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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2020-2021 #16 ("Laws Concerning Cruelty to Animals") **Petitioners:** Janie VanWinkle, Carlyle Currier, Chris Kraft, Terri Diane Lamers, William Hammerich, and Joyce Kelly **v.** **Respondents:** Alexander Sage and Brent Johannes **and** **Title Board:** Teresa Conley, David Powell, and Julie Pelegrin	**▲COURT USE ONLY▲**
Attorney for Petitioners: Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com	Case Number: 2021SA000125

PETITIONERS' OPENING BRIEF ON PROPOSED INITIATIVE 2020-2021 #16 ("LAWS CONCERNING CRUELTY TO ANIMALS")

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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X It contains 6,597 words.

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X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioners

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INTRODUCTION

Initiative 2021-2022 #16 is not a measure that addresses animal cruelty so much as it bans longstanding ranching and farming practices related to livestock, in large part by using the "shiny object" of sexual abuse of animals to describe regular acts that are undertaken throughout Colorado's agricultural economy. Unfortunately for Colorado voters, the Title Board failed to enforce the longstanding rule that a ballot initiative contain only a single subject. The Board compounded its error by setting a title with two emotionally and politically charged catch phrases in it. In short, the proponents of Initiative #16 lured voters with one concept to get them to accept unrelated, dramatic changes to the agriculture industry.

The only remedy to prevent the public from voting on a misleading, multi-subject measure is for this Court to vacate the title set by the Board and remand with instructions to dismiss for lack of jurisdiction or, in the alternative, to set a new title that won't highlight political hot buttons that have little to do with the substance of this measure.

ISSUES PRESENTED FOR REVIEW

Whether the Title Board erred by setting a title for Initiative 2021-2022 #16, as the initiative contains at least three separate and distinct subjects, including:

1. removing the livestock exemption from the animal cruelty statutes;

2. expanding dramatically the definition of "sexual act with an animal" so that it criminalizes certain contact with an covered animal – "however slight" that contact may be; and,
3. adding a new requirement for the slaughter of livestock by arbitrarily defining the "natural lifespan" of livestock and criminalizing the slaughter of livestock before they reach one fourth of the newly defined "natural lifespan."

Whether the Title Board erred by setting a title that includes the impermissible catchphrases "animal cruelty," "cruelty to animals," and "sexual act with an animal," the latter of which is coupled with a graphic description of the Initiative's expanded definition of "sexual act with an animal."

NATURE OF THE CASE, FACTS AND PROCEDURAL HISTORY, AND ORDERS FOR REVIEW

I. Nature of the Case

This matter concerns the title setting for Initiative 2020-2021 #16 (hereinafter, "Initiative 16"). Initiative 16 seeks to amend various provisions of Part 2 of Article 9 of the Colorado Criminal Code (Title 18), which is titled "Cruelty to Animals" (hereinafter, "Part 2"). Part 2 currently contains an exemption for livestock. *See* C.R.S. § 18-9-201.5(1) (providing that "[n]othing in this part 2 shall affect accepted

animal husbandry practices utilized by any person in the care of companion or livestock animals").

The Title Board erroneously concluded that Initiative 16 constitutes a single subject—expanding crimes relating to animal cruelty—where the Initiative, in fact, alters several distinct aspects of the State's law. At a minimum, it contains three separate subjects by (1) removing the exemption for livestock from Part 2, (2) expanding the definition of "sexual act with an animal" to apply to acts that have nothing to do with sexual acts with animals, and (3) creating a new standard for the lawful slaughter of livestock.

The Board also erred in setting the title by including emotionally and politically charged catch phrases, specifically "animal cruelty," "cruelty to animals," and "sexual act with an animal" and the measure's revision to the definition. These catch phrases impermissibly appeal to voters' emotions and prejudices as opposed to fairly educating them as to the Initiative's provisions. Indeed, before the Initiative even started the ballot signature process, discourse about it is already revolving around how the Initiative will be framed as to whether or not a person supports "sex with animals."

II. Relevant Facts and Procedural History

A. The Initiative's Proponents and Multiple Purposes

The group behind Initiative 16 is Colorado PAUSE, which appears to exist for the sole purpose of passing Initiative 16. *See* Ex. 1 to Pet'rs' Mot. for Reh'g ("About Ballot Initiative PAUSE"), *available at* www.coloradopause.org/about. As they frankly disclose, their measure is designed to address ***three*** subjects, not one:

> Does this change the definition of animal cruelty in CO?
>
> This will not change the definition of what acts constitute abandonment, abuse, neglect, or mistreatment. It does:
>
> 1. Remove the cruelty to animals exemption for livestock
> 2. Add in an exemption to ensure slaughter is still legal once the animal enters adulthood
> 3. Remove a loophole in the definition of sexual act with an animal

Colo. PAUSE, "FAQs," last visited Apr. 22, 2021, www.coloradopause.org/faqs (attached as Ex. 1).[1]

B. The Initiative

The proponents filed two versions of the Initiative (Initiatives 2021-2022 #13 and #15) before settling on Initiative 16. The Initiative works a number of changes to Part 2 to accomplish its various goals. The first set of changes concern removing

[1] The Court may consider the proponents' contemporary political statements to the public—communicated by their website—to determine the actual intent of those who propose this initiative. *See In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 281 (Colo. 2006) (citing proponents' website to find multiple subjects proposed by an initiative).

the exemption for livestock from statute. The Initiative explicitly adds "livestock" to the definition of "animal."[2] Initiative 16, sec. 1 (amending definitions). It then alters the scope section of Part 2, which currently provides that "[n]othing in this part 2 shall affect accepted animal husbandry practices utilized by any person in the care of companion or livestock animals[.]" C.R.S. § 18-9-201.5(1). The Initiative eliminates this qualification from Part 2 altogether. Initiative 16, sec. 2 (amending scope of Part 2). Finally, the Initiative removes an exception for livestock, along with other classes of animals, from the sentencing provisions of Part 2. *Id.*, sec. 3 (amending C.R.S. § 18-9-202).

Initiative 16 also drastically changes the definition of "sexual act with an animal" by making ***any*** penetration of ***any*** animal's anus or genitals a "sexual act with an animal." The Initiative adds the following language to the definition: "Sexual act with an animal also includes any intrusion or penetration, however slight, with an object or part of a person's body into an animal's anus or genitals." (*Id.*, sec. 1 (amending definitions).) The Initiative includes an exception from this expansive new definition for "care to an animal in the interest of improving that animal's health." (*Id.*) Finally, the Initiative adds new requirements for when an

[2] This change may not be substantive. The current definition of "animal" is "any living dumb creature," which would include livestock.

animal may be slaughtered lawfully. It accomplishes this by adding a new definition for the purported "natural lifespan" of common livestock:

> (3.5) "Natural lifespan" for the following species shall be explicitly defined here based on statistical estimates: a cow lives to 20 years, a chicken lives to 8 years, a turkey lives to 10 years, a duck lives to 6 years, a pig lives to 15 years, a sheep lives to 15 years, a rabbit lives to 6 years.

Id., sec. 1 (amending definitions). The Initiative then provides that an animal may not be slaughtered until it has lived "one quarter" of its purported "natural lifespan":

> (1.9) Any person who slaughters livestock in accordance with accepted agricultural animal husbandry practices does not violate the provisions of subsection (1) of this section so long as the animal has lived one quarter of their natural lifespan based on species, breed, and type of animal and the animal is slaughtered in such a way that the animal does not needlessly suffer.

Id., sec. 2 (amending C.R.S. § 18-9-202).

The Initiative also provides that, in the case of a conflict with other areas of law, Part 2 supersedes other animal care laws.

C. Proceedings Below

Legislative Council staff and Office of Legislative Legal Services reviewed and commented on Initiative 16 and the prior versions of the Initiative.[3] During the

[3] Although specific language changed between the different versions of the Initiative, the overall substantive scheme of the Initiative remained unchanged.

January 11, 2021, Review and Comment Hearing on the first version of the initiative (which was the primary review and comment hearing for the Initiative), the Designated Representatives read their proposed title into the record:

> 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. Proponents were warned by legislative staff that their approach as to a ballot title reflected a multi-subject initiative, but Proponents were unaffected by this caution. *Id.* at 11:03:30. Following these proceedings before Legislative Council staff and Office of Legislative Legal Services, Proponents submitted Initiative 16 to the Secretary of State for submission to the Title Board.

The Title Board held the initial title setting on March 17, 2021. The Board concluded that Initiative 16 contained a single subject, and it proceeded to set a title. Petitioners timely filed a motion for rehearing on March 24, 2021.[4] Petitioners raised three argument. First, they argued that Initiative 16 violates the single subject rule.

[4] Another group of registered electors also submitted a motion for rehearing. Their motion similarly argued that the initial title was misleading and confusing, and they also argued Initiative 16 violated the single subject rule. Like Petitioners' motion, the Title Board granted their motion in part and denied it in part.

Pet'rs' Mot. for Reh'g at 2-3. Second, Petitioners argued that the title set by the Board was misleading and incomplete based on numerous different grounds. *Id.* at 3-5. Finally, Petitioners argued that the title contained impermissible "catch phrases." *Id.* at 5-6.

The rehearing for Initiative 16 occurred on April 7, 2021. The Title Board granted in part and denied in part Petitioners' motion. With respect to single subject, at least two members of the Title Board recognized Initiative 16 implicated the single subject limit, describing it as "close," a "tough one," and "very close." Apr. 7, 2021, Hr'g at 1:25:53-1:25:58 (David Powell: "I think it's close. This is a tough one."); 1:26:55-1:26:58 (Theresa Conley: "I also think it is very close."); 1:23:06-1:23:20 (Theresa Conley: "I am somewhat questioning whether or not the creation of the lifespan is in fact a separate subject to the expansion of the criminal statutes."). Despite their reservations, the Board moved forward to set titles.

The Board granted Petitioner's motion and agreed that certain language in the titles required change in order to fairly represent the initiative, but the Board denied the motion as to the catch phrases it had included by its earlier decision. One Board member admitted to being "a little bit persuaded" that the language around "sexual act with an animal" "being so explicit" could involve "emotional pleas from the public," *id.* at 1:36:45-1:37:47 (comments of Theresa Conley)), while another

conceded the language will "draw people's attention," (*id.* at 1:39:10 (comments of Julie Pelegrin). The Board nonetheless left the phrase "sexual act with an animal" and the graphic description of the proposed revised definition in the title. The Board also included "cruelty to animals" and "animal cruelty" four total times (twice each) in the title.

The Board revised the initial title and set the following final title for Initiative 16:

> 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.

III. Orders for Review

The order for review is the Title Board's denial in part of Petitioners' motion for rehearing on the grounds that (1) Initiative 16 violates the single subject rule and (2) the title set by the Board includes impermissible catch phrases.

SUMMARY OF THE ARGUMENT

The Title Board erred in two respects. First, it erroneously accepted jurisdiction over Initiative 16, as the Initiative violates the single subject rule. Initiative 16's seemingly central purpose is to remove the livestock exemption from Part 2. Yet the proponents included two other subjects within it: (1) a significant redefinition of "sexual act with an animal" and (2) a new definition of the "natural lifespan" of livestock and a requirement that they must live one quarter of it in order to be lawfully slaughtered. These latter two subjects do not bear any logical or necessary connection to the Initiative's primary purpose. They are not implementing measures or procedures but, instead, are standalone substantive changes to the law. The mere fact that they all concern "animals" or the theme "cruelty to animals" is insufficient to satisfy the single subject requirement. Initiative 16 is an omnibus measure that houses separate and distinct issues upon which voters may have differing opinions.

Second, the Board erred in setting the title by including catch phrases in it. The phrases "animal cruelty" and "cruelty to animals," which each appear twice, are a facial appeal to voters' sympathies for animals generally—which distracts from and masks the Initiative's underlying purpose of changing the regulation of ***livestock***. The inclusion of "sexual act with an animal" and the graphic description

of Initiative 16's revisions to it are also catch phrases. These phrases suggest that the primary purpose of this measure is to counter sexual acts between humans and animals. By using this misdirection of voter attention, Initiative 16 was intended to, and the titles do, trigger strong emotional and political responses that are far removed from the Initiative's other purposes. Indeed, the political debate around Initiative 16 is already being framed around whether or not a person supports sex with animals. Although these phrases appear in Part 2 and the Initiative itself, that does not save them, as the Court has held, from the prohibition on catch phrases.

ARGUMENT

I. Initiative 16 contains three separate and distinct subjects, which deprives the Title Board of jurisdiction to set a title.

A. Standard of Review; Preservation of Issues Presented.

The Colorado Constitution requires that any initiative must comprise a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board's analysis and this Court's review is a limited one, addressing the meaning of an initiative to identify its subject or subjects. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999- 2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). To find that a measure

addresses only one subject, the Court must determine that an initiative's topics are "necessarily and properly" related to the general single subject, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17),* 920 P.2d 798, 802 (Colo. 1996).

Petitioners presented the single subject issue to the Board in their motion for rehearing and during oral argument. Pet'rs' Mot. for Reh'g at 2-3; Apr. 7, 2021 Hr'g at 09:20-15:15, 23:30-23:50. Accordingly, the issue is preserved for review.

B. Initiative 16 contains at least three separate and distinct subjects.

As the proponents of Initiative 16 admit on their website, and as was reflected in the title they proposed during the Review and Comment Hearing, Initiative 16 contains three separate and distinct subjects: (1) removing the livestock exemption from Part 2; (2) expanding the definition of "sexual act with an animal"; and (3) adding a new restriction on when livestock may be lawfully slaughtered through the new definition of "natural lifespan" and the requirement livestock live one quarter of the lifespan before slaughter.

1. Initiative 16's first subject: removing the livestock exemption from Part 2.

Initiative 16's Designated Representatives highlighted their central purpose for the measure during the initial Title Board hearing. Mar. 17, 2021, Hr'g at 9:50 (stating the single subject is "the removal of the exemption that livestock has in the animal cruelty statutes"). Initiative 16 can accomplish this purpose with only ***two*** of the changes it makes: removal of the livestock exception in Part 2's scope provision and removing the sentencing exception for livestock. No other change to Part 2 is necessary to accomplish the proponents' stated goal for Initiative 16. The additional changes the proponents make are, therefore, by their nature addressing issues that are not "necessarily and properly" related to the Initiative's single subject. *See In re April 17, 1996 (1996-17)*, 920 P.2d at 802.

2. Initiative 16's second subject: expanding the definition of "sexual act with an animal."

The proponents nonetheless include a second subject by substantially redefining "sexual act with an animal." This redefinition bears no logical or necessary relationship to removing the livestock exemption from Part 2, as it is unnecessary to redefine "sexual act with an animal" in order to remove the livestock exception to Part 2. One issue concerns expanding the types of animals covered by Part 2, while the other redefines a type of conduct that constitutes animal cruelty ***regardless*** of the animal. Rather than simply extend the law that now applies to pets

to also apply to livestock, Initiative 16 includes a second subject to legislate on an entirely unrelated issue in order to achieve an entirely unrelated objective.

The revised definition substantively addresses various practices that do not implicate how livestock are reared and cared for. For instance, the Board heard multiple comments on how Initiative 16 actually is aimed at changing animal owners' and animal health care professionals' ability to provide veterinary care. A representative of a Colorado veterinary association, for example, explained that livestock rearing (animal husbandry) is different from veterinary care, and that the measure would literally undermine multiple practices that are accepted elements of veterinary care. *See, e.g.*, Apr. 7, 2021, Hr'g at 2:47:66-2:50:11 ("there are a number of practices that are standard veterinary practices that might involve the hind end of an animal which have nothing to do with animal husbandry practices but have everything to do with the . . . prevention of zoonotic disease transmission from animals to humans").

The proponents do not address these goals directly. Instead, they use the cover of sexual abuse of an animal as the basis for changing long-accepted, necessary agricultural practices. In essence, the Proponents hold out one politically explosive topic in order to provide cover for their seemingly less politically compelling topic of treating livestock like pets under the Colorado criminal laws.

The second subject violates the underlying concern behind the single subject requirement that a subject pass on its own merits and without comingling of support for another subject. *See In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶11, 274 P.3d 562, 566 (Colo. 2012) (single subject rule prevents "combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions . . . could lead to the enactment of measures that would fail on their own merits"). "Sexual act with an animal" is a highly charged reference used to attract supporters who would not otherwise be sympathetic to this measure. As the proponents' website makes clear, they intend to rely on arguments that Initiative 16 protects animals against sexual assault to secure its passage:

> The initiative informally titled Protect Animals from Unnecessary Suffering and Exploitation, is a ballot initiative filed with the state of Colorado for the November 2022 midterm election.
>
> If enacted, the initiative would simply extend the most basic animal welfare rights that are granted to pets to all farmed animals. ***While the animal is alive***, it must not be abandoned, abused, neglected, mistreated or ***sexually assaulted***.

Ex. 1 to Pet'rs' Mot. For Reh'g (emphasis added). This is precisely the type of logrolling the Court has condemned, and which the single subject rule prohibits.

As this Court has noted, an initiative that groups fundamentally separate subjects in one measure presents "the logrolling dilemma that the voters intended to

avoid when they adopted the single subject requirements of article V, section 1(5.5) of the Colorado Constitution." *2011-2012 #3, supra,* 2012 CO 25, ¶31. Directly related to the logrolling concern (and the potential for adoption of initiatives where voters are forced to make trade-offs between their views on unrelated topics) is the mandate that voters be fully and fairly apprised of what they are considering. A measure that logrolls "also violates the requirements that an initiative must not potentially mislead voters, that its title must not misrepresent or insufficiently inform voters so as to create confusion, and that it convey the initiative's likely impact so as to enable voter choice." *Id*. (initiative violated the single subject requirement by mixing "water" issues that were not clearly related).

For example, in *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, the Court considered an initiative that sought to reform state and local recall elections and which made non-elected officers subject to recall. 333 P.3d 76 (Colo. 2014). The Court explained that the two changes had "no necessary connection," depriving voters of the ability to assess each change on the merits:

> In the case before us, some voters might favor changes to the manner in which recall elections for elected officers are triggered and conducted, but not favor establishing a new constitutional right to recall non-elected officers, or visa-versa. Initiative #76 unconstitutionally combines the two subjects in an attempt to attract voters who might oppose one of these two subjects if it were standing alone.

Id. at 86; *see also, e.g.*, *In re Title, Ballot Title and Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1079 (Colo. 2010) ("An elector going to the polls in the upcoming general election might favor a beverage container tax while being opposed to depriving the General Assembly of its legislative authority over the basin roundtables and the interbasin compact committee or vice versa.").

Here a voter may approve of improving conditions for livestock generally but disapprove of a significant change to what constitutes "sexual act with an animal" given its potential effects on the care of pets, veterinary medicine, artificial insemination, and other subjects. Or vice versa. In either event, they will be confronted with a measure that is sold to the public as an expansion of one area of the law when it fundamentally changes an unrelated subject. The legislative staff cautioned Proponents about the single subject issues raised by their own encapsulation of their measure as a title; the Title Board expressed similar concerns. But the latter's decision to give this measure the benefit of the doubt as to the single subject requirement was misplaced and should be reversed.

3. Initiative 16's third subject: creating a new requirement for the slaughter of livestock.

Initiative 16's third subject is the new requirement for the lawful slaughter of livestock. The Initiative accomplishes this through two changes: first, it adds a new definition of "natural lifespan" for livestock and then requires that, subject to

criminal penalties, livestock be allowed to live one quarter of that lifespan before slaughter. But these changes bear no necessary or logical relationship to the other subjects in the Initiative.

Part 2 concerns how animals are to be treated ***while*** they are alive, and the Initiative extends those protections to livestock through the removal of the livestock exception. How an animal is to be treated while it is alive is a distinct issue from what age an animal must reach in order to be lawfully slaughtered for commercial purposes. And the "natural lifespan" of an animal, expressed as a term of years, has no bearing on how an animal is treated during that lifespan. Nor do the slaughter provisions bear any relationship to the redefinition of "sexual act with an animal." The latter is a specific type of act that is wholly separate from the question of how long to allow livestock to live before slaughter.

This bundling of issues mirrors the circumstances in *In re the Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 84*, 961 P.2d 456, 460 (Colo. 1998). The initiative there provided for tax cuts, but it also effectively required reductions in state spending programs. The Court held this type of combining of issues is "precisely the types of mischief which the single subject requirement was intended to prevent." *Id.* While voters may support a tax cut, they

"would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs." *Id.* at 460-61.

Initiative 16 works the same type of "mischief" on voters. Voters may generally be supportive of better treatment of livestock but be "surprised to learn" that, by voting for better treatment, they are fundamentally altering when livestock may be slaughtered for food. Indeed, by supporting Initiative 16, voters would be making it unlawful to raise calves and lambs at all for slaughter and thereby approving the "possible eventual elimination" of an entire segment of the ranching industry in Colorado. Such a dramatic change—and one which is unnecessary to achieving the proponents' underlying purpose of extending Part 2 to livestock—should be separately put to voters, as the single subject rule requires.

The Proponents' misrepresent this change to agricultural practice. They state on their website that this provision preserves rather than limits animals used in the food chain. Initiative 16 will "[a]dd in an exemption to **ensure slaughter is still legal once the animal enters adulthood**." https://www.coloradopause.org/faqs (last viewed May 3, 2021) (emphasis added). Proponents also state that Initiative 16 will "maintain an exception for slaughter once the animal has reached adulthood" rather than accurately portray that their measure prescribes lifespans and imposes criminal penalties for livestock owners where animals are slaughtered at any point before

these time periods expire. *See* https://www.coloradopause.org (last viewed May 3, 2021). As such, Initiative 16 violates the single subject requirement, "[m]asquerading as a measure to protect the public" (or here, as a measure to protect animals) when it actually "contains surreptitious measures that would strip … farms[] and families throughout this state of their most valuable economic interests." *2011-2012 #3, supra*, 2012 CO 25, ¶35.

C. Animals and animal cruelty are too general of a topic to satisfy the single subject requirement.

Contrary to the Designated Representatives' stated purposes, the Title Board found a single subject based on the notion that all of the changes in Initiative 16 related to "animal cruelty." However, such a vague and general subject or theme does not satisfy the single subject requirement.

The Court has held repeatedly that proponents of an initiative cannot avoid the single subject requirement through a general subject or "under an overarching theme." *In re 2013-2014 #76*, 333 P.3d at 79. Among the circumstances in which the Court has rejected overarching themes as too-general subjects are:

- "Concerning the recall of government officers" where the initiative reformed recall elections for elected officials ***and*** made non-elected officials to recall, *id.* at 85-86;

- "Restricting non-emergency government services" for an initiative that restricted benefits for undocumented persons ***and*** potentially denied them access to administrative government services, *In re 2005-2006 #55*, 138 P.3d at 282; and
- "Water" for an initiative that addresses water district election requirement ***and*** public trust water rights, *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by the Title Board Pertaining to a Proposed Initiative "Public Rights In Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995).

The same is true here. The subjects "animals" or "animal cruelty" are so general that they obscure what the Initiative is supposedly about—removing the ***livestock*** exemption—and what the Initiative's alternative subjects for alternative political audiences are—substantially redefining "sexual act with an animal" for all animals and altering in profound, unheard of ways when livestock can be slaughtered so that the owners of livestock can avoid criminal prosecution. Masking these issues under the omnibus subject or theme "animals" or "cruelty to animals" deprives voters of the information and understanding they need to intelligently consider Initiative 16.

As Initiative 16 contains multiple subjects in violation of the single subject rule, the Court should hold that the Title Board lacked jurisdiction.

II. The Title Board erred by including catch phrases in the title for Initiative 16.

A. Standard of Review; Preservation of Issues Presented.

The "Title Board must avoid using catch phrases or slogans when formulating a title." *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 649 (Colo. 2010). A catch phrase is a political slogan – a combination of "words that work in favor of a proposal without contributing to voter understanding." *Id.* The prohibition on catch phrases "prevent[s] prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and [avoids] distracting voters from consideration of the proposed initiative's merits." *Id.* Merely descriptive words do not violate the prohibition, while words that "provoke emotion such that they distract from merits" do. *Id.*

Petitioners objected to the inclusion of catch phrases in the title for Initiative 16 in their motion for rehearing and during oral argument. Mot. for Rehr'g at 5-6; Apr. 7, 2021 Hr'g at 19:45-22:52. Accordingly, the issue is preserved for review.

B. Animal Cruelty and the graphic description of "sexual act with an animal" are impermissible catch phrases.

The Title Board included two impermissible catch phrases in the title. First, the Board included "animal cruelty" and "cruelty to animals" four times in the title (twice each). Second, the Board included "sexual act with an animal" and graphic

language from the Initiative to describe the revisions to the definition. Although these phrases appear in Part 2 and the Initiative, they still constitute, under the Court's precedent, impermissible catch phrases.

1. Animal cruelty and cruelty to animals generate empathetic responses from voters.

The phrases "animal cruelty" and "cruelty to animals" may be used in current statute as a matter of summarizing legislative actions, but in the context of an initiative's ballot title, they evoke emotions that are only supportive of the measure, not informative to voters. These slogans certainly will have the effect of swaying voters without regard for the substance of the measure, which changes certain aspects of the treatment of ***livestock*** under the law. The language will "improperly distract voters or appeal to their emotions." *In re Title Ballot Title & Submission Clause for 2015-2016 #63*, 370 P.3d 628, 634 (Colo. 2016).

Courts have recognized that animal cruelty is, by its very nature, an intrinsically emotionally charged subject implicating immoral conduct. *Cf., e.g.*, *United States v. Stevens*, 533 F.3d 218, 238-39 (3d Cir. 2008) (Cowen, J., dissenting) ("Our nation's aversion to animal cruelty is deep-seated. . . . This interest has nested itself so deeply into the core of our society . . . that it warrants being labeled compelling."), aff'd, 559 U.S. 460 (2010); *Animal Lovers Volunteer Ass'n (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985) (per curiam) (recognizing "the

generalized abhorrence other members of the public may feel at the prospect of cruelty to animals"); *Commonwealth v. Haun*, No. 935 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 2365, *16 (Pa. Sup. Ct. Jan. 4, 2013) (agreeing that "evidence of Appellant's cruelty to animals is intrinsically prejudicial" and "risked the possibility that the jury would become distracted" from the merits). The invocation of "animal cruelty" pulls at voters' emotions to protect defenseless animals.

But enforcing the general social norm against animal cruelty is not the central subject of Initiative 16. From a substantive perspective, Proponents' measure primarily changes the manner of ***livestock*** treatment so that farm and ranch animals are required to be treated as if they were pets. The Title Board's use of "animal cruelty" bootstraps emotions about animal cruelty generally into the separate question of how to treat livestock in Colorado. The Title Board's couching of this question as animal cruelty serves only to distract voters and mask the real questions before them. The phrases here thus work precisely the prejudice that the prohibition on catch phrases is intended to avoid. *See In re Title, Ballot Title & Submission Clause for 1999-2000 #258(A) (English Language Education in Public Schools)*, 4 P.3d 1094, 1100 (Colo. 2000) (holding that including the phrase "as rapidly and effectively as possible" was a catch phrase, as it "mask[ed] the policy question" presented by the initiative).

2. "Sexual act with animal" and the graphic description of the revised definition elicit highly charged emotional responses about sexual deviancy.

"Sexual act with an animal" and the measure's redefinition of the phrase, which was incorporated by the Board into the titles, also constitute catch phrases. The measure itself redefines sexual abuse with an animal solely to use that as a "hook" for voters. The language evokes emotions concerning sexual abuse of an animal, and graphically describes what constitutes such abuse under the measure. The graphic nature of the language can only trigger a response separate and apart from the Initiative's meaning, which impermissibly "tips the substantive debate surrounding the issue to be submitted to the electorate." *In re 1999-2000 #258(A)*, 4 P.3d at 1100.

The sheer breadth of a provision that prohibits any intrusion, "however slight," is a far-reaching measure that has nothing to do with the notion that an animal has actually been sexually abused. Thiis new definition applies when, for instance, a veterinarian or animal owner inserts a thermometer into a cow or sheep. *See* https://www.youtube.com/watch?v=vFNOWMIRlQE (last viewed May 3, 2021).

Proponents provide a very limited exception to their prohibition if the act is done for "improving" an animal's health. But "improve" means to "advance to a

better state" or "make better." *See Megdal Assocs., LLC v. La-Z-Boy Inc.*, 2016 U.S. Dist. LEXIS 119168, *7 (S.D. Fla. 2016), citing American Heritage Dictionary 648 (2d ed. 1982). It does not include such acts that will maintain the animal's health or check on its current status for purposes of procreation or any other element of regular animal care. Instead, the proponents used the notion of sexual abuse to restrict regular agricultural practices beyond anything contemplated by or consistent with reasonable care of an animal.

By couching animal care as sexual abuse, the Proponents seek to divert voters and play to their worst fears. And the Board's use of that phrase and inclusion of excruciating detail from the measure necessarily leads to voter confusion about what this measure really does. This particular catch phrase cannot help but generate an emotional response that stands separate from the actual legal change to be considered by voters. *See In re Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative Designated "Governmental Business"*, 875 P.2d 871, 876 (Colo. 1994) (considering the commonly understood meanings and connotations of phrases to hold that the phrases "open government" and "consumer protection" violated the prohibition on catch phrases and slogans).

3. The Title Board may not use catch phrases even when the language appears in a measure.

Although the phrases "animal cruelty," "cruelty to animals," and "sexual acts with an animal" appear in Part 2 and the language of Initiative 16, that does not require the Board or even give it license to use the language in the title. As the Court has explained, just because an initiative seeks to inflame voter passions and uses a catch phrase, the Board is not bound to commit legal error by incorporating such language. In fact, "the Title Board is not free to include this wording in the titles if, as here, it constitutes a catch phrase." *In re 1999-2000 #258(A)*, 4 P.3d at 1100 (Title Board incorporated the proponents' catch phrase in the title, requiring reversal of the Board's decision). Thus, although the phrases appear in the measure, the Board errs where it distracts voters by using proponents' catch phrases.

C. The political catchphrases used in the title are already defining the political debate around Initiative 16.

In order to find that a title contains a catch phrase, the Board must be presented with "convincing evidence" that the wording in question is a catch phrase, in light of "contemporary political debate." *In re Title, Ballot Title & Submission Clause for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000). Here, as evidence of this political catch phrase, the proponents' own website tells voters that this provision is not simply about changing standards for animal care but is, instead, designed to

ensure that farmed animals are not "sexually assaulted." (*See* Ex. 1 to Pet'rs' Mot. for Reh'g.) It also represents that the measure will "[r]emove a loophole in the definition of sexual act with an animal." https://www.coloradopause.org/faqs (last viewed May 3, 2021).

One state representative already has summarized the political volatility of this phraseology by noting that voters who are approached to support the measure will be asked "a simple question: 'Who Wants to Have Sex with Animals?'" John D. Smith, "The animal cruelty initiative is exacerbating controversy among Colorado ranchers," *Arabica Post*, last visited Mar. 24, 2021, https://arabicapost.net/the-animal-cruelty-initiative-is-exacerbating-controversy-among-colorado-ranchers/amp/ (comments of Rep. Richard Holtorf (R-Washington County)). As another commentator has argued, the "sexual act with an animal" provision will lead "those with pruriently active minds [to] think of people having sexual relations with an animal." Michael Cox, "Don't buy the hype – it's not about animals," *Montrose Press*, Mar. 11, 2021.

As a matter of Colorado law, a court would mislead a jury if it used "sexual intercourse" to describe acts that do not actually involve intercourse. A district court errs if its jury instructions "could permit a conviction of sexual assault premised on sexual penetration even though actual sexual penetration was not established."

People v. Jurado, 30 P.3d 769, 771-72 (Colo. App 2001) (applying a statute that includes human-animal contact as well as acts between humans). If a jury operating under the tutelage of a judge and with legal argument of counsel can be misled by a jury instruction that misstates this crime, voters operating only with the ballot title will be misled by being told they are voting on sexual abuse when they are only doing so because such acts are described that way for political purposes. A jury can't be misinformed in this way, and voters shouldn't be misled by comparable language either.

CONCLUSION

The single subject rule and prohibition on catch phrases ensure that voters are making informed choices about ballot initiatives that reflect the merits of a measure. But the Title Board here did not observe these rules by failing to recognize Initiative 16's multiple subjects and including catch phrases in the title. The Court should, therefore, vacate the title and remand to the Board with instructions to return the Initiative to its proponents for lack of jurisdiction, or, in the alternative, remand with instructions to set a new title that does not include impermissible catch phrases.

Respectfully submitted this 4th day of May, 2021.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS' OPENING BRIEF ON PROPOSED INITIATIVE 2020-2021 #16 ("LAWS CONCERNING CRUELTY TO ANIMALS")** was sent electronically via Colorado Courts E-Filing this day, May 4, 2021, to the following:

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