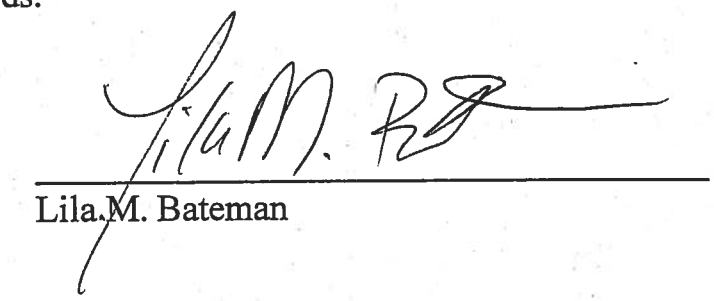
SUPREME COURT OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80203	FILED IN THE SUPREME COURT FEB 2 1 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for 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	**▲ COURT USE ONLY ▲**
Attorneys for Petitioners: Lila M. Bateman, #32297 Edward T. Ramey, #6748 Heizer Paul Grueskin LLP 2401 15th Street, Suite 300 Denver, CO 80202 Telephone: 303-595-4747 Facsimile: 303-595-4750 Email: lbateman@hpgfirm.com; eramey@hpgfirm.com	Case No. 12SA10
PETITIONERS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). The brief contains 3,586 words.



Lila M. Bateman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Leslie Durgin, Cathy Alderman and Amy Pitlik ("Petitioners"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit the following Answer Brief concerning Proposed Initiative for 2011-2012 #46 ("Initiative #46").

ARGUMENT

I. The Proposed Initiative Violates the Single Subject Requirement Because It Contains Multiple, Distinct and Separate Subjects That Are Not Dependent Upon or Necessarily Connected To Each Other, And Which Are Not Clearly Expressed in the Title.

The Title Board and proponents argue that the sections of the measure each relates to the other. Their arguments, however, rest on their refusal to define the term "innocent person" and their conflation of at least two distinct and unconnected subjects in one measure. Neither of their approaches meets the threshold single subject requirement and no title should have been set.

A. "Innocent person" cannot be left undefined or it will result in voter confusion and fraud

There is no common or contextual understanding of the term "innocent person" in Initiative #46. To prove this point, Petitioners identified at least four possible readings that each result in a markedly different meaning and reach for the measure. Pet. Op. Br. at 9-11. The Title Board and proponents, however, attempt a piecemeal approach to focus only on the word "person" and leave the rest of the

term undefined, positing irreconcilable approaches that will result in voter confusion and fraud.

1. Title Board's Arguments

The Title Board does not try to argue there is a common understanding of the term "innocent person." It, instead, omits reference to the word "innocent" entirely and equates the proposed initiative to two different measures that exclusively dealt with rights accorded to "unborn" or "prenatal persons." Title Bd. Op. Br. at 6-8. While this narrower interpretation is not entirely unfounded – even the Swanson proponent in his opening brief accepts the possibility that some voters may understand "innocent person" as a substitute for "innocent child" – the Title Board's two examples have no adverse impact on the present case. *See* Swanson Op. Br. at 27.

First, in *Metzger,* the county instituted an action against the father of an "unborn child" for refusing to provide support for the mother. *Metzger v. People*, 53 P.2d 1189, 1190 (Colo. 1936). The father challenged the constitutionality of the dependency and neglect statute on the basis that all legislation, except appropriations, must have a title that embraces the content. The father argued that the original 1907 title for "dependent and neglected children" did not cover the new content of the 1923 amendment. *Id.* The text of the 1923 amendment –

unlike the original statute and even current law – defined the term to specifically include children from the time of their conception. *Id.* at 1190-91; *cf. People ex rel. H.*, 74 P.3d 494, 495 (Colo. App. 2003). The *Metzger* Court held that the amendment's specific definition did not introduce a foreign subject under the original title.

Like here, *Metzger* recognizes the importance of formal definitions in the text to identify the proper subjects and scope of the measure. Fundamental to the *Metzger* case is the Court's recognition that the "efficiency of social legislation depends largely upon the definition of terms." *Metzger,* 53 P.2d at 1191. In fact, "[n]o better means of accomplishing the purpose [of the legislation] can be imagined than a formal definition." *Id.* (emphasis added). However, unlike in *Metzger* where "dependent and neglected children" was actually defined, the present initiative contains no definition of "innocent person" in either the text or the title. Leaving that key term undefined disguises the subjects of the present measure.

Second, the recent Nevada initiative sought to prohibit the intentional taking of a "prenatal person's life," specifically defining "prenatal person" in the measure. *See* Title Bd. Op. Br., Ex. C at 1, 4. While the Nevada court aptly acknowledged that an excessively general subject can violate the single subject requirement, the

court determined that the taking of "prenatal life" could be a single subject. Focusing on "prenatal life," the court determined that the measure had unequivocal effects on birth control, ectoptic pregnancy, in vitro fertilization treatment, and stem cell research. Because the proponents had not fully described those effects, the court sua sponte rewrote the initiative's description of effects to include more accurate information. Shortly after that order issued, the Nevada proponents voluntarily withdrew their ballot petition and re-filed a new one. *See* Nevada Secretary of State, http://nvsos.gov/index.aspx?page=1016 (last visited Feb. 20, 2012).

The former Nevada initiative is not an appropriate benchmark for whether the current Colorado initiative meets the single subject requirement. The Colorado measure is not limited to "prenatal persons." It sweeps far broader to prohibit the taking of all "innocent persons'" lives, again without defining that term in the text or title.

In this respect, Initiative #46 is identical to the 2011-2012 Arkansas initiative that prohibited the intentional killing of "innocent persons" which included, but was not limited to the "unborn." In Arkansas, the Attorney General rejected the ballot measure due, in part, to ambiguities relating to the undefined term "innocent person." *See* http://ag.arkansas.gov/opinions/docs/2011-163.pdf

(last visited Feb. 20, 2012). As is true with the proposed Colorado initiative, the Arkansas Attorney General recognized that this undefined term may simply be a rhetorical assertion that all persons are innocent, or alternatively that it could refer to some legally non-culpable subset of persons where some or all of the remaining persons fall outside the constitutional "right to life." *Id.* at 6. The ballot petition's ambiguities were compounded, not clarified, by reference to the unborn.

2. Proponents' Arguments

The proponents take a different tack before the Court: they renounce their earlier explanation to the Title Board of the term's meaning and now assert that "innocent person" should be left undefined. They contend that the legislature has used the term, without definition, repeatedly and uniformly throughout the UCC and the criminal code. Swanson Op. Br. at 24-26; Lozano Op. Br. at 15. There are obvious flaws with this argument.

First, the Swanson proponent seeks to increase the frequency of use by pointing to inapposite terms – such as "innocent purchaser" or "innocent cause" – when Initiative #46 specifically uses the term "innocent person." Even then, the proponents grossly overstate the frequency in which "innocent" or "innocence" is used in Colorado statutes. They include nearly 60 references from the case annotations and comments, not the statutes themselves. The proponents' contrary

assertion notwithstanding, the legislature has set out context-specific thresholds for innocence in the various statutes, such as "factually innocent" for identity theft in C.R.S. § 16-5-103(c) and "presumption of innocence" until proven guilty beyond a reasonable doubt in a criminal proceeding in C.R.S. § 18-1-402.

Second, the term "innocent person" is expressly mentioned in only two Colorado statutes. Both proponents rely on the perjury provision in the first degree murder statute, C.R.S. § 18-3-102(1)(c), to suggest that the term is not legislatively defined. That statute, however, establishes the contextual meaning of the term "innocent person" as one who was "born" and "alive" (excluding fetuses) then wrongfully convicted and executed through another's perjury. *Id.*; C.R.S. § 18-3-101(2). While the Lozano proponent overlooks the legislature's other express definition of the term "innocent person" set out in C.R.S. § 18-1-602(b)(2), the Swanson proponent simply dismisses it as just a mens rea requirement, without any explanation why that is inapplicable to an understanding of their initiative. The term is nonetheless key to Initiative #46 and cannot be dismissed as a byproduct of "legislative silence."

Third, the Lozano proponent also surmises that "[e]veryone knows what it means to be 'innocent'" and no definition is needed – or offered – based on some voters' presumptive jury service in criminal cases. Lozano Op. Br. at 15. Even

taking the proponent at her word, her theory rests on what a jury member would understand the term to mean.

Ballot measures should not rely on the interpretative demands of a hypothetical jury. Juries are armed with specific jury instructions and faced with the question whether to convict an individual for a specific offense. Relying on a jury member's extrapolation would be a marked departure from the test to be applied to a petition initiative. The threshold requires that the text of the initiative be understood by the Title Board before a title can be set, and at least one Title Board member expressed serious uncertainty. *In re Proposed Initiative for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999); *see also* Pet. Op. Br., Ex. 1, 12/21/11 Tr. at 26:4-6 ("This is really hard, in my mind, for someone to read and understand what's going on."). The title must then be written to provide a brief but meaningful glimpse into the measure for a voter "quickly scanning" a petition, whether that person is "familiar or unfamiliar with the subject matter of a particular proposal." *In re Proposed Initiative for Limited Gaming in the City of Antonito,* 873 P.2d 733, 742 (Colo. 1994). A ballot title cannot require "ingenious reasoning," as would be the case here. *In re Proposed Initiative for 1999-2000 #25,* 974 P.2d 458, 469 (Colo. 1999).

Fourth, even if "legislative silence" or "jury service" is the yardstick for what a voter may understand, the proponents now advocate a dangerous sliding-scale for what the term "innocent person" should mean. The Swanson proponent argues that Initiative #46 would not prohibit killing those people who would later "almost certainly be found guilty," even without an actual conviction. Swanson Op. Br. at 26. There is no contextual or legal basis for an almost-but-not-quite convicted standard. More importantly, the existence of a sliding scale for an "innocent person" is demonstrable proof that there is no, and will be no, common voter understanding absent an express definition in the initiative's text and title.

B. There is no single subject

Petitioners argued before the Title Board and to this Court that the measure has multiple subjects: it seeks to impose a constitutional "right to life" to prohibit abortions and other reproductive health care procedures and also to make every intentional act that results in the death of an "innocent person" unlawful. In response, the Title Board conflates the two by suggesting that "#46 extends the 'right to life' to 'persons' 'at any stage of development' by prohibiting the intentional killing of any person." Title Bd. Op. Br. at 6. The proponents have a different view and argue that there is a single subject, framed now as either to "prohibit the intentional killing of innocent persons" or to "protect all innocent

human life at any stage of development." Lozano Op. Br. at 4, 7, 9; Swanson Op. Br. at 3-4.

The Title Board and the proponents concede the overwhelming breadth of the measure. The proponents frankly admit that there are really two "rights" and countless varieties of conduct at issue in Initiative #46. According to the proponents, the two rights are a "right to life" and "right to not be intentionally killed." Swanson Op. Br. at 23; Lozano Op. Br. at 10. The latter prohibits not just "euthanasia" but also "any other topic that might involve the intentional killing of an innocent human being." Lozano Op. Br. at 10 (emphasis added). This spectrum is so broad as to trigger the very concerns that lie at the heart of the single subject requirement. *See* C.R.S. § 1-40-106.5(e).

1. This a case involving multiple subjects, not predicted effects or necessary connections

The proponents attempt to dismiss all concerns by casting this as a challenge to future applications, implementations, or necessary connections. Swanson Op. Br. at 6-9; Lozano Op. Br. at 6-9. They point the Court to the initiative's "four corners." *Id.*

First, the four corners of Initiative #46 prove that this is not a case about hypothetical applications or predicted effects. The stated "purpose" of the measure is to provide a "right to life." The specific enumerated "effects" establish the

prohibition on abortion, birth control and other reproductive health care procedures. The Swanson proponent concedes that voters will understand this initiative to be an abortion ban. *See* Swanson Op. Br. at 16. Even more, the Lozano proponent concedes that a voter with rudimentary language skills will know that a yes vote on Initiative #46 is a "vote to confer a right to life upon the unborn." Lozano Op. Br. at 17.

However, as the proponents further admit, those enumerated effects and stated purpose do not limit the other material prohibition set forth in the first sentence in Section 2: the prohibition on intentionally killing innocent persons.[1] Swanson Op. Br. at 13; Lozano Op. Br. at 10. That prohibition leaves nothing to predict. By its plain terms, it precludes: vigilantism, lawful and lethal defense of the home, officers who kill in the line of duty, euthanasia, and even advance medical directives, to name just a few.

---

[1] The Swanson proponent suggests that the Petitioner's Motion for Rehearing concedes that vigilantism, the make-my-day defense and others are hypothetical legal applications of the measure. Swanson Op. Br. at 6-7. The Motion for Rehearing does no such thing. It points out the proponents' concession that the measure also covers a wide range of legal and illegal conduct, which they do not articulate in the enumerated effects. The Petitioners have consistently argued, and Chairman Hobbs agreed, that the express prohibition on killing innocent persons is far broader than the enumerated effects that the proponents chose to mention. Pet. Op. Br. at 11-17.

This case is therefore distinguishable from the proponents' "effects" and "implementation" cases. In each of those cases, the measures' broad opening statements or central focus were narrowed or confined by the subsequent implementation and effects provisions. *See In re Proposed Initiative #45,* 234 P.3d 642, 646-47 (Colo. 2010); *In re Proposed Initiative #258(A)*, 4 P.3d 1094, 1098-99 (Colo. 2000). Here, Initiative #46 has a separate substantive "right" or "effect" that prohibits killing innocent persons that is far broader than the preceding "right to life" purpose and the subsequent enumerated abortion and reproductive health care applications. This is therefore a case about multiple subjects.

Second, there is no necessary and proper connection between the prohibition on abortion and the prohibition against killing "innocent" persons such as those who have not been convicted of a crime. The proponents seem to imply that the former is a subset of the latter, but voters should not have to choose a general grant as opposed to the narrow objective. In fact, when the proponents crafted the prior initiatives, they did not roll their "personhood" objective into a broader prohibition.

In the current measure, the proponents seek to unite the disparate subjects that would prohibit abortion and would prohibit killing non-convicted persons under the umbrella of "protecting all innocent life." Swanson Op. Br. at 4; Lozano Op. Br. at 4. A protection of life is the widest possible net and would make

impermissibly broad concepts with unconnected subjects – such as "non-emergency services," "judicial branch," "limiting government spending," "revenue changes," or "water" – seem manageable. *See, e.g., In re Proposed Initiative for 2005-2006 #55,* 138 P.3d 273, 281-82 (Colo. 2006) (holding that the "theme of restricting non-emergency government services is too broad and general" to make the measure's two purposes part of the same subject); *In re Proposed Initiative for 1997-1998 #64*, 960 P.2d 1192, 1200 (Colo. 1998) ("If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated."); *In re Proposed Initiative 1996-4*, 916 P.2d 528, 532-33 (Colo. 1996) (reasoning that the single subject requirement precludes grouping provisions under a broad concept and holding that "[l]imiting government spending is too broad and general a concept to satisfy the single subject requirement"); *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (concluding that a "revenue changes" umbrella did not alter the fact that there were two subjects, tax credit and ballot title procedural requirements); *In re Proposed Initiative "Public Rights in Water II"*, 898 P.2d 1076, 1080 (Colo. 1995) (where two provisions merely have a common

characteristic, such as water, such a connection is "too broad and too general" to make them part of the same subject).

2. Initiative #46 impermissibly logrolls multiple subjects

Notably, the Title Board's and proponents' opening briefs ignore the reasons for the 2-1 split and Chairman Hobbs' concerns about logrolling. The Lozano proponent, instead, argues that there is no logrolling when the initiative applies to a "broad class of people" that includes "all human beings at all stages of development." Lozano Op. Br. at 9. The Swanson proponent suggests that the inclusion of details in Sections 2(a)-(e) is not logrolling because those "effects mentioned" are related. Swanson Op. Br. at 14-15. Respectfully, the proponents misunderstand the nature of the logrolling problem.

Initiative #46 is something very different from "personhood" initiatives presented previously. Initiative #46 includes an admittedly separate, substantive provision that prohibits killing innocent persons. As Chairman Hobbs aptly recognized, by including language that prohibits the intentional killing of innocent persons in Section 2 of the initiative, the new proposed measure is broader than the two prior unsuccessful "personhood" measures. Pet. Op. Br., Ex. 2, 1/4/12 Tr. at 24:22-25:15. While a substantial number of voters may support a prohibition against killing "innocent persons," voters may not also want to define fertilized

eggs as "persons" or support a categorical prohibition on abortion or other common reproductive rights and procedures. Here, the proponents seek to garner voter support for controversial subjects by including a seemingly more palatable general prohibition against killing innocent persons. Conversely, while some voters may favor a prohibition directed to abortion, they may not favor the inextricably linked broader sweep for an undefined and generalized prohibition on the killing of "innocent persons."

The logrolling problem is therefore not simply an issue of an expanded class of persons. If that were true, the Title Board would have viewed Initiative #46 as a mirror of the two earlier initiatives that sought to redefine "person." It did not. Nor is the issue resolved by selective mention of some "effects" that concern abortion, birth control and reproductive health care procedures.

II. The Title is Not Fair or Accurate[2]

A. The title and submission clauses fail to inform the voters that there are new and controversial standards

The Title Board and the proponents concede that Initiative #46 has a "new" legal standard. *See* Title Bd. Op. Br. at 11; Swanson Op. Br. at 21; Lozano Op. Br.

[2] Petitioners prevailed on their catch-phrase challenge before the Title Board. The Title Board agreed that the phrase "right to life" in the original title was an impermissible catch-phrase, and omitted that phrase from the current title. While the Lozano proponent argues that there are "no catch phrases" in the current title, this is not an issue upon which Petitioners appealed.

at 16. They argue that it is enough to apprise voters of the new legal standard by reciting what "person" would now mean and tracking component parts of Initiative #46. The Title Board and proponents, however, attempt to re-write the measure to eliminate the innocence threshold.

The new legal standard created by the measure and title is "innocent person," not just "person" or "human beings" alone. As explained above, and in Petitioner's Opening Brief, there is no singular definition or common understanding of that term for this measure. Notwithstanding the proponents' contrary suggestion, even virtual word for word reiteration of the initiative in the title "does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative." *In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850 (Colo. 1994).

B. Initiative #46's title is inaccurate and misleading

The Swanson proponent argues that the title is not misleading because voters are informed of the "most significant change in the law" in the first clause in the title. Swanson Op. Br. at 20. The title, however, makes the new standard even more ambiguous. The first clause that the proponent relies upon focuses on extending "rights to all human beings at any stage of development," irrespective of

innocence. Yet that is an inaccurate recitation of the legal standard the proponents seek to impose in Initiative #46.

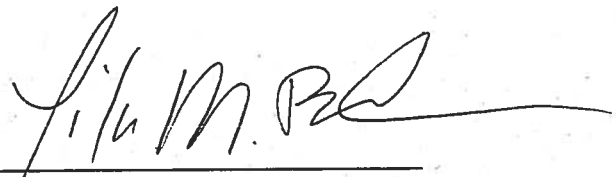
The Swanson proponent also argues that the title is not misleading because it sets out what they purport to be the single subject of the initiative, which is to prohibit intentionally killing innocent persons. Swanson Op. Br. at 21. That referenced subject is buried, however, five lines down in the title and is embedded between the redefinition of person to include fertilized eggs and the prohibition on birth control and other reproductive health care choices. By embedding the broader subject, this could easily mislead voters into believing that the measure only concerns a prohibition on intentionally killing "unborn" or "prenatal persons." *See In re Proposed Initiative for Limited Gaming in the City of Antonito,* 873 P.2d at 742 (title is misleading based on order of presentation when provisions having statewide effect were buried between references to Antonito so that a voter quickly scanning the initiative could be misled into believing that the measure only concerned limited gaming in Antonito).

In short, the title is misleading and fails to reflect the true intent and purpose of the measure.

CONCLUSION

The Petitioners respectfully request that this Court should declare that the proposed initiative violates the single subject requirement and that the title fails to correctly and fairly express the initiative's true intent and meaning. The Title Board's decision should be reversed and the measure returned.

Respectfully submitted this 21st day of February, 2012.



Lila M. Bateman, #32297
Edward T. Ramey, #6748
Heizer Paul Grueskin LLP
2401 15th Street, Suite 300
Denver, CO 80202
Telephone: 303-376-3702;
303-376-3712
Facsimile: 303-595-4750
Email: lbateman@hpgfirm.com;
eramey@hpgfirm.com
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2012, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was served via Federal Express to the following:

John Case
Benson & Case, LLP
1660 South Albion Street, Suite 1100
Denver, CO 80222
Attorney for Respondent Rosalinda Lozano

Robert J. Corry, Jr.
600 17th Street
Suite 2800, South Tower
Denver, CO 80202
Attorney for Respondent Kevin Swanson

Maurice G. Knaizer, Esq.
Deputy Attorney General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Amy Knight