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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Brett Rutledge and Joyce R. Kelly, Objectors,

vs.

John Seber and John Surenkamp, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2019-2020 #314

Brett Rutledge and Joyce R. Kelly (“Objectors”), registered electors of Yuma and Weld Counties respectively as well as of the State of Colorado, through undersigned counsel, submit this Motion For Rehearing on Initiative 2019-2020 #314 (“#314”), pursuant to C.R.S. § 1-40-107, and states:

On April 15, 2020, the Title Board set titles for Initiative 2019-2020 #314. The ballot title and submission clause as designated and fixed by the Board reads:

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 the confinement without adequate space of 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 without adequate space; allowing certain exceptions to the requirement for adequate space for covered farm animals; imposing a fine for violations of the confinement standards; and directing the commissioner of agriculture to enforce the provision?

A. The titles set are unfair, inaccurate, and misleading.

- 1. “Confinement” and “confined” represent a political catch phrase, intended to inflame voter passions rather than educate voters.**

“Confinement” and “confined” are politically loaded terms that make this title something other than the neutral summary it is supposed to be. Catch phrases are words that can “form the basis of a slogan for use by those who expect to carry out a campaign” on the measure. *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). They are “**tailored for political campaigns** – brief striking phrases for use in advertising or promotion.” *Id.* (emphasis added). A catch phrase will “encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposal’s merits.” *Id.*

“[T]he state of being confined” and “a period of confinement” are equated with “imprisonment.” *Tapia v. United States*, 564 U.S. 319, 329 (2011) (citing Black’s Law Dictionary 825 (9th ed. 2009) and Webster’s Third New International Dictionary 1137 (1993)). The notion of “imprisoning” as applied to #314 is an emotional, nonsubstantive, and inaccurate representation that is inconsistent with the Board’s primary objective, “a proper fair title.” C.R.S. § 1-40-106(1).

A term’s campaign potential is judged “in the context of contemporary political debate.” 258(A), *supra*, 4 P.3d at 1100. The terms “confined” and “confinement” are featured on a webpage about a recent California ballot measure, “Why Mercy for Animals is **Tirelessly Campaigning for YES** on 12.” <https://mercyforanimals.org/why-mercy-for-animals-is-tirelessly-campaigning> (emphasis added) (last viewed April 21, 2020). Notably, Mercy for Animals’ website lists one of Initiative #314’s two Designated Representatives as its Senior Vice President of Advocacy¹ and describes its California ballot measure advocacy by emphasizing:

- “mother pigs confined in gestation crates;”
- “animals confined in California’s factory farms;” and
- “forms of extreme confinement.”

In the same campaign, this group sent other messages to the same effect, such as the one titled, “Yes on Prop 12! Early Voting Begins for CA Law to End Extreme Farmed Animal **Confinement**.” <https://mercyforanimals.org/yes-on-prop-12-early-voting-begins-for-ca> (referencing “extreme cage confinement”) (emphasis added) (last viewed on April 21, 2020). Besides using “confinement” for campaign advantage, this organization routinely uses that term for other political positioning.²

#314’s legislative declaration – actually, its very first sentence – ties “animal cruelty” to “extreme methods of farm animal confinement.” Proposed Section 35-21-201. If there was any question about the expected campaign usage of this term, that provision in #314 answers it.

¹ <https://mercyforanimals.org/about> (see bio of John Seber) (last viewed on April 21, 2020).

² The aforementioned organization advocates on its website for new laws relating to:

- “production and sale of meat and eggs from intensively confined animals;”
- “production and sale of eggs from hens confined in cages;”
- “confinement law for hens;”
- “intensive confinement... for egg-laying hens, pigs used for breeding, and calves used for veal;”
- “intensively confined animals;” and
- “cage confinement.”

<https://mercyforanimals.lat/2019-august>; <https://mercyforanimals.org/progress-oregon-bans-cage-confinement-of> (emphasis added) (last viewed April 21, 2020).

The Title Board erred in using “confinement” and “confined” four (4) times in seven (7) lines of the title. Those terms reflect and consolidate political rhetoric – and have been used as part of admitted “tireless campaigning.”

The fact that #314’s text uses “confinement” does not mean it is any less of a catch phrase. “While we agree that the initiative contains this language, the Title Board is not free to include this wording in the titles if, as here, it constitutes a catch phrase.” 258(A), *supra*, 4 P.3d at 1100.

There are suitable, non-inflammatory alternatives. Instead of “confined,” the Board could use “housed” or “maintained.” Such terms lend themselves to voter understanding, not voter sympathy or passions, and the Board should employ one here.

2. The title improperly refers to animal housing that lacks “adequate space.”

“Adequate space,” used three times in the titles, does not reflect the language of the initiative and is qualitative, subjective phrasing without being informative or fair. The measure itself provides specific space dimensions for affected animals. A ballot title cannot use wording that generally but inaccurately describes the measure. *See In re Proposed Election Reform Amendment*, 852 P.2d 28, 35 (Colo. 1993) (Board erred by stating measure would just “revise” certain constitutional provisions where it actually materially changed or repealed both procedural and substantive law).

Advocates on both sides of this issue could disagree over whether #314’s detailed dimensions provide – or fail to provide³ – “adequate space.” But this Board has no basis to judge if the stated dimensions provide the listed animals “adequate space.”

Instead, the Board should use “according to specified dimensions for each animal” or some comparable phrase that is accurate without being subjective.

3. The titles are incomplete, and thus inaccurate, in describing fines that can be imposed under this measure.

The titles fail to inform voters about key elements of the fines for violations, namely:

- Fines are criminal in nature, stemming from the status of a violation as a misdemeanor and the measure’s express references to “criminal penalty; and
- Fines are imposed on a “per animal, per day” basis.

The fact that the measure uses something other than a simple administrative penalty and that it uses not one but two multipliers (per animal and per day) to heighten the penalty are central features of #314.

³ In California, Proposition 12 set forth space-related requirements for farm animals but was still criticized by animal activist groups because it did not go far enough and thus were inadequate. <https://www.peta.org/blog/prop-12-cage-free-misleads-consumers/> These spacing provisions could trigger similar reactions from other organizations and interested parties.

Failing to provide the specifics of key portions of an initiative represents reversible error. *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, 34, 369 P.3d 565, 570 (Board erred by writing a title that was “so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative”). Thus, the ballot title should be revised to reflect these two factors – the criminal nature of this fine and the fact that the significant multipliers are mandated for calculating these fines.

4. The titles are incomplete, and thus misleading, by not stating that government officials are authorized to seek liens against a person’s real property and equipment as well as institute court-ordered auctions of such property or equipment.

These extra remedies reflect a key element of the measure. They present a more severe burden than a mere monetary fine, as they directly implicate agricultural producers’ and grocers’ abilities to earn livings (literally taking the tools of their livelihoods away) and fulfill their respective roles in the state’s food supply chain.

5. The titles are incomplete, and thus incorrect, in stating the measure will be enforced, seemingly alone, by the commissioner of agriculture.

The commissioner is authorized to take certain steps, but the judiciary will actually enforce many of these provisions. For instance, the courts will be involved in adjudicating lien requests and/or hearings for court-ordered auctions. Thus, there is not simply an administrative remedy that will be triggered by the measure. It is simply inaccurate to say that the commissioner alone is involved in enforcing this measure.

6. The titles are incomplete, and thus incorrect, in stating that fines are imposed only “for violation of the confinement standards,” given that (a) criminal fines are levied for sales of certain agricultural products and (b) even if sellers only “should have known” about producers’ animal housing practices.

In addition and of greater possible effect to voters/consumers, fines can be imposed against “business owners or operators” who engage in the sale of agricultural products raised without complying with the new provisions relating to housing of animals. Therefore, retail sellers are subject to these penalties even though they did not violate the specified housing standards. Proposed Sections 35-21-203(b), 35-50.5-103(b).

Specifically, voters should know that sellers can receive criminal fines. In this regard, the titles are incorrect that sellers are just “prohibit[ed]... from selling” affected agricultural products. The titles are also incomplete for failing to state that penalties can be imposed where sellers “should have known” of animal housing practices, not (as voters might presume) just where they had actual knowledge of such practices. #73, *supra*, 369 P.3d at 570 (overly general title language can be misleading to voters).

7. The titles fail to disclose the significant private party enforcement role provided by the measure.

Initiative #314 gives private parties a cause of action under C.R.S. § 6-1-113, a consumer protection statute. This law allows persons to sue to obtain, among other remedies, treble damages against a defendant. In light of the ability to sue “business owners or operators,” the private right of action will be a substantial element of the potential liability created by #314, a factor that voters should understand through the ballot title.

Because the private right of action is not limited to Colorado residents, C.R.S. § 6-1-113(1)(a)-(c); Proposed Sections 35-21-205(c) and 35-50.5-105(c) (authorizing suit by “any person”), the fact that so many agricultural products are sold outside of Colorado renders this threat a significant one. Normally, 48% of Colorado’s agricultural goods are sold outside the state; at present, it’s 90%.⁴ The initiative’s authority for this civil liability against Colorado producers must be disclosed.

8. “Covered animals” is a vague and potentially misleading phrase

Used twice in the titles without context, “covered animals” is non-specific and does not communicate to voters that it refers to animals affected by this measure.

More importantly, “covered” is susceptible to multiple meanings that will confuse voters, particularly in a measure related to animal housing. The primary meaning of “covered” is “to place something on, over, or in front of, so as to conceal, protect, or close.” *Webster’s New World Dictionary*, Third College Edition 320 (1988).

In other words, it describes adding an additional layer. As such, “covered” can be interpreted by voters as suggesting roofs or other extra protection in the housing or physical structures – which are very much at issue here – in which animals are kept.

9. Reference to “the provision” in the final clause of the title is non-specific and will be confusing to voters.

This term lacks meaning and context as to what the commissioner will be enforcing. It will therefore confuse voters.

B. The abstract is misleading.

1. The abstract fails to state the fiscal impact of #314 on the judicial department.

As noted above, the judicial department will be involved in enforcing this measure. The abstract is silent on this issue, even if only to note that such impact is currently indeterminate. The abstract thus does not fulfill the requirement that it provide an

⁴ <https://www.denverpost.com/2020/04/19/colorado-farms-face-new-worries-as-coronavirus-threatens-food-supply/> (last viewed April 21, 2020).

“estimate of the amount of any state and local government recurring expenditures or fiscal liabilities if the measure is enacted.” C.R.S. § 1-40-105.5(3)(c).

2. The abstract understates the number and cost of department personnel, as well as travel costs, required to enforce this measure.

The fiscal impact statement estimates 2.0 FTE (one compliance specialist and one administrative assistant) to administer this program. The measure specifically requires the Department to “**ensure** compliance” directly and not to use third party contractors. Proposed Sections 35-21-206(c), 35-50.5-106(c) (emphasis added).

The Department of Agriculture estimates there are 34,000 farms and ranches in the state.⁵ As such, these two individuals would each have to guarantee compliance of more than 46 farms and ranches every day – assuming they worked 365 days a year including all holidays. Given that there are approximately 250 work days (365 minus weekends and holidays) and that the inspections can occur only “during regular business hours,” Proposed Sections 35-21-206(a) and 35-50.5-206(a), each of the two staff persons would have to inspect almost 70 farms and ranches of every work day – or 9 each hour daily.

In addition, there are tens of thousands of grocery stores, convenience stores, butcher shops, and vendors at farmers markets (among others) who would be “business owners or operators” whose sales activities would also have to be monitored for compliance. It is just not reasonable to think that two government employees will be sufficient to meet the measure’s mandate of “ensur[ing] compliance.”

Likewise, it is common sense that the mandate of inspection for 34,000 farms and ranches and many thousands of retailers of these food products cannot be met with a travel budget of \$4,151.

These personnel and travel estimates must be revised to reflect the actual requirements that must fulfilled by regulators to comply with C.R.S. § 1-40-105.5(3)(c).

WHEREFORE, the Title Board should correct the titles and abstract set on April 15, 2020 for Initiative #314 as provided herein.

Respectfully submitted this 22nd day of April, 2020.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, Colorado 80202
303-573-1900 (telephone)
mark@rklawpc.com

⁵ <https://www.growingyourfuture.com/student-center/colorado-agriculture-fun-facts/> (last viewed April 21, 2020).

Objectors Addresses:

Brett Rutledge
7443 County Road 30
Yuma, Colorado 80759

Joyce R. Kelly
23101 County Road 64
Greeley, Colorado 80631

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the Motion For Rehearing for Initiative 2019-2020 #314, was sent this 22nd day of April, 2020 by email to counsel of record for the designated representatives at:

Christopher Jackson
cmjackson@hollandhart.com

s/ Erin Holweger