

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board</p> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020 #314 (“Concerning Farm Animal Confinement”)</p> <p>Petitioners: Brett Rutledge and Joyce R. Kelly, v. Respondents: John Surenkamp and John Seber, and Title Board: Theresa Conley, David Powell, and Julie Pelegrin.</p>	
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<p style="text-align: center;">RESPONDENTS’ OPENING BRIEF</p>	

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all the requirements of C.A.R. 28 and C.A.R. 32. I further certify that:

A. The brief complies with C.A.R. 28(g) because it contains 2,069 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because it contains a statement regarding whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled.

/s/ Christopher M. Jackson
Christopher M. Jackson
Attorney for Respondents

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board (“Board”) abused its discretion by omitting from the title the fact that the fine for violating the measure is criminal in nature.
2. Whether the Board abused its discretion by omitting from the title the fact that the measure provides for a private civil remedy.
3. Whether the Board abused its discretion by omitting from the title the fact that the measure provides for court-ordered auctions and liens.

STATEMENT OF THE CASE

Respondents John Seber and John Surenkamp seek to circulate #314 to obtain the required number of signatures to place the measure on the ballot. If enacted, #314 would prevent cruelty to farm animals by prohibiting extreme methods of confinement. *See* April 27, 2020 Certified Record #314 (“Certified R.”), at 2 (§ 35-21-201). In particular, the measure would prohibit farm owners and operators from knowingly confining egg-laying hens, calves raised for veal, or breeding pigs in a space that is smaller than a specified size for each animal. *Id.* at 4, 7–8 (§§ 35-21-203, 35-50.5-103). It also prohibits business owners and operators from knowingly selling eggs, veal, or pork that comes from an animal that was confined in a prohibited manner. *Id.* at 8. At the same time, #314 includes several exceptions to this prohibition, including ones for medical research,

veterinary care, transportation, and slaughter. *Id.* at 4–5, 8 (§§ 35-21-204, 35-50.5-104).

The measure also imposes penalties on those who break the law. Any farm or business owner or operator who violates #314 commits a misdemeanor and, if convicted, is subject to a fine. *Id.* at 5, 9 (§§ 35-21-205, 35-50.5-105). If the farm or business owner or operator doesn't pay the fine, the commissioner of agriculture “may recover the amount of the penalty, plus costs and attorney fees, by an action in court.” *Id.* The commissioner may also “place a lien or seek a court-ordered public auction of ... farm property or equipment” to collect on the fine. *Id.* Finally, #314 provides that any violation of the law “constitutes unfair and deceptive trade practices for which any person may commence a civil action” under Colorado’s Consumer Protection Act. *Id.*

The Board held a hearing on #314 on April 15, 2020, where it granted single-subject approval and set a title. *Id.* at 10. Petitioner-objectors Brett Rutledge and Joyce R. Kelly filed a motion for rehearing, and the Board made several changes to the title; Rutledge and Kelly’s motion was denied in all other respects. *Id.* at 18. The final version of the ballot title reads:

A change to the Colorado Revised Statutes concerning the confinement standards for certain farm animals used in commercial production, and, in connection therewith, prohibiting confinement that does not meet specified space requirements for egg-laying hens of

domesticated fowl, calves raised for veal, and breeding pigs; prohibiting a business from selling eggs or meat produced from covered farm animals confined in violation of the measure; allowing certain exceptions to the confinement standards for covered farm animals; imposing a fine for violations of the measure; and directing the commissioner of agriculture to enforce the measure.

Id.

SUMMARY OF THE ARGUMENT

Number 314’s title correctly and fairly expresses the true intent and meaning of the measure and would not lead to public confusion. For that reason, the Board’s decision should be affirmed.

ARGUMENT

I. The title the Board set for #314 was proper.

A. Standard of review.

This Court does not demand that the Board “set the best possible title.” *In re Title, Ballot Title, & Submission Clause for 2009–2010*, #45, 234 P.3d 642, 648 (Colo. 2010). Rather, it “give[s] great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles, are insufficient, unfair, or misleading.” *Id.* (citation omitted).

This issue was properly preserved. The Board held a hearing and set a title on April 15, 2020. Certified R., at 18. The Petitioners moved for rehearing on

April 22, and the Board held a hearing on April 23. *Id.* at 16, 18. Petitioners then timely filed their petition for review with this Court on April 30.

B. The title complies with state law.

The state constitution requires that the subject of a proposed initiative “be clearly expressed in its title” COLO. CONST., art. V, § 1(5.5). Section 106(3)(b) establishes the standard for setting titles:

[T]he title board shall consider the public confusion that might be caused by misleading titles The title for the proposed law ... shall correctly and fairly express the true intent and meaning thereof Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” ... or “no” ... and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S. In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title, & Submission Clause for 2007–2008*, #62, 184 P.3d 52, 58 (Colo. 2008).

Here, the Board’s title plainly expresses the measure’s core purpose—to prevent animal cruelty by prohibiting extreme methods of confinement. It also provides considerable detail about #314, clarifying that it applies to egg-laying hens, calves raised for veal, and breeding pigs; that it imposes space requirements for these animals; that it includes certain exceptions to those space requirements; that it prohibits business owners and operators from dealing in eggs or meat

produced in violation of the law; that it imposes fines for violating the measure; and that it charges the commissioner of agriculture with enforcement. Because the title clearly and briefly explains the true intent and meaning of #314, it complies with state law.

In their petition for review, Rutledge and Kelly state that the Board “additionally erred by setting titles for #314 when the abstract for #314 is misleading.” April 30, 2020 Pet. for Review, at 4. But in their prayer for relief, Rutledge and Kelly don’t ask the Court to order that no title be set at all; rather, they ask only for an order “direct[ing] the Title Board to correct the title and address the deficiencies outlined by Petitioners.” *Id.* At the same time, the three issues the Petitioners list don’t implicate anything in the abstract. As a result, it’s difficult to say whether and to what extent Rutledge and Kelly object to #314’s abstract. Respondents Seber and Surenkamp reserve their right to respond to any such objections in their answer brief.

C. The Board didn’t abuse its discretion in omitting the fact that the fines are criminal.

Petitioners suggest that to comply with state law, #314’s title must, in addition to the information already contained in the Board’s title, add a clause explaining that the fine imposed is criminal in nature. But Petitioners do not assert that the title as written is inaccurate in any way—nor could they. The title

correctly states that #314 “impos[es] a fine for violations of the measure.” While it doesn’t clarify whether that fine is criminal or civil, the Board “is not required to describe every nuance and feature of the proposed measure.” *In re Title, Ballot Title, & Submission Clause*, 823 P.2d 1353, 1355 (Colo. 1991). Indeed, while this Court has in at least one case required the Board to note the existence of “mandatory, nonsuspendable fines for willful” violation of a measure, even then it didn’t mandate that the title specify whether the fine was civil or criminal. *In re Matter of Proposed Election Reform Amend.*, 852 P.2d 28, 33–34 & n.4 (Colo. 1993) (requiring inclusion of the phrase “to require a mandatory fine for violation of the campaign contribution and public expenditure provisions”). Because this omission doesn’t render the title “insufficient, unfair, or misleading,” *Blake v. King*, 185 P.3d 142, 146 (Colo. 2008), the Court should affirm the Board’s title setting.

D. The Board didn’t abuse its discretion in omitting the fact that the measure provides for a civil remedy.

The Petitioners go on to say that the Board abused its discretion in declining to include a clause about “the significant civil remedy” available under the measure. April 30, 2020 Pet. for Review, at 4. This presumably is a reference to Rutledge and Kelly’s motion for rehearing where the pair argued that the title improperly failed to disclose that “#314 gives private parties a cause of action”

under Colorado’s “consumer protection statute.” Certified R., at 15. In that motion, Rutledge and Kelly argue that this “private right of action will be a substantial element of the potential liability created by #314, a factor that voters should understand through the ballot title.” *Id.* But while the Petitioners suggest this is a central feature of the measure, the Office of Legislative Legal Services (“OLLS”) and Legislative Council Staff (“LC”) disagree. In their review-and-comment memorandum, OLLS and LC suggested that because this provision had so little significance, the proponents should *remove it from the measure*. OLLS and LC noted that to bring a private action, a plaintiff must have “suffered damages proximately caused by the legal violation.” April 1, 2020 Memo from LC and OLLS to Surenkamp and Seber, at 12 (Ex. A). Because it isn’t “clear how a person would suffer an injury or loss” through a violation of this measure, “it is unlikely that this provision would ever be used Would the proponents consider deleting this provision?” *Id.* To be sure, the proponents declined to adopt this suggestion and kept the private-action clause in; but the OLLS/LC memorandum confirms that this clause is hardly a “central feature” of the measure. As this Court has recognized, albeit in a slightly different context, “civil remedies are often attached to criminal statutes and enforced through private actions, and thus would not create any voter surprise.” *King*, 185 P.3d at 146 (citation omitted).

E. The Board didn't abuse its discretion in omitting the fact that the measure provides for court-ordered auctions and liens.

Finally, the Petitioners contend that the Board shouldn't have omitted from its title information about court-ordered auctions and liens. As noted above, #314 provides that if a farm or business owner or operator is charged and convicted of violating this animal-cruelty measure, and if that defendant is assessed a fine, and if that defendant doesn't pay the fine, and if the agricultural commissioner decides to file an action in court to collect the fine, *then* the agricultural commissioner may (but is not required to) “place a lien on or seek a court-ordered public auction of ... any farm property or equipment necessary to recoup [those] unpaid penalties.” Certified R., at 5, 8 (§§ 35-21-205(b), 35-50.5-105(b)).

In their motion for rehearing, the Petitioners claimed that “[t]hese extra remedies reflect a key element of the measure.” Certified R., at 14. But as noted above, the Board doesn't need to “spell out every detail of a proposal.” *In re Matter of Title, Ballot Title, & Submission Clause for 2013–14 #129*, 333 P.3d 101, 106 (Colo. 2014). A title need only be a “relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters,” rather than “an item-by-item paraphrase of the proposed ... statutory provision.” *In re Proposed Initiative 1997–1998 # 62*, 961 P.2d 1077, 1083 (Colo. 1998). Requiring the Board to include this information—including the long list of conditions

necessary to trigger a lien—would serve only to engender the “public confusion” the Board is charged with preventing. § 1-40-106(3)(b), C.R.S. Including all of this detail could hardly qualify as “brief,” as § 106(3)(b) requires. Because the title distills the measure down to a “reasonably ascertainable expression of [its] purpose,” *In re Title, Ballot Title, & Submission Clause for 2009–2010*, #45, 234 P.3d 642, 648 (Colo. 2010) (citation omitted), the Court should affirm the Board’s decision.

CONCLUSION

The law does not require the title the Board sets to be perfect; it need only “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Title, Ballot Title, & Submission Clause for 2009–2010*, #24, 218 P.3d 350, 356 (Colo. 2009) (quotation omitted). No. 314’s title satisfies that standard. The Board’s decision should be affirmed.

Respectfully submitted on this 15th day of May, 2020.

/s/ Christopher M. Jackson
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Attorney for Respondents

CERTIFICATE OF SERVICE

This is to certify that I electronically served the **RESPONDENTS' OPENING BRIEF** and related documents upon the following parties through the Colorado courts' efilng system on May 15, 2020:

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MEMORANDUM

TO: John Surenkamp and John Seber
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 1, 2020
SUBJECT: Proposed initiative measure 2019-2020 #314, concerning farm animal confinement

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to Colorado Revised Statutes appear to be:

EXHIBIT A

1. To prohibit a farm owner or operator from knowingly confining pigs during pregnancy, calves raised for veal, breeding pigs, or egg-laying hens ("covered animals") in a cruel manner;
2. To prohibit a business owner or operator from knowingly selling animal products derived from covered animals that were confined in a cruel manner;
3. To define what constitutes confinement "in a cruel manner", initially based on whether the manner of confinement prevents the animal from lying down, standing up, fully extending limbs, or turning around freely, and after December 31, 2021, based on the specific dimensions of the floor space for the particular covered animal;
4. To specify the animals covered by the measure and to define those specific animals;
5. To provide exceptions to the prohibitions in the measure for:
 - a. Medical research;
 - b. Veterinary activities performed by or under the direct supervision of a licensed veterinarian;
 - c. Transportation;
 - d. Certain types of exhibitions;
 - e. Slaughter in accordance with applicable law;
 - f. Temporary periods for purposes of animal husbandry, but limited to 6 hours in a 24-hour period and 24 hours in a 30-day period; and
 - g. A breeding pig for 5 days before the expected birth date and while the breeding pig is nursing piglets.
6. To provide penalties of \$1,000 per violation, per animal, per day for confining covered animals in a cruel manner or selling animal products from covered animals that were confined in a cruel manner;
7. To authorize the commissioner of agriculture to seek enforcement of a penalty in an action in court and allow the commissioner to recover the penalty plus costs and attorney fees, and to place a lien on or seek a court-ordered public auction of a farm or equipment necessary to recover unpaid penalties;
8. To authorize a private right of action under the Colorado Consumer Protection Act to enforce the measure; and

9. To require the commissioner of agriculture to enforce the measure and adopt rules governing enforcement and to require farm owners or operators and business owners or operators to allow the commissioner, during regular business hours, to access the farm or business, vehicles, and records pertinent to the activities regulated by the measure.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. Under section 1-40-105.5, Colorado Revised Statutes (C.R.S.), the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at BallotImpactEstimates.ga@state.co.us.
4. Article 21 of title 35, C.R.S., regulates eggs. Although the parts of the proposed initiative that address the confinement of egg-laying hens are appropriately included in article 21, the parts of the proposed initiative that address the confinement of pigs and calves do not fit well in that article. Article 50.5 of the title deals with the confinement standards for gestating sows and calves raised for veal.

- a. Would the proponents consider moving all of this proposed initiative to article 50.5? Or would proponents consider moving at least the portions of this proposed initiative that address anything other than egg-laying hens to article 50.5?
 - b. If the proposed initiative is moved to article 50.5, the proponents should review the definitions in article 50.5 to ensure that they work for the proposed initiative. Or the proponents may amend the definitions in article 50.5 to clarify that they don't apply to this new part 2.
5. The proposed initiative has substantial overlap with the current article 50.5. Would the proponents consider reviewing the current article 50.5 to see if it is still needed if the proposed initiative passes? If the proponents consider it no longer relevant, would the proponents consider deleting the current language and replacing it with the proposed initiative?
6. Proposed section 35-21-201 refers to "the act." For clarification, the proponents should consider referring to "this part 2" instead of "the act."
7. In proposed section 35-21-201, the phrase "which also threaten the health ..." applies back to "animal confinement." Is it the proponents' intention that this phrase apply to "extreme methods"? If so, would the proponents consider changing this to read "extreme methods of farm animal confinement? Extreme methods threaten ..."?
8. In the definition of "breeding pig":
 - a. The clause "who is 6 months or older or pregnant" is misplaced. It appears the intention is to apply this modifying phrase to "pig" to specify that the term "breeding pig" means a pig that is six months or older or pregnant. The phrase could be moved, but it might be easier to rewrite it so that both parts of the definition refer back to the phrase "breeding pig."
 - b. The word "that" is preferred to the word "who" for statutes.
 - c. When indicating age, the term of art is "of age."
 - d. Would the proponents consider rewriting the definition to read, ""Breeding pig" means a female pig that is kept for the purpose of commercial breeding and that is six months of age or older or pregnant."?

9. In the definition of "cage-free housing system," the following comments concern this phrase: "are provided enrichments that allow them to exhibit natural behaviors, including, at a minimum, scratch areas, perches, nest boxes, and dust bathing areas":
- a. The including phrase is placed next to the word "behaviors" and therefore grammatically modifies that word. It appears that the phrase is intended to modify the term "enrichments."
 - b. Although the word "them" is typically used as the plural of "him" or "her," the word "them" may be used as the plural of the word "it." The immediate preceding noun is the word "enrichments," so the word "them" may reasonably be interpreted to refer to the word "enrichments." The intention appears to apply the word to hens. Would the proponents consider replacing the word "them" with the phrase "the hens"?
10. In the definition of "cage-free housing system," the provision has a series that is separated by semicolons: "within which hens are ...; are provided ...; and within which" The first two items in the series appear to apply to "hens," meaning hens are free to roam and hens are provided enrichments. But the last item in the series, "within which farm employee can provide", does not relate back to hens. Would the proponents consider revising the draft to make a series that relates correctly back to the introductory portion? For example:
- (3) (a) "Cage-free housing system" means a controlled environment for egg-laying hens where:
 - (I) The hens are free to roam unrestricted;
 - (II) The hens are provided enrichments that allow them to exhibit natural behaviors and that include, at a minimum scratch areas, perches, nest boxes, and dust bathing areas; and
 - (III) Farm employees can provide care while standing within the hens' usable floor space.
 - (b) "Cage-free housing systems" include, if the system meets the definition in subsection (3)(a) of this section: ...
11. The definition of "cage-free housing system" is a definition, not a substantive requirement. Therefore, the phrase "to the extent they comply with the requirements of this subsection" is incorrect. It should read, "if the system meets the definition in subsection (3)(a) of this section."

12. In the definition of "cage-free housing system," the last item in subsection (4) reads: "Any future systems that will comply with the requirements of this subsection." This list of items is introduced with the phrase "include," which is normally interpreted by Colorado courts to be a term of enlargement or extension. Therefore, a catchall is unnecessary and the last item on the list is surplusage. Would the proponents consider deleting it?
13. The definition of "confined in a cruel manner" is a list of substantive requirements. It is a best practice to place requirements within substantive provisions of law. Would the proponents consider moving these provisions to a substantive section in the proposed initiative? An example of a suggested rewrite would move the substance of the definition to the prohibition for a farm owner or operator:
- (1) A farm owner or operator shall not knowingly:
 - (a) Cause a covered animal to be confined in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely; or
 - (b) After December 31, 2021:
 - (I) Confine a calf raised for veal with less than 43 square feet of usable floor space per calf;
 - (II) Confine a breeding pig with less than 24 square feet of usable floor space per pig; or
 - (III) Confine an egg-laying hen with less than the amount of usable floor space per hen required by the 2017 edition of the United Egg Producers' Animal Husbandry Guidelines For U.S. Egg-Laying Flocks: Guidelines for Cage-Free Housing, or in an enclosure that is not a cage-free housing system.

A similar change would need to be made to the prohibition for business owners and operators.

14. The definition of "egg-laying hen" is ambiguous because it is not clear whether the phrase "kept for the purpose of egg production" applies to all the listed types of hens. Assuming the phrase is intended to apply to all of the listed hen types, would the proponents consider rewriting this provision to read: "'Egg-laying hen" means a female of the following domesticated species kept to produce eggs: chicken, turkey, duck, goose, or guinea fowl." Or would the proponents consider rewriting this definition in another way to remove the ambiguity?

15. In the definition of "farm":

- a. The word "other" in the phrase "other equipment" indicates that the word "equipment" may be redundant with the other items on the list. Do the words "equipment" and "facilities" mean the same thing? If the words mean the same thing, then one of these words should be deleted. If not, the word "other" should be deleted
- b. The applicability of the phrase "used for food or fiber" is ambiguous because it is not clear whether the phrase applies to "animals" and "animal products" or just "animal products". Is it a farm if it merely produces animals? Or must it produce animals for food or fiber? In addition, it is not clear whether the word "used" should apply to the word "animal." An animal that is used for food or fiber, such as a pig, may also be produced for other uses, such as a pet. Would the proponents consider rewriting the pertinent part of this provision to read "used for the commercial production of animals for food or fiber or animal products used for food or fiber"?

16. With regard to the definition of "fully extending the animal's limbs":

- a. An egg-laying hen is an animal, so the phrase "other egg-laying hens or another animal" is redundant. Would the proponents consider deleting the phrase "other egg-laying hens"?
- b. The including phrase "including, in the case of egg-laying hens," follows the word "enclosure," which is what it modifies. It appears to be intended to modify "extending all limbs." Would the proponents consider rewriting this to clarify its application? A possible revision would read as follows:

(1) "Fully extending the animal's limbs" means:

- (a) For egg-laying hens, fully spreading both wings without touching the side of an enclosure or another animal; or
- (b) For all other covered animals, fully extending all limbs without touching the side of an enclosure.

17. In the definition of "liquid eggs":

- a. The commas setting off the phrase "intended for human use" arguably make this phrase nonrestrictive, which means that it is not essential to the definition. Would the proponents consider removing these

commas? A suggested rewrite would read, ""Liquid eggs" means the eggs of an egg-laying hen that are broken from the shells and that are intended for human food."

- b. "Mixed and strained" is redundant with "mixed." Unstrained and mixed eggs are still mixed eggs; therefore, would the proponents consider deleting the phrase "mixed and strained"?
- c. The word "separated" causes an ambiguity. It could mean that the egg and yoke are physically separated, that the egg and yoke are physically together in a solution but are physically distinct, or that the yolks and whites have been mixed to a substantially uniform solution. It appears that the definition is attempting to cover all three meanings.
 - i. Arguably, the phrase "with the yolks and whites in their natural proportions" covers all three so long as the natural proportions are maintained. There is an implication that this phrase does not cover the situation where the yolks and whites are physically separated. Is this intentional?
 - ii. Do the proponents intend to cover all three meanings if the natural proportions are maintained, but intend to exclude one if the natural proportions are not maintained?
 - iii. Would the proponents consider rewriting this to make any of these distinctions clear?
 - iv. If the proponents wish to cover all three meanings, the simplest solution is to delete these tests and write the following:
""Liquid eggs" means the eggs of an egg-laying hen that are broken from the shells and that are intended for human food."
- d. The last sentence is confusing, which may lead to misinterpretation. Also, part of this definition appears to be omitted. In each of these examples, an egg is merely one of multiple ingredients, so the omission is that the egg is merely one of multiple ingredients. Would the proponents consider revising this provision? It could be rewritten to read as follows: ""Egg product" does not include combination food products, including pancake mixes, cake mixes, cookies, pizzas, cookie dough, or ice cream, that include egg as one of multiple ingredients in the product; except that merely adding sugar, salt, water, seasoning, coloring, flavoring, preservatives, stabilizers, or similar food additives does not make an egg product a combination food product."

18. The word "person" is defined for all of Colorado Revised Statutes in section 2-4-401 (8) C.R.S. Therefore, the definition of "person" in proposed section 35-21-202 is unnecessary. Would the proponents consider deleting it?
19. The definition of "pig during pregnancy" is not used within the substantive portions of the proposal. It is used only in the definition of "covered animal." The definition is redundant with "breeding pig," and therefore the definition of covered animal could be changed to read, "'Covered animal" means a breeding pig during pregnancy...." This makes the definition unnecessary. Would the proponents consider adding the word "breeding" to the definition of covered animal and deleting this definition?
20. In the definition of "sale," the word "chapter" is used. Chapter is a valid subdivision in federal law, but is not a valid subdivision of the statutes in Colorado law. For this measure, the appropriate term is "part 2," but this may change if the provisions in the measure are moved to another article or part within another article. If moved to a different article, the appropriate term would be "article" plus the article number.
21. In the definition of "sale," the following questions concern the sentence that reads: "For purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by this part 2."
 - a. The phrase "For purposes of this section," is incorrect and unnecessary. Would the proponents consider deleting it?
 - b. The clause "a sale shall be deemed to occur ..." uses the word "shall" incorrectly to give a sale a duty to be something. Would the proponents consider replacing the phrase "shall be" with the word "is"?
 - c. Would the proponents consider rewriting this provision to read as follows: "A sale is deemed to occur at the location where the buyer takes physical possession of the sold item covered by this part 2."?
 - d. This is a substantive provision. In accordance with drafting guidelines, substantive provisions of law are not included in a definition. Would the proponents consider moving this sentence to the substantive provisions of the proposed initiative?
22. In the definition of "shell egg," the phrase "intended for use as human food." follows the word "form." The phrase appears to be intended to modify the word "egg." Would the proponents consider rewriting the definition to read as

follows: "'Shell egg" means a whole egg of an egg-laying hen in its shell if the egg is intended for use as human food."?

23. The definition of "uncooked" appears to be inaccurate. Eggs and meat are sometimes eaten raw. Although they are not necessarily required to be cooked to be eaten, raw eggs and raw meat are, in fact, "uncooked." Unless the proponents intend a special meaning, the word "uncooked" is not a term of art, so the definition is unnecessary. Would the proponents consider deleting this definition?
24. In the definition of "usable floor space," the word "shall" is misused twice. The word "shall" is defined in section 2-4-401 (13.7), C.R.S.: "'Shall' means that a person has a duty." In the sentence, the word is giving the defined term a duty to mean something. A definition cannot have a duty. Would the proponents consider replacing the phrase "shall include" with the word "includes" and replacing the phrase "but shall not include" with the phrase "but does not include"?
25. In the definition of "whole pork meat":
 - a. The phrase "including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet" is unnecessary. The phrase preceding the list "uncooked cut of pork" is not unclear or ambiguous, and the list of illustrations are not clarifying an uncertainty or ambiguity. Would the proponents consider deleting this phrase?
 - b. Because the definition specifies that the term actually means a cut of pork, would the proponents consider deleting the word "whole"?
 - c. The phrase "except for" does not work as an exception because the list that follows it is not an exception to pork meat. Would the proponents consider deleting the comma before the phrase "except for" and replacing it with the word "and"?
26. In the definition of "whole veal meat":
 - a. The phrase "including chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin or cutlet" is unnecessary. The phrase preceding the list "uncooked cut of veal" is not unclear or ambiguous, and the list of illustrations are not clarifying an uncertainty or ambiguity. Would the proponents consider deleting this phrase?

- b. Because the definition specifies that the term actually means a cut of veal, would the proponents consider deleting the word "whole"?
 - c. The phrase "except for" does not work as an exception because the list that follows it is not an exception to veal meat. Would the proponents consider deleting the comma before the phrase "except for" and replacing it with the word "and"?
27. In the introductory portion of proposed section 35-21-203, the phrase "In addition to other applicable provisions of law" is unnecessary because statutes normally apply in addition to the other statutes. Would the proponents consider deleting it? There is a similar phrase used in proposed section 35-21-205 (3) that could be eliminated.
28. The introductory portion of proposed section 35-21-203 has an effective date of "on or after December 31, 2021." The definition of "confined in a cruel manner" has the same effective date for most of its provisions but, presumably, the provision without an effective date is intended to take effect sooner. The effective date in proposed section 35-21-203 would override the intention that one provision take effect immediately. This is one reason why it is better to place substantive requirements in substantive provisions rather than in a definition. Would the proponents consider deleting "on or after December 31, 2021." and incorporating the definition of "confined in a cruel manner" into proposed section 35-21-203?
29. In proposed section 35-21-203 (B), how would a court or the commissioner of agriculture determine if a business, such as a grocery store or restaurant, "should know" that the animal was confined in a cruel manner?
30. In proposed section 35-21-204 (g), the phrase "five day period prior to" is not limited to the five days that occur immediately before the pig gives birth. It could be any five days. Is this the proponents' intention? If not, the provision should read "five days immediately before." If this were the proponents' intention, would the proponents consider making this revision?
31. In proposed section 35-21-205 (1):
- a. The word "shall" means that the commissioner of agriculture is required to impose a penalty. Do the proponents wish to deny the commissioner discretion to determine if the violation merits a specific penalty?
 - b. The reference to the commissioner imposing a criminal penalty is unconstitutional. The commissioner may impose civil penalties but may

not impose criminal penalties. Only a court can impose criminal penalties. If the proponents want to make it a crime, it needs to be classified as a misdemeanor. A solution would be to make these civil penalties. Another solution would be to make this an unclassified misdemeanor: "A farm owner or operator or business owner or operator that violates this section is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of one thousand dollars per animal per day." Would the proponents consider revising this provision to make it constitutional?

32. With regard to proposed section 35-21-205 (2):

- a. As mentioned with regard to section 35-21-205 (1), a criminal penalty needs to be imposed by a court. If the proponents make the previous provision a misdemeanor, would the proponents consider deleting this provision? If the proponents make the previous provision a civil penalty, would the proponents consider making this provision apply to civil penalties?
- b. The following phrase appears to have a redundancy: "If the commissioner is unable to collect a criminal penalty or if a farm owner or operator or business owner or operator fails to pay any portion of a criminal penalty imposed under this section ..." Is there a situation where the farm or business fails to pay the penalty but the commissioner collects it? If not, would the proponents consider deleting one of these conditions?
- c. It is not clear whether the commissioner needs to have a court order to impose a lien. Would the proponents consider clarifying whether the commissioner needs a court order to impose a lien?
- d. Colorado Revised Statutes do not use the word "chapter" to subdivide the statutes. The penalties are imposed in proposed section 35-21-205 (2), so "this section" is an appropriate citation. Would the proponents consider replacing the word "chapter" with the word "section"?

33. Proposed section 35-21-205 (3) gives a person a cause of action for a violation of the proposed initiative. To bring a civil action, a person must have standing. Normally, a person has standing only if the person suffered damages proximately caused by the legal violation. Damages occur when a person suffers an injury or loss. It is not clear how a person would suffer an injury or

loss because eggs are produced by inappropriately caged hens or because the meat comes from an inappropriately caged calf or pig. Therefore, it is unlikely that this provision would ever be used because it is unlikely that a person would have standing. Would the proponents consider deleting this provision?

34. Proposed section 35-21-206 (2) prohibits the commissioner of agriculture from using a "government or private inspection or process verification provider." What is a government or private inspection or process verification provider? How is this related to the commissioner's designee as mentioned in the previous subsection? Would the proponents consider being more specific? Would this provision preclude the use of a Colorado department of agriculture inspector or employee who performs process verification? Does the term "government" include the state government? If so, how would the commissioner be able to perform inspections or process verification if the commissioner is unable to use state government personnel that provider or perform these functions?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to the Colorado Revised Statutes. Amending clauses do not need to be in small capital letters.

Additionally, although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:

- a. The first letter of the first word of each sentence;
- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
- c. The first letter of proper names, unless they are the names of federal, state, or local officers, departments, or agencies.

Finally, headnotes that briefly describe the content of the section should be in boldface type and not all capitals. See example below in technical comment 2.

2. The proponents should consider including a part heading (or article heading, if the proponents decide to relocate the proposal) and should use the proper amending clause format. For example:

SECTION 1. In Colorado Revised Statutes, **add** part 2 to article 21 of title 35 as follows: {no ALL CAPS used in the amending clause, and the word indicating the action being proposed – "add" – should appear in boldface type}

PREVENT CRUELTY TO FARM ANIMALS

35-21-201. Legislative declaration. THE PURPOSE OF THIS PART 2 IS TO ... {Section headnote appears in lowercase, boldface type, then statutory text appears in SMALL CAPS TYPE}

3. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

- (a) Paragraph
 - (I) Subparagraph
 - (A) Sub-subparagraph
 - (B) Sub-subparagraph
 - (II) Subparagraph

- (b) Paragraph
- (2) Subsection
- (3) Subsection

Proposed section 35-21-202, the definitions section, is the only section where the introductory provision should *not* be labeled as subsection (1). The definitions instead should be numbered "(1) "Breeding Pig" means ..." and so on.

4. Internal references should be phrased as such:

- b. This article 21
- c. This part 2
- d. This section
- e. This subsection (2) – not "this subsection" without reference to the particular subsection number
- f. This subsection (2)(a)

5. In proposed section 35-21-201, the comma after "consumers" in the phrase "which also threaten the health and safety of Colorado consumers, and increase ..." could lead to some confusion. The proponents should consider removing the comma to clarify that the "which" clause should read "which also threaten the health and safety of Colorado consumers and increase the risk of food-borne illness and associated negative ...". Please also note that "foodborne" should be hyphenated as "food-borne."
6. In the definitions of "liquid eggs," "whole pork meat," and "whole veal meat," the proponents should use commas, not parentheses, to set off the "including" phrases.
7. The proponents should consider adding to the definition of "egg-laying hen" the words "or hen" as the proponents refer to simply "hens" throughout proposed section 25-21-202. For example: "(7) "Egg-laying hen" or "hen" means ...".
8. In the proposed definition of "cage-free housing system," the quotation marks around the phrases "multi-tiered aviaries", "partially-slatted systems", and "single-level all litter floor systems" are incorrect because the phrases are described, not defined. Standard drafting format is to only use quotations marks to indicate a term that is being defined. Would the proponents consider removing the quotation marks around those phrases?
9. In the definition of "calf raised for veal," the phrase "the food product described as veal" appears to mean the same thing as "veal." Would the proponents consider replacing "the food product described as veal" with "veal"?
10. The definition of "farm" is a very long sentence that could be difficult to follow. This issue could be addressed by breaking the one long sentence into two. For example: "'Farm' means land ... used for the commercial product of animals ... used for food or fiber. 'Farm' does not include ...".
11. In the definitions of "farm" and "sale," the best practice is to place short titles in quotes and to include a citation. Would the proponents consider replacing "Meat Inspection Act" with "'Meat Inspection Act', 21 U.S.C. sec. 601 et seq." and "Egg Products Inspection Act" with "'Egg Products Inspection Act', 21 U.S.C. sec. 1031 et seq."? Similarly, in proposed section 35-21-205 (3), the reference should be to the "Colorado Consumer Protection Act."
12. In the definition of "fully extending the animal's limbs," the phrase "in the case of" may be replaced with the word "for." Would the proponents consider making this replacement?

13. In the definition of "liquid eggs," the comma after the word "proportions" is incorrect. Would the proponents consider deleting it?
14. In proposed section 35-21-203, the provisions currently marked as (A) and (4) are the second-to-last items in a series. As such, the proponents should consider ending the provisions with a semicolon, not a period, and adding an "and" after the semicolon in that subsection.
15. The introductory portions of proposed sections 35-21-203 and 35-21-204 should be labeled as subsection (1). For instance:

35-21-203. Prohibitions. (1) IN ADDITION TO OTHER APPLICABLE PROVISIONS ...

(a) A FARM OWNER OR OPERATION ...; AND

(b) A BUSINESS OWNER ...

35-21-204. Exceptions. (1) SECTION 35-21-203 DOES NOT APPLY DURING:

16. In proposed section 35-21-204 (e), the word "an" before "applicable" implies that there is only one law. Would the proponents consider deleting the word "an"?
17. In proposed section 35-21-204 (1)(g), the word "the" may be missing before the word "five." Additionally, the "(5)" after the word "five" is not needed. Also, the phrase "five day" modifies "period" and should be connected with a hyphen. With these changes, subsection (1)(g) would begin: "To a breeding pig during the five-day period ...".
18. Proposed section 35-21-205 (2) uses the phrase "and/or." The Colorado Revised Statutes do not use the phrase "and/or" because it normally means the same thing as the word "or." Normally, the word "or" authorizes both unless it is made exclusive by adding the word "either," e.g., "either ... or." Would the proponents consider replacing the phrase "and/or" with the word "or"? If the proponents are concerned the word "or" will be used in its exclusive sense, then the phrase "or both" should be added. The provision would read as follows: "The commissioner may place a lien on or seek a court-ordered public auction of, or both place a lien on and seek a court-ordered public auction of any farm property or equipment." Relatedly, the word "lien" in this subsection (2) is misspelled as "lein."
19. In proposed section 35-21-206 (2), the proponents should consider using the defined terms instead of the broader terms in the following list: "... the

inspection of farms, shell eggs, egg products, pork, and veal ...". While "farms" and "shell eggs" are defined, "egg products", "pork", and "veal" are not. Should the word "pork" instead be "pork meat" or "whole pork meat"? Should the word "veal" instead be "veal meat" or "whole veal meat"?

20. In proposed section 35-21-206 (2), there appears to be one or more words missing between the words "Colorado" and "are produced." Perhaps "that" should be inserted.
21. The last C.R.S. section of the proposed initiative is section 35-21-209, but it appears that it should be 35-21-207.