

<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 #145 (“Medical Aid in Dying”)</p> <p><b>Petitioners: Michelle Stanford, Robin Stephens and Renee Walbert</b> v. <b>Respondents: Jaren Ducker and Julie Selsberg,</b></p> <p><b>and</b></p> <p><b>Title Board: SUZANNE STAIERT; DAVID BLAKE; and JASON GELENDER</b></p>	<p style="text-align: right;">DATE FILED: June 2, 2016 5:00 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;"><b>RESPONDENTS’ ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #145 (“MEDICAL AID IN DYING”)</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 C.A.R. 28(g).

Choose one:

It contains 1,730 words.

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The brief complies with C.A.R. 28(k).

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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## SUMMARY

Petitioners' Opening Briefs are chock full of conjecture about this measure. The Title Board correctly refused to inject speculation, campaign jargon, and an array of details into the ballot title it set for Initiative #145. The Initiative Proponents urge this Court to expeditiously dispatch this appeal to the land of one-line affirmances.

## LEGAL ARGUMENT

### **I. Initiative #145 is comprised of a single subject.**

None of the arguments raised is quite as speculative as the explanation of Walbert's single subject contention that this initiative "modifies unrelated statutes regarding coroner duties." Walbert Op. Br. at 9.

Walbert hypothesizes that changes to coroner statutes will somehow affect a "perpetrator of coercion or homicide" or a patient who "died without a struggle" or medications "hidden in drinks and food unbeknownst" to imagined persons. *Id.* at 10, 11. These notions are more the grist of soap opera plot lines than ballot titles. Neither the Title Board nor the Court may make single subject decisions based on "Petitioner's argument [which] is comprised of mere speculation about the potential effects of the initiative." *In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008). The Court will reject such an argument by the "Petitioner [who] speculates about the effects of the measure,

postulating that if the measure is interpreted in a way that fits his conclusions, then the measure will have multiple effects.” *Id.* This is just such an argument.

Walbert never exactly describes why making changes to certain statutes that will directly affect persons who qualify for medical aid-in-dying medication do not relate to this initiative’s key objective – authorization of, and procedures associated with, medical aid-in-dying medication. To come up with a single subject argument, Walbert “thinly parse[d] the language of the measure in an attempt to create separate and distinct subjects.” *Id.* But this does not amount to a true single subject violation, and the Title Board correctly rejected this argument.

## **II. The ballot title is fair and accurate.**

A. This title would not be accurate if it described #145’s subject as authorizing “physician-assisted suicide.”

Petitioners ask the Court to order the Board to substitute a catchy but misleading slogan (“authorize physician-assisted suicide”), Walbert Op. Br. at 13; Stanford Op. Br. at 12, for the ballot title’s substantive and descriptive single subject statement (“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 willing licensed physician for medication that can be self-administered to bring about death”).

Actually, Stanford established before the Title Board that “physician-assisted suicide” is a misleading and inaccurate phrase by presenting an outside document, in support of her arguments. The exhibit she presented specifically states that such references are both “incorrect and inaccurate.” *See* Resp. Op. Br. at 11-12. Knowing that, the Board would have erred had it employed this phrase in the title. *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 25, 974 P.2d 458, 465 (Colo. 1999)* (Title Board cannot “neglect[] its duty to consider the public confusion that might result from misleading titles”).

Even if the Petitioners were advocating for a less inflammatory and more accurate phrase, this Court’s “role does not include rewriting the titles and summary to achieve the best possible statement of the proposed measure’s intent.” *In re Proposed Initiative 1999–2000 # 246(e)*, 8 P.3d 1194, 1197 (Colo. 2000). Yet, that is exactly what Petitioners ask the Court to do. As a result, Petitioners misapprehend the Court’s self-imposed restriction on its potential as a title editor. In fact, the Court has held it will not intervene in matters that are “either editorial in nature or focus on material for which inclusion, non-inclusion, or phrasing thereof is within the Commission's discretion.” *Id.* There is nothing “clearly misleading,” *id.*, about describing the purpose and scope of the measure in the title’s single subject statement. Therefore, there is no cause for judicial correction

of a title that does not contain Petitioner’s preferred turn-of-phrase but is still clear for voters’ purposes.

As justification for requiring such language, Walbert raises the concerns of the playwright (“an outright murder for the money”) and the actuary (“skewed statistics about actual causes of death”). Walbert Op. Br. at 14, 15. These arguments go to the perceived merits of the measure, an assessment that is inappropriate here. “In our limited review of the Title Board’s actions, we do not address the merits of the proposed initiatives nor suggest how they might be applied if enacted.” *In re Title, Ballot Title & Submission Clause 2013–2014 # 90*, 328 P.3d 155, 159 (Colo. 2014).

Walbert argues that the title’s single subject statement is “legalese” that will surprise voters. Walbert Op. Br. at 13. Yet, there is no legal jargon in the single subject statement, and no specific phraseology or wording is identified or complained of. As noted above, it is not the role of the Court to rewrite the title; a correction is warranted only if the title is inaccurate or misleading. A fair reading of the title does not permit the conclusion that this title would stump or bewilder voters, and thus the Board’s decision should be upheld.

B. The title did not need to state #145’s impacts on vital records statutes.

Both Petitioners’ argue that the title should have specified that cause-of-death recitations on death certificates for patients who use medical aid-in-dying



medication will reflect the patient's underlying disease. Walbert Op. Br. at 14; Stanford Op. Br. at 15.

It is not clear from the briefs why any voter would base his or her decision on Initiative #145 on this issue or even would need to know about the death certificate provision in order to fully and fairly understand what he or she is voting on. Instead, this is a detail of the measure, one that is quite apart from the medical and mental condition of the patient, the steps required of medical professionals in order to prescribe aid-in-dying medication, and the legal impacts upon those involved in the administration of such medication. These elements are clearly and thoroughly summarized in the title. Beyond that, the Title Board was not required to go. It certainly did not have to “present a side-by-side proposal of the existing law and how the proposed initiative would change it. **It need not touch on every aspect of a proposal.**” #246(e), *supra*, 8 P.3d at 1197 (emphasis added). Instead, the Board must “present straight forward, succinct, and nonargumentative titles.” *Id.* Because it did so here, the Board's title should be affirmed.

C. The title did not need to refer to life insurance contracts to be accurate.

Stanford argues that Initiative #145 “changes the way insurance contracts will be interpreted and applied in Colorado.” Stanford Op. Br. at 8. Stanford goes on to discuss what “most life insurance contracts” say and how they condition the payment of benefits, speculating for undisclosed reasons that there could be

“potentially significant consequences on the overall rates charged for life insurance premiums.” *Id.* at 8-9.

This Court stops well short of prognosticating whether any legal change will affect insurance rates or have any other marketplace impact. “We are not permitted in our review to determine the legal meaning or application of the initiative when reviewing its title for defects.” *In re Title, Ballot Title, Submission Clause for 2009–2010 #45*, 234 P.3d 642, 645 (Colo. 2010). Again, this Court refuses to intervene as to a Title Board decision “if that language is not clearly misleading” with the understanding that the Court will “resolve all legitimate presumptions in favor of the Title Board’s choice.” #246(e), *supra*, 8 P.3d at 1197.

As there is nothing misleading about the language the Board chose, there is no basis for reversing the title over this issue.

D. The title did not need to address health care facilities’ policies concerning medical aid-in-dying medication.

Stanford insists that the title should set forth that, under #145, “a health care facility may choose not to participate” in physician authorization for patient access to medical aid-in-dying medication. Stanford Op. Br. at 10.

Stanford does not suggest that the title is misleading based on its existing references. She only argues it could be more complete and bases her contention on the “national debate” about unrelated laws. *Id.* at 11. The Title Board is not

obligated to “include a description of every feature of a proposed measure,” *In re Proposed Initiative on School Pilot Program*, 874 P.2d 1066, 1070 (Colo. 1994), or base its titles on the operation of Petitioner’s representations about a national political discussion. *See In re Title, Ballot Title & Submission Clause for 2009–2010 # 45*, 234 P.3d 642, 650 (Colo. 2010) (finding that national polling results do not dictate whether certain terms amount to a “catch phrase” for Colorado voters).

The title does not even reference health care facilities, and therefore, it could not be attacked as misrepresenting the measure to, or misleading, voters. The fact that the measure addresses the physician option by using “willing” as a modifier of “physician” in the single subject statement is not determinative. As a reminder, it is the physician who is the primary patient contact and who makes the key medical decisions about the patient’s six-month prognosis and his or her mental capacity.

Stanford overlooks the fact that the goal of the title is to provide voters with a “reasonably ascertainable expression of the initiative’s purpose.” *Id.* at 648. It is not intended to be an exhaustive replication of the initiative text. Establishing that voters will be able to perceive “the initiative’s purpose” is far different than determining “whether the Title Board set the best possible title,” which is beyond the Court’s mission here. *Id.* A title will be upheld so long as it “is not likely to mislead voters as to the initiative’s purpose or effect” and does not “conceal some

hidden intent.” *Id.* at 649. This title does neither, and therefore, the decision of the Board should be affirmed.

### **CONCLUSION**

The Board’s title was carefully constructed to describe a thorough statutory amendment, allowing medical aid-in-dying medication and dealing with the ancillary issues associated with that authorization. Nothing raised in Petitioners’ arguments detracts from the Board’s substantive but targeted description of Initiative #145, and that decision should be promptly affirmed by the Court.

Respectfully submitted this 2nd day of June, 2016.

*/s/ Mark Grueskin*

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**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #145 ("MEDICAL AID IN DYING")** was sent this day, June 2, 2016, via ICCES to counsel for the Petitioners and to counsel for the Title Board at:

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