SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 5, 2014 4:36 PM
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 #98 ("Protection of and Prevention of Cruelty to Livestock Animals") **Petitioner: Marc Arnusch** **v.** **Respondents: Mike Callicrate and Angela Smith** **and** **Title Board: SUZANNE STAIERT; DAVID BLAKE; and SHARON EUBANKS**	▲ 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.**

REFILED PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2013-2014 #98 ("PROTECTION OF AND PREVENTION OF CRUELTY TO LIVESTOCK ANIMALS")

Marc Arnusch ("Petitioner"), registered elector of the State of Colorado, through his undersigned counsel, respectfully petitions this court pursuant to C.R.S. § 1-40-107(2), to review the actions of the Title Setting Board with respect to the title and ballot title and submission clause set for Initiative 2013-2014 #98 ("Protection of and Prevention of Cruelty to Livestock Animals").

INTRODUCTION

In a timely manner on May 1, 2014, the Petitioner filed a Notice of Appeal from the Title Board's decisions regarding Initiatives 2013-2014 #97 and #98, which were informally captioned "Care of Livestock Animals" and "Protection of and Prevention of Cruelty to Livestock Animals" by legislative staff. The Court accepted the Notice for #97 but has requested a separate notice for #98. This Refiled Notice of Appeal meets the Court's directive in that regard. Thereafter, the Court may consider motions for consolidation if filed by the parties.

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative #98

Mike Callicrate and Angela Smith (hereafter "Proponents") proposed Initiative 2013-2014 #98 (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 18, 2014 to establish the single subject of and set a title for both measures. On April 23, 2014 Petitioner filed Motion for Rehearings, alleging that the titles were confusing, misleading, and failed to reflect the intent of the Proponents. The rehearings were held on April 24, 2014, at which time the Title Board granted in part the Motions for Rehearing to cure certain deficiencies in the title it had set but denied the Motions in other respects, some of which are at issue in this appeal.

B. Jurisdiction

Petitioner is entitled to a review before the Colorado Supreme Court pursuant to C.R.S. § 1-40-107(2). Petitioner timely filed the Motions for Rehearing with the Title Board. *See* C.R.S. § 1-40-107(1). Additionally, Petitioner timely filed this Petition for Review within five days from the date of the hearing on the Motion for Rehearing. C.R.S. § 1-40-107(2).

As required by C.R.S. § 1-40-107(2), attached to this Petition for Review are certified copies of: (1) the draft, amended, and final versions of each initiative filed by the Proponents; (2) the original ballot titles set; (3) the Motions for Rehearing filed by the Petitioner; and (4) the rulings on the Motions for Rehearing as reflected by the title and ballot title and submission clause set by the Board.

Petitioner believes that the Title Board erred in denying certain aspects of the Motions for Rehearing. Consequently, this matter is properly before this Court.

GROUNDS FOR APPEAL

In violation of C.R.S. §§ 1-40-106, -107, the titles set by the Title Board are unfair, misleading, not fairly and correctly reflective of the true meaning of the Proposed Initiative, and will lead to voter confusion. The following is an advisory list of issues to be addressed in Petitioner's brief:

> The Title Board failed to state the complete and accurate standard for the affirmative defense being repealed ("accepted animal husbandry practices") which is a brief but essential element of Initiatives 2013-2014 #97 and #98, central to voters' understanding.

PRAYER FOR RELIEF

Petitioner respectfully requests that, after consideration of the parties' briefs, this Court determine that the titles set for the Proposed Initiatives are neither fair nor accurate and remand the Proposed Initiatives to the Title Board with instructions to redraft the titles to accurately and fairly represent the text of the Proposed Initiatives.

Respectfully submitted this 5th day of May, 2014.

/s Mark G. Grueskin
Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
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Facsimile: 303-446-9400
Email: mark@rechtkornfeld.com
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **REFILED PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2013-2014 #98 ("PROTECTION OF AND PREVENTION OF CRUELTY TO LIVESTOCK ANIMALS")** was transmitted this day, May 5, 2014, via ICCES, to counsel for the Initiatives' Proponents and counsel for the Title Board:

Sarah Clark
Brownstein Hyatt Farber Shreck
410 17th Street, #2200
Denver, CO 80202

Sueanna P. Johnson
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Erin Holweger

DATE FILED: May 5, 2014 4:36 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, SCOTT GESSLER, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the original text, amended text, final text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #98 'Protection of and Prevention of Cruelty to Livestock Animals'".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 28th day of April, 2014.

SECRETARY OF STATE

APR 04 2014 S,WARD
2:20 P.M.

Colorado Secretary of State

Proposed Initiative 2013-2014 #98
Original

Be it enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, **add** section 17 to article XVIII as follows:

Section 17. Protection of and prevention of cruelty to livestock animals. (1) **Use of accepted animal husbandry practice is not a negation.** NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, IT IS NOT A NEGATION TO THE ELEMENTS OF THE OFFENSES LISTED IN PART 2 OF ARTICLE 9 OF TITLE 18, C.R.S. THAT A LIVESTOCK OR COMPANION ANIMAL WAS TREATED IN ACCORDANCE WITH AN ACCEPTED ANIMAL HUSBANDRY PRACTICE.

(2) **Severability.** IF ANY PROVISION OF THIS SECTION OR THE APPLICATION THEREOF IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS SECTION THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS SECTION ARE DECLARED TO BE SEVERABLE.

(3) **Effective date.** ALL PROVISIONS OF THIS SECTION ARE EFFECTIVE UPON OFFICIAL DECLARATION OF THE VOTE HEREON BY PROCLAMATION OF THE GOVERNOR, PURSUANT TO SECTION 1(4) OF ARTICLE V OF THE CONSTITUTION OF THE STATE OF COLORADO.

Proponent Representative 1

Name: Mike Callicrate

Physical Address: 1184 Hill Cir., Colorado Springs, CO 80904

Mailing Address: 1184 Hill Cir., Colorado Springs, CO 80904

Phone: 785-332-8218

Fax: N/A

E-mail: mike@nobull.net

Proponent Representative 2

Name: Angela Smith

Physical Address: 4655 Calhan Hwy, Calhan, CO 80808

Mailing Address: 4655 Calhan Hwy, Calhan, CO 80808

Phone: 719-478-2581

Fax: N/A

E-mail: highplainsangela@live.com

RECEIVED
APR 04 2014
S.WARD
2:20P.M.
Colorado Secretary of State

Proposed Initiative 2013-2014 #98
Amended

Be it enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, **add** section 17 to article XVIII as follows:

Section 17. Protection of and prevention of cruelty to livestock animals. (1) Use of accepted animal husbandry practice is not a negation. NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, IT IS NOT A NEGATION TO THE ELEMENTS OF THE OFFENSES LISTED IN PART 2 OF ARTICLE 9 OF TITLE 18, C.R.S., THAT A LIVESTOCK OR COMPANION ANIMAL WAS TREATED IN ACCORDANCE WITH AN ACCEPTED ANIMAL HUSBANDRY PRACTICE.

~~(2) Severability. IF ANY PROVISION OF THIS SECTION OR THE APPLICATION THEREOF IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS SECTION THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS SECTION ARE DECLARED TO BE SEVERABLE.~~

~~(3)~~2) **Effective date.** All provisions of this section are effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V of the constitution of the state of Colorado.

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Proponent Representative 1

Name: Mike Callicrate

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Phone: 785-332-8218

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Proponent Representative 2

Name: Angela Smith

Physical Address: 4655 Calhan Hwy, Calhan, CO 80808

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Phone: 719-478-2581

Fax: N/A

E-mail: highplainsangela@live.com

RECEIVED
APR 04 2014
S.WARD
2:20 P.M.
Colorado Secretary of State

Be it enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, **add** section 17 to article XVIII as follows:

Section 17. Protection of and prevention of cruelty to livestock animals. (1) **Use of accepted animal husbandry practice is not a negation.** NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, IT IS NOT A NEGATION TO THE ELEMENTS OF THE OFFENSES LISTED IN PART 2 OF ARTICLE 9 OF TITLE 18, C.R.S., THAT A LIVESTOCK OR COMPANION ANIMAL WAS TREATED IN ACCORDANCE WITH AN ACCEPTED ANIMAL HUSBANDRY PRACTICE.

(2) **Effective date.** All provisions of this section are effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V of the constitution of the state of Colorado.

Proponent Representative 1

Name: Mike Callicrate

Physical Address: 1184 Hill Cir., Colorado Springs, CO 80904

Mailing Address: 1184 Hill Cir., Colorado Springs, CO 80904

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Fax: N/A

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Proponent Representative 2

Name: Angela Smith

Physical Address: 4655 Calhan Hwy, Calhan, CO 80808

Mailing Address: 4655 Calhan Hwy, Calhan, CO 80808

Phone: 719-478-2581

Fax: N/A

E-mail: highplainsangela@live.com

Ballot Title Setting Board

Proposed Initiative 2013-2014 #98[1]

The title as designated and fixed by the Board is as follows:

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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

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?

Hearing April 18, 2014:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 10:06 a.m.

[1] Unofficially captioned **"Protection of and Prevention of Cruelty to Livestock Animals"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED
APR 2 3 2014
Colorado Secretary of State
SWARD 2:24 P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Marc Arnusch, Objector

vs.

Mike Callicrate and Angela Smith, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2013-2014 #98

Marc Arnusch, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2013-14 #98 ("Protection of and Prevention of Cruelty to Livestock Animals").

On April 18, 2014, the Board set the following ballot title and submission clause:

> 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?

ADVISORY GROUNDS FOR RECONSIDERATION

A. Contrary to the statutory requirements for a ballot title that is not confusing, not misleading, and reflective of the intent of the proponents, C.R.S. §§ 1-40-106, -107, the Board has erred by setting titles the current title for this measure.

1. The title misstates the legal effect of the measure, as negating an element of the crime is not a defense.

2. "Animal cruelty" is a prohibited political catchphrase.

3. The title fails to state that the statutes affected by this measure are criminal statutes.

4. The title fails to state that the statutes affected by this measure are those listed in Part 2 of Article 9 of Title 18, C.R.S.

5. "Accepted animal husbandry practices" is an unknown phrase to most voters and must be defined or clarified in the title.

6. "Companion" animals must be defined or clarified in the title

RESPECTFULLY SUBMITTED this 23rd day of April, 2014.

RECHT KORNFELD, P.C.

Mark Grueskin
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rechtkornfeld.com

Objector's Address:

Marc Arnusch
6506 County Road 65
Keenesburg, CO 80643

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2013-2014 #98** was sent this day, April 23, 2014, via first class U.S. mail, postage pre-paid to the proponents at:

Mike Callicrate
1184 Hill Cir.
Colorado Springs, CO 80904

Angela Smith
4655 Calhan Hwy
Calhan, CO 80808

Erin Holweger

RECEIVED
APR 2 3 2014
Colorado Secretary of State
S.WARD
4:45 P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

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

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 #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.

HOGAN LOVELLS US LLP

/s/ Chantell L. Taylor

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Hogan Lovells US LLP
1200 Seventeenth Street, Suite 1500
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Attorneys for Lauren Dever and Julie McCaleb

Objectors address:

Lauren Dever
215 Trader St.
Keenesburg, CO 80643

Julie McCaleb
3918 CRD AA
Anton, CO 80801

Ballot Title Setting Board

Proposed Initiative 2013-2014 #98[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution providing that it is not a defense to a criminal charge relating to the mistreatment of animals that a person used generally accepted practices in the care of companion or livestock animals.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution providing that it is not a defense to a criminal charge relating to the mistreatment of animals that a person used generally accepted practices in the care of companion or livestock animals?

Hearing April 18, 2014:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 10:06 a.m.

Hearing April 24, 2014:
Motion for Rehearing denied except to the extent that the Board made changes to the titles.
Hearing adjourned 12:11 p.m.

[1] Unofficially captioned **"Protection of and Prevention of Cruelty to Livestock Animals"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.