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| <p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> | |
| <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #144 (“Veterinary Telehealth”)</p> <p>Petitioners: Will French and Diane Matt,</p> <p>v.</p> <p>Respondents: Apryl Steele and Ali Mickelson,</p> <p>and</p> <p>Title Board: Theresa Conley, Christy Chase, and Kurt Morrison</p> | <p>Case Number: 24SA65</p> |
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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:

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

/s Nathan Bruggeman

Nathan Bruggeman
Attorney for Petitioners

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INTRODUCTION

Proponents of Initiative #144 say that their measure, which authorizes “veterinary telehealth,” only applies to Colorado licensed veterinarians. They demonstrated this purported limited application of the measure through, in their words, a “definitional tunnel” or, in the Board’s description, a “maze.” Proponents’ tunnel does not lead where they say, and if their intent was to limit the measure to licensed veterinarians, there was an easy way to do just that.

Proponents could have used the defined term “licensed veterinarian” in the measure, as was suggested during the review and comment process. They chose *not* to do so and instead used the catchall defined term “veterinarian.”

Consequently, it is unclear to whom the measure applies—all veterinarians (a veterinarian with a phone or a Zoom account in Florida or Costa Rica, for example) or only those veterinarians licensed in Colorado. It is a question that is central to the measure.

Confronted with this vagueness and unable to resolve the measure’s application—problems the Title Board expressly recognized—the Board should have returned the measure to Proponents, but it did not. This Court should reverse or, at a minimum, order correction of the titles to address this and other issues.

ISSUES PRESENTED

1. Whether the Title Board lacked jurisdiction to set titles on single subject grounds because Initiative #144, by its terms, authorizes unlicensed “veterinarians” to practice veterinary telehealth even though the Initiative purports to limit such expanded forms of care only to veterinarians licensed in Colorado.
2. Whether the Title Board erred in setting titles that are misleading by describing the measure as authorizing a “veterinarian licensed in Colorado to use telehealth” when the measure authorizes any veterinarian regardless of his/her licensure status to practice veterinary telehealth on an animal located in Colorado.
3. Whether the Title Board erred in setting titles that are misleading and incomplete by incorrectly describing the meaning of “veterinary telehealth” under the Initiative.
4. Whether the Title Board erred in setting titles that are misleading and incomplete in that the titles do not adequately inform voters of the authority a veterinarian practicing veterinary telehealth will have to order, prescribe, or make available prescription drugs.

5. Whether the Title Board erred in setting titles that are misleading and incomplete in that the titles do not adequately inform voters of the limitations on a veterinarian practicing veterinary telehealth to prescribe controlled substances.

STATEMENT OF THE CASE

A. Statement of Facts.

Apryl Steele and Ali Mickelson (hereafter “Proponents”) proposed Initiative 2023-2024 #144 (the “Initiative” or “Initiative #144”). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted a final version of the Initiative to the Secretary of State for purposes of submission to the Title Board.

1. The Initiative.

Initiative #144 adds a new authorization to the Colorado Veterinary Practice Act (“Practice Act”), C.R.S. §§ 12-315-101 *et seq.*, for the provision of “veterinary telehealth.” The measure defines “veterinary telehealth” as

The practice of veterinary medicine through telecommunication systems, including information, electronic, and communication technologies, to facilitate the assessment, diagnosis, or treatment of a patient while the patient is at one site and the veterinarian is at a different site, as specified in section 12-315-127.

(Proposed C.R.S. § 12-315-104(27) (CF p. 3).) The measure initially provides that a “veterinarian holding an active Colorado license” may practice veterinary

telehealth. (*Id.* § 12-315-127(1) (CF p. 3).) But the remaining substantive provisions of the measure authorize various acts by, and provide disciplinary immunity to, a “veterinarian” practicing veterinary telehealth.

Initiative #144 provides that telehealth occurs at the animal’s location rather than the location of the “veterinarian.” (*Id.* § 12-315-127(2) (CF p. 3).) It gives the state board of veterinary medicine jurisdiction over a “veterinarian practicing veterinary telehealth on a patient in Colorado, regardless of where the veterinarian’s physical office is located.” (*Id.* § 12-315-127(3) (CF p. 3).) It requires a “veterinarian” to make disclosures and establishes the substantive parameters for veterinary telehealth, including requiring that the telehealth be provided consistent with the standard of care. (*Id.* § 12-315-127(4) & (5) (CF p. 4).) A “veterinarian” cannot be disciplined for providing telehealth. (*Id.* § 12-315-127(6) (CF p. 4).) And it gives a “veterinarian” providing telehealth prescribing authority, including, under certain circumstances, for controlled substances. (*Id.* § 12-315-127(7) (CF p. 4).)

Proponents’ choice to use the term “veterinarian” is consequential. “Veterinarian” is a defined term under the Practice Act, and it means anyone who

holds a doctor’s degree in veterinary medicine. A “licensed veterinarian,” in contrast, means a veterinarian who holds a license issued by the State of Colorado.

| “Veterinarian” | “Licensed Veterinarian” |
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| <p>“(18) ‘Veterinarian’ means a person who has received a doctor’s degree in veterinary medicine, or its equivalent, from a school of veterinary medicine.”</p> <p>C.R.S. § 12-315-104(18)</p> | <p>“(11) ‘Licensed veterinarian’ means a person licensed pursuant to this part 1 [of the Colorado Veterinary Practice Act].”</p> <p>C.R.S. § 12-315-104(11)</p> |

In other words, “licensed veterinarian” is a smaller, regulated group than the general catchall of “veterinarian.” The defined term “licensed veterinarian” appears nowhere in Initiative #144.

2. Proponents intended to use the defined term “veterinarian.”

During the review and comment process, legislative staff asked Proponents whether they intended for the defined terms in the Practice Act to apply to their measure:

Section 12-315-104, C.R.S., defines terms that apply to all of article 315 of title 12, C.R.S. By placing the proposed language in article 315 of title 12, C.R.S., do you intend the definitions of words in § 12-315-104, C.R.S., to apply to the proposed language?

(Jan. 22, 2024, Review and Comment Mem. (“Review and Comment Mem.”) at 2

¶ 3, available at <https://tinyurl.com/mr2n65x6>.) During the hearing, Proponents

confirmed, “yes,” that was their intent. (Jan. 25, 2024, Review and Comment Hr’g (“Review and Comment Hr’g”) at 10:04:41.¹)

Legislative staff further asked Proponents why they did not use the defined term “licensed veterinarian” in their measure, because the choice to use “veterinarian” made the measure unclear as to who was being authorized to practice telehealth—veterinarians or licensed veterinarians:

The proponents use the term “veterinarian” throughout the proposed initiative. Does the reference to “veterinarian” in the proposed initiative mean a veterinarian licensed in this state? If so, the proponents should consider adding “licensed” before “veterinarian” in the proposed initiative to match the defined term “licensed veterinarian.”

(Review and Comment Mem. at 2 ¶ 5.) Proponents acknowledged this problem and stated they would consider fixing it: “Let me just say, we’re considering doing that.” (Review and Comment Hr’g at 10:05:20-10:05:25.)

Given the problem created by their drafting, legislative staff asked Proponents a *second* time if they intended to allow people who are not licensed veterinarians to provide telehealth:

¹ The hearing recording is available at <https://tinyurl.com/3uf66ymu>.

Under the proposed initiative, is an individual who is not a licensed veterinarian able to deliver any veterinary health-care services through veterinary telehealth? If so, which services and under what conditions? If veterinary technicians are able to do so, part 2 of article 315 of title 12, C.R.S., should be amended as well.

(Review and Comment Mem. at 4 ¶ 15.) Proponents again acknowledged the issue and said they would consider addressing it: “We’re considering what to do with that.” (Review and Comment Hr’g at 10:13:10.)

Despite being asked twice by legislative staff if the measure allows a person who is not a licensed veterinarian to provide veterinary telehealth, Proponents chose not to revise their measure to use the defined term “licensed veterinarian.”

(See Jan. 26, 2024, “2023-2024 #144 - Amended Text,” *available at* <https://tinyurl.com/48c6p2kn>).

B. Nature of the Case, Course of Proceedings, and Disposition Below.

The Title Board heard the measure on February 7, 2024, at which time it set titles. On February 14, 2024, Petitioners filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set titles and that the titles set by the Board are misleading and confusing as they do not fairly communicate the true intent and meaning of the measure. (CF p. 9-15.)

The Title Board heard the Motion for Rehearing on February 21, 2024.

During the hearing, it became apparent the Board was unable to determine whether, based on Proponents' use of the defined term "veterinarian," the measure authorized all "veterinarians" or only "licensed veterinarians" to practice veterinary telehealth. Proponents attempted to defuse this issue through what they described as a "definitional tunnel," (Feb. 21, 2024, Title Board Hr'g ("Feb. 21 Hr'g")² at 15:07-15:08), but which, in the Board's word, was a "maze" of interpretation to determine the scope of the measure.

The Board representative from the Office of Legislative Legal Services ("OLLS") articulated the fundamental problem with the measure:

On this issue of using the term licensed veterinarian. Could you talk a little bit more about why you didn't use the defined term licensed veterinarian? I'm not necessarily seeing the use of the term veterinarian as a separate subject but I am worried about clear title because I'm following your maze to get to how this is intended to apply just to a Colorado licensed veterinarian, but I do think, I just searched the entire Practice Act for the term, and licensed veterinarian is used in most, almost every instance where the term veterinarian is used, and that is to make it clear that it applies to a person who is licensed in Colorado. ***So I wonder about the confusion that may be created by not using that term, and I also wonder about the actual effect of not using that term.*** You're stating an argument of how you think the measure can be interpreted that way, but there may be an

² The February 21 hearing recording is available at <https://tinyurl.com/2687e63a>.

argument for it not to be interpreted that way. So is our title really clear? ***Can we set a clear title based on the fact that it may be confusing about whether or not it applies to a non-licensed veterinarian?***

(*Id.* at 24:16-25:37 (emphasis added).)

The Chair of the Board was uncertain as to how to reconcile Proponents' intent with their decision not to use the defined term "licensed veterinarian," and the OLLS member explained the problem created by Proponents' choice:

Chair: ... Ms. Chase, I may lean on you a little bit given how [often] you're drafting statutes. It does say, in 12-315-217(1), that you need to have a license. So I don't know, I wouldn't think then if you get down to sub-(5) that you would need to say licensed again.

OLLS: In theory, yes. ***But the fact that those two specific terms are defined in the statute.*** Veterinarian is defined as a person who has the requisite degree, and then licensed means the person who has the requisite degree and is licensed by the board. ***So that makes it a little more confusing, in my view, in terms of every time the term veterinarian is used. You have to get through this circle to interpret it to mean licensed veterinarian when there is a defined term used consistently through the Practices Act that means a person who is licensed.*** So I can hear both sides of the argument and I, ***it's going to take some interpretation. I wonder about whether or not the Board will have the authority to impose that licensing requirement based on the language of the measure. But that's getting down to interpretation, which is not necessarily our role here.*** I do think though it plays in on if we need to modify the title. ***Because it is not clear to me that despite the intent of the Proponents you have to go through this maze to get to the result that they're claiming when throughout the Practice Act they use the term licensed veterinarian***

when they mean licensed, this is requirement, this is a limitation, on a person who is licensed in Colorado.

...

This kind of, muddies the water even further by referring to veterinarian without that qualifier licensed. So again, *I just worry about the title being clear when it's not clear what the ultimate outcome* of the [inaudible].

(*Id.* at 34:42-36:46, 39:20-39:46 (emphasis added).)

The Board member from the Department of Law then suggested how a hypothetical court might construe the measure to harmonize it as a means of addressing this problem:

I can see the argument from the movants on why the drafting here leaves certain questions open. *I presume, this is only a presumption, that if this made it to a court they would read subsection (1) and Section 127, subsection (5), and try to harmonize those two* because I think what's being posited to us by the motion is this. If we are to read the way the motion says subsection (5) will take effect it renders subsection (1) moot, and the phrase holding an active Colorado license. If a court were to find this vague, which I think this discussion [inaudible], it would look to give effect to all parts of the statute together. So I'm less likely to believe that this blows the door wide open to all veterinarians here given the fact that subsection (1) will still be [inaudible]. *We're discussing what a court may or may not do, so I don't know where that leaves us for clear expression, for single subject [inaudible].*

(*Id.* at 39:56-41:01 (emphasis added).) The Chair noted that Proponents intentionally did not use the phrase “licensed veterinarian,” which seemed to undercut that argument:

The one thing that raises a little bit of concern is that this was addressed during review and comment, and the proponents indicated that they did intend it to mean licensed veterinarian. ***So I don’t, it does seem like a choice. They made some changes and then didn’t add in that word later.***

(*Id.* at 41:04-41:19 (emphasis added).) The OLLS member was, however, persuaded at least in part by the argument as to how a hypothetical court would “harmonize” the measure, though she recognized such an approach was outside the Board’s authority:

I do not see a single subject issue, um, clear title may be an issue. ***I’m a bit persuaded by Mr. Morrison’s argument about how a court could treat this to harmonize the measure internally.*** I’m sensitive to the issues that the movants are raising as well, but I’m not sure, ***I’m not sure what to do about it because it would mean we’re making an interpretive decision on what may be some vagueness in the measure and I’m not sure that’s, we can do that.***

(*Id.* at 44:18-45:06 (emphasis added).) The Chair recognized that the lack of clarity in the measure affected the Board’s ability to identify the single subject, while the OLLS member expressed concern about whether it would be accurate for the title to state the measure applied to an unlicensed veterinarian:

Chair: I felt coming into it like they could have been more precise in using licensed, but I didn't, having it being in one, it seemed OK to me. I do think that, if it is allowing a veterinarian to practice telehealth, an unlicensed veterinarian to practice telehealth and a licensed, ***I do think, I do think it goes to single subject. ... The multiple subjects would be allowing, I guess the one subject would be allowing any veterinarian to practice telehealth verses how the movants have phrased it was a licensed veterinarian then an unlicensed veterinarian and then change in ... standard of care, excuse me.***

OLLS: Well, the specific provision about practicing in the new 12-315-127 does say a veterinarian holding an active Colorado license to practice. So I don't think its incorrect to say that it allows a veterinarian who is licensed in Colorado to practice. ... the permissiveness there is limited to a licensed veterinarian. I don't it would be necessarily accurate to say or an unlicensed veterinarian.

Chair: Right, I think ***there is some lack of clarity in the measure***, but I think it does, it goes more to implementation. And the only thing that's ***sort of pausing a little bit is the fact that this was raised, so they made the decision not to put in that additional clarification***, but indicated on the record that it was intended only to apply to licensed. So I'm inclined, I think, to stay where we landed.

(*Id.* at 45:08-47:19.)

Despite the confusion over the measure's meaning and its reservations about the interpretation necessary to determine the meaning, the Board denied the Motion for Rehearing. The titles set for #144 is as follows:

Shall there be a change to the Colorado Revised Statutes concerning veterinary telehealth, and, in connection therewith, allowing a veterinarian licensed in Colorado to use telehealth to assess, diagnose, or treat an animal patient located in Colorado; allowing a veterinarian

to establish a relationship with an animal patient and the owner or caretaker through the use of audio-video communication; and establishing parameters on prescribing controlled substances?

(CF p. 7.)

3. Jurisdiction

Petitioners are entitled to review before this Court pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed their Motion for Rehearing with the Board. *See* C.R.S. § 1-40-107(1). They timely filed their Petition for Review seven days from the date of the hearing on the Motion for Rehearing. *See* C.R.S. § 1-40-107(2).

SUMMARY OF ARGUMENT

The Board lacked jurisdiction to set a title because it was unable to determine whether Initiative #144 applies to “veterinarians” or “licensed veterinarians.” When confronted with this problem, the Board engaged in impermissible speculation regarding how the initiative would be interpreted, and it improperly deferred to Proponents’ “intent,” which conflicted with the record, at the expense of its duty to protect the public from confusion.

The Board also ran afoul of the clear title requirement in several ways. First, it failed to inform voters of the Initiative’s application to “veterinarians” and not simply those licensed in Colorado. Second, the titles do not inform voters that “veterinary telehealth” is the “practice of veterinary medicine,” opting instead to

partially describe the definition of “veterinary telehealth.” Finally, the Board erred in its description of the measure’s prescription drug authority by failing to inform voters of (1) a veterinarian’s general prescribing authority under the measure and (2) by failing to describe the specific “parameters” on a veterinarian’s ability to prescribe controlled substances.

LEGAL ARGUMENT

I. Initiative #144 violates the constitutional single subject limitation.

A. Standard of Review; Preservation of Issue Below.

The Title Board cannot set a ballot title where it does not know what the initiative does, as that inquiry goes to the identification of the single subject itself. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 468-69 (Colo. 1999). An initiative’s single subject must “be clearly expressed in its title.” Colo. Const. art. V, § 1(5.5); *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 22. Where the Board cannot identify how a measure’s key features will operate, it is unable to identify the measure’s single subject and lacks jurisdiction over the initiative. *1999-2000 #25*, 974 P.2d at 468-69.

Petitioners raised this issue in their motion for rehearing and argued it during the rehearing. (CF p. 9-10; *see, e.g.*, Feb. 21 Hr’g at 42:56-43:15.) Accordingly, they preserved the issue.

B. The measure is unclear as to whether it authorizes “veterinarians” or “licensed veterinarians” to perform veterinary telehealth.

“Licensed veterinarian” is a defined term under the Practice Act, and it “means a person licensed pursuant to this part 1” of the act. C.R.S § 12-315-104(11). The term “veterinarian” also is defined, and it “means a person who has received a doctor’s degree in veterinary medicine, or its equivalent, from a school of veterinary medicine.” *Id.* § 12-315-104(18). “Veterinarian” is, therefore, a broader category than “licensed veterinarian,” and it includes anyone in Colorado—or outside of Colorado—so long as they hold the requisite degree.

While recognizing this broader group of “veterinarians,” the Practice Act does not allow them to practice veterinary medicine in Colorado: “[a] person shall not practice veterinary medicine in this state if the person is not a licensed veterinarian.” *Id.* § 12-315-105(1). If that provision left any doubt, the remainder of the Practice Act dispels it. As the Board recognized, nearly every substantive provision in the Practice Act uses the defined phrase “licensed veterinarians.” (*See,*

e.g., Feb. 21 Hr’g at 24:53-25:08 (“I just searched the entire Practice Act for the term, and licensed veterinarian is used in most, almost every instance where the term veterinarian is used, and that is to make it clear that it applies to a person who is licensed in Colorado.”).) The practice of veterinary medicine in Colorado, in short, is authorized only for “licensed veterinarians” and not “veterinarians” generally.

Unlike the Practice Act, Initiative #144 is unclear whether its authorization for “veterinary telehealth” is limited to “licensed veterinarians” or applies to “veterinarians” generally. On the one hand, the measure states:

A veterinarian holding an active Colorado license may practice veterinary telehealth on a patient located in Colorado.

(Proposed C.R.S. § 12-315-127(1) (CF p. 3).) On the other, the substantive provisions in the measure apply to “veterinarians,” for example:

- It grants the state board of veterinary medicine jurisdiction over “veterinarians practicing veterinary telehealth on a patient in Colorado.” (*Id* § 12-315-127(3) (CF p. 3).) If the measure only applies to a licensed veterinarian, this provision would not be needed because the board already has jurisdiction over licensed veterinarians. *See* C.R.S. § 12-315-106(5).
- The measure permits a “veterinarian” to obtain consent for the use of telehealth. (Proposed C.R.S. § 12-315-127(4) (CF p. 4).)

- It authorizes a “veterinarian” practicing telehealth to establish a “veterinarian-client-patient relationship,” (*Id* § 12-315-127(5)(a) (CF p. 4)), which is the foundational relationship in the practice of veterinary medicine, *see* C.R.S. § 12-315-107(19) (defining the relationship).
- The measure establishes the standard of care applicable to a “veterinarian” practicing telehealth. (Proposed C.R.S. § 12-315-127(5)(a) (CF p. 4).) As with the board’s jurisdiction, this provision would not be necessary if the measure applies only to “licensed veterinarians” because licensed veterinarians already are responsible for adhering to the standard of care, *see* C.R.S. § 12-315-112(1)(z) (requiring licensed veterinarians to provide care that “meet[s] generally accepted standards of veterinary practice”).
- Initiative #144 creates disciplinary immunity for any “veterinarian” based upon his/her provision of veterinary telehealth. (Proposed C.R.S. § 12-315-127(6) (CF p. 4).)
- Finally, it authorizes a “veterinarian” to order prescription drugs, including controlled substances. (*Id.* § 12-315-127(7) (CF p. 4).)

Thus, under its plain language, Initiative #144 authorizes both “licensed veterinarians” to perform veterinary telehealth *and* allows “veterinarians” more generally to engage in veterinary telehealth, including immunizing them from disciplinary authority for providing telehealth. Whether the measure applies to “veterinarians” or “licensed veterinarians” is core to the measure’s subject, as they are vastly different authorizations, but it was not possible for the Board to determine to which group the measure applies.

C. If the Board cannot understand a measure’s single subject, it lacks jurisdiction to set a title.

Understanding which group the measure applies to is necessary to understanding the measure’s single subject, and the Board must be able to communicate the single subject to voters. Where, as here, the Board cannot understand the measure, it lacks jurisdiction to set titles.

The Court addressed this issue in a case considering proposals to add yearly state and local tax cuts to the Taxpayer’s Bill of Rights. As the Court explained, the genesis of the single subject requirement “embraces two interdependent mandates: one forbidding the union of separate and distinct subjects in the same legislative bill, *and* the other commanding that the single subject treated in the body of the bill shall be clearly expressed in its title.” *1999-2000 #25*, 974 P.2d at 460 (emphasis added). These restrictions are “designed to obviate flagrant evils connected with the adoption of laws,” with the latter requirement of clearly stating the single subject preventing “the passage of unknown and alien subjects, which might be coiled up in the folds of the bill.” *Id.* (quoting *In re Breene*, 24 P. 3, 3-4 (Colo. 1890)).

These concerns came to be embodied in the single subject requirement for ballot initiatives. *See id.* 462-65. As the Court explained, in exercising its title

setting duties, the Board must balance the right of initiative and respect for the proponents' intent with "concurrently protecting the voters against confusion and fraud" and satisfying its "duty to consider the public confusion that might result from misleading titles." *Id.* at 465. In attempting to strike this balance, "if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *Id.*

Applying these principles, the Court reversed in *1999-2000 #25* because the Board had been "unable to ascertain the meaning of the initiatives" such that it could not identify and articulate its single subject. *Id.* at 467. Not only had the Board been unable to understand the initiative, it also had engaged in interpretative overreach by "resolving all ambiguities in favor of the proponents herein" which was a derogation of the Board's duties to consider and protect the public from "confusion." *Id.* at 469. The Court stated the rule thus:

In cases such as this one, where the Board has acknowledged that it cannot comprehend the initiatives well enough to state their single subject in the titles, we hold that the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.

Id.; see also, e.g., *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 15 (same); *In re Title,*

Ballot Title & Submission Clause, & Summary for 1999-2000 #44, 977 P.2d 856, 858 (Colo. 1999) (same).

D. The Board acknowledged it could not determine whether the measure applied to “veterinarians” or “licensed veterinarians.”

Similar to the Board in *1999-2000 #25*, all three members of the Board here acknowledged that, because of Proponents’ choice to use the term “veterinarian,” they could not determine whether the measure applied to “licensed veterinarians” or “veterinarians.” The OLLS representative stated the problem bluntly: “Can we set a clear title based on the fact that it may be confusing about whether or not it applies to a non-licensed veterinarian?” (Feb. 21 Hr’g at 25:29-25:37; *see also id.* at 39:20-39:46 (“So again, I just worry about the title being clear when it’s not clear what the ultimate outcome of the [inaudible].”)) The Department of Law representative similarly recognized that the measure is “vague” and “why the drafting here leaves certain questions open. (*Id.* at 39:56-41:01.) And the Board Chair was “concern[ed]” by Proponents’ drafting, which, based on the opportunity to address the “veterinarian” verses “licensed veterinarian” problem after the review and comment hearing, “seem[s] like a choice.” (*Id.* at 41:04-41:19.)

This is the same scenario the Court considered in *1999-2000 #25*, and the Board's duty was clear: return the measure to Proponents. Instead of doing so, the Board overstepped its role here in the same ways that the Court disapproved of in *1999-2000 #25*.

1. The Board was required to determine if it could understand the meaning of Initiative #144.

Confronted with the confusing drafting and lack of clarity in Initiative 1999-2000 #25, the Board there proceeded to set a title even though it was “unable to ascertain the meaning of the initiatives[’]” central features. 974 P.2d at 467. This was error, the Court explained, because of the Board's duties to ensure it understands a measure such that it can set a title. Leaving the “question [of the measure's meaning] unresolved for appellate review” is “in derogation of the Board's duty under section 1-40-106.5(1)(3)(I)” to effectuate the single subject requirement. *Id.* at 468.

The Board in this case proceeded in the same manner the Court disapproved in *1999-2000 #144*. “The transcript of the hearings before the Board evidences the fact that the Board members recognized the potential shortcomings of the proposed initiatives.” *Id.* at 467. Yet, confronted with the ambiguity created by Proponents’

choice to use the defined term “veterinarian,” the Board left the “question unresolved for appellate review,” a “derogation of the Board’s duty.” *Id.* at 468.

2. The Board engaged in impermissible speculation and interpretation in setting a title.

This Court has made clear that, while the Board and the Court must engage in some review and interpretation of a measure as part of the title setting process, the scope of interpretation is “limited,” and does not include “address[ing] the merits of a proposed initiative or suggest[ing] how an initiative might be applied if enacted.” *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 # 43*, 46 P.3d 438, 443 (Colo. 2002).

The Board engaged in prohibited interpretation during the hearing. The Department of Law member speculated as to how a court would resolve the ambiguity raised in the motion for rehearing. (Feb. 21 Hr’g at 39:56-41:01.) The OLLS member admitted to being “a bit persuaded” by how this hypothetical “court” would “harmonize the measure internally.” (*Id.* at 44:18-45:06.) The Board engaged in this interpretation despite this Court’s admonishment that, in addressing the meaning of an initiative, it is improper to “predict its application,” *1999-2000 #25*, 974 P.2d at 465, or “determine [its] construction[] or future application[, which are] for judicial decision in a proper case if voters approve the proposal,” *In*

re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 258(A)
(English Language Education in Public Schools), 4 P.3d 1094, 1097-98 (Colo.
2000). Thus, the Board overstepped its authority.

3. The Board improperly deferred to Proponents instead of protecting the public from confusion.

In approving a title, the Board improperly interpreted the measure in Proponents' favor and, further, improperly deferred to Proponents' purported intent that the measure only applies to "licensed veterinarians."

In predicting how a hypothetical court would interpret the measure, the Board put its thumb on the scale and concluded that a court would "harmonize the measure." There is no basis for the Board to have concluded that a court would decide not to apply the measure's plain language—"veterinarian"—and in so concluding, the Board "resolv[ed] all ambiguities in favor of the proponents." *1999-2000 #25*, 974 P.2d at 469. Although the Board must respect the right of initiative, that does not include taking sides in determining a measure's meaning. *See id.*

The Board also improperly elevated Proponents' purported intent. To be sure, Proponents stated that they intend for the measure to apply to licensed veterinarians. However, that is not what the measure *says*, and the Board should

not have deferred to Proponents' subjective intent over the words Proponents used. Moreover, as the Board recognized, the record tells a different story. As the Chair noted, the review and comment process surfaced this issue, including recommending using the term "licensed veterinarian," and Proponents *decided* not to make the change. Thus, instead of using a clearly defined term that is well established in the Practice Act, Proponents offered a "definitional tunnel" or "maze" as evidence of their intent. Traveling that "definitional tunnel" exceeded the Board's interpretative authority and improperly favored Proponents' intent over the Board's duty to protect the public.

Accordingly, the Board erred, and this Court should reverse and order the Board to return #144 to Proponents for lack of jurisdiction.

II. The titles set by the Board are incomplete and misleading.

A. Standard of Review; Preservation.

An initiative title must "fairly summarize the central points" of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.*, 877 P.2d 311, 315 (Colo. 1994). Titles must be "fair, clear, accurate, and complete" but are not required to "set out every detail of the

initiative.” *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006* # 73, 135 P.3d 736, 740 (Colo. 2006).

This Court reviews titles set by the Board “with great deference” but will reverse where “the titles are insufficient, unfair, or misleading.” *Id.* No such deference is required where the titles “contain a material and significant omission, misstatement, or misrepresentation.” *In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998* #62, 961 P.2d 1077, 1082 (Colo. 1998). “Perfection [in writing a title] is not the goal; however, the Title Board’s chosen language must not mislead the voters.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* # 29, 972 P.2d 257, 266 (Colo. 1999).

Petitioners preserved their clear title arguments in their Motion for Rehearing and during the rehearing. (CF p. 5-6; Feb. 21 Hr’g at 8:45-10:18.)

B. The titles must inform voters that unlicensed veterinarians can practice telehealth.

If the Court determines that the Board could sufficiently understand the measure to set a title, then the titles must reflect that unlicensed veterinarians can practice veterinary telehealth. The Board’s obligation was to describe what the measure says and not how the Board believes it will be implemented. In this case, while the titles correctly state that Colorado licensed veterinarians can practice

veterinary telehealth, the Board also needed to explain that unlicensed veterinarians were subject to the measure—which grants the state board of veterinary medicine jurisdiction over them, authorizes them to establish a veterinarian-patient-client relationship, allows them to practice telehealth, immunizes them from discipline based upon the provision of telehealth, and grants them prescribing authority as telehealth providers. The titles set by the Board do not acknowledge, let alone explain to voters, the authorization as it applies to “veterinarians.” Thus, the titles will mislead voters by stating that the measure applies to licensed veterinarians when, in fact, it applies to “veterinarians” generally. *See In re Title, Ballot Title and Submission Clause for 2015-2016 #73, 2016 CO 24, ¶ 35* (explaining that title that referred to one set of recalled officials but not another set of officials affected by the measure was misleading).

C. The titles incompletely describe “veterinary telehealth.”

The titles define veterinary telehealth as allowing a veterinarian to “assess, diagnose, or treat an animal patient located in Colorado.” (CF p. 7.) The definition of “veterinary telehealth” is broader, as it means the “practice of veterinary medicine”—in other words, the full scope of what a licensed veterinarian may do:

(26) “Veterinary telehealth” *means the practice of veterinary medicine* through telecommunication systems, including information,

electronic, and communication technologies, to facilitate the assessment, diagnosis, or treatment of a patient while the patient is at one site and the veterinarian is at a different site, as specified in section 12-315-127.

(Proposed C.R.S. § 12-315-104(26) (CF p. 3.) The “practice of veterinary medicine” is far broader than “assess[ing], diagnos[ing], or treat[ing]” an animal.

As defined in the Practice Act:

(14) “Practice of veterinary medicine” means any of the following:

(a) The diagnosing, treating, correcting, changing, relieving, or preventing of animal disease, deformity, defect, injury, or other physical or mental conditions, including the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic substance or technique and the use of any manual or mechanical procedure for artificial insemination, for ova transplantation, for testing for pregnancy, or for correcting sterility or infertility or to render advice or recommendation with regard thereto;

(b) The representation, directly or indirectly, publicly or privately, of an ability and willingness to do an act described in subsection (14)(a) of this section;

(c) The use of any title, words, abbreviation, or letters in a manner or under circumstances that induce the belief that a person using them is qualified to do any act described in subsection (14)(a) of this section;

(d) The application of principles of environmental sanitation, food inspection, environmental pollution control, animal nutrition, zoonotic disease control, and disaster medicine as applied to an act described in subsection (14)(a) of this section.

C.R.S. § 12-315-104(14). While the titles need not quote or describe in detail the definition of “practice of veterinary medicine,” they do need inform voters that the definition of veterinary telehealth is coextensive with the “practice of veterinary medicine.”

Providing this clarity is particularly important because the measure misuses the word “telehealth.” Telehealth is commonly understood as applying to the broad range of services related to healthcare. *Telemedicine* in contrast (which is what Initiative #144 permits) refers to delivery of clinical care. The National Coordinator for Health Information Technology explains the difference:

Telehealth is different from telemedicine because it refers to a broader scope of remote healthcare services than telemedicine. While telemedicine refers specifically to remote clinical services, telehealth can refer to remote non-clinical services, such as provider training, administrative meetings, and continuing medical education, in addition to clinical services.

National Coordinator for Health Information Technology, last visited Mar. 10, 2024, <https://www.healthit.gov/faq/what-telehealth-how-telehealth-different-telemedicine>. Colorado law recognizes this distinction in the medical context, as the “practice of medicine” includes “telemedicine,” which is distinct from the concept of providing “telehealth.” See C.R.S. § 12-240-107(1)(a) & (1)(g). The

titles should have clearly informed voters that the telehealth proposal means “the practice of veterinary medicine” and not some more limited authorization.

D. The titles incompletely describe the prescribing authority allowed by the Initiative.

The Board’s titles incompletely describe the measure’s provision regarding the prescribing authority of a veterinarian practicing veterinary telehealth in two ways.

1. The titles fail to inform voters that a veterinarian can generally order prescription drugs.

First, the titles only inform voters that veterinarians will be able to prescribe controlled substances under certain conditions. (CF p. 7.) The prescribing authority, however, is not so limited. Rather a veterinarian may prescribe any drug consistent with state and federal law. (Proposed C.R.S. § 12-315-127(7)(a) (CF p. 4).) The titles’ narrow description of being able to order controlled substances does not imply a general prescribing authority. Moreover, the limitations on the prescribing authority are different. The measure’s general prescribing authority does not include the specific limitations applicable to controlled substances. To the extent a voter would assume the ability to prescribe controlled substances includes

the authority to prescribe drugs generally, there is nothing in the titles that alerts voters to the different restrictions on the general prescription authority.

2. The titles should describe the limitations on a veterinarian's ability to order controlled substances through telehealth.

Second, while the titles alert voters that there are “parameters” on the ability to prescribe controlled substances (CF p. 7), they do not inform voters what those parameters are. While this level of detail may not be required in other circumstances, the Board should have recognized the significant public interest attendant to the availability of controlled substances such opioids. *See, e.g.*, Colo. Gen. Assembly House-Bill 22-1326 (recognizing that illegal distribution of opiates “present[] a serious health risk in Colorado and across the country”); Health Resources & Services Administration, <https://www.hrsa.gov/opioids>, last visited Mar. 10, 2024, (“The Nation is in the midst of an unprecedented opioid epidemic. More than 130 people a day die from opioid-related drug overdoses.”). Both the federal government and the American Veterinary Medical Association recognize the potential for diversion of controlled substances prescribed by veterinarians. *See, e.g.*, Am. Veterinary Med. Ass’n, “Vet Shopping and Drug Diversion: A Guide for Veterinarians,” <https://tinyurl.com/987ynjh9>, last visited Mar. 10, 2024;

U.S. Food and Drug Admin., “The Opioid Epidemic: What Veterinarians Need to Know,” Mar. 3, 2023, <https://tinyurl.com/bdf794vr>.

Given the ongoing public health crisis attendant to opioids and other controlled substances, and the potential for diversion of prescribed controlled substances, the titles should have informed voters of the specific limitations under the measure on a veterinarian’s ability to prescribe a controlled substance *remotely*. The titles’ general reference to “parameters” on the prescribing authority is insufficient “to allow voters to determine intelligently whether to support or oppose the proposal.” 2015-2016 #73, 2016 CO 24, ¶ 32 (explaining that alerting voters to recall procedures but not explaining the procedures was insufficient to inform voters).

CONCLUSION

Petitioners respectfully request that this Court determine that the titles are legally flawed and direct the Title Board to return the initiative to the designated representative for lack of jurisdiction or, in the alternative, to correct the title to address the deficiencies outlined in Petitioners’ briefs.

Respectfully submitted this 19th day of March, 2024.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS' OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, March 19, 2024, to the following:

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