

COLORADO SUPREME COURT  
101 West Colfax Ave., Suite 800  
Denver, Colorado 80202

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

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**In the matter of the Title, Ballot Title, and  
Submission Clause for the Proposed Initiative  
2011-2012, #46**

**Petitioners:** LESLIE DURGIN, CATHY  
ALDERMAN and AMY PITLIK

v.

**Respondents:** ROSALINDA LOZANO and KEVIN  
SWANSON

and

**Title Board:** WILLIAM A. HOBBS, DANIEL  
DOMENICO, and JASON GELENDER

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OF THE STATE OF COLORADO  
Christopher T. Ryan, Clerk

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Supreme Court Case  
No.: 2012SA10

**ANSWER BRIEF OF RESPONDENT ROSALINDA LOZANO**

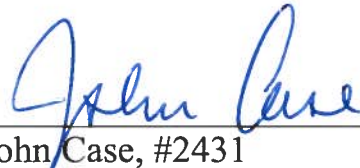
## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting and filing requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it does not exceed 30 pages.

The brief complies with C.A.R. 28(k) because, for each 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.



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## **ISSUES PRESENTED FOR REVIEW**

Ms. Lozano incorporates by reference the Statement of Issues set forth on page 1 of her Opening Brief, filed January 30, 2012.

## **STATEMENT OF THE CASE**

Ms. Lozano incorporates by reference the Statement of the Case set forth on pages 1 through 4 of her Opening Brief, filed January 30, 2012.

## **SUMMARY OF ARGUMENT**

In their Opening Brief, Petitioners Leslie Durgin, Cathy Alderman and Amy Pitlik cite extensively from transcripts of hearings before the Title Board. Those transcripts are not part of the record, and this Court should disregard them.

Petitioners' contention that Proposed Initiative 2011-2012 #46 ("Initiative 46") violates the constitutional single subject requirement fails. Initiative 46 has one purpose, namely prohibiting the intentional killing of any innocent person at any stage of development. The initiative's title clearly defines "person" and, contrary to Petitioners' claim, "innocent" has a well established, commonly understood meaning and therefore does not need to be defined.

The fact that Initiative 46 applies to multiple classes of innocent persons does not render the initiative improper. The provisions of Initiative 46 are interrelated and operate as an integrated whole to carry out the initiative's purpose of protecting all innocent human life. That is all the single subject rule requires.

There is nothing misleading about Initiative 46's ballot title. To the extent a new legal standard is established, the Title Board accurately and adequately defined that standard by incorporating the initiative's definition of "person" in the ballot title. The voters will know precisely what they are called upon to decide.

Finally, the title of Initiative 46 is accurate in all respects because it describes the initiative's terms and effects. Petitioners' protests notwithstanding, the initiative does in fact "extend" an extant state constitutional right to life to persons who do not currently enjoy that right, namely the unborn.

None of Petitioners' objections to Initiative 46 has merit. Accordingly, Ms. Lozano respectfully asks that this Court affirm the Title Board's actions.

### **ARGUMENT**

I. THE TRANSCRIPTS APPENDED TO AND CITED IN PETITIONERS' OPENING BRIEF ARE NOT PROPERLY INCLUDED IN THE RECORD AND THIS COURT SHOULD DISREGARD THEM.

A. **Standard of Review:**

The content of the record in this original proceeding is established by statute. Statutory construction is a question of law that this Court reviews *de novo*. *E.g.*, *Apodaca v. Allstate Ins. Co.*, 255 P.3d 1099, 1101 (Colo. 2011).

B. **Transcripts of hearings before the Title Board are not part of the record and Petitioners' reliance on them is improper.**

Petitioners attached to their Opening Brief the transcripts of two hearings before the Title Board. (*See* Exs. 1 & 2 attached to Petitioners' Opening Brief.)



Petitioners cited and relied heavily upon those transcripts in making their arguments. For the following reasons, that reliance is misplaced.

This proceeding is an original action created by statute. The material on which this Court bases its decision is as follows:

[T]he secretary of state shall furnish . . . , 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**.

C.R.S. § 1-40-107(2) (emphasis added).

By statute, the only materials properly included in the record are the certified copies of the petition, titles and submission clauses, motion for reconsideration and Title Board rulings appended to the Petition. The transcripts appended to Petitioners' Opening Brief are not part of the record. Even if such transcripts were properly includable, the copies appended to Petitioners' Opening Brief are not certified by the Secretary of State, as § 1-40-107(2) mandates. Petitioners' reliance on the transcripts is improper and this Court should not consider them.

II. INITIATIVE 46 CONTAINS ONLY ONE SUBJECT: PROTECTING INNOCENT HUMAN LIFE AT ANY STAGE OF DEVELOPMENT.

A. **Standard of Review:**

Petitioners' statement of the standard of review is incomplete. Petitioners fail to note that this Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title & Submission Clause for*

2009-2010 #91, 235 P.3d 1071, 1076 (Colo. 2010). Further, the Court “do[es] not determine the initiative’s efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal.” *Id.*

**B. The term “innocent person” does not implicate the single subject requirement, since the ballot title clearly defines “person,” and the word “innocent” has a commonly understood meaning that need not be spelled out in the title.**

The principal thrust of Petitioners’ single subject contentions is their claim that “innocent person” is undefined and confusing. (Petitioners’ Opening Brief at 9-11.) Petitioners proffer no argument as to how or why the absence of a definition constitutes a single subject rule violation in and of itself, so there is really nothing to refute in this regard. Even so, Ms. Lozano respectfully submits that the term at issue is not a single subject violation for the reasons that follow.

Inclusion of the undefined term “innocent person” in a ballot initiative and ballot title is hardly unprecedented. The Oregon Supreme Court approved such a ballot title in *Mabon v. Myers*, 35 P.3d 1016 (Ore. 2001), which involved a proposed amendment to the state constitution that would have prohibited abortions, physician-assisted suicides and causing mortal harm to “innocent persons.”

The key component of Initiative 46 is the term “person.” That term is defined in both the initiative’s text and the ballot title. As explained on pages 16 and 17 of Ms. Lozano’s Opening Brief, the title correctly advises voters that for purposes of Initiative 46 “person” means “every member of the species homo

sapiens at any stage of development.” Thus, voters will know that Initiative 46 establishes legal protections for everyone from the moment of conception forward.

Petitioners aver that “innocent” has “no ordinary or intuitive meaning.” (Petitioners’ Opening Brief at 16.) That is incorrect.

In analyzing an initiative this Court “appl[ies] general rules of statutory construction and accord the language of the initiative its plain meaning.” *2009-2010 #91*, 235 P.3d at 1076. “Innocent” does not require further definition because it is a commonly known term with a plain meaning that will not confuse voters.

Per the Merriam-Webster Online Dictionary, “innocent” means:

1. (a) Free from guilt or sin especially through lack of knowledge of evil: blameless (an *innocent* child);  
(b) Harmless in effect or intention (searching for a hidden motive in even the most *innocent* conversation);  
(c) Free from guilt or fault: also, lawful (a wholly *innocent* transaction).
2. (a) Lacking or reflecting a lack of sophistication, guile, or self-consciousness (almost entirely *innocent* of Latin);  
(b) Ignorant;
3. Lacking or deprived of something (her face *innocent* of cosmetics.)

*Innocent Definition*, Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/innocent> (last visited Feb. 16, 2012). The Oxford American Dictionary defines innocent as:

1. Not guilty.
2. (a) Simple; guileless; naïve; (b) pretending to be guileless.

3. Harmless.
4. Without; lacking
5. Not causing physical or moral injury; harmless: *innocent fun*.
6. Devoid (usually followed by *of*): *a law of innocent merit*.

*Oxford American Dictionary* 406 (1999). The above definitions define “innocent” similarly. Both refer to the term as an adjective that modifies an object. The gist of the definition is that “innocent” describes an absence of guilt, blame or fault.

In the context of “innocent person” as used in Initiative 46, “innocent” is an adjective modifying the term “person,” which the initiative and ballot title define. Combining the given definition of “person” and the ordinary meaning of “innocent,” an innocent person is a human being at any stage of development lacking in guilt, fault or blame. Petitioners’ argument that the term “innocent person” has no ordinary or intuitive meaning is incorrect as a matter of fact.

**C. Initiative 46 has a single purpose and effect.**

Petitioners contend that Initiative 46 “contains two unrelated subjects: (i) prohibiting the killing of all persons who have not been convicted of a crime; and (ii) prohibiting abortion, birth control, artificial reproductive technology, and stem cell research through a constitutional recognition of a ‘right to life’ that applies to fertilized eggs.” (Petitioners’ Brief at 11.) The spin-doctoring inherent in that characterization appears to be a thinly veiled invitation for this Court to reject Initiative 46 on substantive grounds. Respondent asks that the Court decline that invitation and leave the substantive evaluation to the electorate. *See In re Title,*

*Ballot Title & Submission Clause for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000) (in conducting single subject review the Court does “not engage in policy choice – that is the role of the voters should the initiative qualify for the ballot.”).

In any event, Petitioners’ claim that the initiative “links at least *two* broad, unrelated substantive concepts in a single initiative” is inaccurate. (Petitioners’ Opening Brief at 11 [emphasis original].) Even if individual components of an initiative address multiple subjects, the single subject rule is satisfied where the disparate provisions further a single purpose or objective. *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010).

Section 1 of Initiative 46 confers a constitutional right to life on all innocent persons. Section 2 implements that right by prohibiting the intentional killing of an innocent person. Thus, the provisions of Initiative 46 work in complete harmony to further a single purpose, namely the protection of innocent human life at all stages of development. That easily satisfies the single subject rule.

Petitioners’ principal claim is that Initiative 46 is broad and covers a “wide range” of acts. (Petitioners’ Opening Brief at 12.) That is, of course, true. However, the mere fact that Initiative 46’s protection of innocent life applies to an array of circumstances does not render it a multi-subject measure. Petitioners claim that the initiative violates the single subject rule because the right to life applies to euthanasia, abortion, physician compliance with DNR directives, stem

cell research, and many other areas. But the breadth of the term “innocent person” is not the issue. If Petitioners’ argument were correct, an initiative fails single subject review if it applies equally to blacks and whites, old and young, Christians and atheists, homosexuals and heterosexuals, able-bodied and disabled, etc. It is not the number of factual circumstances to which an initiative might apply that counts; the key is unity of purpose and effect. As discussed above and in Ms. Lozano’s Opening Brief, such unity abounds in Initiative 46.

Petitioners also allege that subjects such as prohibiting abortion and stem cell research are “incongruent” with prohibiting the killing of persons not convicted of a crime. (Petitioners’ Brief at 13.) How so? As Initiative 46 defines “person,” an unborn child is as much a person as a grown adult. Both the unborn child and unconvicted adult are “innocent” as that term is commonly understood, so both are entitled to the protection afforded by Initiative 46’s constitutional right to life and its related prohibition against intentional killings. Those subjects are perfectly congruent and comport fully with single subject principles.

Again, Petitioners’ complaints regarding alleged overbreadth go to substance. Petitioners are free to take their concerns to the electorate. If the voters of this state do not want the wide-ranging protection of innocent life that Initiative 46 would provide, they are free to vote “no.” However, to take that choice from the voters, this Court would have to find that Initiative 46 encompasses multiple

incongruous subjects. That is not the case. Initiative 46 confers a constitutional right to life upon all innocent persons, regardless of their stage of development, and prohibits the intentional killing of such persons. That is a single subject.

**D. Initiative 46 involves no “logrolling.”**

Logrolling is “the practice of jumbling together in one act incongruous subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits.” *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1383 (Colo. 1985). Thus, for Petitioners to make their charge of logrolling stick, they must prove that Initiative 46 lumps together multiple incongruous subjects. Initiative 46 does no such thing.

As previously explained, there is nothing “incongruous” about a provision that prohibits the intentional killing of both born and unborn innocents. Any apparent incongruity between, for instance, restricting stem cell research and prohibiting euthanasia disappears with the simple realization that in both instances the law is protecting an innocent person as Initiative 46 defines that term.

Petitioners complain that some people would support a ban on killing “innocent persons” but would not support defining “person” in a way that included fertilized human eggs. (Petitioner’s Opening Brief at 16.) Of course, there is no danger that those people will be misled into voting for Initiative 46 since the initiative and the ballot title both make clear that a “person” is any human being at

any stage of development. If such a voter does not want to confer constitutional rights upon the unborn, he can and will vote “no.” All the single subject rule requires is that separate matters in a proposed initiative be “properly connected.” *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo. 1996). The “proper connection” here lies in the Initiative’s proposed protection for all human life from the moment of conception to the moment of death.

The single subject rule “should be construed liberally to avoid unduly restricting the initiative process.” *In re Ballot Title 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009). That would be best accomplished here by affirming the Title Board and letting the voters decide whether Petitioners’ concerns have merit.

### III. THE BALLOT TITLE FOR INITIATIVE 46 CORRECTLY AND FAIRLY EXPRESSES THE TRUE INTENT AND MEANING OF THE MEASURE.

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

Petitioners correctly point out the requirement of the Title Board in setting the title that shall, “correctly and fairly express the true intent and meaning” of the initiative. C.R.S. § 1-40-106(3); (Petitioner’s Opening Brief at 17.) Once again, though, Petitioners fail to mention that this Court affords “great deference to the [title] board’s discretion,” *In re Proposed Initiative Concerning “State Personnel Sys.”*, 691 P.2d 1121, 1125 (Colo. 1984), and will “engage in all legitimate presumptions in favor of the propriety and of the Board’s actions” in a title review board challenge, *In re 2009-2010 #91*, 235 P.3d at 1071. This presumption



“precludes this Court from second-guessing every decision the Board makes in setting a title.” *In re Ballot Title 1999-2000 #235(a)*, 3.P3d 1219, 1225 (Colo. 2000). Therefore, this Court affords a much higher deference to the Title Board than the quasi-*de novo* review the Petitioners seem to suggest should apply.

**B. The title and submission clauses are not misleading.**

The law provides that “[i]n setting a title, the title board shall consider the public confusion that might be caused by misleading titles.” C.R.S. § 1-40-106(3). The Title Board should set a title that is concise, fair, accurate, clear, and complete. *In re Ballot Title 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008); *In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1083 (Colo. 1998). In doing so, the Title Board shall “consider the public confusion that might be caused by misleading titles,” and shall avoid setting titles that would make a “yes” or “no” vote unclear. *In re Ballot Title 1999-2000 #255*, 4P.3d 485, 496 (Colo. 2000).

The Title Board need not define every term discussed in the Initiative, unless the terms “adopt a new or controversial legal standard which would be of significance to all concerned with the initiative.” *Id.* at 497. Further, a title board is not required to “address every provision of a proposed measure.” *Id.* at 499.

Petitioners argue that Initiative 46 and its title set forth a new and controversial legal standard by incorporating the term “person” and adding the term “innocent.” (Petitioner’s Opening Brief at 18-19.) This argument must fail.

As discussed above, and in Ms. Lozano's Opening Brief, combining the commonly-understood term "innocent" with the clearly defined term "person" is not confusing. (Respondent's Opening Brief at 13-16.) The term "innocent" modifies the defined term "person" so that, in both Initiative 46 and its title, the average voter is able to understand the application of the proposed amendment.

To the extent Initiative 46 sets forth a new legal standard, the Title Board fully discharged its duty to set forth a concise, fair, accurate title. First, the Title Board included the definition of "person" in the title. Second, the Title Board did not need to include a definition of the commonly-known term "innocent," because it is well-understood by the majority of the public. Therefore, combining the terms "innocent" and "person" does not lead to voter confusion. Rather, it alerts a voter that Initiative 46 "concern[s] the extension of rights to all human beings at any stage of development[.]" (Title Board Rulings at 1, copy attached to Petition.). A voter, therefore, would not be misled by the title. Rather, a voter would understand that Initiative 46 stands for protecting the lives of unborn human beings.

**C. The title accurately represents the intent of Initiative 46.**

The title board may "not speculate on how a potential amendment would be interpreted." *In re 2009-2010 #24*, 218 P.3d at 356-57 (citing *In re Injured Worker's Amendment*, 873 P.2d 718, 721 (Colo. 1994)). Rather, the Board must set a title that accurately represents the initiative, and enables "the electorate,

whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *Id.* at 357.

Petitioners argue the title of Initiative 46 is inaccurate because it describes the initiative as an “extension” of rights when the initiative would actually create new rights. (Petitioners’ Opening Brief at 20-21.) Petitioners argue the application of Initiative 46 to abortion, certain forms of birth control, artificial reproduction, and biomedical and stem cell technology is beyond the current constitutional right to life set forth in both the United States and the Colorado Constitutions. This is, indeed, true. However, Initiative 46 does not stand for a new constitutional prohibition; it stands for an extension of the existing right to life.

The right to life currently exists under the Colorado Constitution and the common law. Article II, section 3 of the Colorado Constitution states that all persons have the following inalienable rights including: “the right of enjoying and defending their lives and liberties.” Article II, section 25 states that “no person shall be deprived of life, liberty, or property without due process of law.” Indeed, “the right to life is an inalienable right which federal and state governments were instituted to secure.” *Taylor v. Welle*, 352 P.2d 106, 110 (Colo. 1960) (Frantz, J. dissenting). This Court held that minors have the same inalienable rights as adult persons. *Hartley v. Hartley*, 886 P.2d 665 (Colo. 1994).

The United States Supreme Court has held that “the word ‘person,’ as used

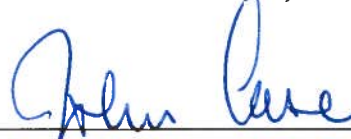
in the Fourteenth Amendment, does not include the unborn.” *Roe v. Wade*, 410 U.S. 113, 159 (1973). Likewise, protection for the unborn is a rarity under Colorado law. *See, e.g., People v. Lage*, 232 P.3d 138 (Colo. App. 2009) (Colorado homicide statutes do not apply to or protect unborn children).

The above discussion demonstrates that a right to life does currently exist under the Colorado Constitution as to born human beings. Initiative 46 extends the right to life under the Colorado Constitution to a broader class of “persons,” namely all innocent persons at all stages of development, including the unborn. Accordingly, Initiative 46 does exactly what the ballot title says it does – it “extends” existing rights to the unborn. Petitioners’ claim of inaccuracy thus fails.

### CONCLUSION

For the foregoing reasons, and those set forth in her Opening Brief, Respondent Rosalinda Lozano respectfully requests that this Court affirm the Title Board’s actions in connection with Proposed Amendment 2011-2012 #46. Respectfully submitted February 21, 2012.

BENSON & CASE, LLP



John Case, #2431

Attorney for Rosalinda Lozano

**CERTIFICATE OF SERVICE**

I hereby certify that on February 21, 2012 the original and ten copies of the foregoing **ANSWER BRIEF OF RESPONDENT ROSALINDA LOZANO** were filed with:


Clerk of the Colorado Supreme Court  
101 West Colfax Avenue, Suite 800  
Denver, CO 80202

I further certify that on February 21, 2012 true and correct copies of the foregoing **ANSWER BRIEF OF RESPONDENT ROSALINDA LOZANO** were served via Federal Express overnight delivery upon the following:

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