

<p>COLORADO SUPREME COURT 2 EAST 14<sup>TH</sup> AVE. DENVER, CO 80203</p>	<p style="text-align: right;">DATE FILED: May 4, 2021</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></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 2020-2021 #16 (“Laws Concerning Cruelty to Animals”)</p> <p><b>Petitioners:</b> Janie VanWinkle, Carlyle Currier, Chris Kraft, Terri Diane Lamers, William Hammerich and Joyce Kelly</p> <p>v.</p> <p><b>Respondents:</b> Alexander Sage and Brent Johannes</p> <p><b>and</b></p> <p><b>Title Board:</b> Teresa Conley, David Powell and Julie Pelegrin</p>	
<p>Attorney for Respondents:</p> <p>Alexander Sage Filed Pro Se PO Box 81 Broomfield CO 80038 Phone: (720) 819-5244 Email: contact@coloradoPAUSE.org</p>	<p>Case No: ____2021SA125____</p> <p>Div./Ct. Rm. _____</p>
<p><b>OPENING BRIEF</b></p>	

Alexander Sage and Brent Johannes (“Respondents”), by and through undersigned counsel, respectfully submit this Opening Brief.

**I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Petitioners contend the Ballot Title Setting Board (“Title Board”) made two errors in its titling of Respondent’s Proposed Initiative 2021-2022 #16 (the “Titling”). Petitioners’ contentions are as follows:

1. The Titling contains multiple subjects in violation of Colo. Const. art. V, § 1(5.5).
2. The Titling violates the clear ballot title requirement because it includes political “catch phrases” in the title.

*See* Pet. for Rev. of Final Action – Title Bd. (“Pet.”), 4, April 14, 2021.

**II. JURISDICTION**

Due to Petitioner’s timely appeal, the Colorado Supreme Court has jurisdiction pursuant to Colorado Revised Statutes (“C.R.S”) § 1-40-107(2).

**III. STATEMENT OF THE CASE**

Respondents proposed three versions of their Proposed Initiative 2021-2022 #16 (“Proposed Initiative”); numbers 13, 15 and 16. Legislative staff comment hearings were held on January 11, 2021 (withdrawn) and February 22, 2021. After the February 22<sup>nd</sup> hearing, the Proposed Initiative was submitted to the Secretary of State to be considered for title setting on March 17.

On March 17, numerous objectors called into the Title Board’s meeting to argue that the Titling was not a single subject. Nevertheless, the Title Board unanimously agreed that the

Titling satisfied the single subject requirement because the entirety of the Proposed Initiative related to the regulating of cruelty to animals.

After a motion for rehearing was filed by the Petitioners and other objectors, a rehearing was held on April 7, 2021. Petitioners and their allies used the same arguments made during the March 17 hearing. They again argued the Titling violated the single subject rule while adding the argument that the Titling used politically charged phrases. Additional, although indirect, arguments were made on the grounds that the Petitioners and their allies had personal disagreements with the Proposed Initiative's underlying merits, which is an issue solely for Colorado voters.

During the April 7 hearing, the Title Board heard all arguments and again, unanimously agreed that the Titling was a single subject, i.e., the regulation of cruelty to animals. Still, the Title Board decided to rewrite the Titling in an effort to address at least some of Petitioners' concerns.

Still unsatisfied, even with the Title Board's rewrite efforts, Petitioners appealed to this Court on April 14, 2021. On April 18, 2021, Respondents began to collect signatures for the Proposed Initiative in earnest.

#### **IV. STATEMENT OF PERTINENT FACTS**

According to Colorado Secretary of State Jena Griswold, three basic requirements guide the decisions of the Title Board.

1. The Title Board determines whether or not an initiative has a single subject.
2. The Board does not comment on the merits of the initiative.

3. When finalizing the language for an initiative, the Title Board considers whether the language in the question adequately represents the changes to law and whether the language in the question would be understandable to voters.

See Jena Griswold, *What is the Title Board?* Colorado Secretary of State (Apr. 28, 2021),

<https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/aboutTitleBoard.html>.

With these requirements in mind, the Title Board designated and fixed the Titling. The Titling reads as follows:

*The ballot title and submission clause as designated and fixed by the Board is as follows:*

*Shall there be a change to the Colorado Revised Statutes concerning expanding crimes relating to cruelty to animals, and, in connection therewith, expanding the definition of “livestock” to include fish; expanding the definition of “sexual act with an animal” to include intrusion or penetration, however slight, into an animal’s anus or genitals with an object or part of a person’s body and removing the existing exception for animal husbandry practices and creating an exception for care to improve the animal’s health; defining the “natural lifespan” for certain species of livestock and providing that slaughtering those animals is not criminal animal cruelty if done according to accepted animal husbandry practices after the animal has lived 1/4 of the natural lifespan; removing the exception to the animal cruelty statutes for animal husbandry practices used in the care of companion or livestock animals; eliminating some exceptions to certain sentencing requirements; and providing that, in case of a conflict with animal care otherwise authorized by law, the criminal cruelty to animals statutes control?*

See Attach. to Pleading, 28, April 14, 2021.<sup>1</sup>

## **V. SUMMARY OF ARGUMENT**

Petitioner’s first argument—the Titling violates the single-subject requirement—turns on the theory that language discussing a crime for slaughtering animals before an authorized timeframe and language expanding the definition of “sexual acts with an animal” are not part of

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<sup>1</sup> Because this filing is not paginated, all page numbers for this citation are in reference to PDF page numbers.

the same subject. In other words, Petitioner argues the criminal slaughter of animals and criminal sex acts with animals do not both fit into the single subject of cruelty to animals.

Petitioner's Proposed Initiative suggests changes to C.R.S. §§ 18-9-201 and 202. Part 2 of Title 18, Article 9 is titled "Cruelty to Animals." Accordingly, any initiatives suggesting changes to Title 18, Article 9, Part 2 of Colorado's Criminal Code would, by default, be classified as within the single subject of "Cruelty to Animals." Petitioner's assertion to the contrary is simply illogical, as will be shown below.

Petitioner's next argument—the Titling is not sufficiently clear to satisfy the constitutional clear title requirement—is similarly flawed because it rests on the theory that "cruelty to animals," "animal cruelty" and a description of an expanded definition of "sexual act with an animal" are political catch phrases.

Petitioner's argument that the above-mentioned terms are political catch phrases bears no fruit because Title 18, Article 9, Part 2 of Colorado's Criminal Code is already titled "Cruelty to Animals" and already contains a definition for "[s]exual act with an animal." *See* C.R.S. § 18-9-201(5). Since the Proposed Initiative is suggesting enhancements to the cruelty to animal statutes, the Titling will necessarily use the above-mentioned phrases to maintain context for the voters and provide a direct reference to the statutes that are potentially being altered. Any other phraseology would be an indirect reference to the statutes being potentially altered and cause confusion.

## **VI. ARGUMENT**

### **A. Because Animals Can be Harmed in More Than One Way, *All* Crimes Against Animals Comprise the Single Subject of Cruelty to Animals.**

The difference between ensuring that the slaughtering of livestock occurs within a specified timeframe and expanding the definition of “sexual act with an animal” is one of degree, not kind and thus both proposed changes to Title 18 fall under the single subject of cruelty to animals found in C.R.S. T. 18, art. 9, Pt. 2.

“In reviewing the Title Board title settings,” the Colorado Supreme Court employs “all legitimate presumptions in favor of the propriety of the Board’s actions.” *Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315* (“*Matter of Title, #315*”), 2020 CO 61, ¶ 7 (quotations omitted). When determining whether the Title Board’s title setting comports with constitutional requirements, the Court “employ[s] the general rule of statutory construction, giving words and phrases their plain and ordinary meanings.” *Id.* at ¶ 8. Importantly, “if an initiative tends to effectuate one general objective or purpose, then the initiative presents only one subject.” *Id.* at ¶ 15. Accordingly, “an initiative [will not] be deemed to violate the single subject requirement because it may have different effects on other provisions of Colorado law [because] [s]uch effects are not relevant to whether the proposed initiative contains a single subject.” *Id.* Therefore, the Court provides the Title Board with “considerable discretion” and will “overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *Id.* at ¶ 17 (internal quotations omitted).

In *Matter of Title, #315*, the subject initiative would have created and administered “a Colorado preschool program funded by taxes on nicotine and tobacco products.” 2020 CO 61 at ¶ 20. Petitioner argued that the initiative violated the single subject requirement because “it both expands preschool programs and penalizes local policy makers who ban any form of tobacco or nicotine products.” *Id.* at ¶ 18. In ruling against Petitioner, the Court found that “creating and administering a Colorado preschool program funded by state taxes on nicotine and tobacco

products” was a single subject and it “expect[ed] ... a knowledgeable voter would understand that prohibiting the sale of tobacco and nicotine products in his or her locality would result in a loss of tax revenue derived from the sales of such products.” *Id.* at ¶ 20.

In *In re Title, Ballot Title, Submission Clause for 2007-2008* | 62 (“62”), the subject initiative established “a just cause requirement for discharging or suspending an employee.” 184 P.3d 52, 59 (Colo. 2008). Petitioner argued the initiative contained five subjects, namely:

1. “the elimination of the employment at-will doctrine in Colorado;”
2. “the elimination of Colorado’s civil service system;”
3. “the elimination of the ability for employer and employee to contract and enter into collective bargaining agreements;”
4. “the restriction of a party’s right to access the court system;”
5. “and the restriction of a party’s due process right to appeal a mediator’s decision.”

*Id.* In holding Petitioner’s claim was “without merit,” the Court noted the Petitioner “parse[d] the language of the measure in an attempt to create separate and distinct subjects.” *Id.* Rather, a “necessary association exists among the provisions of the Initiative, in that each provision relates to creating, implementing, or enforcing a ... standard in the employment setting.” *Id.*; *see also In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45* (“No. 45”), 274 P.3d 576, 581 (Colo. 2012) (finding Petitioner’s argument unpersuasive because “Initiative 45 only modifies the existing rights and interests in water between private individuals and the public, ... it does not alter the long-recognized scope of the subject. The Proposal’s provisions are dependent upon and connected to each other because they define the purpose of the measure, describe the

broadened scope of the public's control over Colorado's water resources and outline how to implement and enforce this dominant public water estate.”).

In *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91* (“No. 91”), the measure at issue sought to levy a beverage container tax “to protect and preserve the waters of the state.” 235 P.3d 1071, 1073 (Colo. 2010). The taxes to be collected were to be “distributed to Colorado’s nine basin roundtables and the interbasin compact committee” for “protection, administration, and development of renewable surface waters and groundwater supplies for maximum utilization.” *Id.* at 1073-1074. However, the initiative would also have placed a “four-year moratorium on legislative action by the General Assembly, precluding it from amending, repealing, or modifying the initiative’s provisions governing the basin roundtables and interbasin compact committee.” *Matter of Title, #315*, 2020 CO 61 at ¶ 22 (citing *No. 91*, 234 P.3d at 1075). Ultimately, the Court concluded the four-year moratorium was “a separate subject that was not necessarily and properly connected to the initiative’s subject of establishing and administering a beverage container tax.” *Id.* (citing *No. 91*, 234 P.3d at 1078-1780); *see also In re Title, Ballot Title and Submission Clause, for 2007-2008, #17* (“#17”), 172 P.3d 871, 875 (Colo. 2007), *as modified on denial of reh’g* (Dec. 17, 2007) (“the creation of a new environmental department with the separate and discrete subject of the creation of a public trust standard” violates the single subject rule).

Here, Petitioner’s argument hinges on the contention that “[o]ne issue concerns the expansion of the types of animals covered by the animal cruelty statute” (i.e., livestock that has lived a specified amount of time), “while the other redefines the type of conduct that constitutes animal cruelty” (i.e., “sexual act with an animal”). *See Attach. to Pleading*, 18, April 14, 2021. This argument misses the point entirely. Cruelty to animals takes *many* forms. For example,



C.R.S. §§ 18-9-201(3)-(5) currently provides definitions for “Mistreatment,” “Neglect,” “Serious physical harm” and “Sexual act with an animal.” The Proposed Initiative seeks to “broaden[] [the] scope” of the cruelty to animals statutes by constricting the timeframe of animal slaughter and enhancing the illegality of sexual acts committed against animals; the Titling echoes this. *No. 45*, 274 P.3d at 581. The Proposed Initiative does *not* call for ending the slaughter of livestock, which may or may not “alter the long-recognized scope of the subject.” *Id.* Instead, the Proposed Initiative simply proposes a moratorium on the especially cruel killing of baby animals<sup>2</sup> while maintaining a zone of safety around the sexual anatomy of adult animals, which the Titling makes clear.

Furthermore, the Proposed Initiative does not include an interplay between two seemingly unrelated subjects like tobacco and pre-school, which can be challenging to address in an abbreviated title but was still found to constitute a single subject by this very Court. *See generally Matter of Title, #315*, 2020 CO 61. As for Petitioner’s argument that the Titling uses a “highly charged reference,” (i.e., “sexual acts with an animal”), as stated above, the statute in question *already* uses that phrase. Attach. to Pleading, 18, April 14, 2021. In fact, each provision of the Proposed Initiative “relates to creating, implementing, or enforcing a ... standard in the [cruelty to animals] setting,” and the Titling provides precise clarity for such standards. 62, 184 P.3d at 59. Undoubtedly, “a knowledgeable voter” would understand that voting “yes” based on a review of the Titling would make it a crime to slaughter specific animals under a certain age while also making it a crime to commit sexual acts against specific animals of any age. *Matter of Title, #315* at ¶ 20. There is no caveat discussing a moratorium on subsequent legislative action, *No. 91*, 234 P.3d at 1075, nor is there a caveat discussing “a separate and discrete subject”

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<sup>2</sup> [Johson, Kim. (2019, August 14). How the dairy industry supports the Veal Industry. Retrieved May 03, 2021, from <https://animalequality.org/blog/2019/08/14/dairy-industry-supports-veal-industry/>]

outside the context of cruelty to animals. #17, 172 P.3d at 875. The Proposed Initiative’s Titling is plain, a “yes” vote means that a Colorado voter agrees with enhancing the statutes related to cruelty to animals.

**B. Including the Current Name of a Statute in the Titling of An Initiative that May Alter the Same Statute Does Not Constitute a Political Catch Phrase.**

Including the terms “cruelty to animals,” “animal cruelty,” and laying out a proposed definition for “sexual act with an animal,” does not violate the clear ballot title requirement because the aptly named “Cruelty to Animals” statute, *see* C.R.S. T. 18, art. 9, Pt. 2, is the very statute the Proposed Initiative is potentially amending. Moreover, the Titling’s inclusion of the language associated with the proposed change to the “sexual act with an animal” provision is a mere description of what may no longer be permissible; anything less would create confusion as to the scope of what may or may not be permitted.

“The Title Board must avoid using catch phrases when setting a title and ballot title and submission clause.” *Matter of Title, Ballot Title and Submission Clause for 2013-2014 #85* (“85”), 328 P.3d 136, 146 (Colo. 2014). “Catch phrases are words that work to a proposal’s favor without contributing to voter understanding.” 62, 184 P.3d at 60. Thus, phrases that “engender[] voter confusion” are impermissible catch phrases. #85, 328 P.3d at 146. However, “[p]hrases that merely describe the proposed initiative are not impermissible catch phrases.” *Id.*

In 62, 184 P.3d at 60, Petitioner claimed that “the terms ‘just cause’ and ‘mediation’ are impermissible catch phrases, obscuring the true purpose of the Initiative.” In finding the Petitioner’s argument unpersuasive, this Court found that “[j]ust cause’ accurately describes an element of the Initiative. In addition, the term sets forth a legal standard commonly used in the law.” *Id.* at 61. As for ‘mediation,’ the Court noted it was also “a term commonly used in the

law.” *Id.* Ultimately, the Court found the two terms “no more prejudicial in terms of voter perception than ... phrases we have upheld in the past.” *Id.*; see, e.g., *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #£256*, 12 P.3d 246, 257 (Colo. 2000) (“management of growth” is not a catch phrase); *Matter of Title, Ballot Title Clause and Submission Clause, and Summary for 1997-98 No. 112 (Livestock Operations)*, 962 P.2d 255, 256 (Colo. 1998) (“protect the environment” and “human health” are not catch phrases); #85, 328 P.3d at 146 (“statewide setback” is not a catch phrase because Petitioner’s argument invited the Court to “speculate on the motivations of the initiative proponents or to construe the legal effect of the initiatives as if it were law.”).

In *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)* (“*No. 258(A)*”), 4 P.3d 1094, 1100 (Colo. 2000), the phrase “as rapidly and effectively as possible” was found to “operate as both a catch phrase and a slogan.” The Court’s decision turned on the finding that the phrase “mask[ed] the policy question regarding whether the most rapid and effective way to teach English to non-English speaking children is through an English immersion program.” *Id.* The Court also noted that because “[t]his question is a subject of great public debate[,] [b]y including the ‘as rapidly and effectively as possible’ language in the titles for the Initiative ... the Title Board tips the substantive debate surrounding the issue to be submitted to the electorate.” *Id.*

Here, the phrase “cruelty to animals” and its synonymic counterpart, “animal cruelty,” merely describe the Proposed Initiative. Neither phrase obscures the purpose of the Proposed Initiative; rather, the phrases accurately describe what the Proposed Initiative is about. There is no voter confusion with phrases this direct. If “protect the environment” and “human health” cannot be found to constitute catch phrases, “cruelty to animals” and “animal cruelty” cannot

either. *Livestock Operations*, 962 P.2d at 256. All four phrases speak to the relationship of an impact on a specific entity.

Similarly, the Titling's inclusion of "sexual act with an animal," and its accompanying definition, is "an element of the Initiative" that "sets forth a legal standard" that is associated with "cruelty to animals." 62, 184 P.3d at 60; *see also* C.R.S. § 18-9-201(5) (already defining "Sexual act with an animal"). In other words, in order to define an activity, the details of that activity need to be explicitly described. C.R.S. §§ 18-3-401(5)-(6) uses vulgarity to describe the specifics of "[s]exual intrusion" and "[s]exual penetration" in the human context. Still, the intent of the statute is not vulgarity, the intent of the statute is clarity. The expansion of the definition of "sexual act with an animal," from its current form to a more exhaustive form, therefor requires that the Title Board include some of the vulgar and explicit wording from the Proposed Initiative. To do otherwise would not provide voters with the full picture.

Using any terms aside from direct phrases such as "cruelty to animals," "animal cruelty" and "sexual act with an animal," would "engender[] voter confusion" because the substitute phrases would no longer be on-point and the specifics of what the phrase's implication may be (in the case of "sexual acts with an animal") would become unclear. #85, 328 P.3d at 146.

Ours is not a case where a policy question, divided by two competing views, needs answering. The immediate Titling is not masking an either/or proposition such as what is the "most rapid and effective way to teach English to non-English speaking children." *No. 258(A)*, 4 P.3d at 1100. Rather, this case deals with nothing more than whether a voter wants to bolster Colorado's cruelty to animals statutes by limiting when an animal can be slaughtered and limiting what kind of acts may be committed on an animal's body. Here, the Title Board has not

“tip[ped] the substantive debate surrounding the issue to be submitted to the electorate,” it has merely described the way in which Colorado voters may limit cruelty to animals. *Id.*

## **VII. CONCLUSION**

Respondents respectfully request that this Court affirm the Title Board’s findings and allow Respondents to proceed with their signature collections and for any other relief the Court deems fair and equitable.

Respectfully submitted on this 4th day of May 2021.