SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 13, 2014 9:59 AM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #68 ("Restrictions on Pet Animal Euthanasia") **Petitioner: HOLLY TARRY** **v.** **Respondents: GEORGE BROWN and JULIET PICCONE** **and** **Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER**	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rechtkornfeld.com	**Case No.** 2014SA117
PETITIONER'S OPENING BRIEF	

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 C.A.R. 28(g).

Choose one:

☐ It contains _____ words.

X It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

X For the party raising the issue:

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.

☐ For the party responding to the issue:

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/ Mark G. Grueskin
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STATEMENT OF ISSUES PRESENTED

Whether the Title Board erred in setting a title for a new tax on sales of all pet animals, defined by state law and including animals not typically thought of as pets, without stating the new tax applies to "all" pet animals.

Whether the Title Board erred in setting a title that omits reference to mandatory fines that are paid over to the state, first when used as an agency enforcement tool and also when awarded as statutory damages in any successful private right of action.

STATEMENT OF THE CASE

A. Statement of facts

Initiative #68 is a comprehensive system of taxing all pet sales that occur in the State of Colorado to generate a fund to partially defray the costs of mandatory animal shelter and animal rescue maintenance of all animals until they are adopted or transferred. The measure severely restricts the circumstances under which euthanasia is to be used as to animals held by shelters and rescue facilities and provides a substantial enforcement scheme, including private rights of action, civil penalties, and attorney fees for successful plaintiffs.

The Title Board set the following title for #68:

> Shall state taxes be increased $6,275,000 annually in the first fiscal year and by such amounts that are raised thereafter by

imposition of a 15 percent tax on the sale price of pet animals to fund programs and services to address pet overpopulation, and, in connection therewith, amending the Colorado revised statutes to prohibit pet animal care facilities from euthanizing pets except in limited circumstances; imposing a monetary penalty for each violation of the euthanasia prohibition, allowing persons to bring court actions to enforce compliance with and penalize violations of the euthanasia prohibition, and using certain fees and penalties collected to make grants for programs and services to address pet overpopulation?

B. Nature of the case, course of proceedings, disposition below.

George Brown and Juliet Piccone (hereafter "Proponents") proposed Initiative 2013-2014 #68 (the "Proposed Initiative"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

A Title Board hearing was held on April 2, 2014 to establish the Proposed Initiative's single subject and set a title. The following title was set at that time:

> Shall state taxes be increased $6,275,000 annually in the first fiscal year and by such amounts that are raised thereafter by imposition of a fee on sales of pet animals to fund programs and services to address pet overpopulation, and, in connection therewith, amending the Colorado Revised Statutes to prohibit pet animal care facilities from euthanizing homeless pets except in limited circumstances; imposing

a monetary penalty for each violation of the euthanasia prohibition, allowing persons to bring court actions to enforce compliance with and penalize violations of the euthanasia prohibition, and using certain fees and penalties collected to make grants for programs and services to address pet overpopulation?

On April 9, 2014 Petitioner filed a Motion for Rehearing. The rehearing was held on April 16, 2014, at which time the Title Board granted in part the Motion for Rehearing to cure certain deficiencies in the title it had set. The Board addressed certain issues raised by Objector and then set the title found under the "Statement of facts" above.

The Board did not, however, cure certain remaining deficiencies that were raised at the rehearing, and Petitioner timely filed a petition for review before this Court pursuant to C.R.S. § 1-40-107(2).

SUMMARY

The titles for Initiative #68 omit the fact that this new tax applies to "all pet animals" sold or transferred in Colorado. This Court has held that a reference to "all" sources of new revenue in a TABOR ballot question is important in communicating to voters the expanse of their approval, as an exception from the general limitation on increasing tax revenue and spending. The Board should have included that term here.

Also, the titles for Initiative #68 omit the mandatory penalties, imposed by government in one instance and litigated but then paid to

government and private litigants in a second instance. Based on this Court's previous decisions, titles must include reference to a measure's mandatory penalties.

The Title Board thus erred and the titles should be returned to the Board for correction.

LEGAL ARGUMENT

A. The title set does not accurately communicate central features of Initiative #68.

1. Standard of review; preservation of issue below.

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative and "unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1–40–106(3)(b). A legally adequate title clearly and concisely summarizes the measure's "central features." *Matter of Proposed Election Reform Amendment,* 852 P.2d 28, 32 (Colo. 1993). Where, however, the Board has omitted reference to, or mischaracterized, a central element of the measure, the title is legally deficient because voters will be misled, and the title must be sent back to the Board to be corrected. *Id.* at 34-35.

This issue was presented to the Board at the rehearing and preserved for review. *See* Motion for Rehearing on Initiative 2013-2014 #68 at 2, ¶B.2 and B. 9.

2. The Title Board failed to state that the measure refers to "all pet animals," a phrase with broader meaning than voters would anticipate.

Initiative #68 imposes a 15% sales tax on "all pet animals sold in the state." Proposed C.R.S. § 35-80-106.3(4)(a). The title omits "all" as a modifier of "pet animals." This Court has held previously that "all" is an essential aspect of a ballot title, and this case should be decided in accord with that precedent.

In the article being amended by #68, "pet animal" is a defined terms.

> "Pet animal" means dogs, cats, rabbits, guinea pigs, hamsters, mice, rats, gerbils, ferrets, birds, fish, reptiles, amphibians, and invertebrates, or any other species of wild or domestic or hybrid animal sold, transferred, or retained for the purpose of being kept as a household pet, except livestock, as defined in subsection (9) of this section. "Pet animal" does not include an animal that is used for working purposes on a farm or ranch.

C.R.S. § 35-80-102(10). The breadth of that existing definition is notable and extends to animals that are not typical thought of as pets. For example, voters might not typically process that a pet animal includes any species of wild animal that the owner acquires and retains because he or she desires that such wild animal become a pet. These animals, when sold under the statute, are subject to this new tax.

The Proponents intended to make this statute comprehensive and thus, presumably, used "all" to modify the pet animals referred to that are sold in

the state that are subject to this tax. The use of "all" in a ballot title is meaningful to voters, particularly as to those considering fiscal policy ballot questions. For instance, where school district voters considered measures to remove certain revenue streams from the limitations of Article X, section 20 of the Colorado Constitution ("TABOR"), the fact that the ballot questions "contain[ed] unambiguous terms such as 'all' and 'full'" provided voters with an understanding of the extent of the tax policy measures they considered and adopted. *Mesa County Bd. of County Com'rs v. State*, 203 P.3d 519, 533 (Colo. 2009). The inclusion of this word was what allowed the Court to conclude that the ballot title was "straightforward." *Id.*

It is fair to say, then, that "all" is not a word to be lightly omitted, particularly from TABOR ballot questions and, in fact, is a material and significant term that cannot be omitted. It is not a mere detail of the measure, and it is not an addition to the verbiage of the title that will block the Board's drafting of a brief summary of the initiative. The accurate portrayal of an initiative's reach is part and parcel of a fair and accurate title. *See Election Reform Amendment, supra*, 852 P.3d at 34-35 (ballot title that stated campaign contributions were limited when they were actually prohibited was inaccurate); *see also Matter of Title, Ballot Title, Submission Clause, and Summary Pertaining to Proposed Initiative 1996-17,* 920 P.2d

798, 803 (Colo. 1996) (Board erred when limited geographic region covered by initiative was not reflected in titles); *Matter of Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in City of Antonito,* 873 P.2d 733, 742 (Colo. 1994) (Board erred in obscuring the fact that initiative changed rules for limited gaming wherever it was conducted and not just in newly authorized jurisdiction of Antonito). The Title Board should be directed to include the reference that will fully describe the measure to voters.

3. The Title Board failed to accurately describe the enforcement aspects of Initiative #68.

The ballot title set by the Title Board informs voters that the measure "allow[s] persons to bring court actions to enforce compliance with and penalize violations of the euthanasia prohibition, and us[es] certain fees and penalties collected to make grants for programs and services to address pet overpopulation." The title does not inform voters that there is a mandatory penalty and that private enforcers of this statute get a mandatory "cut" of the penalties assessed.

In fact, Section 2 of the measure (Proposed C.R.S. § 35-80-113)(1)) addresses civil penalties which now are determined by the commissioner. However, the award to government is quite different for the violations created by Initiative #68. Here, "the commissioner shall assess a civil

penalty of one thousand dollars per individual pet animal euthanized in violation of" these provisions. That fact that an initiative imposes "mandatory, nonsuspendable fines... must appear in the titles." *Election Reform Amendment, supra*, 852 P.2d at 33-34. In that decision, the inclusion of comparable penalty language was required to ensure that the titles "unambiguously state the principle of the provision sought to be added, amended, or repealed." *Id.,* citing C.R.S. § 1-40-101(2), recodified as C.R.S. § 1-40-106(3)(b). Given these mandatory penalties imposed by #68, the same treatment of this provision is warranted in the titles, also to ensure the unambiguous statement of the key features of this initiative.

In addition to this form of award, the measure also authorizes private rights of action. (Proposed C.R.S. § 35-80-113(4)). The amount of the penalty here is also prescribed; it is to be "not less than one thousand dollars per pet animal euthanized in violation of" the statute but more importantly, the award gets a statutory split: "75% of the civil penalty shall be paid to the saving shelter pets account of the pet overpopulation fund, (sic) the remaining 25% shall be paid as damages to the prevailing plaintiff." Thus, there is a bounty of sorts that will be paid to successful plaintiffs, but the State fund is a mandatory beneficiary.

The fact that the governmental penalty is a **mandatory** $1,000.00 and the governmental share of penalties from private rights of action is a **mandatory** 75% of the judgment is a significant aspect of this measure. Its inclusion in the titles is controlled by clear precedent. *Election Reform Amendment, supra*, 852 P.2d at 33-34. For that reason, the Title Board erred.

CONCLUSION

For the reasons stated, the titles for Initiative #68 should be returned to the Title Board for correction.

Respectfully submitted this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

I, Mark G. Grueskin, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was sent this day, May 13th, 2014, via ICCES or overnight delivery to the proponents and to counsel for the Title Board at:

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