

SUPREME COURT OF COLORADO
2 East 14th Avenue
Denver, CO 80203

DATE FILED: May 2, 2014 12:31 PM

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
2013-2014 #99 (“Bovine Tail Docking”)

**Petitioners: LAUREN DEVER AND
JULIE MCCALED**

v.

**Respondents: MIKE CALLICRATE
AND ANGELA SMITH**

and

**Title Board: SUZANNE STAIERT;
DAVID BLAKE; DANIEL DOMENICO;
and SHARON EUBANKS**

▲ COURT USE ONLY ▲

Attorney for Petitioners:

Chantell Taylor, No. 33059
Hogan Lovells US LLP
1200 Seventeenth Street, Suite 1500
Denver, Colorado 80202
Phone: (303) 899-7300
Fax: (303) 899-7333

Case No. 2014SA138

**PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE
SETTING BOARD CONCERNING PROPOSED INITIATIVE
2013-2014 #99 (“Bovine Tail Docking”)**

Lauren Dever and Julie McCaleb (“Petitioners”), registered electors of the State of Colorado, through their undersigned counsel, respectfully petition the Court pursuant to C.R.S. § 1-40-107(2), to review the actions of the Title Setting Board (“Title Board”) with respect to the title, ballot title, and submission clause set for Initiative 2013-2014 #99 (“Bovine Tail Docking”) (hereinafter “Proposed Initiative”).

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative

Mike Callicrate and Angela Smith (collectively “Proponents”) are the designated Proponents of the Proposed Initiative. The review and comment hearing required by C.R.S. § 1-40-105(1) was conducted by the Offices of Legislative Council and Legislative Legal Services on March 19, 2014.

Proponents thereafter revised the Proposed Initiative and submitted that revised version directly to the Secretary of State on April 4, 2014, for purposes of having the Title Board set title. The Secretary of State or his designee is a member of the Title Board.

The Title Board considered and set title for the Proposed Initiative at its April 18, 2014 meeting. On April 23, Petitioners timely filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1)(a), alleging that the title was confusing, misleading, and not reflective of the Proponents’ intent. The Title

Board considered Petitioner's Motion at its April 24, 2014 meeting, and denied the Motion except to the extent that the Title Board made changes to the title.

B. Jurisdiction

Petitioners submit this matter to the Colorado Supreme Court for review pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed a Motion for Rehearing with the Title Board pursuant to C.R.S. § 1-40-107(1) and timely filed this Petition for Review within seven days from the date of rehearing as required by C.R.S. § 1-40-107(2). Consistent with the requirements set forth in section 1-40-107(2), Petitioners have attached the following: (1) the original, amended, and final versions of the Proposed Initiative filed by the Proponents; (2) the original ballot title set for this measure; (3) the Petitioners' Motion for Rehearing; and (4) the Title Board's ruling on the Motion. Petitioners respectfully submit that the Title Board erred in denying the Motion and therefore this matter is properly before this Court.

GROUND FOR APPEAL

Contrary to the constitutional and statutory requirements for ballot titles as set forth in Colo. Const. art. V, § 1(5.5) and C.R.S. §§ 1-40-106(3)(b), the Board set a title and submission clause for the Initiative that is confusing, misleading, and not reflective of the Proponents' intent.

The following is an advisory list of issues which will be fully discussed in Petitioners' brief:

1. The Title Board set a title and submission clause for the Proposed Initiative that is defective because, among other things, it omits two key features of the initiative. Specifically, the title fails to inform voters that the measure eliminates the assertion of accepted animal husbandry practices:
 - a. As an affirmative defense to an alleged criminal offense; and
 - b. To negate the elements necessary to prove a criminal offense.

PRAYER FOR RELIEF

Petitioners respectfully request that after consideration of the parties' briefs, this Court determine that the title as set by the Title Board is confusing, misleading, and not reflective of the measure's intent and remand the Proposed Initiative to the Title Board with instructions to redraft the title to accurately and fairly.

Respectfully submitted this 1st day of May, 2014 by:

HOGAN LOVELLS US LLP

s/ Chantell Taylor

Chantell Taylor, No. 33059

Hogan Lovells US LLP

1200 Seventeenth Street, Suite 1500

Denver, Colorado 80202

Phone: (303) 899-7300

Fax: (303) 899-7333

CERTIFICATE OF SERVICE

I certify that on May 1, 2014, a true and correct copy of the above and foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2013-2014 #99 (“Bovine Tail Docking ”)** via e-mail and U.S. Mail of such filing upon:

Sarah Clark, Esq.
Brownstein Hyatt Farber & Schreck
410 17th Street, Suite 2200
Denver, CO 80202-4432
sclark@bhfs.com

Attorney for Respondents

Maurice G. Knaizer, Esq.
Office of the Colorado Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Email: Maurice.Knaizer@state.co.us
LeeAnn.Morrill@state.co.us

Attorneys for the Ballot Title Setting Board

s/ Marcia Yannacito _____



DATE FILED: May 2, 2014 12:32 PM

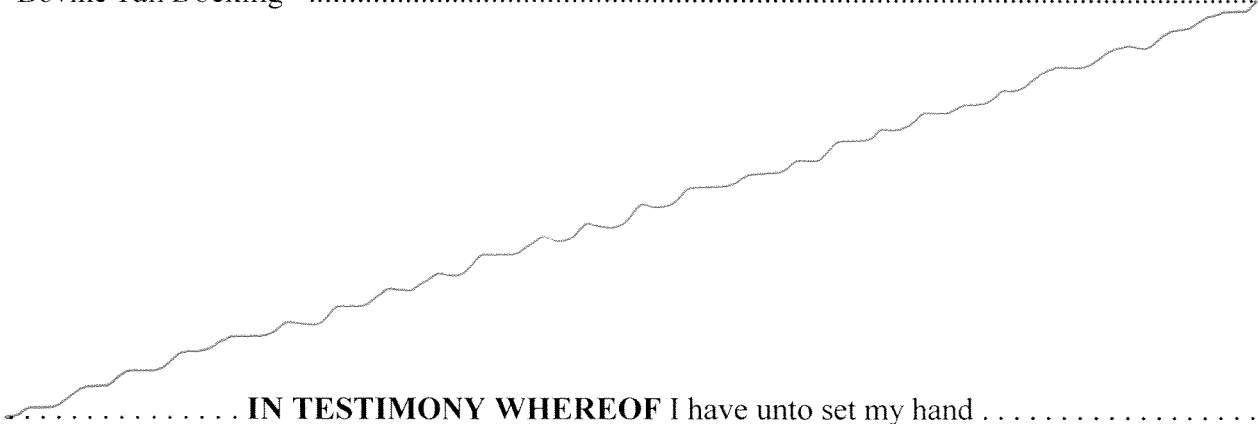
STATE OF COLORADO

DEPARTMENT OF
STATE

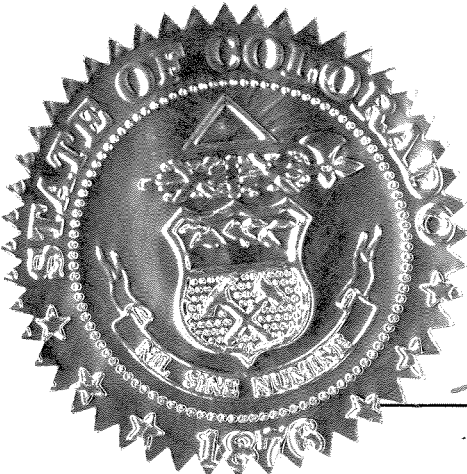
CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the original text, amended text, final text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #99 'Bovine Tail Docking'".....



..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 28th day of April, 2014.



SECRETARY OF STATE

APR 04 2014

S. WARD
2:20 P.M.

Colorado Secretary of State

Proposed Initiative 2013-2014 #99

Original

Be it enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 18-9-210 as follows:

18-9-210. Bovine tail docking. (1) Definitions. AS USED IN THIS SECTION:

(a) "DOCK" MEANS TO CUT OR REMOVE ANY PORTION OF THE FLESH OR BONE OF A BOVINE'S TAIL.

(b) "PERSON" MEANS ANY INDIVIDUAL, CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION OR AGENCY, BUSINESS TRUST, ESTATE, TRUST, LIMITED LIABILITY COMPANY, PARTNERSHIP, ASSOCIATION, OR OTHER LEGAL ENTITY.

(c) "THERAPEUTIC" MEANS FOR THE PURPOSE OF TREATING A SICK OR INJURED BOVINE, WHERE SUCH TREATMENT IS DEEMED MEDICALLY NECESSARY BY A LICENSED VETERINARIAN, AND NOT MERELY PROPHYLACTIC.

(2) Prohibitions- exceptions- penalty. (a) NOTWITHSTANDING ANY PROVISION OF THE LAW TO THE CONTRARY, NO PERSON SHALL DOCK THE TAIL OF ANY BOVINE, OR PROCURE THE SAME TO BE DONE.

(b) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (2), BOVINE TAIL DOCKING MAY BE PERFORMED IF:

(I) SUCH PROCEDURE IS PERFORMED FOR A THERAPEUTIC PURPOSE;

(II) THE PROCEDURE IS PERFORMED BY A LICENSED VETERINARIAN USING SUITABLE INSTRUMENTS AND UNDER HYGIENIC CONDITIONS;

(III) THE PROCEDURE IS CONDUCTED IN SUCH A WAY AS TO MINIMIZE ANY PAIN AND SUFFERING OF THE BOVINE; AND

(IV) THE BOVINE HAS BEEN ADEQUATELY ANESTHETIZED TO MINIMIZE THE BOVINE'S PAIN AND SUFFERING DURING THE OPERATION.

(c) A PERSON WHO VIOLATES ANY PROVISION OF THIS SECTION COMMITS A CLASS 2 MISDEMEANOR.

(d) IT IS NOT AN AFFIRMATIVE DEFENSE TO AN ALLEGED VIOLATION OF THIS SECTION THAT THE TAIL OF ANY BOVINE WAS DOCKED AS AN ACCEPTABLE ANIMAL HUSBANDRY PRACTICE.

(e) IT IS NOT A NEGATION TO THE ELEMENTS OF THE OFFENSES LISTED IN PART 2 OF ARTICLE 9 OF TITLE 18, C.R.S., THAT THE ANIMAL WAS TREATED IN ACCORDANCE WITH AN ACCEPTED ANIMAL HUSBANDRY PRACTICE.

(3) Severability and applicability. (a) IF ANY PROVISION OF THIS SECTION OR THE APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS SECTION THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS SECTION ARE DECLARED TO BE SEVERABLE.

(b) THE PROVISIONS OF THIS SECTION ARE IN ADDITION TO, AND NOT IN LIEU OF, ANY OTHER LAWS PROTECTING ANIMAL WELFARE. THIS SECTION MAY NOT BE CONSTRUED TO LIMIT ANY MORE STRINGENT STATE LAW OR RULES PROTECTING THE WELFARE OF ANIMALS OR TO PREVENT A LOCAL GOVERNING BODY FROM ADOPTING AND ENFORCING ITS OWN ANIMAL WELFARE LAWS AND REGULATIONS.

(c) THIS ACT APPLIES TO OFFENSES COMMITTED ON OR AFTER THE EFFECTIVE DATE OF THIS INITIATED MEASURE.

(4) **Effective date.** THIS SECTION IS EFFECTIVE UPON OFFICIAL DECLARATION OF THE VOTE HEREON BY PROCLAMATION OF THE GOVERNOR, PURSUANT TO SECTION 1(4) OF ARTICLE V OF THE CONSTITUTION OF THE STATE OF COLORADO.

Proponent Representative 1

Name: Mike Callicrate

Physical Address: 1184 Hill Cir., Colorado Springs, CO 80904

Mailing Address: 1184 Hill Cir., Colorado Springs, CO 80904

Phone: 785-332-8218

Fax: N/A

E-mail: mike@nobull.net

Proponent Representative 2

Name: Angela Smith

Physical Address: 4655 Calhan Hwy, Calhan, CO 80808

Mailing Address: 4655 Calhan Hwy, Calhan, CO 80808

Phone: 719-478-2581

Fax: N/A

E-mail: highplainsangela@live.com

RECEIVED

APR 04 2014

S. WARD
2:20 P.M.

Proposed Initiative 2013-2014 #99
Amended

Colorado Secretary of State

Be it enacted by the People of the State of Colorado:

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18-9-210. Bovine tail docking. (1) **Definitions.** AS USED IN THIS SECTION:

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(e) IT IS NOT A NEGATION TO THE ELEMENTS OF THE OFFENSES LISTED IN THIS SECTION PART 2 OF ARTICLE 9 OF TITLE 18, C.R.S., THAT THE BOVINE ANIMAL WAS TREATED IN ACCORDANCE WITH AN ACCEPTED ANIMAL HUSBANDRY PRACTICE.

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(c) THIS ACT APPLIES TO OFFENSES COMMITTED ON OR AFTER THE EFFECTIVE DATE OF THIS INITIATED MEASURE.

(4) **Effective date.** This section is effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V of the constitution of the state of Colorado.

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Proponent Representative 1

Name: Mike Callicrate

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RECEIVED

APR 04 2014

S. WARD

2:20 P.M.

Colorado Secretary of State

Proposed Initiative 2013-2014 #99

Final

Be it enacted by the People of the State of Colorado:

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(4) **Effective date.** This section is effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V of the constitution of the state of Colorado.

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Phone: 719-478-2581

Fax: N/A

E-mail: highplainsangela@live.com

Ballot Title Setting Board

Proposed Initiative 2013-2014 #99¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes prohibiting the cutting or removal of tails of cattle except when medically necessary to treat sick or injured cattle and designating a violation as a class 2 misdemeanor.

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 prohibiting the cutting or removal of tails of cattle except when medically necessary to treat sick or injured cattle and designating a violation as a class 2 misdemeanor?

*Hearing April 18, 2014:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 10:22 a.m.*

¹ Unofficially captioned “**Bovine Tail Docking**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Marc Arnusch, Objector

vs.

Mike Callicrate and Angela Smith, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2013-2014 #99

Marc Arnusch, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2013-14 #99 ("Bovine Tail Docking").

On April 18, 2014, the Board set the following ballot title and submission clause:

Shall there be a change to the Colorado Revised Statutes prohibiting the cutting or removal of tails of cattle except when medically necessary to treat sick or injured cattle and designating a violation as a class 2 misdemeanor?

ADVISORY GROUNDS FOR RECONSIDERATION

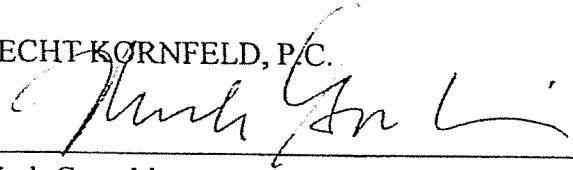
A. Contrary to the statutory requirements for a ballot title that is not confusing, not misleading, and reflective of the intent of the proponents, C.R.S. §§ 1-40-106, -107, the Board has erred by setting the current title for this measure.

1. The title inaccurately uses "cattle" rather than "bovine" as the initiative text does.
2. The title should reflect the actual text of the initiative and state that bovine tail docking is a made a crime, not merely "prohibited."
3. The title should reflect that the initiative criminalizes both the act of bovine tail docking and the procuring of such act.
4. The title should: (a) define an "accepted animal husbandry practice;" and (b) state that accepted animal husbandry practices is not an affirmative defense to and cannot be used to negate a criminal charge of bovine tail docking.

5. The title should reflect that the initiative prohibits the removal of "any portion" of a bovine's tail.
6. The title should state that the measure does not limit more stringent state or local laws or rules.

RESPECTFULLY SUBMITTED this 23rd day of April, 2014.

RECHT-KORNFELD, P.C.



Mark Grueskin
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rechtkornfeld.com

Objector's Address:

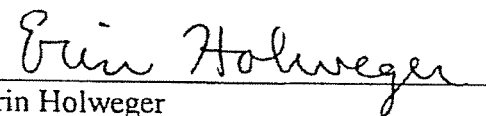
Marc Arnusch
6506 County Road 65
Keenesburg, CO 80643

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2013-2014 #99** was sent this day, April 23, 2014, via first class U.S. mail, postage pre-paid to the proponents at:

Mike Callicrate
1184 Hill Cir.
Colorado Springs, CO 80904

Angela Smith
4655 Calhan Hwy
Calhan, CO 80808



Erin Holweger

APR 23 2014

S. WARD

Colorado Secretary of State

4:45 P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2013-2014 #99

MOTION FOR REHEARING

On behalf of Lauren Dever and Julie McCaleb, registered electors of the State of Colorado, the undersigned counsel hereby submits to the Title Board ("Board") this Motion for Rehearing on Proposed Initiative 2013-2014 #99 ("Initiative"), and as grounds therefore states that the title and submission clause for the Initiative do not conform to constitutional and statutory requirements.

I. BACKGROUND

On April 18, 2014, the Title Board ("Board") designated and fixed the following title for the Initiative:

A change to the Colorado Revised Statutes prohibiting the cutting or removal of tails of cattle except when medically necessary to treat sick or injured cattle and designating a violation as a class 2 misdemeanor.

On April 18, 2014, the Board designated and fixed the following ballot title and submission clause for the Initiative:

Shall there be a change to the Colorado Revised Statutes prohibiting the cutting or removal of tails of cattle except when medically necessary to treat sick or injured cattle and designating a violation as a class 2 misdemeanor?

As set forth below, the title and ballot title and submission clause do not comply with the constitutional and statutory requirements for title setting and require substantial amendment consistent with the following concerns.

II. GROUNDS FOR RECONSIDERATION**A. The Title and Ballot Title and Submission Clause are Confusing, Misleading, and Do Not Reflect the Intent of the Proponents.**

Contrary to the constitutional and statutory requirements for ballot titles as set forth in Colo. Const. art. V, § 1(5.5) and C.R.S. §§ 1-40-106(3)(b), the Board set a title and submission clause for the Initiative that is confusing, misleading, and not reflective of the proponents' intent.

According to state statute, the Board must consider the public confusion that might be caused by misleading titles and set a title that "correctly and fairly express[es] the true intent and meaning" of the initiative. C.R.S. §§ 1-40-106(3)(b). The Board's duty is to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice. *In re Ballot Title 1999-2000 No. 29*, 972 P.2d 257 (Colo. 1999); *Matter of Title, Ballot Title and Sub. Cl., and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999); *Matter of Title, Ballot*

Title and Sub. Cl., and Summary for 1999-2000 No. 38, 977 P.2d 849 (Colo. 1999). The duty to voters is paramount. The Board is statutorily required to exercise its authority to protect against public confusion and reject an initiative that cannot be understood clearly enough to allow the setting of a clear title. *In re Proposed Initiative 1999-2000 No. 25*, 974 P.2d 458 (Colo. 1999).

For the following reasons, the title and submission clause are confusing, misleading, and fail to correctly and fairly express the true intent and meaning of the Initiative:

1. The Initiative purports to prohibit docking of “bovine” tails, and yet at the title setting the Proponents specifically requested that the Board use the term “cattle” because: (a) voters will not likely know what is meant by the term “bovine” and (b) Proponents intended for the Initiative to apply to cattle. Although the Initiative itself fails to define “bovine,” the statutory definition of “bovine livestock” includes: “(a) All cattle and calves; and (b) All sheep being treated as livestock at the request of the owner thereof. C.R.S. § 35-41-100.3 (emphasis added). The Initiative is therefore fatally flawed because Proponents, by their own admission, inadvertently captured a species that was not intended to be covered. Because the Proponents’ intent cannot be reconciled with the actual language of the initiative, *any* title would be misleading and would fail to provide accurate language enabling informed voter choice. *See e.g., In re Proposed Initiative 1999-2000 No. 25*, 974 P.2d at 458 (the Board must reject an initiative that cannot be understood clearly enough to allow the setting of a clear title).
2. The Initiative is impermissibly misleading because it fails to inform voters that the practice of docking, which is presently legal as an accepted animal husbandry practice, would be a criminal act under the Initiative. To be accurate, the title must make clear that any farmer, rancher, veterinarian or other person that docks a bovine’s tail is subject to criminal charges and penalties. It is not sufficient to state the classification of the offense, which most voters will not understand. *See e.g., Matter of Title, Ballot Title and Sub. Cl., and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000) (eliminating or omitting a key feature of an initiative from the title is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes).
3. The title is defective because it omits a key feature of the initiative. Specifically, the title states that the Initiative changes the law, but it fails to inform voters that, rather than simply adding a prohibition against tail docking, it also would eliminate an existing affirmative defense to an alleged *criminal offense* and further state that the use of accepted animal husbandry practices will no longer negate elements of animal cruelty offenses. Although titles need not state every detail of an initiative or restate the obvious, they must not mislead the voters or promote voter confusion. For that reason, the Supreme Court has held that titles containing a material and significant omission, misstatement, or misrepresentation cannot stand. *See In re Ballot Title 1997-98 #62*, 961 P. 2d 1077, 1082.
4. The title fails to fully inform voters regarding the additional requirements necessary to invoke the exception for medical treatment of sick or injured cattle. Contrary to the language in the title, under the Initiative, medical necessity by itself does not render bovine tail docking permissible. As set forth in the Initiative, bovine tail docking may be

performed only if medically necessary, performed by a licensed veterinarian under hygienic conditions and “(III) the procedure is conducted in such a way as to minimize any pain and suffering of the bovine; and (IV) the bovine has been adequately anesthetized to minimize the bovine’s pain and suffering during the operation.” *See* Initiative § (2)(b). The title is misleading and fails to accurately express the intent of the Initiative because the title makes no mention of these other requirements. Moreover, the meaning of section III is impossible to discern because it appears to suggest that one must minimize pain and suffering in addition to adequately anesthetizing the bovine, but does not provide any information as to how that ambiguous requirement is to be met. In this respect, the Initiative cannot be understood clearly enough to allow the setting of a clear title.

Based on the foregoing, the title and submission clause as drafted violates constitutional and statutory requirements and, to the extent no title can accurately inform voters of the Initiative’s true intent, title setting must be denied. In the alternative, the title must be significantly amended to address the concerns described above.

B. The Title and Ballot Title and Submission Clause Use Impermissible Catch Phrases Designed to Prejudice Voters

Use of the terms “cutting or removal” instead of “dock” unfairly appeals to emotion that would prejudice voters and therefore constitutes an impermissible “catch phrase.” *See Matter of Title, Ballot Title and Sub. Cl., and Summary for 1999-2000 No. 258(A)*, 4 P.3d at 1098 (titles may not contain a catch phrase that unfairly prejudices the proposal in its favor). Furthermore, because the term “dock” is defined in the Initiative and does not constitute a new or controversial legal standard, the Board does not need to define it in the title. *See e.g., In re Ballot Title 1999-2000 No. 255*, 4 P.3d 485 (Colo. 2000) (the titles are not required to include definitions of terms unless the terms adopt a new or controversial legal standard that would be of significance to all concerned with the initiative). To be fair and accurate, the term “dock” should be used instead of “cutting or removal.”

Based on the foregoing, the title and submission clause as drafted do not comply with the constitutional and statutory requirements for title setting.

III. REQUEST FOR RELIEF

The Objectors request that this Motion for Rehearing be granted and that the Board reject setting title based on the Initiative’s fatal flaws as described above. Alternatively, Objectors request that the Board amend the title and ballot title and submission clause to address the concerns set forth above.

Respectfully submitted this 23rd day of April, 2014.

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/s/ Chantell Taylor

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Ballot Title Setting Board

Proposed Initiative 2013-2014 #99¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes criminalizing the cutting or removal of tails of bovine animals, including cattle, except when medically necessary to treat sick or injured animals and designating a violation as a class 2 misdemeanor.

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 criminalizing the cutting or removal of tails of bovine animals, including cattle, except when medically necessary to treat sick or injured animals and designating a violation as a class 2 misdemeanor?

Hearing April 18, 2014:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 10:22 a.m.

Hearing April 24, 2014:

Motion for Rehearing denied except to the extent that the Board made changes to the titles.

Hearing adjourned 12:59 p.m.

¹ Unofficially captioned “**Bovine Tail Docking**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.