

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: May 15, 2020 4:43 PM</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 2019-2020 #314 (“Concerning Farm Animal Confinement”)</p> <p><b>Petitioners: Brett Rutledge and Joyce R. Kelly</b></p> <p>v.</p> <p><b>Respondents: John Seber and John Surenkamp</b></p> <p>and</p> <p><b>Title Board: Theresa Conley, David Powell, and Julie Pelegrin</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p>
<p>Attorney for Petitioners:</p> <p>Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) <a href="mailto:mark@rklawpc.com">mark@rklawpc.com</a></p>	<p>Case Number: 2020SA157</p>
<p><b>PETITIONERS’ OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #314 (“CONCERNING FARM ANIMAL CONFINEMENT”)</b></p>	

## 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 3,456 words.

It does not exceed 30 pages.

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

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*

\_\_\_\_\_  
Mark G. Grueskin

*Attorney for Petitioners*

**TABLE OF CONTENTS**

**ISSUES PRESENTED** .....1

**SUMMARY OF ARGUMENT** .....1

**STATEMENT OF THE CASE**.....2

A. Statement of Facts. .....2

B. Nature of the Case, Course of Proceedings, and Disposition Below. .....4

**LEGAL ARGUMENT** .....5

**A. Standard of review; preservation of issue below.** .....5

        1. *The titles must refer to the criminal penalty imposed rather than using the more general and less accurate term, “fine.”* .....7

        2. *The titles fail to inform voters of the enforcement tools designed to deprive farmers and grocers of their property and equipment.* .....10

        3. *The titles fail to inform voters of the broad authority for citizen lawsuits under an unrelated statute, the Colorado Consumer Protection Act.* .....14

**CONCLUSION**.....16

**TABLE OF AUTHORITIES**

**Cases**

*In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998) .....5

*In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.*, 877 P.2d 311, 315 (Colo. 1994) .....5

*In Re: Interrogatory on House Joint Resolution 20-1006 Submitted by the Colorado General Assembly*, 2020 CO 23, ¶12; \_\_\_ P.3d \_\_\_ (April 1, 2020).....11

*In the Matter of the Title and Ballot Title & Submission Clause for 2015-2016 #73*. 2016 CO 24, ¶32; 369 P.3d 565.....9

*In the Matter of the Title, Ballot Title & Submission Clause and 1999-2000 #258(A)*, 4 P.3d 1094, 1099 (Colo. 2000).....13

*In the Matter of the Title, Ballot Title & Submission Clause for the Proposed Constitutional Amendment Concerning “Fair Fishing,”* 877 P.2d 1355, 1359 (Colo. 1994) .....8

*In the Matter of the Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006).....5

*In the Matter of the Title, Ballot Title & Submission Clause, and Summary for the Proposed Election Reform Amendment*, 852 P.2d 28 (Colo. 1993) .....9, 14

*In the Matter of the Title, Ballot Title & Submission Clause, and Summary for Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993).....13

*In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #57*, 185 P.3d 142, 146 (Colo. 2008)..... 6, 8, 14, 15

*In the Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, 23-24, 369 P.3d 565, 569 .....7

*In the Matter of the Title, Ballot Title and Submission Clause for Initiatives #21 and #22*, 44 P.3d 213, 221 (Colo. 2002)..... 11, 12

*In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999).....6

*People v. Coyle*, 654 P.2d 815, 818 (Colo. 1982) .....10

**Statutes**

C.R.S. § 6-1-113 .....3, 15

**Other Authorities**

<https://www.denverpost.com/2020/04/19/colorado-farms-face-new-worries-as-coronavirus-threatens-food-supply/> .....11

## **ISSUES PRESENTED**

1. Whether the Board erred by failing to inform voters that the “fine for violating this measure” is criminal in nature and not just an administrative fine imposed by the Commissioner of Agriculture.
2. Whether the Board erred in failing to inform voters that the measure subjects agricultural producers, as well as the sellers of their products, to court-ordered auctions of, and liens on, their land and equipment.
3. Whether the Board erred in failing to inform voters of the significant civil remedy that is available to “any person,” is not a “fine,” and is different in every material respect from enforcement tools referred to in the titles.

## **SUMMARY OF ARGUMENT**

This initiative contains an intricate array of enforcement mechanisms that warrant description in the title. They are not, as Respondents are sure to argue, mere details or elements of the measure’s potential implementation.

Initiative #314 creates a crime for which a substantial financial penalty must be assessed. Yet, the title (unlike the text of the measure) is silent on the fact that a violation is a crime and violators must pay a “criminal penalty.”

This initiative also authorizes financial encumbrances (liens) and auctions of farmland and farm equipment if agricultural producers are unable to meet the burden

of these mandatory penalties. The same is true for grocers and food distributors – any seller, actually – who sells affected egg or meat products if they knew or should have known of violations. The titles would not need to detail the nature and process used in such a remedy. But neither should they be silent about legal tools that were included to further challenge the state’s food supply chain.

Finally, Initiative #314 subjects both farmers and food sellers to treble damage actions under the Consumer Protection Act. This civil remedy is not a private right of action to enforce the statute. It is a significant and otherwise unrelated remedy, though, that will escape most voters’ attention if the title is not corrected to include it.

## **STATEMENT OF THE CASE**

### **A. Statement of Facts.**

John Seber and John Surenkamp (the “Proponents”) proposed Initiative 2019-2020 #314 (“Initiative #314” or “#314”). Initiative #314 establishes housing standards for certain commercial farm animals. It provides that the commissioner of the Department of Agriculture is to enforce the standards created in this new statute, adopt rules, and inspect properties to “ensure compliance” but not through any third party or private inspection service. Proposed Sections 35-21-206; 35-50.5-106.

Initiative #314 also proposes an array of enforcement and penalty provisions against agricultural producers as well as any seller of affected agricultural products who knew or should have known that these new animal housing standards were not met. The primary penalty is referred to as a “fine” in the ballot title, but the measure specifically refers to it as a “criminal penalty.” Proposed Sections 35-21-205(b); 35-50.5-105(b). That criminal penalty is imposed at the rate of \$1,000 “per violation, per animal, per day.” Proposed Sections 35-21-205(a); 35-50.5-105(a).

Moreover, where a person subject to this criminal penalty does not make payment in full, the Commissioner is authorized to seek a lien or court-ordered auction of any farm property or equipment, or both. Proposed Sections 35-21-205(b); 35-50.5-105(b). This collection process applies to agricultural producers as well as to any sellers of those goods. Proposed Sections 35-21-205(b); 35-50.5-105(b).

Finally, #314 provides a far-reaching civil remedy that is unrelated to the government’s enforcement options. “Any person” will be able to sue under the Colorado Consumer Protection Act for purchasing any agricultural goods produced in violation of these housing standards. The measure treats such a purchase as an “unfair and deceptive trade practice” under C.R.S. § 6-1-113. This private right of action, which includes the ability to obtain treble damages and attorney fees, applies

to agricultural producers and any sellers of affected agricultural products. Proposed Sections 35-21-205(c); 35-50.5-105(c).

The titles' only reference to these various enforcement devices, penalties, and bases of liability is that this new law includes provisions "imposing a fine for violations of the measure; and directing the commissioner of agriculture to enforce the measure."

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

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted final versions of the Proposed Initiative to the Secretary of State for submission to the Title Board.

A Title Board hearing was held on April 15, 2020, at which time titles were set for #314. On April 22, 2020, Petitioners Brett Rutledge and Joyce R. Kelly ("Objectors") filed a Motion for Rehearing, alleging that the Title Board erred because the titles set for #314 were unfair, inaccurate, incomplete and misleading to voters, and additionally that the abstract was misleading. A rehearing was held on April 23, 2020. At that time, the Motion for Rehearing was denied in part but also granted in part to address misleading wording in the titles. The following title was approved:

Shall there be a change to the Colorado Revised Statutes concerning the confinement standards for certain farm animals used in commercial production, and, in connection therewith, prohibiting confinement that does not meet specified space requirements for egg-laying hens of domesticated fowl, calves raised for veal, and breeding pigs; prohibiting a business from selling eggs or meat produced from covered farm animals confined in violation of the measure; allowing certain exceptions to the confinement standards for covered farm animals; imposing a fine for violations of the measure; and directing the commissioner of agriculture to enforce the measure?

### **LEGAL ARGUMENT**

#### **A. Standard of review; preservation of issue below.**

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 the Matter of the Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006).

This Court will review titles set by the Board “with great deference” but will reverse the Board 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 Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

“Perfection (in writing a ballot title) is not the goal; however, the Title Board’s chosen language must not mislead the voters.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999) (“#29”).

The clear title issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See* Motion for Rehearing on Initiative 2019-2020 #314 at A.3, 4, 6, and 7.

**B. The titles are misleading.**

At issue here is whether the Board erred by failing to provide voters with any insight about the severe enforcement mechanisms to be used as part of this measure. Objectors do not contend that this enforcement scheme violates the single subject requirement; this Court has held that enforcement of a measure is not its second subject. *In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #57*, 185 P.3d 142, 146 (Colo. 2008).

Instead, the question presented is whether the Title Board adequately informed voters of the severe means by which this measure will be enforced. The Court reviews the Board’s work “to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *In the Matter of the Title, Ballot*

*Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, 23-24, 369 P.3d 565, 569. Given the title’s superficial description of the measure’s enforcement tools (“imposing a fine for violations of the measure; and directing the commissioner of agriculture to enforce the measure”), voters would not know that the measure contains an unlikely combination of invasive, far-reaching enforcement tools that go far beyond a mere fine through agency enforcement of certain housing standards for farm animals.

1. *The titles must refer to the criminal penalty imposed rather than using the more general and less accurate term, “fine.”*

The “fine” that is imposed here is a criminal penalty as part of the punishment for the misdemeanor created by #314. The measure is specific that a violation comprises a misdemeanor and refers to this financial exaction as a “criminal penalty.” Proposed Sections 35-21-205(a), (b); 35-50.5-105(a), (b). As a matter of legal consequences and voter understanding, a criminal penalty is obviously of different and greater consequence than an administrative fine. Yet, voters would likely read “fine” to be limited to an agency action based on the title’s limited reference to the Commissioner’s power to enforce these provisions.

This Court has held that where a measure creates an act that is criminal in nature, the Title Board acts appropriately in referencing the newly created criminality in the ballot title. In an initiative that treated certain business conduct as

criminal and made certain business executives culpable for participating in such acts, the Court found that the use of the phrase, “criminal conduct,” was not a catch phrase that “would prejudice voters to vote for or against the proposed initiative.” #57, *supra*, 185 P.3d at 147. “Indeed, it is difficult to see how else the Title Board could have described this measure,” noting that “criminal conduct” was nothing more than “a descriptive term” used in the titles. *Id.*

In the same vein, this Court has held that a title properly highlighted the crime of trespass on state waters and thus fairly and accurately described the ballot measure. That title stated, “it is not criminal trespass to be on the water within and the stream bed of any nonnavigable fresh water stream....” *In the Matter of the Title, Ballot Title & Submission Clause for the Proposed Constitutional Amendment Concerning “Fair Fishing,”* 877 P.2d 1355, 1359 (Colo. 1994). That reference to “criminal trespass on the water” was “clear and not misleading.” *Id.* at 1361. Moreover, it served a critical purpose in informing voters. “The plain language of the phrase **lets the reader know that the amendment addresses the crime of trespass** in regards to individuals who are located in a water course.” *Id.* (emphasis added).

The failure to include a reference to the criminal nature of an offense is not merely a discretionary wording choice. Nor is it a statement of the measure’s details

or effects. The lack of detail in raising the criminal aspect of this measure is material to the sufficiency of #314's title. For instance, a ballot title was set for an initiative that changed the recall process for elected officials. That title referenced that the initiative "specifie[d] recall and successor election procedures without in any way describing those procedures." *In the Matter of the Title and Ballot Title & Submission Clause for 2015-2016 #73*. 2016 CO 24, ¶32; 369 P.3d 565. That level of generality "does not provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal." *Id.* As a result, the title was returned to the Board for correction.

Certainly, if reference to "specifying recall and successor election procedures" was too innocuous to be informative, a reference to "fine" that is not qualified by "criminal" fails to bring into focus for voters the severity of this change to the law. As such, it is a material omission that invalidates the Board's decision.

More to the point, this Court has held that the Board errs when it fails to describe fines that are written with particular detail in an initiative. For instance, in *In the Matter of the Title, Ballot Title & Submission Clause, and Summary for the Proposed Election Reform Amendment*, 852 P.2d 28 (Colo. 1993), the measure imposed "mandatory, nonsuspendable fines" for certain campaign finance violations. *Id.* at 33. The Court reversed the Title Board for this material omission,

stating that added clarity about fines was essential. The reference to fines so severe and so specifically drawn “**must appear in the titles** so that they unambiguously state the principle of the provision sought to be added, amended, or repealed.” *Id.* at 34 (statutory citation omitted) (emphasis added).

#314’s penalty is not only mandatory (a violator “shall be punished by a fine of one thousand dollars per violation, per animal, per day”) and nonsuspendable (the initiative does not allow for fines “up to” the specified amount), it is a crime with all of the consequences as to personal liberty and reputation that are associated with a criminal act. *See People v. Coyle*, 654 P.2d 815, 818 (Colo. 1982). The titles need to reflect this aspect of #314.

2. *The titles fail to inform voters of the enforcement tools designed to deprive farmers and grocers of their property and equipment.*

In the event of any non-payment of a criminal penalty, #314 authorizes the Commissioner to seek a lien against, or a court-ordered auction of, the real property or equipment of a violator. The Commissioner can pursue both alternatives if she so chooses. That means that producers of affected eggs and meat are subject to government-imposed liens and court-ordered auctions of their land, their animals, their farm implements, their trucks, trailers, and tractors – the very means by which they earn their livings and feed the consumers in this state. It also means that sellers of these products – neighborhood grocers, vendors at farmers’ markets, food

wholesalers who are the middlemen between producers and retailers, as well as large supermarkets – can lose their property and equipment due to the acts of third parties, acts they know or “should know” are being committed.

This Court has already observed that the COVID-19 pandemic is affecting our society in dramatic ways. *See In Re: Interrogatory on House Joint Resolution 20-1006 Submitted by the Colorado General Assembly*, 2020 CO 23, ¶12; \_\_\_ P.3d \_\_\_ (April 1, 2020). It also threatens the economic vitality of agricultural markets and the supply of food to consumers.<sup>1</sup>

Voters should know that the measure expressly gives the Commissioner the right to encumber or sell off any property and equipment of agricultural producers and those who market their products. The exercise of a hidden power is exactly what the ballot title should disclose to voters. For instance, the title for an initiative that restricted access to bilingual education failed to “sufficiently inform the voters of the parental-waiver process and its virtual elimination of bilingual education as a viable parental and school district option.” *In the Matter of the Title, Ballot Title and Submission Clause for Initiatives #21 and #22*, 44 P.3d 213, 221 (Colo. 2002).

---

<sup>1</sup> <https://www.denverpost.com/2020/04/19/colorado-farms-face-new-worries-as-coronavirus-threatens-food-supply/> (“Farmers face new hardships that threaten to stanch the flow of food to consumers.”).

Notably, in #21 and #22, the Court did not find that the titles were silent on the issue of the parental-waiver process – only that the titles did not “sufficiently” address that subject. There, the title did at least refer to the waiver and actually did so at some length:

establishing a parental waiver process to exempt from the English immersion program children who already know English, older children, and children with special needs; requiring schools in which at least twenty students in the same grade receive a waiver to offer classes teaching English and other subjects through bilingual education techniques or other generally recognized educational methodologies....

*Id.* at 226. The Court addressed the substantive adequacy of the title, however. As to #314, the titles contained some slight reference to penalties imposed, but that overly brief phrase was not sufficient to ensure that voters understood the full reach of this initiative.

In #21 and #22, the structural impediment to programmatic access was not conjectural and did not require the Title Board to engage in speculation about the initiative’s hidden element that addressed such educational programs. “Contrary to the title board’s and proponents’ position, we need not engage in the prediction of doubtful future effects to reach that conclusion.” *Id.*

The same is true here. This title needs only reference the power to seek liens against and auctions of property and equipment owned by agricultural producers and sellers of those products if fines are not paid. As Proponents drafted their measure

to authorize the Commissioner to curtail certain food producers' and sellers' operations, their title should not conceal that fact. The pandemic was known to the world when Proponents drafted the measure, went through the review and comment process, and refined and amended #314 before submitting it to the Title Board. In other words, the government's ability to remove food producers from the supply chain was the Proponents' deliberate policy choice, and it should not be hidden from voters who would be, to put it mildly, interested in that provision.

This Court does not ignore the moment in time when a ballot measure is considered. Just the opposite. It determines, for example, whether particular wording is a political catch phrase, "must be made in the context of contemporary public debate." *In the Matter of the Title, Ballot Title & Submission Clause, and Summary for Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993). Determining the central features of a ballot measure requires assessing the substance of what is proposed in light of what is going to be important as voters consider a measure. "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 the Title, Ballot Title & Submission Clause and 1999-2000 #258(A)*, 4 P.3d 1094, 1099 (Colo. 2000). The omission of this aspect of

the measure will certainly mislead voters about the reach of the measure and the meaning of their votes.

The authority of the Commissioner is at least as important to this measure's penalty aspect as the "mandatory, nonsuspendable" nature of fines was to the measure reviewed in *Election Reform Amendment, supra*. To the extent that clarity about such fines was necessary so the title would "unambiguously" summarize what was before voters, 852 P.2d at 33-34, the same is true here for an enforcement tool of such great consequence. Therefore, the title should be returned to the Board.

3. *The titles fail to inform voters of the broad authority for citizen lawsuits under an unrelated statute, the Colorado Consumer Protection Act.*

Initiative #314 also creates a civil remedy that operates independently from the criminal penalty discussed above.

The Title Board acts appropriately when its title addresses a civil remedy associated with criminal conduct. In #57, *supra*, the Court affirmed the Board's decision because it "accurately described in the titles" the extent of civil relief provided by the measure. *Id.* at 147. That title related the following to voters about the initiative:

allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the state of

Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action....

*Id.* at 148-49. Of course, the title for #314 relates nothing about the civil remedy authorized by this measure.

The civil remedy aspect in #57 was “accurately described in the titles” because the measure itself did “not create civil liability for the breach of traditional civil duties.” *Id.* at 147. Thus, voters could assess the underlying measure and not have to guess that there were other sources of liability triggered by the measure. As to #314, that is not the case as it invokes the Colorado Consumer Protection Act, a foundation for liability that:

- Penalizes violations of #314 under different statutory standards found in C.R.S. § 6-1-113;
- Assesses liability distinctly as an unfair and deceptive trade practice rather than a violation of the new statute;
- Provides monetary damages to persons suing under the act rather than to the government; and
- Allows for a multiplier (treble damages) rather than the \$1,000 “per violation, per animal, per day” standards in the proposed statute.

Voters need notice of the existence of a civil remedy, a device that is entirely unrelated to the monetary “fine” addressed in the title. The title should therefore be returned to the Board so that it may correct this omission as well.

### **CONCLUSION**

This title is flawed for failure to include the three above-described enforcement elements that voters would need to know to make appropriate judgments about Initiative #314. The title should be returned to the Board for correction.

Respectfully submitted this 15<sup>th</sup> day of May, 2020.

*s/ Mark G. Grueskin*

Mark G. Grueskin, #14621

RECHT KORNFELD, P.C.

1600 Stout Street, Suite 1400

Denver, CO 80202

Phone: 303-573-1900

Facsimile: 303-446-9400

Email: [mark@rklawpc.com](mailto:mark@rklawpc.com)

**ATTORNEY FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS' OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #314 ("CONCERNING FARM ANIMAL CONFINEMENT")** was sent electronically via CCEF this day, May 15, 2020, to the following:

Counsel for the Title Board:  
Michael Kotlarczyk

Office of the Attorney General  
1300 Broadway, 6th Floor  
Denver, CO 80203

Counsel for the Designated Representatives:  
Christopher Jackson  
Holland & Hart  
555 17<sup>th</sup> Street, #3200  
Denver, CO 80202

*/s Erin Holweger* \_\_\_\_\_