

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</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 2021-2022 #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>and</p> <p><b>Title Board:</b> Teresa Conley, David Powell, and Julie Pelegrin</p>	
<p>Attorney for Petitioners:</p> <p>Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) <a href="mailto:mark@rklawpc.com">mark@rklawpc.com</a></p>	<p>Case Number: 2021SA000125</p>
<p style="text-align: center;"><b>PETITIONERS’ ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #16 (“LAWS CONCERNING CRUELTY TO ANIMALS”)</b></p>	

## CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

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*s/ Mark G. Grueskin*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTRODUCTION ..... 1

ARGUMENT..... 3

    I. Initiative 16 was drafted to achieve one objective but folded in at least two more, violating the constitutional single subject requirement. .... 3

        A. This measure is one subject only if this Court rejects its previous holdings that a general, overarching description is not the same thing as a single subject. .... 6

        B. The redefinition of “sexual act with an animal” is not a logical or necessary extension of removing the general exemption for the treatment of livestock from these criminal statutes..... 8

        C. Defining the natural lifespan of livestock and imposing a new requirement for the slaughter of livestock is a separate subject. .... 11

    II. The Title Board’s obligation to set a fair title precludes it from using catch phrases in the titles. .... 16

        A “Cruelty to animals” and “sexual act with an animal” are catch phrases, even though the phrases appear in Part 2 and the measure. 17

        B. Proponents concede that the phrase “sexual act with an animal” and the language describing the revised definition is explicit and vulgar. .... 22

CONCLUSION ..... 28

TABLE OF AUTHORITIES

**Cases**

*Salazar v. Kubic*, 2016 COA 148, 370 P.3d 342.....9

*In re Proposed Initiative Designated “Governmental Business”*, 875 P.2d at 876 .....25

*In re Title, Ballot Title and Submission Clause for 2019-2020 #3 “State Fiscal Policy,”* 454 P.3d 1056, 1061 (Colo. 2019).....17, 19

*In re Title Ballot Title & Submission Clause for Initiative 2015-2016 #63*, 2016 CO 34, ¶24, 370 P.3d 628, 634..... 23, 27

*In re Title Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A) (English Language Education in Public Schools) (“#258(A)”* ..... 18, 20, 24, 28

*In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991).....26

*In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 650 (Colo. 2010) ..... 20

*In re Title, Ballot Title and Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶38, 328 P.3d 136, 147 .....26

*In re Title, Ballot Title and Submission Clause, and Summary Regarding Amend Tabor 25*, 900 P.2d 121, 125 (Colo. 1995) .....7

*In re Title, Ballot Title, & Submission Clause 2007-2008 # 62*, 184 P.3d 52, 60 (Colo. 2008) ..... 13, 26

*In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002) .7, 15

*In the Matter of the Title, Ballot Title, Submission Clause and Summary for Proposed Initiative “Public Rights in Waters II,”* 898 P.2d 1076, 1080 (Colo. 1995) .....6

*In the Matter of the Title, Ballot Title, Submission Clause and Summary for Proposed Initiative 1999-2000 #29*, 972 P.2d 257, 273-74 (Colo. 1999) ..... 14

*In the Matter of Title and Ballot Title & Submission Clause for  
Initiative 2013-2014 #89, 2014 CO 66, ¶19, 328 P.3d 172, 178 ..... 7*

**Statutes**

C.R.S. §1-40-106(1) ..... 16  
 C.R.S. §1-40-106(3)(b) ..... 16  
 C.R.S. §18-9-201(2) ..... 8, 9  
 C.R.S. §18-9-202(1)(a) ..... 12  
 C.R.S. §35-80-102(10) ..... 9

**Other Authorities**

[www.coloradopause.org/about](http://www.coloradopause.org/about) ..... 10

## INTRODUCTION

No statement in any opening brief is as revealing as this statement by the Proponents:

The expansion of the definition of “sexual act with an animal,” from its current form to a more exhaustive form, therefore 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**.

Proponents Opening Brief (“Proponents’ Br.”) at 12 (emphasis added). In one respect, that’s true. It *is* impossible to read the title’s vulgar and explicit wording — “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” — without formulating a “full picture” of what Proponents hope will sway voters about Initiative 16.

No party in this appeal disputes that Initiative 16 was intended to remove the livestock exemption for animal husbandry practices from certain existing laws. But that’s not a measure likely to draw voter attention or attract voter sympathies. To fix that political problem,

Proponents used, and the Title Board erroneously replicated, a “vulgar and explicit” picture that will frame voters’ views about this initiative. As such, Initiative 16 violates the single subject rule because it presents a classic case of log rolling — amalgamating disparate provisions to attract different segments of the electorate that might vote “no” on the measure’s distinct purposes.

To the extent the Title Board, acting in good faith, used a lurid description that will shock voters and attract support the measure would not otherwise receive, the Board failed to meet the statute’s fair title mandate. Therefore, the Board erred in wording this title.

Before the Court even addresses the extent of prejudice in Initiative 16’s title, it should find that the Proponents’ position (adopted in this appeal by the Title Board) about Initiative 16’s subject is binding. Both maintain that core purpose of this measure is to eliminate the exemption for livestock pertaining to “animal husbandry” in the animal cruelty statutes. Initiative 16 does this, but it also expands the scope of sexual abuse on an animal (under Initiative 16, to include cats, dogs, and fish) and establishes mandatory lifespans for livestock before they are

slaughtered. Those legal changes are separate subjects because they are not necessarily related to the statute's livestock exemption.

The Title Board's decisions should be reversed by this Court.

## ARGUMENT

**I. Initiative 16 was drafted to achieve one objective but folded in at least two more, violating the constitutional single subject requirement.**

Proponents have been clear: the thrust of their measure is its Section 2, which removes the current exemption for livestock from statute. During the initial Title Board hearing, Proponents described the single subject as “the removal of the exemption that livestock has in the animal cruelty statutes.” Mar. 17, 2021, Title Bd. Hr’g at 9:50.<sup>1</sup>

To accomplish that goal, Proponents would amend the existing statute by striking key wording as shown here: “Nothing in this part 2 shall affect ~~accepted animal husbandry practices used by any person in the care of companion or livestock animals or in~~ the extermination of

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<sup>1</sup> The recording of the initial March 17, 2021, hearing is available at [https://csos.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=199](https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=199).



undesirable pests....” Proposed Section 18-9-201.5(1); Record at 3. Initiative 16 also strikes that statute’s provision which states, “Nothing in this part 2 shall affect animal care otherwise authorized by law.” Proposed Section 18-9-201.5(3); Record at 3. Finally, Initiative 16 strikes “accepted animal husbandry practices” from the exception to the current statute’s definition of “sexual act with an animal” and replaces it with language relating to “care in the interest of improving that animal’s health.” Proposed Section 18-9-201(5); Record at 2.

The Title Board recognized that the central aim of the measure was to address the treatment of livestock. *See, e.g.*, Apr. 7, 2021 Title Bd. Hr’g at 1:27:55-1:28:03 (comments of Title Board Chair, Theresa Conley, framing Initiative 16 as a matter of “expanding animals *to include livestock*” and “expanding these cruelty statutes *to include livestock*”).<sup>2</sup> Before this Court, the Board argues the single subject is removing the existing statutory livestock exemption from these laws. Title Bd. Br. at 8 (“the Proposed Initiative’s single purpose [is] revising the criminal

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<sup>2</sup>The recording of the April 7, 2021, hearing is available at [https://csos.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=213](https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=213).

animal cruelty statute to remove any existing exemptions for fish and livestock”)).

With the Proponents and the Title Board agreeing that the measure’s central purpose is to remove the livestock exemption from Part 2 of Title 18, part 9, this title should be a fairly straightforward, briefly stated question to reflect that single subject. By adding a new redefinition of sexual abuse on an animal (including dogs, cats, and fish) and creating criminal liability for persons whose livestock do not live to a statutorily defined point in time, the Proponents went far afield from their stated purpose and exceeded the bounds of the single subject requirement.

The Title Board argues that changing the definition of “sexual act with an animal” and adding lifespan requirements before livestock may be lawfully slaughtered are both encompassed within the measure’s single subject of “broaden[ing] the scope of Colorado’s criminal animal cruelty statute.” Title Bd. Br. at 10. The Board’s observation is not necessarily consistent with its insistence that the measure’s “single purpose” is “revising the criminal animal cruelty statute to remove any

existing exemptions for fish and livestock,” *id.* at 8, but it does underscore the measure’s single subject problem.

- A. **This measure is one subject only if this Court rejects its previous holdings that a general, overarching description is not the same thing as a single subject.**

An initiative violates the single subject requirement where the label used to justify it as a single subject is “too general and **too broad.**” *In the Matter of the Title, Ballot Title, Submission Clause and Summary for Proposed Initiative “Public Rights in Waters II,”* 898 P.2d 1076, 1080 (Colo. 1995) (emphasis added). Almost by definition, a proposal that is justified as a single subject on the ground that it “broadens” animal cruelty statutes cannot be a single subject where it enacts unrelated provisions. The “subject” of broadening statutes is a vague, overarching phrase and is not sufficient to justify a departure from the Constitution’s single subject standard. By using this general rubric to encapsulate the many aspects of Initiative 16, the Board effectively does not dispute that the title’s loosely stated nexus falls short of being a single subject.

The title’s single subject statement reflects this failing. The title says the measure’s subject is “expanding crimes relating to animal

cruelty.” The single subject amendment was adopted to protect voters from “an initiative, although claiming to have a single subject, in reality has multiple purposes,” meaning that voters would be surprised by “one or more of the initiative's outcomes.” *In the Matter of Title and Ballot Title & Submission Clause for Initiative 2013-2014 #89*, 2014 CO 66, ¶19, 328 P.3d 172, 178. Multiple provisions that are grouped under the same general heading (for example, petitions) still violate the single subject mandate where one objective “serves a very different purpose than the procedures” provided elsewhere in an initiative because they are not interrelated. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002) (“#43”).

Thus, the question before the Court is simple: does an initiative have “at least two distinct and separate purposes which are not dependent upon or connected with each other”? *In re Title, Ballot Title and Submission Clause, and Summary Regarding Amend Tabor 25*, 900 P.2d 121, 125 (Colo. 1995). For a measure that seeks to “broaden” by

creating and then also changing separate criminal laws, the answer to this question is “yes.”

- B. The redefinition of “sexual act with an animal” is not a logical or necessary extension of removing the general exemption for the treatment of livestock from these criminal statutes.**

The Title Board and Proponents contend that Initiative 16’s redefinition of “sexual act with an animal” is part and parcel of the subject of removing the exemption for livestock in certain criminal statutes. The Board states, “This definition is necessarily and properly connected to the measure’s single subject by clarifying how the definition of ‘sexual act with an animal’ will apply to livestock.” Title Bd. Br. at 12.

The problem is, this new redefinition has been expanded to apply to acts that “implicate many traditional or widely accepted agricultural or veterinary practices.” *Id.* at 12-13. Moreover, this new definition doesn’t just apply to livestock. Under Initiative 16, it applies to “an animal,” Proposed Section 18-9-201(5); Record at 2, and the definition of “animal” is changed to apply to “any living non-human creature” and “includ[es] but [is] not limited to a dog, a cat, a horse, [and] livestock....” Proposed Section 18-9-201(2); Record at 2. Thus, this redefinition doesn’t

just change the law so that it would apply to livestock. The initiative's text is much broader and extends the expanded laws to cats and dogs, as well as horses and fish (the latter being defined as "livestock" by Initiative 16).

The Board is incorrect where it states the inclusion of livestock in the definition of "animal" is the link required to meet the single subject requirement. "At its core, the Proposed Initiative would specifically include livestock in the definition of 'animal' for purposes of the criminal animal cruelty statutes. To implement that revision, it includes related adjustments to current law." Title Bd. Br. at 13. This measure changes the criminal statutes that apply to household pets, among others, and thus does not advance a singular, narrow goal of changing the treatment of livestock. *Cf. Salazar v. Kubic*, 2016 COA 148, ¶¶10, 16-18, 370 P.3d 342 (commissioner of agriculture correctly applied "pet animals," which includes dogs, cats, and fish, and excludes "livestock") (citing C.R.S. §35-80-102(10)).

Proponents make a parallel argument, contending that the revised definition "mak[es] it a crime to commit sexual acts against *specific*

animals of any age.” (Proponents’ Br. at 9 (emphasis added).) But because they amended the definition of “animal” as addressed above, Initiative 16 does not just relate to “specific animals,” let alone simply livestock. The new prohibitions and standards are broader than that, as they apply to “any living non-human creature.” Thus, the Proponents’ contentions that Initiative 16 is “clear and simple” and will only “extend the definition of animal cruelty to farmed animals,” *see* [www.coloradopause.org/about](http://www.coloradopause.org/about) (Proponents’ website) (last viewed May 23, 2021), is a political statement rather than an accurate legal summary of their far-ranging measure.

The Board is incorrect about the measure’s reach as to a limited universe of “livestock;” the Proponents are incorrect about the measure’s limited applicability to “specific” animals. A measure this unwieldy, unified only by an overarching summary such as “expanding crimes relating to animal cruelty,” allows for such confusion; the Constitution’s single subject requirement does not. *In the Matter of the Title, Ballot Title & Submission Clause for Initiative 2007-2008 #17*, 172 P.3d 871, 873 (Colo. 2007) (single subject requirement must “apprise voters of the

subject of each measure” to avoid “surreptitious measures that could result in voter surprise or fraud”).

Initiative 16’s expanded definition of sexual abuse on an animal is a generally applicable standard that applies to the treatment of virtually *all* animals whether they are defined as “livestock” or not. As Petitioners noted in their Opening Brief, voters’ will be surprised to discover, in voting on a measure that is supposedly about “livestock,” they actually approved a measure that covers the care of pets. *See* Petitioners’ Opening Brief at 17. Changing the standards that apply to household pets like dogs, cats, and fish (as a matter of daily care or grooming, breeding practices, or other acts that are not remotely related to potential sexual abuse of an animal) is not “necessarily and properly” connected with removing the statute’s livestock exemption for accepted animal husbandry practices.

Initiative 16 should be returned to the Proponents so they may pursue these separate subjects in separate initiative proposals.

- C. Defining the natural lifespan of livestock and imposing a new requirement for the slaughter of livestock is a separate subject.**



The Title Board also argues that Initiative 16's new "natural" lifespans for livestock, and the requirement that they live 1/4 of that lifespan before slaughter, is part of the single subject because otherwise slaughtering an animal would violate the prohibition on cruelty to animals. Title Bd. Br. at 11. This argument suffers two flaws.

The Title Board justifies prescribing livestock lifespans as part of a single subject concerning animal cruelty by linking the new lifespans with the existing prohibition on "mistreat[ing]" animals. C.R.S. §18-9-202(1)(a). But "mistreatment" is a defined terms under this statute, and it does not mandate lifespans by animal species. Rather, "[m]istreatment' means every act or omission that causes or unreasonably permits the continuation of unnecessary or unjustifiable pain or suffering." C.R.S. §18-9-201(3). There is no linkage here.

Whether an animal can be slaughtered for food and how long the animal lives have no relationship to whether an animal is subjected to "unnecessary or unjustifiable pain or suffering." In fact, Initiative 16 itself provides that lawful slaughter cannot cause an animal to "needlessly suffer." Proposed Section 18-9-202(1.9); Record at 3. Thus,

even the Proponents recognize the inherent separation between the way in which an animal is slaughtered (which cannot be done if accompanied by needless suffering) and how long the animal must live – at least for its owner to avoid criminal prosecution.

Contrary to the Board’s argument, Initiative 16’s new livestock slaughter provisions do not serve to harmonize this measure with existing law, and they are not an “effect” of eliminating the general exemption for livestock under these laws. Title Bd. Br. at 10-11. Nothing in current law measures the number of birthdays a cow or sheep must observe so its owner is not prosecuted or otherwise is legally at risk. And Petitioners have never suggested that the animal lifespan mandate of Initiative 16 will have any particular effects on any other provisions of local, state, or federal law which is the only relevant inquiry as to an initiative’s “effects.” *In re Title, Ballot Title, & Submission Clause 2007-2008 # 62*, 184 P.3d 52, 60 (Colo. 2008) (Title Board’s duty does not include “constru[ing] the future legal effects of an initiative as part of the ballot title”). Therefore, the Title Board’s defense of this aspect of the measure is not pertinent here.

In contrast, Proponents contend that if any change is made to the “animal cruelty” statutes, it is necessarily a single subject. “[A]ny 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.’” Petitioners’ Br. at 5; *see also id.* (“because animals can be harmed in more than one way, all crimes against animals comprise the single subject of cruelty to animals”) (capital letters omitted).

Assessing single subject compliance based on the number of sections or articles amended is not a new idea. But this test has never been accepted by the Court. More than 20 years ago, one justice, writing in dissent, proposed treating any measure that amends more than one constitutional section as presumptively, but not conclusively, a violation of the single subject rule. *In the Matter of the Title, Ballot Title, Submission Clause and Summary for Proposed Initiative 1999-2000 #29*, 972 P.2d 257, 273-74 (Colo. 1999) (Scott, J., dissenting). This Court has not embraced such a rule.

As is pertinent here, the Court has never held that an initiative proposing amendments to a complex statutory article is, by that fact alone, a single subject. To the contrary, it has indicated disfavor for such a rule. For instance, the Court considered an initiative that would have treated any measure amending only one constitutional article as a single subject. But the Court observed that such a standard violated the single subject requirement as well as the purposes for which it was adopted. *#43, supra*, 46 P.3d at 445, n.8.

This Court evaluates an initiative's purposes to determine whether they are necessarily connected or, instead, are distinct. Thus, Petitioners' view is without precedential support and is not a legally sufficient reason to find that Initiative 16 constitutes a single subject.

During the January 11, 2021, hearing with Legislative Council staff and the Office of Legislative Legal Services, Proponents accurately described the scope of their measure as encompassing three subjects:

Shall Article 9 of Title 18 of the Colorado Revised Statutes be amended such that livestock will be included in the current cruelty to animal statute, a loophole in the definition with "sexual act with an animal" will be closed, and the minimum age to slaughter livestock will be set to one quarter of the animal's natural lifespan.

Jan. 11, 2021, Review and Comment Hr'g, at 11:02:23.<sup>3</sup> After that occurred, Proponents did not withdraw or modify their statement about these three purposes for their measure. Notably, neither of the latter two subjects referred to mention “animal cruelty” even though Proponents believe that to be their unifying element.

Proponents have changed their position about the relative weight to be given to their measure’s subjects. This Court should reject a late repackaging of Initiative 16 and find that it is comprised of multiple subjects.

**II. The Title Board’s obligation to set a fair title precludes it from using catch phrases in the titles.**

The Title Board must set “a proper fair title” for each single-subject initiative. C.R.S. §1-40-106(1). A title must “correctly and fairly” summarize the measure to be initiated. C.R.S. §1-40-106(3)(b).

To the extent the Board argues it has “discretion” to use inflammatory language from a proposed initiative in the titles it sets, *see*

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<sup>3</sup> The hearing considered the first version of Proponents’ initiative, Initiative 13. The audio recording of the hearing is available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210119/72/10527>.

Title Bd. Br. at 21, it is wrong. It has no such discretion. This Court has been clear that the “Board *must avoid* using catch phrases or slogans when adopting a title and ballot title and submission clause.” *In re Title, Ballot Title and Submission Clause for 2019-2020 #3 “State Fiscal Policy,”* 2019 CO 107, ¶26, 454 P.3d 1056, 1061 (emphasis added) (“#3”).

Such a bright line rule make sense because giving flexibility to the Title Board to use catch phrases would be tantamount to allowing the Board to politically frontload some measures via title setting, either to convince voters to support or oppose a measure. That flexibility would compromise the fairness requirement imposed by statute on the Board.

**A “Cruelty to animals” and “sexual act with an animal” are catch phrases, even though the phrases appear in Part 2 and the measure.**

As Petitioners explained in their opening brief, “cruelty to animals,” “animal cruelty,” and “sexual act with an animal” and the accompanying graphic description of the revised definition are catch phrases. The former evokes general sympathy for and a desire to protect animals, while the latter provokes reactions based on concepts of sexual deviancy. Neither the Title Board nor Proponents really dispute that these phrases

are emotionally charged or have the ability to provoke an emotional response from voters.<sup>4</sup> Indeed, Proponents concede the point at least as to “sexual act with an animal” given the “vulgar” and “explicit” nature of the language. Instead, they principally argue that, since the phrases appear in Part 2 and Initiative 16, it is permissible to use them in the title. This Court has held otherwise.

In *In re Title Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A) (English Language Education in Public Schools) (“#258(A)”*), the Court considered a ballot measure requiring all public schools in Colorado be taught in English. 4 P.3d 1094, 1097 (Colo. 2000). The ballot measure stated that “[a]ll children in the state’s public schools shall be taught English as rapidly and effectively as possible.” *Id.* at 1100,

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<sup>4</sup> Proponents primarily rely on *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 #112 (Livestock Operations)*, 962 P.2d 255 (Colo. 1998), to argue that “cruelty to animals” is merely descriptive. See Proponents’ Br. at 11-12. They contend that the phrases here are no different than “protect the environment” and “human health,” which, they say, the Court approved. *Id.* Those phrases, however, were *not* used by the Board in the title; they were included in the summary, a document that the legislature has since repealed. The Court did not provide any explanation or analysis as it affirmed without opinion. 962 P.2d at 256. The case is not persuasive as to the resolution of this matter.

1104. The Title Board included the phrase “as rapidly and effectively as possible” in the title describing the measure. The Court reversed the Board, holding that the phrase constituted a catch phrase as it “mask[ed] the policy question” presented by the initiative. *Id.* at 1100. The Court specifically rejected the argument that the phrase was permissible because it appeared in the text of the measure: “While we agree that the initiative contains this language, the Title Board is *not* free to include this wording in the titles if, as here, it constitutes a catch phrase.” *Id.* (emphasis added).

Nor does the Court’s decision in *#3, supra*, hold otherwise. The Title Board cites this case for the proposition that “this Court has declined to declare a phrase invalid when it merely re-states relevant constitutional or statutory titles.” Title Bd. Br. at 17. But that is not what the case says. The Court considered only whether the specific phrase “Taxpayer’s Bill of Rights” was a catch phrase. 2019 CO 107, ¶25, 454 P.3d at 1062. The Court’s holding was that the use of “*this* provision” “as used in the title *at issue*” was not a catch phrase — not a general rule that all “constitutional or statutory titles” may be used. *Id.* ¶29, 454 P.3d at 1062



(emphasis added). Indeed, in the next paragraph of its opinion, the Court specifically addressed whether the particular phrase was impermissibly “emotionally laden,” holding that it is not. *Id.*

Finally, the Court’s test for a catch phrase is whether voters will cast their ballots based on the core subject of the initiative or words that trigger emotions without regard for that core subject. When the Court held that the phrase “as rapidly and effectively as possible” in the context of an English-immersion education initiative was improper, it came to this conclusion “because the phrase masked the basic policy question underlying the initiative, that is, whether English-immersion programs are the best way to teach English to non-English speakers.” *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 650 (Colo. 2010), citing #258(A), *supra*.

The Title Board maintains that this inflammatory wording will not mask the change to the livestock exemption in the animal cruelty statutes. Title Bd. Br. at 21-22. To determine if the Board is correct, the Court must ask if, when voters are given the chance to sign a petition for Initiative 16 and/or vote on it, will they focus on the fact that this

measure eliminates the livestock exemption in Part 2 of the affected statutes (given that the Board and the Proponents insist this is the measure's subject)? Or will they consider Initiative 16 a referendum on "animal cruelty" since that phrase, in one form or another, appears four (4) separate times in the titles, a level of emphasis not typically employed by the Board?

Alternatively, will voters make their decision on this proposal because animal husbandry practices should no longer be a defense in these criminal statutes? Or, having read the title, will they be riveted on outlawing a "sexual act with an animal" including "penetration, however slight, into an animal's anus or genitals with an object or part of a person's body"?

The fact that the measure uses inflammatory language is no excuse. Words can inflame and distract voters even when they are pulled from the proponents' measure or an existing statute that went through the normal legislative process. And if the Title Board's decision here is ratified by the Court, that decision will open the barn door to initiative supporters who deploy politically explosive wording in the text of their

measures to get favorable ballot titles, just as these Proponents have done in Initiative 16.

**B. Proponents concede that the phrase “sexual act with an animal” and the language describing the revised definition is explicit and vulgar.**

Proponents concede that the phrase “sexual act with an animal” and the description of the proposed revised definition are both “vulgar and explicit.” Proponents’ Br. at 12. Despite that fact, they insist the shocking wording is necessary to the title. *Id.* (emphasis added). But Proponents miss the point of what a catch phrase is and why it cannot appear in a ballot title. “Catch phrases are prohibited from inclusion in titles to **prevent prejudicing voters in favor of the proposed initiative** merely by virtue of **those words’ appeal to emotion** and to avoid distracting voters from consideration of the proposed initiative's merits.” *In re Title Ballot Title & Submission Clause for Initiative 2015-2016 #63*, 2016 CO 34, ¶24, 370 P.3d 628, 634 (emphasis added) (citations and internal quotation marks omitted) (“#63”).

The “vulgar and explicit” wording in the title is certain to play to voters’ emotions. And in so doing, this graphic description will impede

voter appreciation of the balance of the measure. Indeed, as Petitioners argued in the motion for rehearing before the Board, Record at 22 (Motion for Rehearing at 6), and in their opening brief before this Court, Petitioners' Br. at 28, (and which *neither* the Title Board nor Proponents have disputed), Initiative 16's redefinition of "sexual act with an animal" will be *the* defining feature of public attention given to the measure. The Proponents have already crafted their advocacy website to raise awareness and donations to highlight this strategic redefinition in order to make this an emotional appeal for support. *Id.* at 27-28.

The Title Board argues that Petitioners failed to present evidence of the politically charged nature of this language. Not only is this position inconsistent with the record below, the Title Board in its opening brief never substantively discusses the evidence Petitioners presented and its argument denies and even a modicum of common sense about language that violates the fair title requirement because the language used by the Board is certain to "provoke political emotion." #258(A), *supra*, 4 P.3d at 1100.

Finally, the Title Board argues that it made a “good faith effort” to accurately describe this aspect of Initiative 16 for purposes of voter understanding. Title Bd. Br. at 22. The Board’s good faith has never been in question. But similarly, it is not the issue before the Court. The question of whether voters will consider a repeal of the livestock exemption in these statutes when confronted with this high octane wording is. In essence, will this title be fair to both the “yes” and the “no” sides of this question, given the highly charged wording used by the Board? Based on the Court’s appreciation of voters’ reaction to what is admitted to be “vulgar and explicit” language, it can and should find that the Board erred here.

**C. The Board could have fairly and clearly described the measure without including either catch phrase.**

The Title Board and Proponents both contend that the Board had no choice but to use the catch phrases in order to adequately describe the initiative. Title Bd. Br. at 24; Proponents’ Br. at 10. The Board was not so limited.

As to “animal cruelty” and “cruelty to animals,” the Board gave those phrases outsized influence by repeating them over and over and

over again in the title and by using these phrases instead of, just once, stating the true nature of the measure – removal of the livestock exceptions from Part 2. These phrases did nothing to inform voters that Initiative 16 seeks to change the accepted standards for treatment of livestock.

Given the “negative implication” of the phrase animal cruelty, it is “clear” the words could be used to Proponents’ advantage in pressing the measure. *See In re Proposed Initiative Designated “Governmental Business”*, 875 P.2d 871, 876 (Colo. 1994) (holding phrases “open government” and “consumer protection” constituted catch phrases and slogans given the connotations and public understanding of the phrases). The Title Board should have framed the measure as one dealing with livestock that, as the Board argues in its brief, is the single subject as well as the “core” of the measure. *See* Title Bd. Br. at 13.

Nor was it necessary to use the Proponents’ chosen “vulgar” and “explicit” language, wording incorporated into the redefinition of “sexual act with an animal.” Instead, the title could have referred to a “new definition of ‘sexual act with an animal’” and allowed voters to read the

measure to obtain the specific wording used. As the Title Board often reminds the Court, it “is not required to set out every detail of an initiative.” *In re Title, Ballot Title & Submission Clause for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008); *see In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991) (in setting titles, the “board is not required to describe every nuance and feature of the proposed measure”). Certainly, if the ballot title for an initiative regulating oil and gas wells including hydraulic fracturing (i.e., “fracking”) does not have to refer to the most high-profile form of drilling – hydraulic fracturing, *In re Title, Ballot Title and Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶38, 328 P.3d 136, 147, Initiative 16’s title would be legally adequate without a graphic description of animal body parts that are at issue under the new definition.

The Title Board argues that simply repeating the language from Initiative 16’s redefinition of “sexual act with an animal” was necessary to inform voters and avoid ambiguity. Title Bd. Br. at 22-24. It cites the

objectors' concerns about the partial definition in the original title,<sup>5</sup> a reference that omitted the words "however slight" to describe the minimal, even incidental contact sufficient to trigger this new criminal prohibition. *Id.* at 22. Only if the initiative's definition was to be included in the title – a matter not conceded by Petitioners given their catch phrase concern before the Board – was this qualifier essential to enable voter understanding of this provision.

The Board misses, however, the crux of the issue: the inflammatory nature of this language was sure to "improperly distract voters or appeal to their emotions." #63, *supra*, 2016 CO 34, ¶27, 370 P.3d at 634. Petitioners warned the Board this was the case. Record at 21 (Petitioners' Motion for Rehearing at 5). Knowing that, the Board used the inflammatory wording anyway.

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<sup>5</sup> The title set on March 17, 2021 provided detail of this definition without noting that contact, "however slight," was the new standard. The original title described the measure in this way: "expanding the definition of 'sexual act with an animal' to include intrusion or penetration into an animal's anus or genitals with an object or part of a person's body and allowing an exception only for care to improve the animal's health and eliminating the existing exception for animal husbandry practices." The words "however slight" were added because of the motion for rehearing. *See* Record at 28 (title modified at April 7, 2021 Title Board meeting).



The Board's argument is a roundabout way of saying that language used in a measure cannot be a catch phrase because a measure's language is the only way to describe the measure. The Court has rejected that argument. *See In re 1999-2000 #258(A)*, 4 P.3d at 1100. Even if it was difficult to craft different language, the onus was on the Title Board to use neutral language in the title to avoid "tip[ping] the substantive debate surrounding the issue to be submitted to the electorate." *Id.*

### CONCLUSION

Initiative 16 was advanced before the Title Board on the grounds that it limits currently permitted practices engaged in by Colorado's ranchers and farmers as to their livestock. But after a well-meaning title setting process, the titles have become a political minefield, using "sexual abuse on an animal" to describe newly prohibited veterinary and animal care practices in hopes of scaring or shocking voters into a "yes" vote.

The Court can avoid the catch phrase/fair title dispute by holding that this measure's combination of the repeal of the current statute's livestock exemption, inclusion of a sexual abuse redefinition, and creation of a lifespan mandate to avoid criminal charges are multiple

subjects. Obviously, the Court need not address the fairness of the title if it does so. But if it doesn't, the Court cannot ignore the graphic language in the titles that will tilt the election and produce "yes" votes that have nothing to do with the core issues in Initiative 16. If this language isn't found to be politically loaded and inappropriate for a ballot title, it is inconceivable that the Court would find any language used to describe any initiative to be unfair.

The Court should reverse the Title Board's decision.

Respectfully submitted this 24<sup>th</sup> day of May, 2021.

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**ATTORNEY FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I, Leni Charles, Legal Assistant, hereby affirm that a true and accurate copy of the **PETITIONERS' ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #16 ("LAWS CONCERNING CRUELTY TO ANIMALS")** was sent electronically via Colorado Courts E-Filing this day, May 24, 2021, to the following:

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*/s/ Leni Charles*  
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