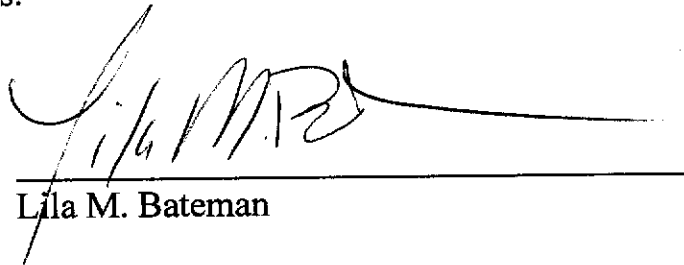


<p>SUPREME COURT OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80203</p>	<p>FILED IN THE SUPREME COURT, JAN 30 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk</p> <p>▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2011- 2012, #46</p> <p>Petitioners: LESLIE DURGIN, CATHY ALDERMAN and AMY PITLIK v. Respondents: ROSALINDA LOZANO and KEVIN SWANSON</p> <p>and</p> <p>Title Board: WILLIAM A. HOBBS; DANIEL DOMENICO; and JASON GELENDER</p>	
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<p>PETITIONERS' OPENING BRIEF</p>	

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 5,016 words.



Lila M. Bateman

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

Initiative #46 would seek to impose a constitutional "right to life" and also make *every* intentional act that results in the death of an "innocent person" unlawful. Yet it nowhere defines that controversial standard for purposes of this initiative. Even assuming the term "innocent person" could be defined by the criminal code or proponents' suggested definition, that definition only serves to clarify that there are at least two broad, unrelated subjects addressed in the initiative. Moreover, the title is misleading and does not accurately disclose the true intent and meaning of the initiative. Initiative #46 thus fails to meet even the minimum legal requirements established to ensure that initiative petitions promote informed voting decisions.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether proposed Initiative #46 violates the single subject requirement by incorporating multiple subjects, many of which are concealed in the folds of the language of the measure and omitted from the title.

2. The ballot title is misleading when it creates a new operative legal standard – extending “rights to all human beings at any stage of development” and prohibiting the killing of “all innocent persons” – without defining or apprising voters in the title of what the new, controversial standard will be.
3. The ballot title is inaccurate when the measure does not actually “exten[d] rights to all human beings at any stage of development;” rather, the text of the measure purports to provide a constitutional “right to life” to “innocent persons” and also to prohibit intentional killing in manners not limited to the ends listed in § 2(a)-(e) of proposed Initiative #46.

STATEMENT OF THE CASE

This is a challenge to the jurisdiction and actions of the Title Board with respect to the title, ballot title, and submission clause set for proposed Initiative #46.

I. Nature of the Case, Course of Proceedings and Disposition Before the Title Board

This original proceeding is brought pursuant to Colo. Rev. Stat. § 1-40-107(2), seeking review of the actions of the Ballot Title Setting Board regarding proposed Initiative #46. Petitioners are registered electors who timely submitted a Motion for Rehearing before the Title Board raising the objections presented herein pursuant to Colo. Rev. Stat. § 1-40-107(1). In addition, Petitioners timely

filed their Petition for Review within five days from the date of the hearing on the Motion for Rehearing. *Id.* at §1-40-107(2).

A Title Board hearing was held on December 21, 2011 to establish the initiative's single subject and set a title. *See Exhibit 1* (December 21, 2011 Transcript ("12/21/11 Tr.")). On December 28, 2011, Petitioners filed a Motion for Rehearing and alleged that there were violations of the single subject requirement and that the title was unfair, misleading and contained impermissible catch-phrases. The rehearing was held on January 4, 2012, at which time the Title Board granted the motion for rehearing to the extent the Board amended the title and denied as to all other respects. *See Exhibit 2* (January 4, 2012 Transcript ("1/4/12 Tr.")). The members of the Title Board were split on the single subject requirement, by a vote of two to one.

II. Statement of Facts

In 2008 and 2010, prior versions of Initiative #46 were presented to the Board. The measures in 2008 and 2010, known at that time as Initiative #36 and Initiative #25 respectively, proposed to add a new section to Article II to the State Constitution to alter a material term – the definition of “person” – in three other selected sections of Article II concerning inalienable rights (Section 3), equality of justice (Section 6), and due process (Section 25). In the 2008 Initiative, the

proponents sought to define “person” as “any human being from the moment of fertilization.” Similarly, in the 2010 Initiative, the proponents sought to define “person” as “every human being from the beginning” of “biological development.” The voters having rejected those measures by wide margins, the proponents now seek to offer Initiative #46. Proponents argued at the rehearing that they intend the new Initiative #46 to have the same effect as the prior initiatives, without specific reference to the Constitution Sections 3, 6 and 25. *See* 1/4/12 Tr. at 32:22-33:19, 42:7-19.

By its terms, however, Initiative #46 is something far broader and quite different from the past “personhood” initiatives, as one Title Board member expressly stated. *See* 1/4/12 Tr. at 43:15-25. Initiative #46 proposes to amend Article II of the Colorado Constitution to add a section with the declared “Purpose” or resolving that “the right to life in this Constitution applies equally to all innocent persons.” The proclamation is followed by a second substantive section, which the proponents labeled “Effects,” that reads in its entirety as follows:

The intentional killing of any innocent person is prohibited.

- (a) Only birth control that kills a person shall be affected by this section.
- (b) Only in vitro fertilization and assisted reproduction that kills a person shall be affected by this section.
- (c) Medical treatment for life threatening physical conditions intended to preserve life shall not be affected by this section.
- (d) Spontaneous miscarriages shall not be affected by this section.

- (e) No innocent child created through rape or incest shall be killed for the crime of his or her father.

(emphasis added). Initiative #46 then provides the following "Definitions" section:

- (a) "Person" applies to every human being regardless of the method of creation.
- (b) A "human being" is a member of the species homo sapiens at any stage of development.
- (c) "Spontaneous miscarriage" is the unintentional termination of a pregnancy.
- (d) "Child" includes a human being prior to and during birth.
- (e) "Medical treatment for life threatening physical conditions intended to preserve life" includes but is not limited to treatment for cancer, ectopic and molar pregnancy, twin-to-twin transfusion syndrome, and placenta previa.

The last section explains that the provisions of the initiative are self-executing and severable. At the rehearing, the Title Board set the title as follows:

An amendment to the Colorado constitution concerning the extension of rights to all human beings at any stage of development, and, in connection therewith, declaring that the protections for life provided for in the state constitution apply equally to all innocent persons; defining "person" as every member of the species homo sapiens at any stage of development; prohibiting the intentional killing of any innocent person; clarifying that the amendment affects only those methods of birth control and assisted reproduction that kill an innocent person and does not affect other methods of birth control or assisted reproduction, medical treatment for life-threatening physical conditions, or spontaneous miscarriages; and specifically prohibiting the killing of a person created through rape or incest committed by the father.

The Title Board agreed at the rehearing that its prior draft of the title contained an impermissible catch-phrase. The Board thus struck the phrase "right to life" from

the title, and that issue has not been appealed by proponents. *See* 1/4/12 Tr. at 60:8-10, 61:5-10. Petitioners brought this timely appeal.

SUMMARY OF ARGUMENT

The Title Board erred in even setting a title. The measure establishes a constitutional “right to life” that would prohibit all abortion and most forms of birth control, artificial reproduction and stem cell research. At the same time, the measure seeks to create an entirely new constitutional ban on the killing of “innocent persons.” There are no constraints on that prohibition and the critical term – “innocent persons” – is left undefined, both in the text and the title of the initiative. As presented, the measure applies to a wide range of conduct. It would prohibit everything from legal compliance with an advance medical directive to currently illegal euthanasia, and from citizens’ lawful use of deadly force to safeguard their homes, to law officers who lawfully shoot to kill a suspect not yet convicted of any criminal offense. One member of the Title Board voted against setting a title on Initiative #46 because the measure expressly combined and logrolled such broad, unrelated prohibitions. The remaining members of the Title Board erred in setting the title in violation of the single subject requirement.

The Title Board also erred by simply repeating the term “innocent persons” in the title to describe those entitled to the proposed constitutional “protections for

life.” There is no single or common understanding of what an “innocent person” is, nor is a definition provided in either the text of the measure or the title. There is nothing in the text of the measure or the title to suggest that this new critically operative term is in any way limited to the pre-birth context, leaving voters to guess as to its true meaning, intent and purpose. Use of the term completely without definition creates a new and controversial standard that will confuse and mislead voters.

The Title Board further erred in phrasing the title as an “extension of rights to all human beings at any stage of development.” There is no “extension” when the amendment creates a new constitutional prohibition on the killing of “innocent persons,” and misleads voters by detailing only those effects relating to reproductive rights and nothing else.

ARGUMENT

I. The Initiative Violates the Single Subject Requirement

A. Standard of Review

No title may be set for an initiative if that measure contains more than one subject. Colo. Const., art. V, sec. 1(5.5); C.R.S. § 1-40-106.5. This requirement has an important purpose. It prevents the practice of putting together in one measure multiple subjects “for the purpose of enlisting in support of the measure

the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.” *In re Proposed Initiative for 1999-2000 # 29*, 972 P.2d 257, 261 (Colo. 1999). The rule also ensures that ballot measures are not so convoluted that they conceal provisions that would come as a surprise to, or act as a fraud upon, voters who thought the measure addressed only one basic topic. *In re Proposed Initiative for 2007-2008 #17*, 172 P.3d 871, 873 (Colo. 2007).

This Court does not engage in an evaluation of the wisdom of the proposed initiative. When necessary, however, this Court “will characterize the proposal sufficiently to enable review of the Title Board’s action” as necessary to evaluate its compliance with the single subject requirement. *In re Proposed Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000); *In re Proposed Initiative for 1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998). The purpose of this assessment is to “root out incongruous subjects.” *In re Proposed Initiative #17*, 172 P.3d at 879 (Eid, J. dissenting).

B. Initiative #46 involves multiple subjects

Initiative #46 violates the requirements and core principles of the single-subject rule. The proposed initiative leaves a critical term undefined and, by doing so, disguises the meaning and operative subjects of the measure. Even assuming a

definition could be applied, any such definition would make clear that there are at least two unrelated subjects addressed in the measure. The Title Board therefore erred in even setting a title.

1. *“Innocent Person” is left undefined*

The text of the proposed initiative opens with the resolution that a constitutional “right to life” applies equally to all “innocent persons.” Initiative #46, Section 1. The measure goes on to say that it also prohibits the “intentional killing” of any “innocent person.” *Id.* at Section 2. Proponents have adamantly sought to preserve the hazy contours of the term “innocent person” by arguing that the term is intuitively understood, or that it is left undefined in the criminal code. *See* 1/4/12 Tr. at 14:20-15:5. This crucial term, however, is the lynchpin for understanding the multiple subjects of the initiative.

First, any attempt to obtain a contextual understanding of what the term means leaves more questions than answers. It may be that the parameters of the undefined “innocent persons” – and thus the subjects of the measure – should be synonymous with the term “innocent child” (also undefined), set forth in section 2(e) of the measure. *See generally*, 1/4/12 Tr. at 71:16-21. The “innocents” then endowed with a constitutionally guaranteed “right to life” presumably would be *each* fertilized egg and *each* born child, but not innocent adults. Alternatively,

some voters may assume the term is a rhetorical assertion that *all* “persons,” including adults, are “innocent” and endowed with a “right to life.”¹ Still others may rely on a dictionary definition of “innocent” person to mean one “free from or unacquainted with sin,” which is a “transgression of religious law.” *Webster’s Third New International Dictionary Unabridged*, 1166, 2122 (3d Ed. 2002).

Others may follow the proponents’ lead and refer to the manner in which the term is applied in the criminal code. *See* 12/21/11 Tr. at 8:17-10 (proponents). Thus neither voter intuition nor a contextual reading clarifies which, if any, is correct.

In the legal context an “innocent person” may be understood to involve only a non-culpable subset of “persons” who have not been convicted of a criminal offense. Under Colo. Rev. Stat. § 18-1-402, for example, the criminal code provides that “[e]very person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilty thereof is proved beyond a reasonable doubt.” Moreover, Colo. Rev. Stat. § 18-1-602(b)(2) specifically

¹ These are the same concerns expressed by the Arkansas Attorney General this month in response to a 2011-2012 ballot measure proposed by Personhood Arkansas. Similar to the proponents’ measure at issue in this case, Personhood Arkansas sought a constitutional amendment to provide a right to life for “innocent” persons. In addressing the failure to define “innocent person” and the absence of any common, contextual understanding, the Arkansas Attorney General concluded that the provision was ambiguous, misleading, and not susceptible to summarizing without further clarification from the proponents. *See* <http://www.arkansasag.gov/opinions/search-agops.php>.

defines an “innocent person” as a person who *committed an offense but is not guilty* despite his behavior, “because of duress, legal incapacity or exemption, or unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose, or any other factor precluding the mental state sufficient for the commission of the offense in question.”

The term “innocent person” has no ordinary or intuitive meaning. Leaving this key term undefined disguises the subjects of the measure, and opens the door to voter confusion and fraud concerning the fundamental meaning and reach of the proposed initiative. Colorado law prohibits this as a violation of the single subject requirement, and thus no title should be set for Initiative #46.

2. *The proposed initiative contains multiple subjects*

Even assuming the term “innocent person” could be defined by reference to existing criminal statutes, that definition would only serve to clarify that the initiative 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.

The problem here is that the measure links at least *two* broad, unrelated substantive concepts in a single initiative. Section 1 proclaims that the purpose of

the initiative is to provide a constitutional “right to life” for “innocent persons,” which the proponents equate with a prohibition on such things as abortion. *See* 12/21/11 Tr. at 5:8-11. The first sentence in Section 2, however, extends much broader to prohibit killing every person who has not been convicted of a crime, which the Title Board members agreed is itself a material provision with a substantive impact. *See* 1/4/12 Tr. at 27:21-28:2, 32:2-4.

The broad wording chosen by the proponents in Section 2 therefore must be assessed in light of the single subject mandate. That blanket prohibition on killing un-convicted persons, *by its own terms*, sweeps in a wide range of unrelated conduct. Such conduct includes physicians’ compliance with patients’ do-not-resuscitate directives, euthanasia, vigilantism, or even law enforcement officers engaged in the line of duty who intentionally kill a person who has not yet been convicted of a crime. *See* 1/4/12 Tr. at 41:9-15, 45:18-22. (Mr. Domenico agrees provision in Section 2 prohibits euthanasia and a “number of things”); *see also* 12/21/11 Tr. at 9:1-17 (vigilantism prohibited by provision in Section 2). This prohibition is not bounded. Proponents made quite clear that the categorical prohibition in Section 2 is not narrowed by the specific, textual applications listed in Sections 2(a)-(e) of the initiative. *See, e.g.*, 1/4/12 Tr. at 16:11-20, 17:11-19; *see also* 12/21/11 Tr. at 11:13-12:13.

The *subject* of prohibiting abortion, birth control, assisted reproduction, and stem cell research is, therefore, distinct from and incongruent with the *subject* of prohibiting killing individuals who have not been convicted of a crime. Subjects this extensive do not comply with the single subject requirement and joinder is virtually certain to result in voter surprise or fraud. See e.g., *In re "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 1995).

The overly broad, multiple subjects and the potential for logrolling led Chairman Hobbs to vote to deny title setting on the basis of single subject. See 1/4/12 Tr. at 44:10-12, 45:23-46:5. The measure's broad prohibition on intentional killing, as Chairman Hobbs recognized, is different from and incongruent with its stated purpose of providing a "right to life" that would outlaw abortion and other forms of reproductive health care rights. He 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.

One is very popular. One would be very questionable.

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, but I do think the drafting approach has an actual real meaning in that the broad, what appear to be substantive provisions to the reader about applying the right to life in

the constitution to all innocent persons and constitutionally prohibiting intentional killing of innocent people-- persons.

Now, I think that's -- a reader, I think, can attribute that has meaning and it's not just a drafting approach to the same results basically as the previous versions. And so, you know, it sure seems a lot like logrolling to me. I know Mr. Domenico disagrees and I respect that.

As I've said, I'm not even sure that 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, other than the fact that maybe there is one or two very broad, substantive provisions, and then there is some specific provisions that deal with the application of the measure to abortions basically.

Id. at 39:17-22, 43:12-44:9. Chairman Hobbs therefore voted to deny setting the title on the basis of the single subject violation. *Id.* at 44:10-12.

This Court has previously held that an initiative violates the single subject requirement when it is so broad and ambiguous that it risks misleading voters as to its multiple subjects. In *In re Proposed Initiative #55*, the Court reviewed the Title Board's actions regarding an initiative attempting to restrict access of persons not lawfully present in the United States to non-emergency governmental services.

See In re Proposed Initiative for 2005-2006 #55, 138 P.3d 273, 275-76 (Colo.

2006). By a plain reading of Initiative # 55, the Court identified two subjects connected only by a broad theme of restricting non-emergency services:

terminating services for persons not lawfully present in Colorado and restricting unrelated administrative services. *Id.* at 275. Because the measure failed to define

the critical term “non-emergency services,” the Court held that the initiative violated the single-subject rule because the ballot measure’s “complexity and omnibus proportions” were “hidden from the voter” and failed to inform voters of the services its passage would affect. *Id.* at 282. The Court reasoned that voters might find that they unwittingly voted to restrict all services, despite only wishing to reduce taxpayer expenditures for medical and social services. *Id.*

Like Initiative #55, the present Initiative #46 leaves the critical term “innocent persons” undefined in the measure. Yet even if somehow defined using proponents' suggestion or by reference to the criminal code, such definitions illustrate the existence of *at least* two unrelated subjects – prohibiting the killing of all persons who have not been convicted of a crime and prohibiting abortion and other forms of reproductive health care rights – impermissibly rolled into one initiative. Such omnibus proportions necessarily hide the measure’s meaning, intent and purpose from the voter. This proponents cannot do.

3. *Logrolling a prohibition on killing “innocent persons” with a prohibition on abortion and other reproductive health care procedures and a new definition of “person” violates the single subject requirement*

The two broad subjects contained in the proposed initiative are quintessential logrolling. *In re Public Rights in Waters II*, 898 P.2d at 1080.

Chairman Hobbs expressed this concern and recognized that, 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 proponents' two prior unsuccessful "personhood" measures. As he stated:

And I do recognize that with respect to the details, the measure is more specific than the previous versions. I'm just focusing on the fact that the previous versions simply address the definition of 'person' and how early that definition applies in the stages of human development.

This measure -- and it goes in the other direction and has a much broader impact. It prohibits the intentional killing of an innocent person. It's a much, much broader measure on the surface, and that's something I would think everybody could agree with, that it should -- that it's wrong to intentionally kill an innocent person.

So that's why it's a little bit like logrolling. You get support for the main proposition that's expressed as a single subject in the measure, but once you really get into the definitions, it sounds like that's where we're back really trying to achieve the purposes of the previous versions of the first title.

1/4/12 Tr. at 24:22-25:15. As Chairman Hobbs recognized, a substantial number of voters may support a prohibition against killing "innocent persons," without also desiring to define fertilized eggs as "persons," and without supporting blanket prohibitions on many common reproductive health care procedures or a broad spectrum of medical research. The effect of the present initiative is to enlist voter support for the all of these disparate purposes, which the proponents' unsuccessful "personhood" initiatives from 2008 and 2010 indicate would be rejected if offered

on their own merits. There is no necessary or proper connection between these subjects. Initiative #46 is, therefore, a clear effort at logrolling and should be rejected by this Court.

II. The Initiative's Title Does Not Correctly and Fairly Express the True Intent and Meaning of the Measure

A. Standard of Review

The Title Board is statutorily required to set a title that “shall correctly and fairly express the true intent and meaning” of the initiative. Colo. Rev. Stat. § 1-40-106(3)(b). In addition, 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’ or ‘no’ vote will be unclear.” *Id.* In order to fulfill this duty, the Title Board must unambiguously state the principle or provision sought to be added, amended or repealed by the proposed measure, so that voters familiar or unfamiliar with the matter will be able to determine intelligently whether to support or oppose the measure. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

This Court's duty is to ensure that the title, ballot title, and submission clause fairly reflect the proposed initiative so that the petition signers and voters will not be misled into supporting or opposing a proposition by reason of the words

employed by the Title Board. *In re Proposed Election Reform Act*, 852 P.2d 28, 32 (Colo. 1993). This requirement helps ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant, provision that was obfuscated by other elements of the proposal. *In re Proposed Initiative for 2001-2002 #43*, 46 P.3d 438, 446-47 (Colo. 2002).

B. The Title and Submission Clauses Are Misleading

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

On a number of occasions this Court has addressed whether a particular definition must be included in a ballot title and submission clause. The determination turns on whether the definition “adopts a new or controversial legal standard which would be of concern to all concerned with the issue,” *In re Proposed Initiative on Parental Notification*, 794 P.2d at 242, or whether the definition concerns a term which is “within the common understanding of most voters.” *In the Matter of the Proposed Initiative on Taxation III*, 832 P.2d 937, 941 (Colo. 1992).

Initiative #46 creates an entirely new legal standard without defining that standard and without apprising voters in the title of what the limits of that controversial standard will be. The title, as well as the initiative itself, redefines the term “person” to mean every “member of the species homo sapiens at any stage

of development.” Both the measure and the title then adopt the term “innocent person” – with no guidance as to what that term may mean.

As discussed above, there is no single common understanding of the term “innocent person” on which the proponents can rely. This is all the more true given that the proponents use the initiative to redefine half that term— “person”— to include fertilized eggs. The title muddies the waters more when the first clause focuses on extending “rights to *all* human beings at any stage of development,” irrespective of innocence. Reasonable and detached voters will not understand from the title what the scope of the measure is and who the actual recipients of the subject rights, and objects of the prohibitions, are. Fertilized eggs, non-convicts, or simply everyone? Without additional language, the “general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear from reading the title.” *See In re Proposed Initiative on “Obscenity,”* 877 P.2d 848, 850 (Colo. 1994).

It was thus error for the Board to copy the measure’s language when the subjects of the measure are indeterminable. *Id.* Indeed, 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.” *Id.* Even in those instances, “there may be situations ... where the title and submission clause likely would create public confusion or ambiguity about the

effect of an Initiative even though they merely repeat the language contained in the Initiative itself.” *Id.* This is one such case.

2. *The title is inaccurate*

The title to this measure states that it is an “amendment to the Colorado constitution concerning the extension of rights to all human beings at any stage of development, and in connection therewith, declaring that the protections for life provided for in the state constitution apply equally to all innocent persons; ... prohibiting the intentional killing of any innocent person.” The title thus states broadly that there are existing “rights” that Initiative #46 will now extend to every human being. The Title Board made this change after it correctly determined that “right to life” provided in the text of the initiative is an impermissible catch-phrase and cannot be included in the title.

In redrafting the title, however, the Title Board erred when it phrased the single subject as an “extension” of rights. That phrase wrongly implies that the measure’s new constitutional prohibition against killing “innocent persons” is actually nothing more than an “extension” of existing constitutional rights. Further, it is certainly cannot be said that the measure does no more than “extend” rights that already exist when it would clearly outlaw all forms of abortion and would criminalize currently legal forms of birth control, artificial reproduction, and

biomedical stem cell technology. Finally, taking proponents at their word, the title at a minimum should include the forms of prohibited conduct that go along with the broad prohibition on killing "innocent persons," particularly when there are five lines at the end of the title that relate only to reproductive health care. Failing to include other conduct that would clearly fall within the initiative's virtually unlimited sweep would mislead voters into believing the scope of amendment is simply limited to birth control, assisted reproduction, and abortion. As such, the title is misleading and fails to reflect the true intent and purpose of the measure.

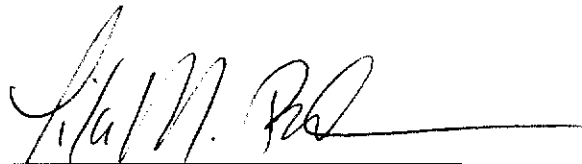
CONCLUSION

In the end, this Court must determine whether Colorado law permits a ballot measure that voters could legitimately understand to be: a complete ban on all abortion, regardless of whether the woman's life is at risk and regardless of whether she seeks an abortion because she was raped; a blanket prohibition on the use of lethal force, except against individuals actually tried and convicted of criminal offenses; a constitutional bar to stem cell research aimed at a cure for Parkinson's disease; a requirement that courts appoint guardians ad litem for fetuses at issue in marital dissolution proceedings; a declaration that Colorado physicians may no longer comply with their patients' advance medical directives

absent the threat of criminal prosecution; or, perhaps, all of these. The Petitioners respectfully submit that Initiative #46 is just such a measure.

Therefore, 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 30th day of January, 2012.

A handwritten signature in cursive script, appearing to read "Lila M. Bateman", is written over a horizontal line.

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CERTIFICATE OF SERVICE

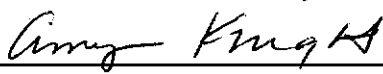
I hereby certify that on the 30th day of January, 2012, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served via Federal Express to the following:

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Amy Knight

INITIATIVE TITLE SETTING REVIEW BOARD
 Secretary of State's Blue Spruce Conference Room
 1700 Broadway, Suite 270
 Denver, Colorado
 December 21, 2011
 2011-2012 #46, Definition of the Term Person

APPEARANCES:

William A. Hobbs
 Deputy Secretary of State
 1700 Broadway, Suite 270
 Denver, Colorado 80290

Jason Gelender
 Senior Attorney
 Office of Legislative Legal Services
 091 State Capitol Building
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Mr. Dan Domenico

1 will be here.
 2 MS. LOZANO: Thank you, members of the
 3 board. I'm Rosalinda Lozano of Lighthouse Pregnancy
 4 Center. (Inaudible). We're going to talk about the
 5 amendment.
 6 MR. HOBBS: And you are the other
 7 proponent.
 8 MS. LOZANO: Yes.
 9 MR. HOBBS: Thank you very much. Thank
 10 you. So perhaps Ms. Burton and -- I'm sorry.
 11 MR. JONES: Gualberto Garcia Jones.
 12 MR. HOBBS: Thank you. If you'll come
 13 forward and we'll see if the -- and you may have an
 14 introductory statement, but my primary role is to
 15 give board members a chance to ask you questions
 16 about the measure. But if you'll identify yourself
 17 for the record and who you represent.
 18 MR. JONES: Gualberto Garcia Jones, and
 19 I represent personhood in USA, which is a member of a
 20 coalition that's promoting this proposed amendment.
 21 MS. BROWN: I'm Christy Burton Brown and
 22 I'm representing Colorado Fetal Rights, which is also
 23 a member of the coalition.
 24 MR. HOBBS: Questions for the
 25 representatives of the proponent. I do have a lot of

1 MR. HOBBS: Let's move on to number 3,
 2 2011-2012, number 46, application of the term
 3 persons. And again, the time is now 3:11 p.m. I
 4 believe we have both proponents present, and I know
 5 that -- I think that somebody else is going to speak
 6 for them, but if the proponents are here, if they
 7 could at least identify themselves and indicate who's
 8 going to speak for them, I would appreciate that.

9 UNIDENTIFIED SPEAKER: I think we lost
10 one of our proponents.

11 MR. HOBBS: Okay.

12 UNIDENTIFIED SPEAKER: And (inaudible).

13 MR. HOBBS: Okay. So Mr. Swanson,
 14 perhaps if you would come to the podium. I'm not
 15 trying to make this too confusing, but I'm also
 16 trying to be faithful to the new law. I know both
 17 proponents were present when they signed the
 18 affidavits. So Mr. Swanson, if you'd just identify
 19 yourself.

20 MR. SWANSON: Yes. My name is Kevin
 21 Swanson. I'm the proponent for the proposed
 22 initiative Number 46, 2011-2012, number 46.

23 MR. HOBBS: Thank you.

24 MR. SWANSON: And speaking on behalf,
 25 Gualberto, Garcia Jones, also Christy Burton Brown

1 questions, so I don't know whether -- I'll go ahead
 2 and start out. I -- you know, I have a lot of
 3 specific questions, but I just generally I find the
 4 measure hard to understand. And -- and that's really
 5 significant for purposes of the title board because
 6 the case law says we have to be able to understand
 7 the measure well enough to identify the single
 8 subject and to draft clear titles.

9 And I don't know whether I'm there yet,
 10 but hopefully, you can get me there, because I just
 11 it's -- it seems very -- to me, just hard to
 12 understand what is really going on in the measure.
 13 You know, the basic language, the -- the fundamental
 14 element says the intentional killing of an innocent
 15 person is prohibited. And I would think that's not
 16 much of a change in current law, but I suspect I have
 17 to keep reading that that's not the operative
 18 provision of the measure; that it may be in the
 19 definitions.

20 So can you tell me -- you can start any
 21 way you want, but, you know, what is the single
 22 subject? What's -- what does the measure actually
 23 do? How does it change current law? Okay.

24 MR. JONES: Well, basically, the purpose
 25 of this measure is -- is to properly apply the right

1 to life, which is present in other sections of the
 2 Bill of Rights. However, we believe that the right
 3 to life is not currently being applied consistently
 4 because of the definition of who the subject that's
 5 worthy of the right to life is. And so this
 6 amendment clarifies the right to life and applies it
 7 universally to all human beings.

8 And so obviously, the right to life is
 9 synonymous with abortion being one of the contentious
 10 issues, but also euthanasia, and stem cell research,
 11 other things like that. And so I think when somebody
 12 looks at this, they should be thinking, you know, the
 13 right to life. This is a constitutional amendment to
 14 establish firmly and define the right to life within
 15 our constitution.

16 According to federal precedent, Roe
 17 versus Wade, and subsequent cases, the child in the
 18 womb since 1973 hasn't been considered a person and,
 19 therefore, although we guarantee the right to life to
 20 all persons in other sections of the constitution we
 21 think this is a necessary amendment; and in addition,
 22 because we believe that the right to life should be
 23 applied universally to all human beings and so that
 24 the -- the subject of this person should span the
 25 whole spectrum of the development of a human being.

1 MR. HOBBS: And, you know, how the
 2 measure seems to get there, it starts with the
 3 operative provision. I -- I think I can characterize
 4 it as the operative provision that the intentional
 5 killing of any innocent person is prohibited. Person
 6 then is defined to apply to ever human being
 7 regardless of method of creation.

8 And then human being is defined to be a
 9 member of the species homosapien at any stage of
 10 development. And I'm guessing that that's really the
 11 key phrase, that any homosapiens at any stage. Is
 12 that fair to say?

13 MR. JONES: I think in terms of being
 14 able to tell the difference in the law as it -- as it
 15 stands now and as we hope it (inaudible), I would
 16 agree that that's sort of the operative language. I
 17 still think, you know we're trying to deal with --
 18 with a universal right. It's one of the original
 19 right to -- rights and inalienable rights that
 20 proceed from our creator, something even prior to
 21 government itself and Declaration of Independence,
 22 Constitution.

23 And so that's why we felt that we needed
 24 to really lay out the right in the broadest terms
 25 possible and then go ahead and define of within this

1 -- this amendment who it applies to, every human
 2 being.

3 MR. HOBBS: Any stage of development.

4 MR. JONES: I mean, at every stage of
 5 development, right.

6 MR. HOBBS: And I'm not trying to be
 7 difficult, but I'm just -- it almost strikes me that
 8 kind of begs the question of when is someone -- a
 9 human being? You know, it's at any stage of
 10 development, but it's defined to be a homosapien at
 11 any stage of development. When is somebody a
 12 homosapien. I mean, I'm wondering about an
 13 interpretation that says this may not be very clear
 14 as to which stage of development you're trying to
 15 include.

16 MR. JONES: Based on the language for
 17 the stages of development on the Lacy and Connors
 18 law, it's actually current enacted in (inaudible)
 19 it's been upheld by the courts. And the way that
 20 they refer to the unborn in that law is to -- is
 21 actually the exact same term (inaudible) out of
 22 there. And part of that was because -- I don't know
 23 if you recall, but in the last election, 2010, there
 24 was a question about, well, what does biological
 25 development mean?

1 The opposition said it was ambiguous and
 2 so we tried to get something that's already
 3 established in federal law (inaudible) defined what
 4 -- what the or who the subject of the right to life
 5 is. So look at the (inaudible) act that's exactly
 6 the words that they use; at every stage of
 7 development for any member of the species.

8 MR. HOBBS: Further questions? I mean,
 9 that's sort of the gist of it, sort of the gist of
 10 what I'm struggling with. But I am kind of curious
 11 about the other words choice. I think there's
 12 references to innocent persons. And I'm wondering
 13 what that has.

14 I mean, I notice that one of the
 15 questions from legislative staff is, you know, what
 16 does the term innocent mean? But --

17 MS. BROWN: We included the term
 18 innocent persons because we just mean anyone who's
 19 not been proven guilty by a court of law. We didn't
 20 want to deal with the death penalty in this
 21 amendment. And if we just said people, then,
 22 obviously, we'd be -- the intention of killing of
 23 persons is not allowed to deal would deal with death
 24 penalty, and that's not what this is about. That was
 25 the reason for including (inaudible).

1 MR. HOBBS: And, you know, on one of
 2 their questions was would this provision permit a
 3 vigilante killing of a guilty person?
 4 MS. BROWN: No.
 5 MR. HOBBS: I'm wondering how you
 6 answered that.
 7 MR. JONES: (Inaudible) very interesting
 8 question that we've -- I've never thought of before
 9 that. But I think vigilante violence would be
 10 basically convicting somebody without a trial, which
 11 in our legal system, would basically be (inaudible)
 12 or, you know, convicting somebody without due
 13 process. And so --
 14 UNIDENTIFIED MALE SPEAKER: (Inaudible)
 15 innocent.
 16 MR. JONES: Right. Or considered
 17 innocent. And so we go through that process and have
 18 the trial by a jury of our peers.
 19 MR. DOMENICO: Well, and the -- just
 20 because the intentional killing of an innocent person
 21 that's prohibited doesn't mean that the converse is
 22 true. It doesn't mean that the killing of any guilty
 23 person is authorized.
 24 MR. HOBBS: Affirmative defense.
 25 MR. DOMENICO: It doesn't -- I don't

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1 think that you necessarily go hand in hand.
 2 MR. HOBBS: And from all the comments so
 3 far, really, that changes nothing at all other than
 4 expanding the scope of the term person.
 5 MR. JONES: Right.
 6 MS. BROWN: And if you see in our first
 7 portion you called the operative language, it says it
 8 applies equally to all innocent persons. Basically,
 9 the purpose behind this amendment is we don't believe
 10 the right to life in Colorado is applied equally to
 11 all persons since the unborn are not defined -- or
 12 humans at every stage aren't defined as people. So
 13 in order to apply it equally, we have to put forth
 14 that definition.
 15 MR. DOMENICO: It also
 16 constitutionalizes what currently (inaudible).
 17 Murder is not unconstitutional generally. It's
 18 illegal because of statute. So this would -- that's
 19 another thing it actually changes about the law is it
 20 would make murder of anybody illegal setting aside
 21 that's the definition of a person, it would make it a
 22 constitutional aspect of the law.
 23 MR. HOBBS: (Inaudible) with that? This
 24 would constitutionalizes the crime of murder?
 25 MS. BROWN: Right.

1 MR. JONES: Aren't we -- we looked at
 2 the prohibition on slavery that -- that Colorado
 3 enacted after it became a state. And one of the --
 4 one of the questions that we've had with attorneys,
 5 both friendly to our cause or not has been whether we
 6 tend (inaudible) actions (inaudible) constitutional
 7 amendment. And I think that when it deals with
 8 (inaudible) rights, I think the constitution is the
 9 proper placement and the proof would be that Colorado
 10 saw fit to prohibit clearly (inaudible) private
 11 action which was owning (inaudible) person.
 12 MR. HOBBS: Any other questions?
 13 MR. DOMENICO: I just wanted to clarify
 14 a couple of things in section two. The first -- 2A
 15 and 2B, if I'm reading that right, when it says only
 16 birth control, et cetera, only in vitro
 17 fertilization, et cetera, is affected by this, what
 18 -- what you're saying is not that this only applies
 19 to that type of birth control and that type of in
 20 vitro fertilization.
 21 It also applies to other types of
 22 actions. I mean, I think it's pretty clear that
 23 would take what you've defined as a person here. But
 24 when it comes to birth control, it's only this type.
 25 When it comes to in vitro fertilization, it's only

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1 this type. I think that's clear, but I -- I just
 2 wanted to make sure.
 3 MR. JONES: That's correct. And we
 4 actually, included this language in here after two
 5 prior amendments and basically the public debate that
 6 -- that came up as we put these on the ballot and
 7 people voted on it, which was what -- you know, what
 8 effect would this have on birth control.
 9 So we put that on there are as a clear
 10 statement of our intent that we're not intending to
 11 outlaw all birth control or even affect any kind of
 12 action unless that really deals with the deprivation
 13 of the right to life of a human being.
 14 We believe there are a lot of instances
 15 of use of birth control that don't involve ending the
 16 life of a human being. Same with IVF. So we put
 17 that out there for clarity.
 18 MR. HOBBS: Sorry. No to be redundant,
 19 but can you -- can you define for me biologically
 20 what is the earliest stage of development that this
 21 measure would include?
 22 MR. JONES: Right. We can. I think --
 23 I think it would be something that I believe a judge
 24 would -- would be able to discern from scientific
 25 evidence that would be presented. And that is, under

1 normal circumstances, the early stage of a individual
 2 human being's development is fertilization of the
 3 meeting of the sperm and the egg.
 4 However, there are -- there are a lot of
 5 technical situations, such as twinning, where there
 6 isn't actual fertilization. It's -- there is a cell
 7 and then that cell becomes two human beings. So we
 8 didn't want to cut out any -- any person based on how
 9 they -- they were created.
 10 There's also medical advances with
 11 cloning, with different forms of procreation that we
 12 can perceive would not entail fertilization.
 13 MR. HOBBS: Thank you.
 14 MR. DOMENICO: So just to follow up on
 15 that, I think the -- the fight were this to pass
 16 would obviously be over what we've just -- what
 17 you've just been talking about. What is a member of
 18 the species homosapiens? Is that a scientific -- do
 19 you understand that? That that will be somehow
 20 fought out in court through battling scientific
 21 experts or is it a legislative? Can the legislature
 22 define that? Is it an accepted term? How -- is it a
 23 legal question? Or how is that supposed to be
 24 resolved?
 25 MR. JONES: Well, with respect, I think

1 -- I think the question would be not necessarily who
 2 a member of the species homosapiens is. I think that
 3 medically that question is -- is defined. It's a
 4 fact.
 5 I think the question is when dealing
 6 with competing interests what are the rights that we
 7 are willing to guarantee to nascent human beings?
 8 Right now, it's basically you're an equal member of
 9 society once you're born, and before then, you're
 10 sort of a second class.
 11 MR. DOMENICO: Well, I understand that
 12 will be sort of the debate before this is passed.
 13 That will be (inaudible). But once it's passed, your
 14 position is that that definition in 3B is sort of
 15 well-established scientific fact, that maybe when
 16 there's a unique DNA created, that is -- I just don't
 17 know enough, I guess, about the science to know
 18 whether pretty much everybody would say, okay,
 19 well --
 20 They might disagree with the amendment
 21 saying, well, we should treat this member of the
 22 species homosapiens as a person entitled to all the
 23 rights that you want to extend them, but they are not
 24 really much debate about when something becomes a
 25 species, a member of the species homosapiens.

1 I mean, I don't know that it matters for
 2 my purposes here as much as I just want to understand
 3 sort of how you see this playing out. If it were to
 4 pass, would that be something where there's a debate
 5 in the lawsuit or how would it be defined?
 6 MS. BROWN: I mean, I don't think that
 7 there is a real debate on that issue. Certainly, the
 8 opposition may bring a lawsuit trying to debate on
 9 it. But the fact that a federal law already has used
 10 this definition after a lot of research and several
 11 states have copied that federal law for their own
 12 unborn victims of violence act and this is the same
 13 definition used multiple times over in law, so it's
 14 pretty established by the medical community and
 15 science and law.
 16 So I don't think we really foresee a
 17 debate beyond that issue.
 18 MR. HOBBS: Okay. Thank you. Let's
 19 turn then to the question of whether the measure
 20 comprises a single subject. Is there anybody here
 21 who wishes to object to the measure on the grounds
 22 that single subject?
 23 Yes, ma'am. If you'll come forward,
 24 identify yourself and who you represent.
 25 MS. BATEMAN: Good afternoon, Mr.

1 Chairman, members of the board. My name is Lila
 2 Bateman. I'm representing Leslie Durgin, registered
 3 elector of the state of Colorado. We do -- we are
 4 here today because we believe that this initiative 46
 5 does violate the single subject requirement. What it
 6 does is, I think we just even heard, is bundle
 7 several subjects with distinct purposes that are not
 8 properly connected together and it puts them into a
 9 very broad theme where it's almost impossible to
 10 discern what the type of conduct that's going to be
 11 prohibited because it covers so much. And that's by
 12 the plain language itself.
 13 As mentioned, it's the intentional
 14 killing of any innocent person that's prohibited.
 15 Now, again, that would include the reproductive
 16 rights that it sounds like they would like to limit.
 17 It would also, as they also say, prohibit euthanasia.
 18 It would also go to vigilante killing.
 19 It would also go towards Make My Day, to
 20 an officer who's chasing an armed suspect who has not
 21 yet been found guilty by a court of law. All of this
 22 conduct is going to be prohibited by constitutional
 23 amendment, which is something very different from the
 24 law as it stands today, and it's getting conduct --
 25 you mentioned earlier that seems like this is fairly