

SUPREME COURT OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. S.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.

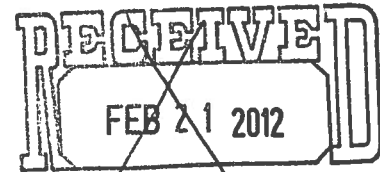
Respondents: ROSALINDA LOZANO and
KEVIN SWANSON

and

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

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OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

Supreme Court Case
No.2012SA10

ANSWER BRIEF OF RESPONDENT KEVIN SWANSON

CERTIFICATE OF COMPLIANCE

Applicable Word Count: I hereby certify, according to C.A.R. 32, that this brief complies with the applicable word limit set out in C.A.R. 28. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28 as the word count is 3,829.



Drew Hymer

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ISSUES PRESENTED FOR REVIEW

Mr. Swanson incorporates by reference the statement of issues set forth on page 1 of his Opening Brief, filed January 30, 2012.

STATEMENT OF THE FACTS AND CASE

Mr. Swanson incorporates by reference the Statement of the Facts and Statement of the Case set forth on pages 1 through 3 of his Opening Brief, filed January 30, 2012.

SUMMARY OF ARGUMENT

Rather than making legal claims concerning an alleged single subject violation and the alleged inaccuracy of Initiative #46's title, Petitioners' Opening Brief instead sets out merely an ideological opposition to the initiative. The appeals process is not the proper forum for an ideological debate.

Instead, Petitioners must prove Respondent's failure to conform his proposed initiative to the single subject requirement or the Title Board's failure to set an accurate title. Petitioners have failed to prove either of these claims.

Initiative #46 clearly defines the new legal standard that it lays out, both in its language and in the title. Initiative #46 should not be discriminated against by being forced to define the term innocent, which the Colorado legislature itself opts to define only once out of the 86 times it appears in the 2011 Colorado Revised Statutes.

Despite Petitioners' attempts to ideologically refute the single subject of this initiative, they have not succeeded in bringing a true legal objection to it. They have failed to prove the presence of multiple subjects. They have failed to prove that the title is inaccurate or misleading in any way. Therefore, Respondent requests that Petitioners' appeal be expediently dismissed, and that Initiative #46 should be allowed to continue on its way to the 2012 ballot so that Colorado voters are allowed a choice in the matter. Respondent requests an expedient review and dismissal of Petitioners' appeal because any unnecessary delay in time is prejudicial to the right to circulate since Feb. 7th, 2012 was the last day for initiatives to enjoy the statutorily defined right to circulate during a full 180 days.

LEGAL ARGUMENT

I. Initiative #46 Does Not Violate the Single Subject Requirement by Leaving a Critical Term Undefined.

Petitioners accuse Initiative #46 of violating the single subject requirement because of the lack of a definition for the term “innocent.” (Petitioner’s Opening Brief, pp. 9-11) They call this word a “critical term” and accuse Respondents of disguising the true meaning and subjects of the initiative by failing to define it.

However, the term “innocent” is not a critical term to Initiative #46. The terms “human being” and “person” are the two most critical terms, and they are defined in a clear way, in both the title and language of the initiative. These terms are most critical because they are different than the usual definition put forth in Colorado law. The term “innocent”, as argued in Respondent Swanson’s Opening Brief, pages 25-27, has not been considered critical enough by the Colorado Legislature to be defined in 85 of the 86 times the 2011 Colorado Revised Statutes mentions it.

Initiative #46 does not define the term innocent in a different or unusual way, so there is no reason for Respondent to be forced to define it.

Initiative #46 is following the example of preceding Colorado law by not defining the term innocent.

Furthermore, Respondent has no desire to disguise the meaning or subject of the initiative. In plain terms, Initiative #46 lays out the single subject that the intentional killing of innocent persons will be prohibited.

Colorado voters can easily understand what it means to protect an innocent person's right to life under the law by prohibiting their killing. This is not a difficult concept. In order to ensure that voters have accurate information, both the language and the title of Initiative #46 lay out an effects section that details how the initiative would apply to the specific areas of concern which voters have expressed in previous elections. There is no requirement that every possible effect or, by similar application, every possible interpretation of a certain term be included within the title or the ballot title and submission clause. *See In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916 (Colo. 1982); *Spelts v. Klausung*, 649 P.2d 303 (Colo. 1982).

In addition, it was necessary to use the term “innocent” in the wording of Initiative #46 so that the debate did not center around the death penalty. The death penalty is an entirely separate subject from other intentional killings because it is the killing of a guilty person. This is a completely separate subject from prohibiting the intentional killing of innocent persons which is what Respondent desired to make the single subject of Initiative #46.

Petitioners grasp when they attempt to come up with every possible definition of the word innocent in many different contexts and apply it to Initiative #46. (*See* Petitioners’ Opening Brief, pp. 9-10.) Contrary to Petitioners’ claim, Colorado voters will not wonder, for example, if Initiative #46’s term “innocent” means “free from sin” as this is clearly used only in a religious context and not a legal one. (*See* Petitioners’ Opening Brief, pg. 10.) Though Petitioners apparently desire to bring what amounts to an ideological challenge against the merits of Initiative #46, the “Board was created by statute to assist in the implementation” of “[t]he right of the People to initiate laws,” *In re Proposed Initiative Concerning Drinking Age*, 691 P.2d 1127, 1130 (Colo. 1984) and not as a

way for opponents to launch pre-election hypothetical challenges of what voters may possibly conjure up in their minds.

Moreover, even if the term innocent was considered to be critical by this Court, the majority of Colorado ballot initiatives leave many terms undefined that could arguably be considered “critical.” For example, in the 2010 election, all four of the voter initiatives that made the ballot left arguably critical terms undefined. Petitioners did not bring a suit to challenge these initiatives. Instead, they bring a suit against Initiative #46 because of their ideological opposition to it, not because of their sincere concern for the definition of an allegedly “critical term.”

The four voter initiatives that made the Colorado ballot in 2010 were Amendments 60, 61, 62, and 63. The 2010 Colorado Blue Book laid out the exact wording of each of these amendments. (*See* <http://www.law.du.edu/images/uploads/library/CLC/599.pdf>). In each of them, it is quite easy to find arguably critical terms that were left undefined.

Amendment 63 did not define “health care” in its key “right to health care choice” section, even though it was called the “Health Care Choice” Initiative. Clearly this term was very central to the initiative and yet remained undefined.

Amendment 60 provided a new legal standard that “Electors may vote on property taxes where they own real property” and yet did not define the critical term “property taxes”.

While Amendment 61 provided in a key section that “no political subdivision of the state shall contract any debt,” the Amendment did not define “political subdivision” for the voters, though this term was arguably key to their understanding of the Amendment’s provisions.

Amendment 62 did not define the term “human being” though this was a clearly central term to the personhood debate that revolved around this amendment in 2010. While debatable—as nearly every word in the English language could be—the term human being, like the term innocent, is a commonly understood one.

It is apparent that the majority of Colorado voter initiatives do not define commonly understood words, neither are they required to do so, even when these words are included in the midst of a controversial standard. While all four of these 2010 initiatives did indeed adopt a new and possibly controversial legal standard, they explained the *standard* without having to pick apart and define every single word, especially words with accepted definitions that are used in every-day language and understood by the average voter. The average voter does not ponder the meaning of the word “innocent” as the opposition suggests.

The terms that should indeed be defined in Initiative #46—and they are—are the terms “human being” and “person.” These definitions are new and controversial. This is why the initiative’s language advises the voters up front of the new legal standard. The title reflects this, and also duly puts voters on notice.

II. Even if the Term “Innocent” Was Defined, the Single Subject Requirement Would Not be Violated.

Petitioners make an incorrect assumption in their Opening Brief by suggesting that even if the term “innocent” was defined, the initiative would consist of multiple subjects. (*See* Petitioners’ Opening Brief, pp. 11-15.) They delve into an ideological argument here instead of making a legal argument against Initiative #46’s single subject. Colorado law is very clear that neither the secretary of state nor any reviewing court should be concerned with the merit or lack of merit of a proposed constitutional amendment. *Say v. Baker*, 137 Colo. 155, 322 P.2d 317 (1958). Ideological arguments can hold no weight.

Petitioners claim that prohibiting 1) the intentional killing of persons not convicted of a crime and 2) prohibiting abortion, birth control, artificial reproductive technology, and stem cell research are two different subjects because, in their words, the latter prohibition applies to “fertilized eggs” instead of persons. (*See* Petitioners’ Opening Brief, pp. 11, 16, 19.)

First, Petitioners incorrectly assert that all birth control and artificial reproductive technology will be prohibited. (*See* Petitioners’ Opening

Brief, pg. 11.) They overstate the effects of Initiative #46 by making these claims. Initiative #46's effects section makes it clear that only birth control and reproductive technology that take the life of an innocent person will be prohibited.

More importantly, Petitioners forget the fact that the critical terms "person" and "human being" are clearly defined in Initiative #46 to include every member of the species homo sapiens at any stage of development. According to medical science, embryology textbooks, and legislative research, fertilization is the earliest stage of human development. (*See, for example*, Report of the South Dakota Task Force to Study Abortion, Dec. 2005

<http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf> in which the following conclusion was

made: "There can no longer be any doubt that each human being is totally unique from the very beginning of his or her life at fertilization.")

As laid out in pages 18-19 of Respondent Swanson's Opening Brief, despite several cases being brought, no court has struck down definitions

that are very similar to Initiative #46 and include all stages of human development.

Furthermore, Petitioners are incorrect and make yet another ideological argument by referring to the earliest stage of human life as a “fertilized egg.” (See Petitioners’ Opening Brief, pp. 16, 19.) Science does not refer to a new human life in this way, and neither should Petitioners. It is dehumanizing, scientifically inaccurate, and attempts to direct the Court’s attention away from the clear definitions laid out in Initiative #46.

Initiative #46 very clearly defines human beings in this stage of development as persons and extends to them the same protection against killing as it extends to human beings in any other stage of development such as infancy, adolescence, adulthood, and old age. Thus, it is very clear, from the language and title, that Initiative #46’s single purpose of prohibiting the intentional killing of innocent persons extends to human beings from the moment of their earliest development.

There is, in fact, no difference in prohibiting the intentional killing of persons who have not been convicted of a crime (if that is the interpretation of the non-critical term innocent) and prohibiting abortion and birth control that takes the life of an innocent person. According to the definitions laid out in Initiative #46, the unborn persons killed by abortion and some forms of birth control are equally persons who have not been convicted of a crime. These are not two subjects, but instead, one and the same. In reviewing actions of the Title Board, this Court must liberally construe the single-subject and title requirements for ballot initiatives. *Matter of Title, Ballot Title*, 917 P.2d 292 (Colo. 1996); *Matter of Title, Ballot Title, Submission Clause*, 917 P.2d 1277 (Colo. 1996).

Respondent does not deny that Initiative #46 may sweep broadly. The Title Board agreed that its effects may indeed be broad. But the mere breadth of an initiative—especially when it is based on a broad constitutional provision such as the right to life—does not violate the single subject requirement. Petitioners confuse broadness with multiple subjects, and they insert their own ideological beliefs about the beginning

of human life and the definition of person into their appeal. Ideological arguments have no place in a single subject determination. The single subject requirement must be construed liberally so as not to impose undue restrictions on the initiative process. *In re Title for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo.1998).

Prohibiting abortion is an obvious purpose of Initiative #46 and not hidden. Though the Court cannot address the merits of an initiative or conjecture how it might be applied, it can indeed determine any purpose not directly stated in an initiative along with its relationship to the initiative's central theme. *In re Ballot Title 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). If the Court finds an unstated purpose, but that purpose is related to the central theme of the initiative, there is no violation of the "hidden purpose" prong of the single subject requirement.

A quote by Chairman Hobbs included in Petitioners' Opening Brief (*see* pp. 13-14) is illustrative of the Petitioners' inability to actually identify any single subject violation in Initiative #46. Chairman Hobbs stated:

I'm just having difficulty with the broad prohibition against intentional killing of innocent people versus the primary purpose, I think, which is to limit or restrict abortion rights.

You know, I think it really is a very, very difficult issue for me, and I may be the only one that's having the difficulty. I'm not certain that there is incongruous measures...

As I've said, I'm not even sure that gets you all the way home with a single subject violation anyway because they have to be incongruent subjects. And I'm not entirely sure how to describe that... *See* 1/4/12 Tr. at 39:17-22; 43:12-44:9.

Not only did Chairman Hobbs vote in the minority to decline to set a title for Initiative #46, but, in addition to making his own assumptions about the primary purpose of the initiative, he was also unable to articulate his own problems with the initiative. Similar to Petitioners, he had difficulty with the breadth of the initiative and seemed to personally disagree that

the intentional killing of innocent persons could be equated with abortion. However, this is an ideological argument, as it is clear in its definitions that Initiative #46 does equate the two.

Ideological arguments are not legally allowed to be a part of the Title Board's or the Court's determination on the single subject issue. Even as the lone vote against setting a title for the initiative, Chairman Hobbs was uncertain that Initiative #46 had incongruous measures. He was unable explain why he thought it did, and the majority of the Title Board voted that Initiative #46's single subject was clear and free of incongruous measures.

The single-subject requirement is not violated if the "matters encompassed are necessarily or properly connected to each other rather than disconnected or incongruous". Based on the definitions set out in Initiative #46, the matters encompassed within its boundaries are necessarily connected to one another. Stated another way, the single-subject requirement is not violated unless the text of the measure "relates to more than one subject and has at least two distinct and separate

purposes that are not dependent upon or connected with each other." *In re Ballot Title 2005-2006 No. 73*, 135 P.3d 736 (Colo. 2006); *In re Ballot Title 2005-2006 No. 74*, 136 P.3d 237 (Colo. 2006).

Prohibiting the intentional killing of innocent persons at the earliest stages of development is inextricably connected to prohibiting the intentional killing of innocent persons at later stages of development because Initiative #46 asserts that all human beings have the equal right to life, regardless of their developmental stages. The single subject requirement must be liberally construed and has not been violated.

III. Initiative #46, Since it Contains a Single Subject, Does Not Engage in Logrolling.

In Petitioners' contention regarding logrolling, they make their ideological opposition to Initiative #46 even clearer. These arguments are not permitted to be considered by the Court during this phase of the ballot initiative process. They are best reserved for the election, when the people of Colorado get the choice.

Petitioners again insist that Initiative #46's prohibition on intentional killing is completely separate from a prohibition on abortion and the new definition of person laid out in the initiative. (*See* Petitioners' Opening Brief, pp. 15-17.) At the risk of repeating ourselves, we will again state that *based on the definition of person* laid out in Initiative #46, abortion is the intentional killing of an innocent person and is treated exactly the same as the intentional killing of any other person in the initiative.

Rather than logrolling, this adheres exactly to the single subject requirement. Petitioners' objection to equating abortion with other types of killing does not make their assertion of logrolling correct.

Initiative #46 will give the voters of Colorado an opportunity to decide if they desire to prohibit the intentional killing of all innocent human beings at every stage of development. Petitioners cannot object to voters having this choice simply because they agree with the killing of human beings in the womb (abortion) and do not desire to view this in the same light as the killing of persons at other stages of human development.

The Colorado Constitution created the initiative process so that voters could have a choice in the laws of their state. Colorado Constitution, art.V, §. 1. Petitioners would deny Colorado voters this choice, merely based on their own ideological objections to the merits of Initiative #46. They have still failed to present compelling reasons on why Colorado's voters should have their choice stripped from them. Petitioners have failed to meet their burden of proof.

It is the right of Respondent to bring this issue before the voters of Colorado and allow them to make their own choice. Classifying the intentional killing of any human being at any stage of development in the same way does not constitute logrolling, and Petitioners' appeal should be dismissed based on their failure to make anything other than an ideological argument against Initiative #46.

IV. The Title of Initiative #46 Directly Informs Voters of the New and Controversial Legal Standard.

The titles of ballot initiatives are not required to include definitions of terms unless the terms adopt a new or controversial legal standard that would be of significance to all concerned with the initiative. *In re Ballot Title 1999-2000 No. 255*, 4 P.3d 485 (Colo. 2000). Petitioners argue that the term “innocent” as used in Initiative #46 sets a new legal standard and must therefore be defined. (*See* Petitioners’ Opening Brief, pg. 18.)

However, Petitioners appear to be confused, as they first admit that Initiative #46 and its title define for voters the term “person”, but then go on to state that the term “innocent persons” is not defined. By their own admission, “person” is clearly defined in the language and title. (*See* Petitioners’ Opening Brief, pp. 18-19.) Petitioners incorrectly assume that the word “innocent” is the word that lays out the new legal standard when it is actually the word “person” that does this. Since this word is clearly defined for Colorado voters in the language and the title, the title is clear and accurate.

Because the word “innocent” is a self-evident term (as evidenced by the Colorado legislature’s treatment of it), and because Initiative #46 does

not use it in a way unrelated to the rest of Colorado law, reasonable voters will not experience the confusion that Petitioners discuss. Reasonable voters will instead notice the clearly spelled out new definition of the term “person” and be able to decide if they want to prohibit the intentional killing of all innocent human beings at any stage of development or not. Voters will not go through the thought process of “fertilized eggs, non-convicts, or simply everyone?” that Petitioners indicate. (*See* Petitioners’ Opening Brief, pg. 19.) Voters will instead be able to read the clear title of Initiative #46, determine if they agree that all innocent human beings at any stage of development deserve to be protected against intentional killing, and vote accordingly.

As previously discussed in this answer, “fertilized eggs” is an unscientific and dehumanizing term and is further evidence of Petitioners’ ideological opposition to calling human beings at the earliest stages of development persons. Petitioners’ ideological opposition does not make the title unclear or misleading.

V. The Title is Accurate.

By accusing the Title Board of setting an inaccurate title based on the use of the word “extension”, Petitioners evidence their desire to pick apart every single word in a scrambling attempt to prevent an issue they ideologically oppose from appearing on the ballot. They desire to strip Colorado voters of a choice in the matter. (*See* Petitioners’ Opening Brief, pp. 20-21.)

The word extension could just as easily be interpreted—and, in fact, should be interpreted—as referring to the initiative’s extension of the right to life to all human beings at all stages of development. Petitioners act as though the title of Initiative #46 does not inform Colorado voters of how the right to life and the interconnected right not to be killed are extended, when in fact, the title very descriptively lays out how the extension of rights will prohibit the intentional killing of innocent persons: the single subject of Initiative #46.

Again, despite Petitioners’ desperate wish that the people of Colorado not be given a choice when a proposed initiative conflicts with their ideology

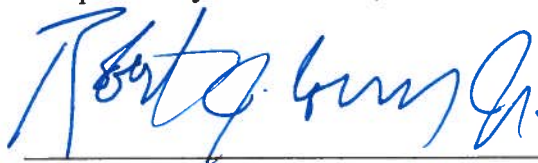
this cannot be at issue in this appeal. This Court reviews titles set by the Board with great deference and only reverses the Board's decision if the titles are insufficient, unfair, or misleading. *In re Ballot Title 2005-2006 No. 73*, 135 P.3d 736 (Colo. 2006). For all the reasons outlined above and in Respondent's Opening Brief, Respondent respectfully submits that Initiative #46's title is neither insufficient, unfair, nor misleading and should therefore be upheld by this Court.

CONCLUSION

Since Petitioners have not proved anything more than their own ideological opposition to Initiative #46, Respondent respectfully requests that the Court dismiss Petitioners' appeal expediently so that the ballot initiative process may continue and so that the voters of Colorado can make their choice. Respondent requests an expedient dismissal of Petitioners' appeal because any unnecessary delay in time is prejudicial to the right to circulate since Feb. 7th, 2012 was the last day for initiatives to enjoy the statutorily defined right to circulate for 180 days.

Date: February 21, 2012

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Robert J. Corry, Jr.", written over a horizontal line.

Robert J. Corry, Jr

CERTIFICATE OF SERVICE


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

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I further certify that true and correct copies of the foregoing **ANSWER BRIEF OF RESPONDENT KEVIN SWANSON** were served via overnight delivery upon the following:

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