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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
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 2019-2020 #314 ("Concerning Farm Animal Confinement") **Petitioners: Brett Rutledge and Joyce R. Kelly** **v.** **Respondents: John Seber and John Surenkamp** **and** **Title Board: Theresa Conley, David Powell, and Julie Pelegrin**	**▲COURT USE ONLY▲**
Attorney for Petitioners: Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com	Case Number: 2020SA157

PETITIONERS' ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #314 ("CONCERNING FARM ANIMAL CONFINEMENT")

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).

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s/ Mark G. Grueskin
Mark G. Grueskin
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INTRODUCTION

The Opening Briefs of the Initiative Proponents ("Respondents") and the Title Setting Board ("Title Board" or "Board") do not raise extensive legal reasons to justify the Board's decision. The proceedings that led to the Board decision make it clear that there were deliberate decisions made to include certain enforcement mechanisms. And even though they were not exhaustively discussed before Title Board, Respondents created enough of a record to show just how important three aspects of Initiative 2019-2020 are and why they deserve mention in the ballot title.

For that reason, the Board's decision should be reversed so that these errors may be corrected.

LEGAL ARGUMENT

A. The title misleads voters because it does not tell them that the "fine" is a criminal fine.

Respondents argue that the title's reference to "fine," without stating it is a criminal fine, is acceptable because: (1) the title isn't inaccurate; and (2) the title doesn't need to describe "every nuance and feature" of an initiative. Resp. Op. Br. at 5, 6.

A title is misleading if it omits an important element of the initiative. "Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually

proposes." *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1099 (Colo. 2000). Respondents do not deny that the criminal nature of the penalty is important to them or to the implementation of the measure if adopted by voters.

When #314 was originally submitted for review by the Office of Legislative Legal Services and the Office of Legislative Council (together "Legislative Offices"), their measure allowed the Commissioner of Agriculture to impose the fine and make the violation of animal housing standards a felony. Needless to say, the staff of the Legislative Offices highlighted constitutional and other concerns with administrative officials imposing financial penalties at the level of a felony.

> The reference to the commissioner imposing a criminal penalty is unconstitutional. The commissioner may impose civil penalties but may not impose criminal penalties. Only a court can impose criminal penalties. **If the proponents want to make it a crime, it needs to be classified as a misdemeanor. A solution would be to make these civil penalties.** Another solution would be to make this an unclassified misdemeanor: "A farm owner or operator or business owner or operator that violates this section is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of one thousand dollars per animal per day." Would the proponents consider revising this provision to make it constitutional?[1]

[1] April 1, 2020 Memorandum to John Surenkamp and John Seber at 11, 12 (Questions 31.b, 32.a) (hereafter "Review and Comment Memorandum") (http://leg.colorado.gov/sites/default/files/initiatives/2019-2020%2520%2523314.002.pdf).

Thus, Proponents literally were asked whether they "want to make it (a violation) a crime," and the answer – based on the final text of their initiative – was "yes."[2]

Had the criminal aspect of their proposal not been so important to their "true intent and meaning" for this measure, *In the Matter of the Title, Ballot Title & Submission Clause, and Summary for Proposed Election Reform Amendment*, 852 P.2d 28, 33 (Colo. 1993), they would have used the Legislative Staff's alternative of civil penalties to be imposed by the Commissioner of Agriculture. Instead, they gave her the ability to use the full brunt of the State to criminalize a commercial activity, whether it is raising certain animals in certain types of housing or selling the food products from those animals with an awareness of what the housing conditions on farms and ranches were.

Rarely does this Court get to know, based on a pointed question and an action that comprises an answer, what is central to proponents of an initiative. By their actions, Proponents waived off a civil penalty in order to make animal breeding under the conditions specified in #314 a crime. If this was not a central feature of

[2] Likewise, at their Review and Comment hearing before the Legislative Offices, the Proponents verbally answered "yes" when asked if they would alter their penalty provision to make it defensible as a matter of constitutional law. April 1 Hearing Audio Recording of Initiative 2019-2020 #314 Review and Comment Hearing at 35:00-35:45 (https://coloradoga.granicus.com/MediaPlayer.php?view_id=57&clip_id=15262).

their measure – rather than a "nuance" – they would have used a civil fine or even an administrative penalty in a proceeding conducted within the Department of Agriculture's existing framework. But they did not. And having made this deliberate choice to make any offense a criminal one, Proponents should have no objection to reflecting it to voters in the title.

The Title Board justifies non-disclosure of the criminal nature of the penalty because titles should not be "an exhaustive summary of every facet" of a measure. Title Board Op. Br. at 5. No doubt, brevity is a laudable objective for ballot titles. That have been said, brevity in titles is a balancing with, rather than a priority over, voter understanding. The goal for voters is "full disclosure."

> However, if a choice must be made between brevity and a fair description of essential features of a proposal, **the decision must be made in favor of full disclosure** to the registered electors. In the case of a complex measure embracing many different topics like the proposal now before us, the titles and summary cannot be abbreviated by omitting references to the measure's salient features.

Election Reform Amendment, supra, 852 P.2d at 32 (emphasis added).

Respondents point to this Court's decision in *Election Reform Amendment, supra*, as support for the notion that a title can be silent as to the type of penalty (civil or criminal) imposed by an initiative. Actually, that decision supports the argument for clarity about the fine rather than justifying the Board's superficial treatment of it.

First, the penalty in that matter was a civil fine. *Id.* at 42. By staying silent about whether the fine was civil or criminal in that matter, the Board in *Election Reform Amendment* reflected what it saw as a common understanding – that "fine" standing alone would not imply that it was being assessed as a criminal penalty.

Further, the Court required the Board to include specific elements about the fine. other than just that term alone. It directed the Board to amend the title to add the phrase, "TO REQUIRE A MANDATORY FINE FOR VIOLATION OF THE CAMPAIGN CONTRIBUTION AND PUBLIC EXPENDITURE PROVISIONS." *Id*. at 34, n.4. A proper title would need to note extraordinary aspects of any penalty (here, that it was "mandatory") and what violations would trigger it. This description was not optional; the Court said it "must appear" in the title so that the title would meet the statutory standard described above. *Id.* at 34.

The Court observed that providing such specificity was consistent with its own ballot title precedent. Citing two of its previous holding in this field, the Court said, "certain phrases must be added to the titles in order for the titles to fairly reflect the content of the proposed amendment." *Id.*, n.4.

Proponents' position that a title is sufficient if it lacks these key details but is not inaccurate lacks support in the very precedent Proponent cited. If extraordinary elements are excluded from the title, it will not "**unambiguously** state the principle

of the provision sought to be added, amended, or repealed." *Id.* at 34, citing what is now C.R.S. § 1-40-106(3)(b) (emphasis added); *see* Colo. Const., art V, § 1(5.5) (requiring that the title "clearly express[]" the subject of an initiative).

Thus, "criminal" must modify "fine" in the pertinent phrase in the title ("imposing a fine for violations of the measure") if the title is to adequately inform voters.

B. The title misleads voters because it does not tell them that of ability to seek imposition of liens and court-ordered auctions against agricultural producers and sellers of agricultural goods.

Respondents refer to this aspect of their measure a "detail" that would only "engender the 'public confusion' the Board is charged with preventing." Resp. Op. Br. at 8, 9.

Taking the economic tools away from agricultural producers and food sellers is hardly a minor element. After all, Proponents agreed that one of the "major purposes" of their measure was:

> To authorize the commissioner of agriculture to seek enforcement of a penalty in an action in court and allow the commissioner to recover the penalty plus costs and attorney fees, and **to place a lien on or seek a court-ordered public auction of a farm or equipment necessary to recover unpaid penalties**.

Review and Comment Memorandum at 2 (¶7) (emphasis added).[3] When asked to confirm whether certain provisions comprised the measure's "major purposes" and had been correctly summarized as such, Proponents' counsel answered, "Yes, we believe that they do."[4]

And it wouldn't confuse voters; it would educate them about how the measure will actually relate to them if 50.1% of the electorate votes for #314. And while this issue is particularly important in the midst of a pandemic, that does not mean that this is a matter of injecting either the merits or prejudicial considerations into the title.

The relevance of any provision of an initiative must be considered in light of what is relevant to voters. And Proponents clearly seek to authorize governmental taking of these properties and equipment from persons who have not fully paid their criminal fines. As they stated, it is one of their "major purposes."

It is the Board's obligation to represent in a title the "true intent and meaning" of the proposed text of an initiative. The initiative laws state and restate that "true intent and meaning" requirement in four different places. C.R.S. §§ 1-40-102(10)

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[3] http://leg.colorado.gov/sites/default/files/initiatives/2019-2020%2520%2523314.002.pdf.

[4] April 1 Hearing Audio Recording of Initiative 2019-2020 #314 Review and Comment Hearing at 5:15-5:25 (https://coloradoga.granicus.com/MediaPlayer.php?view_id=57&clip_id=15262).

(defining "title"), -106(3)(b) (setting forth Title Board legal responsibilities), -107(1)(a)(I) (outlining grounds on which Title Board's title may deviate from mandatory aspects, -107(1)(b) (outlining eligible grounds for challenges to titles).

Therefore, the title should reflect this key feature of #314.

C. The title misleads voters because it does not tell them that of the private right of action that is a significant enforcement tool for #314.

Respondents argue that the use of treble damage actions under the Colorado Consumer Protection Act represent an insignificant element of their measure, based on a concern expressed by Legislative Staff that would-be plaintiffs might lack standing to pursue such actions when they deal with animal housing. Resp. Op. Br. at 7. Because of staff comments that this remedy could be removed from the measure over standing concerns, Proponents now state it must not be a central feature of the measure. *Id.*

First, Respondents fail to note that they include in their measure the device that will be used to seek standing – a legislative presumption of health impacts to consumers. The legislative declarations in #314 state, in part, "Extreme methods (of farm animal confinement) threaten the health and safety of Colorado consumers and increase the risk of food-borne illness and negative fiscal impacts on the state of Colorado." Proposed Sections 35-21-201 and 35-50.5-101.

The Legislative Staff was incorrect when it posed the standing issue as a function of the impact on animals. "It is not clear how a person would suffer an injury or other loss because eggs are produced by inappropriately caged hens or because meat comes from an inappropriately caged calf or pig." Review and Comment Memorandum at 12-13 (Question 33).[5]

As indicated, the issue for potential plaintiffs will not be allegations about the effect of animal housing on animals. A complaint's allegations would reflect plaintiffs' allegations that they had "increase[d] risk of food-borne illness" or that their "health and safety" was affected. No surprise, then, that Proponents "declined to adopt (Legislative Staff's) suggestion and kept the private-action clause in" #314. Resp. Op. Br. at 7.

Moreover, at the Review and Comment hearing, Proponents did not seriously entertain removing this provision over standing concerns. As their counsel stated in response to Question 33 of the staff memo, "I think we're okay with there being a limited scope of the private cause of action and have decided to keep it in." April 1 Hearing Audio Recording of Review and Comment Hearing at 37:35-38:35.[6] Advised that their civil remedy might not have teeth, Proponents – presumably

[5] http://leg.colorado.gov/sites/default/files/initiatives/2019-2020%2520%2523314.002.pdf.
[6] https://coloradoga.granicus.com/MediaPlayer.php?view_id=57&clip_id=15262.

believing that not to be the case given health claims set forth in the legislative declarations – decided to retain a provision that is otherwise portrayed to have "little significance." Resp. Op. Br. at 7.

The fact that Proponents decided to retain a provision that they were counseled to drop makes its presence at least noteworthy. That such lawsuits would be brought under an unrelated statute (the Colorado Consumer Protection Act) with multiple magnifiers of liability (treble damages and the $1,000 per animal, per day, per violation standard) makes this a central feature of #314. As such, it should be reflected in #314's ballot title.

CONCLUSION

For the reasons stated, the Title Board's decision should be reversed.

Respectfully submitted this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS' ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #314 ("CONCERNING FARM ANIMAL CONFINEMENT")** was sent electronically via CCEF this day, May 29, 2020, to the following:

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