

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. 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>Petitioners: Brett Rutledge and Joyce R. Kelly, v. Respondents: John Surenkamp and John Seber, and Title Board: Theresa Conley, David Powell, and Julie Pelegrin.</p>	
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<p style="text-align: center;">RESPONDENTS’ ANSWER BRIEF</p>	

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all the requirements of C.A.R. 28 and C.A.R. 32. I further certify that:

A. The brief complies with C.A.R. 28(g) because it contains 1,432 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because it contains a statement regarding whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled—via adoption of the Respondents’ statements in their opening brief.

/s/ Christopher M. Jackson
Christopher M. Jackson
Attorney for Respondents

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Respondents adopt the statement of issues from their opening brief.

STATEMENT OF THE CASE

Respondents adopt the statement of the case from their opening brief.

SUMMARY OF THE ARGUMENT

Number 314’s title correctly and fairly expresses the true intent and meaning of the measure and would not lead to public confusion. For that reason, the Board’s decision should be affirmed.

ARGUMENT

I. The title the Board set for #314 was proper.

A. Standard of review.

The Respondents adopt the standard-of-review and preservation statements they made in their opening brief.

B. The Board didn’t abuse its discretion in omitting the fact that the fines are criminal.

Petitioners begin their brief by arguing that #314’s title must refer to the fine adopted by the measure as a “criminal penalty.” Pet’rs Opening Br. at 7. In support, they claim—without evidence—that “voters would likely read ‘fine’ to be limited to an agency action” *Id.* But that limited reading is at odds with the dictionary definition of the term: a “fine” is “[a] *pecuniary criminal punishment* or

civil penalty payable to the public treasury.” BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 11th ed. 2019) (emphasis added); *see also* Merriam Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/fine> (last accessed May 20, 2020) (“fine” is “a sum imposed as punishment for an offense”). It’s also inconsistent with the Excessive Fines Clause in the Federal Constitution, which “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quotation omitted). These authorities make clear that the term “fine” is commonly used in the criminal context, and that no confusion could reasonably result from using it that same way here. Petitioners claim that confusion would result from “the title’s limited reference to the Commissioner’s power to enforce these provisions,” Pet’rs Opening Br. at 7, but that reference is set out in a separate independent clause; there isn’t any reason why a voter would assume that one independent clause in the title limits the scope of another clause.

Next, Petitioners say that “[t]his Court has held that where a measure creates an act that is criminal in nature, the Title Board acts approvingly in referencing the newly created criminality in the ballot title.” *Id.* In support, they cite two cases where this Court affirmed the Board’s decision to use phrases like “criminal conduct” and “criminal trespass.” *Id.* at 7-8. But this argument misapplies the

standard of review. Even if Petitioners are right in claiming that the Board could have legitimately used a phrase like “criminal conduct” in #314’s title, that isn’t enough. A litigant cannot mount a successful challenge under an abuse-of-discretion standard merely by asserting that the Board could have set a different title; it must demonstrate that the option the Board actually chose was “insufficient, unfair, or misleading.” *In re Title, Ballot Title, & Submission Clause for 2009–2010*, #45, 234 P.3d 642, 648 (Colo. 2010).¹

Finally, Petitioners invoke *In re Title, Ballot Title, & Submission Clause for the Proposed Election Reform Amendment*, 852 P.2d 28 (Colo. 1993). In that case, this Court required the Board to include a reference to mandatory, nonsuspendable fines for willful violation of a campaign-finance measure. *Id.* at 33–34 & n.4. But as Respondents noted in their opening brief, even there the Court didn’t mandate that the title specify whether the fine was civil or criminal. *Id.* Petitioners go on to claim that #314’s fine is also “mandatory” and “nonsuspendable.” Pet’rs Opening Br. at 10. But that isn’t quite right: #314 only allows a fine to be imposed if the

¹ Petitioner’s reliance on *In the Matter of the Title and Ballot Title & Submission Clause for 2015-2016* #73, 369 P.3d 565, 570 (Colo. 2016), doesn’t fare any better. That case arose from a completely different context—elected official recalls—and stands only for the general proposition that a title can be too general to “provide sufficient information” to voters. Petitioners’ bare assertion that #314’s title is also too general begs the question.

farm or business owner or operator is both charged with and convicted of a misdemeanor. Certified R. at 5, 9 (§§ 35-21-205, 35-50.5-105) (an owner or operator “who violates this section is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine ...”). And of course, “[p]rosecutorial discretion to bring or not bring charges is extraordinarily wide. Many considerations go into deciding whether to file a case and, if filed, whether to continue pursuing it.” *People v. Weiss*, 133 P.3d 1180, 1189 (Colo. 2006). If the Court were to adopt the Petitioners’ interpretation of the law, the Board would be required to call out and describe every fine included in every proposed measure. That kind of a one-size-fits-all rule cannot be squared with the broad discretion the Board enjoys.

C. The Board didn’t abuse its discretion in omitting the fact that the measure provides for a civil remedy.

Petitioners argue that the Board erred in failing to include in the title the fact that #314 provides for a private cause of action under Colorado’s Consumer Protection Act. In support, Petitioners cite to caselaw they say confirms that “[t]he Title Board acts appropriately when its title addresses a civil remedy associated with criminal conduct.” Pet’rs Opening Br. at 14. But that assertion, even if accurate, isn’t enough to prevail under an abuse-of-discretion standard. Perhaps it’s true that the Board *may* address a civil remedy associated with criminal

conduct in its title; but that’s a far cry from saying the Board *must* do so in all cases. In fact, an abuse-of-discretion standard contemplates precisely the opposite—that the decision maker may choose from “a range of reasonable options.” *E-470 Public Highway Auth. v. Revenig*, 140 P.3d 227, 230–31 (Colo. App. 2006).

Moreover—and as Respondents discussed in their opening brief—#314’s reference to the Consumer Protection Act isn’t a central feature of the measure. The OLLS/LC memorandum even asked Respondents to remove the provision from the proposal due to its minimal significance. *See* Resp’ts Opening Br. at 7. The Board didn’t abuse its discretion in declining to include this relatively inconsequential provision in the title.

D. The Board didn’t abuse its discretion in omitting the fact that the measure provides for court-ordered auctions and liens.

The Petitioners’ last argument focuses on #314’s provision authorizing the commissioner of agriculture to seek a lien or court-ordered auction to recoup an assessed fine. Pet’rs Opening Br. at 10. Claiming that this provision “threatens the economic vitality of agricultural markets and the supply of food to consumers,” the Petitioners say that the COVID-19 “pandemic was known to the world when Proponents drafted the measure” and that “the government’s ability to remove food producers from the supply chain was the Proponents’ deliberate policy choice”

Id. at 12-13. Respondents respectfully submit that this argument is overwrought. Providing the commissioner with procedural tools to collect criminal fines cannot reasonably be interpreted as threatening global food supply or as a “deliberate policy choice” to “remove food producers from the supply chain.” It is, rather, a run-of-the-mill enforcement mechanism that’s available to execute any criminal fine or civil judgment. *E.g.*, § 16-11-101.6(3), C.R.S. (“To collect on past due orders of fines or fees, the state may employ any method available to collect state receivables, including assigning such accounts to private counsel or private collection agencies under section 24-30-202.4(2), C.R.S.”); § 13-52-102(1), C.R.S. (“All goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained ... are liable to be sold on execution to be issued upon such judgment.”). In any event, #314 also gives the commissioner discretion on whether to use this tool; the commissioner may decide—if global food supply chains really are threatened—*not* to seek a lien or court-ordered auction on a party that had been criminally convicted of violating state law.²

² Petitioners also assert that “sellers of [covered] products ... can lose their property and equipment due to the acts of third parties” Pet’rs Opening Br. at 11. But again, that isn’t right: sellers must *themselves* violate #314’s prohibitions to be guilty of a misdemeanor. Certified R., at 5, 9 (§§ 35-21-205, 35-50.5-105). Moreover, a conviction requires proof that the defendant “*knowingly engage[d]* in the sale within the State of Colorado of any” covered item produced in violation of the measure. *Id.* at 3, 8 (§§ 35-21-203(b), 35-50.5-103(b)) (emphasis added).

CONCLUSION

For the reasons given above, the Court should affirm the Board's decision.

Respectfully submitted on this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I electronically served the **RESPONDENTS' ANSWER BRIEF** and related documents upon the following parties through the Colorado courts' efiling system on May 29, 2020:

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