

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to 1-40-107(2),
C.R.S. (2013)

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,

Title Board:
SUZANNE STAIERT, DANIEL DOMENICO, and
JASON GELENDER

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Case No. 2014SA117

TITLE BOARD'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).

It contains 2,452 words.

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

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 (R. , p.), not to an entire document, where the issue was raised and ruled on.

/s/ Kathryn A. Starnella

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Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (“Title Board”), hereby submit their Opening Brief.

I. Statement of the issues

(1) Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 # 68 correctly and fairly express the true intent and meaning of the proposed initiative?

(2) Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 # 68 accurately describe the scope of the available private rights of action and available damage awards and attorneys’ fees?

II. Statement of the case

This is an appeal of a ballot title setting by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013).

On March 20, 2014, proponent George Brown and Juliet Piccone filed Proposed Initiatives 2013-2014 # 68 (“# 68”), with the Colorado Secretary of State. The Title Board conducted a hearing on April 2,

2014, and set title for the measure. On April 9, 2014, Petitioner Holly Tarry submitted a motion for rehearing on the title. The Title Board considered the motion on April 16, 2014, and granted in part the motion to cure certain deficiencies in the title it had set. Petitioner filed this appeal shortly thereafter.

III. Statement of the facts

68 seeks to amend Colorado's Pet Animal Care and Facilities Act, C.R.S. § 35-80-101, *et seq.*, by amending §§ 35-80-106.3, -113, -116, and -116.5, C.R.S. In sum, # 68 would:

- Implement a fifteen percent sales tax on pet sales to provide animal shelters and rescues access to funds to defray the costs of shelter and adoption programs and services;
- Require over-capacity animal shelters and rescues to engage in reasonable efforts to transfer unaccommodated pets to other available facilities;
- Allow the commissioner's assessment of a one thousand dollar, per-pet civil penalty for each pet euthanized in violation of the proposed restrictions on euthanasia;
- Enable the commissioner to sue to recover unpaid civil penalties, plus costs and attorneys' fees, and deny license renewal to any delinquent payer of the assessed penalties;

- Enable any Coloradan to bring a private action for various forms of relief, including a restraining order, injunctive relief, a writ of mandamus and prohibition, damages or other appropriate remedies at law or in equity for violations of the proscriptions on euthanasia; and
- Enable prevailing plaintiffs in private actions to obtain costs and attorneys' fees.

Additionally, the measure's declared purpose is to prohibit:

- The use of tax payer dollars to subsidize the cost of euthanizing pet animals, except where medically necessary, or in the interest of safety; and
- The use of euthanasia to control the pet animal population.

The title set by the Title Board mirrors the text and structure of #

68. Specifically, the title is structured as follows:

- First, the title mentions the fifteen percent sales tax on the price of pets to fund the cost of sheltering and rescuing pet animals;
- Second, the title identifies the general prohibition of animal shelters' and rescues' use of euthanasia;
- Third, the title discloses a possible monetary penalty for each violation of the euthanasia prohibition;
- Fourth, the title discloses private citizens' ability to commence private actions regarding violations of the euthanasia prohibition; and

- Fifth, the title states that certain funds generated from assessed penalties will be used to address pet overpopulation.

IV. Summary of the argument

The title and submission clause meet the clear title standards established by this Court. They fairly and accurately set forth the major elements of the measure.

V. Argument

A. Standard of review

The titles must clearly express the single subject of the proposal. The language of the titles cannot obscure the meaning of the measure. The titles must enable all citizens, whether familiar or unfamiliar with the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) (#45). The Title Board must “consider the confusion that might be caused by misleading titles” and “avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear.” § 1-40-106(3)(a), C.R.S. (2013). Ballot titles shall be brief. *Id.* The title need not discuss every aspect of a measure, provide

specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 314, 315 (Colo. 1994) (“*Political Finance*”).

The Court has set forth the following directive for ballot titles:

We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal but need not include every detail.

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 44 P.3d 213, 222 (Colo. 2002) (#21 and #22).

When the Court reviews a challenge to the clear title requirement of a ballot title setting, it employs all legitimate presumptions in favor of the propriety of the Board’s decision. #45, 234 P.3d at 645. The Court will examine the text to determine whether the titles and submission clause are consistent with the standards established in statute. The

Court will not determine the efficacy, construction or future application of the proposal, if passed. *Id.*

The Court has recognized that the Title Board has the difficult task of balancing the competing interests of the proponents against concerns raised by opponents and other members of the public. *In re Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives Nos. 67, 68 and 69*, 293 P.3d 551, 554 (Colo. 2013). The Title Board's decisions are presumptively valid. The Title Board has considerable discretion in setting ballot titles.

B. The title board set a clear title.

1. Summary of # 68

68 is captioned as "Restrictions on Pet Animal Euthanasia." That caption reflects the measure's key purpose, namely to save the lives of shelter pets. The measure identifies various ways in which the lives of shelter pets will be saved, including: a general proscription of euthanasia, except in limited circumstances; a policy to encourage overstretched animal shelters and rescues to transfer overflow pets to other available shelters and rescues; the establishment of a sales tax-

generated fund to defray the cost of pet shelter and adoption programs; a monetary penalty for each violation of the euthanasia prohibition; and the availability of private actions for violations of the euthanasia prohibition.

2. The title mirrors the major elements of # 68.

The title set by the Title Board follows the format required by this Court in *# 21 and # 22*, 44 P.3d 213. The title provides a clear summary of the measure's key aspects: (1) a fifteen percent sales tax on the price of pet animals; (2) the use of funds to address pet overpopulation; (3) prohibition of animal shelters' and rescues' use of euthanasia, except in limited circumstances; (4) monetary penalty for each violation; and (5) the availability of private actions and actions by the commissioner to ensure compliance with and prosecution of violations. Additionally, the title identifies the projected amount of sales tax to be collected, and provides information as to how the sales tax will be spent.

C. The title's validity should be affirmed.

Petitioner challenges the title's validity because the title purportedly fails to: (1) describe the new sales tax's scope as expressly applying to "all" pet animals; (2) describe the scope of private rights of action that may be commenced; and (3) describe the multiple forms of damages to be awarded, including attorneys' fees, to a prevailing plaintiff or the commissioner in either a private action or a civil enforcement action. As discussed in greater detail below, these grounds for invalidation should be rejected.

1. The title adequately describes the sales tax's scope.

Petitioner contends that the title fails to convey that the imposed sales tax applies to the "all" pet animals, or, at least, the categories of animals identified in § 35-80-102(10), C.R.S. *Pet. for Review* at 4. The title, however, expressly requires the imposition of a fifteen percent sales tax "on the sale price of pet animals." In other words, the title informs voters that the sales tax will be imposed on the price of any pet animal that is for sale by a facility that is licensed to sell pets.

It is common knowledge that many licensed pet facilities sell animals ranging from typical pets, such as cats, dogs, birds, and fish, to more unusual or exotic animals that are part of the reptile, amphibian, and invertebrate species. Accordingly, Petitioner's claim that the phrase, "the sale price of pet animals" does not clearly include "all" pet animals should be rejected. *See Mesa Cnty. Bd. of Cnty. Comm'rs v. Colorado*, 203 P.3d 519, 534 (Colo. 2009) (rejecting argument that a school funding initiative's references to "all revenues" or "full revenues" did not include property tax revenues because "it is common knowledge that the great majority of local funding for schools comes from property tax revenues").

Moreover, whether the title could be written in another way is irrelevant to the Court's analysis. *See In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2012) (noting that "whether the Title Board set the best possible title" is irrelevant). The Court must consider whether the title "fairly reflects the proposed initiative so that the petition signers and voters will not be misled" in their support for or opposition to the initiative. *Id.* at 656.

Because the title's language does not limit the term, "pet animals" in any way, voters will not be misled about the scope and application of the fifteen percent sales tax. Therefore, the title fairly reflects the proposed initiative and its validity should be upheld.

2. The title adequately identifies the private actions and permissible damages available for violations of the euthanasia prohibition.

Next, Petitioner contends that the title fails to accurately describe the scope of the lawsuits that private citizens may commence and the forms of damages they may seek for violations of the prohibition on euthanasia. *Pet. for Review* at 4.

"Unless the summary adopted by the Board is clearly misleading or does not fairly reflect the [initiative's purpose], [the Court] will not interfere with the Board's choice of language." *In re Proposed Initiative Under the Designation "Tax Reform,"* 797 P.2d 1283, 1289 (Colo. 1990). Moreover, "[a] summary is not intended to fully educate people on all aspects of the proposed law, and it need not set out in detail every aspect of the initiative." *Id.*

68 sufficiently appraises voters that private citizens may commence actions to enforce violations of the euthanasia prohibition. Specifically, the initiative states that it will “allow[] persons to bring court actions to enforce compliance with and penalize violations of the euthanasia prohibition[.]” Thus, the initiative informs prospective voters that a “yes” vote will subject violators to potential lawsuits by private citizens, in addition, or as an alternative, to previously available governmental enforcement actions. The nature of permissible private actions, however, is irrelevant to the scope and purpose of # 68 and, thus, the title’s failure to identify specific permissible actions does not deceive or mislead voters about the measure’s meaning.

This Court’s analysis in *Tax Reform* is instructive. In that case, the challenged summary for a sales tax initiative expressly stated that “[f]ood shall not be included in the tax base without approval of the registered electors” and that “services are prohibited from being included in the tax base unless approved by a two-thirds vote of both houses of the General Assembly.” 797 P.2d at 1289-90. In reality, however, pre-existing local sales taxes on food and taxes on services

would remain and, thus, this Court determined that summary was likely to mislead voters. *Id.*

Although # 68's title and submission clause does not educate voters about all the available private actions, summaries are not intended to educate voters about the initiative's intricacies. Moreover, curious voters are free to peruse the proposed initiative's text, which states that "[a]ny person residing in or domiciled under the laws of [Colorado] may bring suit in a court of competent jurisdiction" for any of the following forms of relief: (1) temporary, preliminary, or permanent injunction; (2) writ of mandamus and prohibition; (3) monetary damages; and (4) other appropriate remedies at law or equity. Proposed text, C.R.S. § 35-80-113(4). Thus, unlike the situation presented in *Tax Reform*, the title and submission clause does not distort or omit key provisions of # 68.

3. The title adequately discloses the forms of prospective damage awards and civil penalties.

Finally, Petitioner contends that the title fails to accurately describe the various forms of prospective damage awards and civil penalties for euthanasia violations and to disclose the fact that only prevailing plaintiffs, not prevailing defendants, are entitled to costs and attorneys' fees from bringing private enforcement actions. *Pet. for Review* at 4.

68 expressly states that violators of the euthanasia prohibition could face a monetary penalty for each committed violation and that individuals may bring private actions for violations. Monetary penalties (irrespective of amount) and the availability of private rights of action serve # 68's declared purposes of restricting pet animal euthanasia and generating funds to defray animal shelters' and rescues' overhead, programming, and service costs. Therefore, the disclosure of possible monetary penalties and the general availability of private rights of action are critical to ensuring voters' understanding of the initiative's meaning.

The disclosure of penalty amounts and the fact that only prevailing plaintiffs may recoup attorneys' fees, however, are not critical to ensuring voters' understanding of the initiative's meaning. Therefore, the absence of details concerning the penalty amount or attorneys' fees awards does not invalidate the title. *See In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 # 255*, 4 P.3d 485, 497 (Colo. 2000) (noting that "[t]he titles and summary are intended to alert the electorate to the *salient* characteristics of the proposed measure") (emphasis added). The title and summary need not "address every conceivable hypothetical effect the [i]nitiative may have[.]" *Id.* Moreover, curious voters are free to peruse the proposed initiative's text. Accordingly, this basis for the title's invalidation should be rejected.

CONCLUSION

Based on the foregoing reasons and authorities, the Title Board respectfully requests that this Court approve the title for # 68. In sum,

the title adequately describes the initiative's salient characteristics in a non-misleading, clear manner.

Respectfully submitted this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on May 13, 2014, I duly served this
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