

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2020) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #16 (“Laws Concerning Cruelty to Animals”)</p> <p>Petitioners: Janie VanWinkle, Carlyle Currier, Chris Kraft, Terri Diane Lamers, William Hammerich, and Joyce Kelly</p> <p>v.</p> <p>Respondents: Alexander Sage & Brent Johannes,</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell, & Julie Pelegrin.</p>	<p>^ COURT USE ONLY ^</p> <p>Case No. 2021SA125</p>
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<p>THE TITLE BOARD’S ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,566 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

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TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. The separate topics identified by Petitioners are necessarily and properly connected to the Proposed Initiative’s single subject.	2
A. The provisions addressing “sexual act with an animal” are part of the measure’s single subject.	3
B. Establishing lifespans for certain animals and allowing the slaughter of those animals is not a separate subject.	7
C. Legislative staff and the Title Board correctly determined that the Proposed Initiative contained a single subject.....	8
D. The Proposed Initiative’s single subject is sufficiently narrow to satisfy the requirement.....	10
II. The Board’s title for #16 satisfies the clear title requirement.....	11
A. The Title Board was within its discretion to use the phrase “animal cruelty” to describe the Proposed Initiative’s changes to the animal cruelty statutes.....	13
B. The Title Board was within its discretion to include the definition of “sexual act with an animal” from the Proposed Initiative.....	15
CONCLUSION	20

TABLE OF AUTHORITIES

	PAGES
CASES	
<i>In re Title, Ballot Title, & Submission Clause for 2019–2020 #315,</i> 2020 CO 61	12, 15, 19
<i>In re Title, Ballot Title, & Submission Clause for 2013–2014 #76,</i> 2014 CO 52	5
<i>In re title, Ballot Title, & Submission Clause for 2013–2014 #90,</i> 2014 CO 63	2
<i>In re Title, Ballot Title, & Submission Clause for 2013–2014,</i> 2014 CO 66	2, 4
<i>In re Title, Ballot Title, & Submission Clause for 2015–2016 #63,</i> 2016 CO 34	13, 14
<i>In re Title, Ballot Title, & Submission Clause for 2019–2020 #3,</i> 2019 CO 57	5, 11
<i>In re Title, Ballot Title, & Submission Clause, & Summary for 1997–</i> <i>1998 No. 105,</i> 961 P.2d 1092 (Colo. 1998).....	12
<i>In re Title, Ballot Title, & Submission Clause, & Summary for 1997–</i> <i>1998 No. 112,</i> 962 P.2d 255 (Mem.).....	14
<i>In re Title, Ballot Title, & Submission Clause, & Summary for 1999–</i> <i>2000 No. 227 & No. 228,</i> 3 P.3d 1 (Colo. 2000).....	12, 16, 17, 18
<i>In re Title, Ballot Title, & Submission Clause, & Summary for 1999–</i> <i>2000 No. 258(A),</i> 4 P.3d 1094 (Colo. 2000).....	12, 14

<i>In re Title, Ballot Title, Submission Clause for 2009–2010 No. 45,</i> 234 P.3d 642 (Colo. 2010).....	11, 20
<i>In re Title, Ballot Title, Submission Clause for 2011–2012 No. 45,</i> 274 P.3d 576 (Colo. 2012).....	11
<i>In re Title, Ballot Title, Submission Clause, Summary for 1997–1998</i> <i>No. 84,</i> 961 P.2d 456 (Colo. 1998).....	8
<i>In re Title, Ballot Title, Submission Clause, Summary for 2005–2006</i> <i>No. 73,</i> 135 P.3d 736 (Colo. 2006).....	6
<i>People v. Weinreich,</i> 119 P.3d 1073 (Colo. 2005).....	19
<i>Say v. Baker,</i> 137 Colo. 155, 322 P.2d 317 (1958)	20
STATUTES	
§ 18-9-202(1)(a), C.R.S.....	3, 8
§ 18-9-202(2)(a.5)(VII), C.R.S.....	3
OTHER AUTHORITIES	
Review & Comment Hearing (Jan. 11, 2021), <i>available at</i> https://tinyurl.com/3zn9m4we	9
<i>See Colorado Pause, About, available at</i> https://tinyurl.com/3f9nf68h (last visited May 23, 2021)	16
Michael Cox, <i>Don't buy the hype – it's not about animals</i> , Montrose Press (March 11, 2021), <i>available at</i> https://tinyurl.com/u4vhny2d ...	17

SUMMARY OF THE ARGUMENT

This Court should affirm the title as set by the Title Board for Proposed Initiative 2021–2022 #16 (“the Proposed Initiative”) for the reasons stated in the Board’s opening brief. This answer brief responds to the arguments raised by the Petitioners/Objectors in their opening brief.

I. The Board correctly determined that #16 satisfies the single subject rule. Each of the topics identified by Petitioners is necessarily and properly connected to the Proposed Initiative’s goal of expanding the reach of the animal cruelty statute. The definition of “sexual act with an animal” is part of the expansion, and is also adjusted to reflect how the Proponents would treat accepted animal husbandry practices once livestock are covered by the statute. And the lifespans for certain animals address how the slaughter of livestock will be treated under the statute once livestock are included within its ambit.

II. Petitioners have failed to carry their burden of proving that the title for #16 includes impermissible catch phrases. “Animal Cruelty,” “Cruelty to Animals,” and the new definition of “sexual act

with an animal” were included to satisfy the Title Board’s obligation to ensure voters are not misled about the terms of a proposal.

ARGUMENT

I. The separate topics identified by Petitioners are necessarily and properly connected to the Proposed Initiative’s single subject.

The fact that an initiative includes several changes to existing law does not mean it violates the single subject requirement. *See, e.g., In re Title, Ballot Title, & Submission Clause for 2013–2014 #89*, 2014 CO 66, ¶ 16. So long as the provisions are “necessarily and properly connected,” they do not constitute separate subjects. *In re title, Ballot Title, & Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶ 11. Consistent with that framework, “provisions necessary to effectuate the purpose of the measure are properly included within its text.” *Id.*

The Proposed Initiative seeks to broaden the application of Colorado’s animal cruelty statutes, primarily by removing any existing exemptions for livestock. “Implementation details” tied to this central purpose “do not constitute a separate subject.” *In re Title, Ballot Title, & Submission Clause for 2013–2014 #89*, 2014 CO 66, ¶ 16.

The Proposed Initiative amends Colorado’s criminal animal cruelty statute. Presently, and under #16, that statute criminalizes “knowingly, recklessly, or with criminal negligence . . . engag[ing] in a sexual act with an animal, or otherwise mistreat[ing] or neglect[ing] any animal.” § 18-9-202(1)(a), C.R.S. (2020). Currently, livestock is exempted from this misdemeanor. *See* § 18-9-202(2)(a.5)(VII), C.R.S.

The Proposed Initiative would remove this exemption and add livestock to the list of animals covered by the statute. Record at 2 (proposed § 18-9-201(2)), *id.* at 4 (proposed § 18-9-202(2)(a.5)(VII)). This would constitute a significant change, and necessarily raises questions about how existing law—developed without the animal cruelty statutes applying to livestock—would react to the revision.

A. The provisions addressing “sexual act with an animal” are part of the measure’s single subject.

Chief among those questions is how existing animal husbandry practices would be treated. Many such practices, such as artificial insemination, include touching or entering an animal’s genital area. *See generally* Record at 2 (petition for rehearing noting that the measure

would criminalize “common veterinary and animal husbandry practices, such as spaying, neutering, palpating, artificial insemination, [and] correcting a breach baby”).

The Proposed Initiative addresses these practices by expanding the definition of “sexual act with an animal.” Record at 2 (proposed § 18-9-201(5)). This “implementation provision[] tend[s] to effect or to carry out the one general object or purpose of the initiative.” *Id.* (citations and quotations omitted). The expanded definition of “sexual act with an animal” in #16 addresses questions and circumstances necessarily raised by the inclusion of livestock within the animal cruelty statutes. In doing so it assists in carrying out the proposal’s primary objective, and is therefore necessarily and properly related.

Petitioners contend that this provision may attract support from voters who might otherwise be inclined not to broaden the animal cruelty laws. Pet’rs. Opening Br. at 15. But the question before the voters will be whether the animal cruelty statutes should be expanded in the ways outlined by the proposal. This single subject does not force voters to make “trade-offs between their views on unrelated topics.” *Id.*

at 16. Voters will either favor expanding the reach of those laws to criminalize a greater range of activity, or not.

In this way, #16 bears no similarity to #76 from the 2013–2014 election cycle. *See id.* at 16–17 (citing *In re Title, Ballot Title, & Submission Clause for 2013–2014 #76*, 2014 CO 52, ¶ 33). There, the Court addressed a proposal which would have dramatically changed the procedures for recalling elected officials. *In re Title, Ballot Title, & Submission Clause for 2013–2014 #76*, 2014 CO 52, ¶¶ 17–25 *disapproved of on other grounds by In re Title, Ballot Title, & Submission Clause for 2019–2020 #3*, 2019 CO 57, ¶ 33. It also would have expanded the right to recall elected officials to encompass non-elected officers. *In re Title, Ballot Title, & Submission Clause for 2013–2014 #76*, 2014 CO 52, ¶¶ 30–35. This Court reversed the Board’s single subject determination because “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 vice-versa.” *Id.* ¶ 35.

Unlike the dichotomous subjects at issue here, the Proposed Initiative's topics are aligned in pursuit of a single objective. A more analogous proposal came before this Court in 2006. *In re Title, Ballot Title, Submission Clause, Summary for 2005–2006 No. 73*, 135 P.3d 736, 739 (Colo. 2006). The subject there was campaign finance restrictions involving local government ballot measures. The proposal sought to address “pay-to-play” concerns by limiting the economic and business “benefits” local governments could offer persons who had contributed to issue committees supporting initiatives for that government. *Id.* It also would have restricted “pass-through” contributions to those same committees. *Id.* The Court concluded these were not separate subjects because any effect on provisions outside of the relevant constitutional amendment would be “indirect.” *Id.* at 740.

Some voters may have favored limiting “pay-to-play” but not restricting “pass-through” contributions. But the proposal did not violate the single subject requirement because the provisions were related. Namely, the pass-through provision was included in part to

prevent persons from using pass-through contributions to skirt the pay-to-play provisions.

The same is true here. The expansion of Title 18’s definition of “sexual act with an animal” answers questions raised by expanding the animal cruelty statutes to encompass livestock. In this way it fits within the general subject of the Proposed Initiative and does not warrant rejection of the Title Board’s single-subject determination.

B. Establishing lifespans for certain animals and allowing the slaughter of those animals is not a separate subject.

Absent the proposed new subsection 18-9-202(1.9), Record at 3, the Proposed Initiative would criminalize the mistreatment of livestock. *Compare* Record at 2 (proposing addition of livestock to animal cruelty statutes) *with* § 18-9-202(1)(a), C.R.S. (criminalizing mistreatment of animals). The provision at issue concerns whether and at what point slaughtering these animals constitutes “mistreatment,” and is therefore necessarily and properly connected to the measure’s single subject.

Petitioners’ authority otherwise is inapposite. Initiative #84 during the 1997–1998 election cycle, Pet’rs’ Opening Br. at 18–19, dealt

with two disparate fiscal actions: 1) cutting taxes, and 2) imposing mandatory reductions in state spending, *In re Title, Ballot Title, Submission Clause, Summary for 1997–1998 No. 84*, 961 P.2d 456, 460 (Colo. 1998). The Court noted that “requiring the state to replace affected local revenue in itself sufficiently relates to a tax cut,” and would not be a separate subject. *Id.* Because the measure went further than that by imposing reductions in state spending, the Court concluded the measure violated the single subject requirement. *Id.*

Number 16’s provisions related to the slaughter of animals are more akin to replacing affected local revenue than required reductions in spending. A tax cut necessarily affects local revenue, which is why replacing that revenue is not a second subject. And adding livestock to the animal cruelty statutes necessarily affects animal slaughter, which is why addressing that topic is not a second subject.

C. Legislative staff and the Title Board correctly determined that the Proposed Initiative contained a single subject.

Petitioners suggest that the Title Board’s careful consideration of whether this measure violates the single subject requirement is

evidence that the Title Board abused its discretion. *See* Pet’rs’ Opening Br. at 8. Instead, it shows the care with which the Board exercised its considerable discretion.

First, the proceedings before the Office of Legislative Legal Services during the Proposed Initiative’s Review and Comment Hearing undermine Petitioners’ argument. As Petitioners state, legislative staff warned the measure’s Proponents that “their approach as to a *ballot title* reflected a multi-subject initiative.” Pet’rs’ Opening Br. at 7 (emphasis added). But legislative staff did so precisely because they believed the measure satisfied the single subject rule, and the proposed title was not reflective of that fact. Review & Comment Hearing at 11:03:22–41, *available at* <https://tinyurl.com/3zn9m4we> (“I think there is a single subject. But I think what you proposed as the title, with the long string of items, the title board will want that summarized into [something] a little bit smaller.”).

Like legislative staff, the Title Board determined that the Proposed Initiative encompassed a single subject. As Petitioners note, it

did so after carefully considering arguments as to why the measure did not satisfy the single subject rule.

In reviewing the Title Board’s single subject decision, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions,” and “will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *In re Title, Ballot Title, Submission Clause for 2011–2012 No. 45*, 274 P.3d 576, 579 (Colo. 2012). Here, the Title Board appropriately exercised its discretion, ensuring that it considered all arguments for and against the proposal. Recognizing this reasoned discretion, this Court should join all other bodies that have reviewed this proposal in determining that it satisfies the single subject requirement.

D. The Proposed Initiative’s single subject is sufficiently narrow to satisfy the requirement.

Finally, Petitioners argue that the Proposed Initiative’s single subject is too “vague and general.” Pet’rs’ Opening Br. at 20–21. But, in fact, its single subject of expanding the animal cruelty laws is similar to the single subjects this Court has approved in the past:

- Whether the entirety of the Taxpayer’s Bill of Rights should be repealed was a single subject. *In re Title, Ballot Title, & Submission Clause for 2019–2020 #3*, 2019 CO 57, ¶ 2.
- “Public control of waters” was a single subject. *In re Title, Ballot Title, Submission Clause for 2011–2012 No. 45*, 274 P.3d 576, 578 (Colo. 2012).
- “Preserving individuals’ rights to choose their own healthcare arrangements” was a single subject. *In re Title, Ballot Title, Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 644 (Colo. 2010).

The Proposed Initiative’s single subject of expanding the animal cruelty laws, primarily to encompass livestock, is at least as specific as in these cases. The Title Board’s determination should be affirmed.

II. The Board’s title for #16 satisfies the clear title requirement.

Petitioners allege that the Title Board’s title for #16 violates the clear title requirement by adding two impermissible catch phrases. First, by referring to changes to the animal cruelty statutes using the phrases “animal cruelty” and “cruelty to animals,” and second by

including the measure’s definition of “sexual act with an animal.” Pet’rs’ Opening Br. at 22–26.

This Court has been properly hesitant to reverse the Board on the grounds that a drafted title contains an impermissible catch phrase. *See In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000) (“We approach the potential existence of a catch phrase cautiously.”). This reticence reflects the “considerable discretion” afforded the Board, *In re Title, Ballot Title, & Submission Clause for 2019–2020 #315*, 2020 CO 61, ¶ 6, and this Court’s caution that it “must be careful to recognize, but not create, catch phrases,” *In re Title, Ballot Title, & Submission Clause, & Summary for 1997–1998 No. 105*, 961 P.2d 1092, 1100 (Colo. 1998).

To prevail on this argument, Petitioners must offer “convincing evidence” of a catch phrase “beyond the bare assertion that political disagreement currently exists over” the challenged phrase. *In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 No. 227 & No. 228*, 3 P.3d 1, 7 (Colo. 2000). This evidence must “prove that, rather than describing the initiative, the phrase provokes emotion such

that it impermissibly distracts voters from consideration of the initiative’s merits.” *In re Title, Ballot Title, & Submission Clause for 2015–2016 #63*, 2016 CO 34, ¶ 26.

Petitioners have failed to provide such evidence here, and the Court should reject their arguments.

A. The Title Board was within its discretion to use the phrase “animal cruelty” to describe the Proposed Initiative’s changes to the animal cruelty statutes.

The Proposed Initiative would amend Colorado’s animal cruelty statute. Recognizing this fact, and that a different phrase may mislead voters as to whether the proposed penalties for violations of this section were civil or criminal, the Board used exactly this phrase in the Title.

The question is not, as Petitioners suggest, whether the central subject of the Proposed Initiative is to “enforce[] the general social norm against animal cruelty.” Pet’rs’ Opening Br. at 24. Contrary to Petitioners’ assertion, the Proposed Initiative does not address treatment of livestock generally. *See id.* Instead, it amends the animal cruelty statute to expand its coverage. There is nothing improper about

including the phrase “animal cruelty” in a title describing a measure which would expand the animal cruelty statutes

Petitioners further argue that “animal cruelty” is an “emotionally charged subject.” Pet’rs’ Opening Br. at 23. But aside from citing to cases from outside this jurisdiction, Petitioners provide no evidence that the term “impermissibly distracts voters from consideration of the initiative’s merits.” *In re Title, Ballot Title, & Submission Clause for 2015–2016 #63*, 2016 CO 34, ¶ 26.

Moreover, “protect[ing] the environment,” evokes similar passions, but the Court has rejected arguments that this phrase constitutes an impermissible catch phrase. *In re Title, Ballot Title, & Submission Clause, & Summary for 1997–1998 No. 112*, 962 P.2d 255 (Mem.) (Colo. 1998). As there, the term “animal cruelty” does not “mask” the question behind the proposal, *In re Title, Ballot Title, & Submission Clause for 1999–2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000), and does not therefore warrant this Court’s intervention.

B. The Title Board was within its discretion to include the definition of “sexual act with an animal” from the Proposed Initiative.

In its Opening Brief, the Title Board detailed the reasoned consideration behind the decision to include the definition of “sexual act with an animal” in the title. *See* Opening Br. of Title Board at 22–24. Including this language reflected the Board’s efforts to describe the measure fairly, accurately, and briefly. *See In re Title, Ballot Title, & Submission Clause for 2019–2020 #315*, 2020 CO 61, ¶ 26.

It is clear from the Opening Briefs that Petitioners and Respondents/Proponents simply disagree as to what acts should be criminalized. Petitioners argue that the new definition “has nothing to do with the notion that an animal has actually been sexually abused.” Pet’rs’ Opening Br. at 25. But Respondents’/Proponents’ express purpose is to “expand[] . . . the definition of ‘sexual act with an animal,’ from its current form to a more exhaustive form.” Resp’ts’ Opening Br. at 12. In other words, Petitioners argue that the title’s language misleads the electorate by suggesting that “sexual act with an animal” is being expanded to include acts the Petitioners do not believe

constitute sexual abuse. But to the Respondents, such an expansion is exactly the point of the proposed provision.

This dispute is one of policy and merit, which are beyond the scope of the Title Board's purview and this Court's. The evidence marshalled by the Petitioners reinforces that the dispute is over the merits of the new definition. This evidence establishes only that "political disagreement currently exists over" the Proposed Initiative, which is insufficient to carry Petitioners' evidentiary burden. *In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 No. 227 and No. 228*, 3 P.3d 1, 7 (Colo. 2000).

Petitioners' first piece of evidence is the Proponents' website. Pet'rs' Opening Br. at 27–28. But that website reflects Proponents' position on the measure, stating that if enacted, it "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." *See Colorado Pause, About, available at <https://tinyurl.com/3f9nf68h>* (last visited May 23, 2021). Far from demonstrating that the definition of "sexual act

with an animal” is a slogan, this shows that Proponents are treating it for what it is: one part of a comprehensive proposal.

Next, Petitioners cite to an editorial by Michael Cox, a commentator in the Montrose Daily Press. Pet’rs’ Opening Br. at 28. At most, the Cox editorial reflects his opinion that the definition of “sexual act with an animal” may cause confusion amongst “those with pruriently active minds.” *See id.* But the editorial as a whole reveals that Cox’s quarrel is with the proposal itself, not its description. Cox’s point is that the new definition intends to “shutdown artificial insemination practices among livestock owners.” Michael Cox, *Don’t buy the hype – it’s not about animals*, Montrose Press (March 11, 2021), available at <https://tinyurl.com/u4vhny2d>.

Moreover, the Cox editorial was published roughly a week before the original title was set, Record at 5, and almost a month prior to the drafting of the title presently before this Court, *id.* at 28–29. In fact, Cox encourages readers to “read the text [of the new definition of sexual act with an animal] closely,” specifically the part about “any intrusion or penetration, however slight, with an object . . .” Cox, *Don’t buy the*

hype – it’s not about animals. The Title Board actually facilitated Cox’s encouraged activity by including this phrase almost verbatim in the Proposed Initiative’s title. *See Record at 28.*¹

Rather than demonstrating that including elements of the new definition in the title creates an impermissible catch phrase, the Cox editorial establishes only that “political disagreement currently exists over the challenged phrase.” *In re Title, Ballot Title, & Submission Clause, & Summary for 1999–2000 No. 227 & No. 228*, 3 P.3d 1, 7 (Colo. 2000) (quotations omitted). As the Cox editorial shows, different entities are opposed to the changes proposed by #16 and accurately summarized by the Board in its Title. This is insufficient to establish the existence of a catch phrase.

As for their invocation of “sexual intercourse,” Petitioners are correct that a court “would mislead a jury if it used ‘sexual intercourse’ to describe acts that do not actually involve intercourse.” *Id.* But it

¹ Undersigned counsel was unable to access the second piece cited by the Petitioners from the Arabica Post. Pet’rs’ Opening Br. at 28. Regardless, a single legislator’s comment is insufficient to carry Petitioners’ evidentiary burden, and that story too was published before the Title Board amended the title on April 7, 2021. Record at 28–29.

would not mislead a jury if, as the Title Board did here, it used language from the relevant statute to describe that term. *See, e.g., People v. Weinreich*, 119 P.3d 1073, 1076 (Colo. 2005) (“A jury instruction should substantially track the language of the statute describing the crime.”).

Petitioners point is that “sexual act with an animal” should only criminalize certain behavior such as intercourse. But the Proposed Initiative would define the term more broadly than that. This argument concerns the merits of the proposal and is therefore beyond the scope of this Court’s review. *See, e.g., In re Title, Ballot Title, & Submission Clause for 2019–2020 #315*, 2020 CO 61, ¶ 8 (“[I]n our limited review of the Title Board’s actions, we do not address the merits of the proposed initiative.”).

Petitioners and Proponents have fundamental disagreements about whether the animal cruelty statutes should be expanded in the manner sought by the Proposed Initiative. Attuned to that disagreement, the Board addressed the expansion of “sexual act with an

animal” by trusting the voters to assess for themselves whether the Proposed Initiative’s language should be added to Colorado law.

This Court grants “great deference” to the Board’s drafting expertise, *In re #45*, 234 P.3d at 648, giving it discretion to resolve “interrelated problems of length, complexity, and clarity in setting a title[.]” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014). “[I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient.” *Say v. Baker*, 137 Colo. 155, 159, 322 P.2d 317, 319 (1958). Thus, this Court should affirm.

CONCLUSION

This Court should affirm the Title Board’s actions in setting the title for #16.

Respectfully submitted this 24th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCE and/or via overnight delivery at Denver, Colorado this 24th day of May, 2021, addressed as follows:

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