” mentioned, nor did Objectors raise it at the rehearing on April 20, 2016. Accordingly, Objectors are prohibited from raising this argument here. *See In re Ballot Title 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000); *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3

(Colo. 1996). Objectors' remaining arguments were preserved in their motion for rehearing.

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. Omitting the term “euthanasia” does not mislead voters.

Even assuming Objectors preserved their argument that promoting euthanasia is the true intent of #100, the Board did not err by omitting the term “euthanasia” from the title, for two reasons.

First, the term “euthanasia” does not appear in the text of #100. Rather, the text states that a qualifying person may “set the time and tone of their own death by obtaining a medical professional’s assistance in achieving a peaceful death through the careful administration of a medical protocol.” *Attachment to Petition, 2015-2016 # 100 – Final, § 4(a)*. The title as set by the Board uses similar language: “establishing a right to assistance from a medical professional to achieve death through

a medical protocol” This Court has routinely rejected the argument that titles that track the language of the initiative are misleading. *See, e.g., In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008); *In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #10*, 943 P.2d 897, 901 (Colo. 1997).

Second, the phrase “promoting euthanasia” is potentially an impermissible political catch phrase. Including it 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. Instead of inserting this problematic phrase in the title, the Board appropriately exercised its drafting discretion to use neutral phrases that are merely descriptive of the measure. *See id.* (stating phrases that “are merely descriptive of the proposal” are not political catch phrases).

D. Omitting the terms “citizen-sovereigns” and “inalienable rights” does not mislead voters.

Objectors also contend that the title fails to reflect that #100 creates a new class of “citizen-sovereigns” or new inalienable rights. For three reasons, both of these arguments should be rejected.

First, regarding the “citizen-sovereigns” language, the Board properly declined to insert this term in the title because it possibly constitutes an impermissible political catch phrase that does not contribute to voter understanding. Although the term is used in the measure’s text, it is a defined term that means “a mentally competent, adult, [and] lawful resident of the United States of America.”

Attachment to Petition, 2015-2016 # 100 – Final, § 6(c). The Board appropriately used this actual descriptive definition, rather than “citizen-sovereign,” when setting the title. *See In re Title #258(A)*, 4 P.3d at 1100.

Had the Board used “citizen-sovereign,” voters likely would have been confused due to the similarity of the phrase “sovereign citizens”—a colloquial term that refers to certain extremists that believe federal,

state and local governments operate illegally. *See Sovereign Citizens: A Growing Domestic Threat to Law Enforcement*, FBI Law Enforcement Bulletin, Sept. 2011, at 20-24, available at: <http://tinyurl.com/hfswr5y> (last visited May 9, 2016).

Second, as indicated, #100 does not create a new class of persons. Rather, through the use of a defined term, the measure identifies the prerequisites that are necessary before a person may obtain the medical protocol—he or she must be a mentally competent adult who is a lawful resident of the United States. *Attachment to Petition, 2015-2016 # 100 – Final, § 6(c)*. It is no different than identifying the minimum requirements necessary to be a “consumer” who may lawfully use or possess retail marijuana in Colorado. *See* COLO. CONST. art XVIII, § 16(2)(b) & (3).

Third, the Board was not required to use the phrase “inalienable right” in the title, or describe the potential effect #100 may have on other constitutional provisions. *See* COLO. CONST. art II, § 3 (describing “Inalienable rights” protected by state constitution). The Board is not required to set out every detail of the measure in the title. *In re Title*

#21& #22, 44 P.3d at 222. Moreover, no requirement exists that the title state the effect an initiative may have on other constitutional and statutory provisions. *In re Constitutional Amendment Concerning the Fair Treatment of Injured Workers*, 873 P.2d 718, 720 (Colo. 1994).

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for #100.

Respectfully submitted this 12th 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 12th day of May, 2016 addressed as follows:

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