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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2013–2014 #102

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 #102 ("Initiative"), and as grounds therefore states that the Initiative violates single-subject requirements and therefore the Board lacks jurisdiction to set title. Alternatively, the title and submission clause do not conform to constitutional and statutory requirements and must be rejected or amended.

I. BACKGROUND

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

> A change to the Colorado Revised Statutes concerning the treatment of dairy cows, and, in connection therewith, prohibiting a dairy farm owner or operator from cutting or removing the tail of a dairy cow except when medically necessary to treat sick or injured cows; limiting the circumstances in which dairy cows may be confined in a way that restricts their ability to turn around freely; regulating the treatment of dairy cows that will not stand unassisted and their transfer to certain livestock facilities including slaughter houses and feedlots; 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 concerning the treatment of dairy cows, and, in connection therewith, prohibiting a dairy farm owner or operator from cutting or removing the tail of a dairy cow except when medically necessary to treat sick or injured cows; limiting the circumstances in which dairy cows may be confined in a way that restricts their ability to turn around freely; regulating the treatment of dairy cows that will not stand unassisted and their transfer to certain livestock facilities including slaughter houses and feedlots; and designating a violation as a class 2 misdemeanor?

As set forth below, the Initiative violates the single-subject requirements and the title and ballot title and submission clause do not comply with the constitutional and statutory requirements.

II. GROUNDS FOR RECONSIDERATION

A. The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation of Single-Subject Requirements

Contrary to the requirement that every constitutional amendment proposed by initiative be limited to a single subject, which shall be clearly expressed in its title (Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5), the Board set title for the Initiative at issue despite the fact that it contains multiple, distinct and separate purposes that are not dependent upon or connected with each other. Specifically, under the guise of "Dairy Cattle Protection" the initiative actually includes the following unrelated subjects:

1. Prohibits the practice of tail docking, which is presently legal as an accepted animal husbandry practice, and subjects any person who performs the procedure to criminal penalties;
2. Adopts a new definition of the term "dairy farm" that conflicts with the existing statutory definition;
3. Regulates the circumstances under which a farm owner or operator may tether or confine a dairy cow;
4. Regulates the treatment and transport of live non-ambulatory dairy cows to, from, or between slaughtering facilities, livestock markets, feedlots or similar facility that trades in dairy cows; and
5. Eliminates an existing affirmative defense to an alleged criminal offense and further states that the use of accepted animal husbandry practices will no longer negate elements of animal cruelty offenses.

None of these subjects is interdependent or connected to the other and "grouping" them under the catch-all title "Dairy Cattle Protection" will not satisfy the single-subject requirement. *See In re Proposed Initiative 1996-4*, 916 P.2d 528 (Colo. 1996) (grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single-subject requirement); *see also, In re Ballot Title 1999-2000 Nos. 245(b), 245(c), 245(d), and 245(e)*, 1 P.3d 720 (Colo. 2000). To the contrary, the Initiative imposes varied requirements on different activities conducted by different industries at different types of facilities. The Title Board therefore lacks jurisdiction to set title and title setting should be denied.

B. The Title and Ballot Title and Submission Clause are Impermissibly Confusing, Misleading, and Fail to 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 term "dairy cow" as used in the title does not accurately reflect the meaning of the term as defined by the Initiative. In fact, it is unlikely that any title can accurately express and fully inform voters as to how "dairy cow" is defined. Section (1)(a) of the Initiative defines "dairy cow" to mean: "any living bovine held on a dairy farm." (Emphasis added). The Initiative does not define "bovine" but "bovine livestock" is statutorily defined to include "(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 defines "dairy farm" broadly to mean: "the land, buildings, support facilities, and other equipment that are wholly or partially used for the production of dairy cows or milk or other dairy products and does not include live animal markets." Initiative § (1)(b). This definition conflicts with the more plain definition provided currently in state statute, which states: "'Dairy farm' means the place or premises on which one or more lactating hooved animals are kept and from which a part or all of the milk produced thereon is delivered, sold, or offered for sale to a dairy plant for manufacturing purposes." C.R.S. § 25-5.5-101(3).

   Under Proponents definition of dairy farm, even *non-lactating bovine* that are "held" on a farm where the land, buildings or other equipment are used for the production of milk or milk products could be defined as a "dairy cow" subject to the terms of the Initiative. Thus, a beef cattle ranch could be deemed a dairy farm under the Initiative by the simple fact that the rancher maintains one lactating cow to produce milk for personal/family consumption or has equipment used to produce dairy products. If the cattle ranch is deemed a dairy farm, than any living bovines on the ranch are deemed to be dairy cows subject to the regulations enumerated in the Initiative. Proponents could have but declined to adopt the plainer and commonly understood definition of dairy farm provided in state statute, and instead drafted an over-inclusive definition that is impossible to fully comprehend. The Board must therefore reject the Initiative because it is impossible to set a title that can accurately inform voters of the Initiative's full effect. *See e.g., In re Proposed Initiative 1999-2000 No. 25*, 974 P.2d at 458, 465 (the Board must reject an initiative that cannot be understood clearly enough to allow the setting of a clear title); *In re Proposed Initiative on Limited Gaming in Anotnito*, 873 P.2d 733, 741 (Colo. 1994) (holding that title was misleading since a voter scanning the initiative would be misled into believing that the measure concerned only one city, even though the proposed initiative also changed provisions applicable to other areas of the state was limited gaming was lawful).

2. The Initiative and its current title are impermissibly misleading because they fail 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. It is not sufficient to state the classification of the offense, which most voters will not understand. To be accurate, the title must make clear that any farmer or operator who docks a bovine's tail is subject to criminal charges and penalties. *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 another key feature of the initiative. Specifically, the title fails to inform voters that, rather than simply adding a prohibition against tail docking, it would also 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 (Colo. 1998).

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.

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

Inclusion of the term "slaughter houses" unfairly appeals to emotion in a way 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). The fact that the Proponents advocated so vigorously to the Board for inclusion of the term "slaughter houses" underscores its prejudicial weight in their favor. As the Board recognized at the title setting, the use of the phrase "livestock facilities" sufficiently describes the scope of the Initiative's provision regarding transport of dairy cows. Because the specific types of facilities are defined in the Initiative, and the terms "slaughter houses and feedlots" do not constitute a new or controversial legal standard, the Board does not need to further 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 extraneous and prejudicial term "slaughter houses" must be removed.

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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