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**BEFORE THE COLORADO BALLOT TITLE SETTING BOARD**

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IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE  
2013-2014 #98

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**MOTION FOR REHEARING**

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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 #98 (“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 Board designated and fixed the following title for the Initiative:

An amendment to the Colorado constitution providing that it is not a defense to a charge under the animal cruelty statutes that a livestock or companion animal was treated in accordance with an accepted animal husbandry practice.

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

Shall there be an amendment to the Colorado constitution providing that it is not a defense to a charge under the animal cruelty statutes that a livestock or companion animal was treated in accordance with an accepted animal husbandry practice?

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****The Title and Ballot Title and Submission Clause are Impermissibly 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 title is neither fair nor accurate because it describes the Initiative as removing a “defense” when in fact the Initiative states that “accepted animal husbandry practices” cannot be used “as a negation of the elements of the offenses listed in Part 2 of article 9 of Title 18, C.R.S.” It is well established under Colorado law that an affirmative defense is not the same as negation of elements of a crime. According to *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011), there are two general types of defenses to criminal charges: (1) “traverses” that effectively refute the possibility that the defendant committed the charged act by negating an element of the offense; and (2) “affirmative” defenses that admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act. *See also, People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo.1989); *People v. Miller*, 113 P.3d 743, 750 (Colo.2005) (further explaining the distinction between traverses and affirmative defenses). Proponents recognize the legal distinction between affirmative defenses and negation of elements in their other proposed initiatives. In Initiatives 99 and 100 (sections 2(d) and (e)), and 101 and 102 (sections 3(b) and (c)), Proponents address the affirmative defense apart from negation of elements in separate provisions.

Proponents argued to the Board at the title setting that voters would not understand the terminology of the Initiative’s actual language; however, the title as drafted is defective because it does not accurately reflect the true meaning, intent or effect of their measure and misinforms voters. *See e.g., In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) (title, ballot title, and submission clause deficient in that they did not fully inform signers of initiative petitions and voters and did not fairly reflect the contents of the proposed initiative). Proponents could have, but neglected to, define these terms in the Initiative itself. It is not the duty of the Title Board to correct these defects in the title setting. As a result, there is no title that that could accurately and fairly express the true intent and meaning of the Initiative and title setting should therefore be denied.

2. On a related matter, the title as drafted is misleading because it purports to remove or eliminate a defense to animal cruelty charges, when in fact the affirmative defense would remain. In other words, if the Initiative were to pass and become law, a person charged with animal cruelty could not negate an element of such offense with evidence that his or her conduct was accepted husbandry, but if the prosecution proved every element of the offense, the defendant could still invoke accepted husbandry as a defense that justified or excused the offensive conduct.
3. The title is confusing because it fails to inform voters what “accepted animal husbandry practices” means or which types of activities might be included in that term. *See e.g., In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238

(Colo. 1990) (failure of title, ballot title, and submission clause to include definition of abortion which would impose a new legal standard which is likely to be controversial made title, ballot title, and submission clause deficient in that they did not fully inform signers of initiative petitions and voters and did not fairly reflect the contents of the proposed initiative); *Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (the title and summary on an initiative concerning judicial personnel held unclear; title and summary contain contradictory language regarding the definition of personnel, and a voter would not be able to determine which judicial personnel were included in the initiative). Thus, without further clarification, voters may not know that the Initiative subjects individuals, including veterinarians, to criminal sanctions for engaging in the widely accepted practices of spaying or neutering companion animals and conforming dog breeds to their standard breed traits, or earmarking, tagging and branding livestock for identification purposes..

4. The title is misleading because it fails to inform voters that the Initiative is creating a new legal standard for pet owners, farmers, ranchers, veterinarians and other individuals who would face criminal charges and penalties for engaging in an undefined set of practices that are commonly accepted. *See e.g., In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) (failure of title, ballot title, and submission clause to include definition of abortion which would impose a new legal standard which is likely to be controversial made title, ballot title, and submission clause deficient in that they did not fully inform signers of initiative petitions and voters and did not fairly reflect the contents of the proposed initiative). Voters may not know that a “charge” means that violations are punished under the criminal code.

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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