

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: April 8, 2024 4:12 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 2023-2024 #144 (“Veterinary Telehealth”)</p> <p>Petitioners: Will French and Diane Matt,</p> <p>v.</p> <p>Respondents: Apryl Steele and Ali Mickelson,</p> <p>and</p> <p>Title Board: Theresa Conley, Christy Chase, and Kurt Morrison</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>PETITIONERS’ ANSWER BRIEF</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:

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/s Nathan Bruggeman _____

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Petitioners Diane Matt and Will French respectfully submit their Answer Brief.

SUMMARY OF ARGUMENT

“Veterinarians” and “licensed veterinarians” are not the same, and Proponents made a conscious choice to frame the authorizations in Initiative #144 around one and not other. As a consequence, the measure is, on its face, unclear as to whom it applies. Proponents’ discussion of current law’s limitations on the practice of veterinary medicine does not clear up the confusion they created, and the Board’s dismissal of the issue as speculative ignores its *own* explicit recognition (and lengthy discussion) of the problem during the rehearing. When the Board wondered what to do about the problem, the answer, under this Court’s precedent, is clear: return the measure to Proponents for lack of jurisdiction.

Even if that is not the solution, the Board should have set titles that completely and accurately describe (1) who the measure applies to and (2) what they are allowed to do. Further, the Board could not incompletely describe one narrow prescription authority for “controlled substances” and, through that, inform voters of a broader ability to prescribe other drugs. If the Court does not hold the Board lacked jurisdiction, then it should remand to correct these issues.

LEGAL ARGUMENT

I. The Title Board must be able to understand a measure to set titles.

Proponents and the Board offer different arguments as to why the Board could understand #144 sufficiently such that it could set titles. Neither argument is persuasive.

A. Initiative #144 will change current law.

Proponents argue there is no ambiguity in #144 because, under current law, only licensed veterinarians can practice veterinary medicine. (Proponents' Opening Br. at 4-5.) Proponents are right about the limitation that currently exists in Colorado law, *see* C.R.S. § 12-315-105(1) (*see also* Pets.' Opening Br. at 15-16 (describing the Colorado Veterinary Practice Act)), but Proponents' analysis misses the point. The key question before the Board and the Court is what Initiative #144 purports to do, not what the law currently allows. Proponents have proposed #144 because they want to change the law, not restate it. If passed, as specific and later enacted legislation, the Initiative's language would control who can practice veterinary telehealth. *See Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238, 241 (Colo. 2009) (explaining that, unless certain exceptions exist, a "specific provision prevails over the general provision"; and further that "the statute with the

more recent effective date prevails”). Proponents offer no argument regarding Initiative #144’s language and their decision to use the defined term “veterinarian” exclusively as opposed to “licensed veterinarian.”

As explained in Petitioners’ opening brief, while Initiative #144 includes an authorization specific to veterinarians licensed in Colorado (again without using the defined term “licensed veterinarian”), the remaining substantive grants of authority apply generally to “veterinarians.” This drafting presents the problem explicitly recognized, but ultimately ignored, by the Board. As one Board member put it, “Can we set a clear title based on the fact that it may be confusing about whether or not it applies to a non-licensed veterinarian?” (Feb. 21 Hr’g at 25:29-25:37.) Given that this question goes to the central purpose of the measure, the Board needed to be able to determine the answer. Their inability to do so deprived them of jurisdiction. *See In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 15; *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999); *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 468-69 (Colo. 1999).

B. The measure’s ambiguity is not speculative but arises from the language used in the Initiative.

The Board argues that the question of whether the measure applies to veterinarians or licensed veterinarians is either speculation or exceeds the interpretative authority of the Board. (Bd.’s Opening Br. at 7-9.)

1. Initiative #144’s vagueness appears on the face of the measure.

Petitioners’ argument regarding the scope of Initiative #144’s authorization does not rely on any definitional tunnel or interpretive maze. (*See* Pets.’ Opening Br. at 8.) Proponents confirmed below that they intend for the defined terms in the Colorado Veterinary Practice Act (“Practice Act”) to apply to their measure. (*See* Jan. 25, 2024, Review and Comment Hr’g at 10:04:41.¹) The Practice Act contains the defined terms “veterinarian” and “licensed veterinarian.” Proponents chose to use the former term instead of the latter, and, consequently, it is unclear whether the substantive reach of their measure extends beyond those “person[s] licensed pursuant to” the Practice Act (“licensed veterinarians”) to include those “person[s] who ha[ve] received a doctor’s degree in veterinary medicine, or its equivalent, from a school of veterinary medicine” (“veterinarians”). *See* C.R.S. § 12-315-

¹ The hearing recording is available at <https://tinyurl.com/3uf66ymu>.

104(11) & (18). This is not speculation but instead a straightforward reading of the measure in light of the applicable definitions.

2. The Board must determine a measure's single subject.

The Board is right that, as a general matter, interpretation of an initiative during the title setting process is limited—but that is not the issue here. To carry out its constitutional and statutory responsibilities, the Board must necessarily engage in a limited review of a measure to (1) determine its single subject and (2) explain the measure's key aspects, including its single subject, to voters in the titles. The Court has explained the responsibility of the Board thus:

Before a clear title can be written, the Board must reach a definitive conclusion as to whether the initiatives encompass multiple subjects. *See In re Breene*, [24 P. 3, 4 (Colo. 1890)] (noting that the title of an initiative cannot rest upon a merely possible or doubtful inference). Absent a resolution of whether the initiatives contain a single subject, it is axiomatic that the title cannot clearly express a single subject.

In re 1999-2000, 974 P. 2d at 468-69. In fact, any interpretative overreach that occurred was done **by the Board** to resolve the measure's ambiguity. It was the Board that speculated as to whether and how a hypothetical court would resolve the vagueness in the measure. (Pets.' Opening Br. at 22-23.) To describe a measure's single subject to voters, the Board must be able to understand what the measure says, and here, as the Board recognized, the measure itself is unclear.

3. Who the measure authorizes to practice veterinary telehealth is not a mere “implementation” detail.

Finally, the Board seems to contend that whether Initiative #144 applies to veterinarians generally or licensed veterinarians is some minor implementation detail. (*See* Bd.’s Opening Br. at 8.) However, who can practice veterinary telehealth cuts to the core of the measure. As defined in #144, veterinary telehealth is the “practice of veterinary medicine,” (CF p. 3, Proposed C.R.S. § 12-315-104(26)), and it thus incorporates the full panoply of veterinary care from forming the initial veterinarian-client-patient relationship through the delivery of care. Who can practice this new authorization—veterinarians generally or only licensed veterinarians—is a fundamental component of what voters are being asked to approve. Put differently, voters cannot intelligently decide whether to support the measure if they don’t know to whom it applies.

Thus, contrary to the Board’s argument, Initiative #144 presents precisely one of the risks the single subject requirement protects against: the authorization for all veterinarians and not just licensed veterinarians to practice telehealth is coiled in the folds of the measure. *See* C.R.S. § 1-40-106.5(1)(e)(II) (single subject requirement “prevent[s] surreptitious measures and apprise[s] the people of the subject of each measure by the title, that is, to prevent surprise and fraud from

being practiced upon voters”). Whether to allow veterinarians licensed by Colorado to practice veterinary telehealth presents voters with a fundamentally different question than allowing any person anywhere with a degree in veterinary medicine to practice veterinary telehealth.

II. The titles set by the Board are incomplete and misleading.

A. The titles need to describe that the measure applies to veterinarians and not licensed veterinarians.

Both Proponents and the Board argue that, because the measure should be interpreted as applying to Colorado-licensed veterinarians, the titles accurately describe the measure. However, neither Proponents nor the Board explain how this can be so when the measure uses the *defined term* “veterinarian.” Proponents elide over the issue (Proponents’ Opening Br. at 4-5), while the Board argues again that the argument is impermissible speculation (Bd.’s Opening Br. at 11). As explained above, it is not speculation—it is the word Proponents chose to use and the Board’s obligation was to explain it to voters so they will have a “general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote.” *See* C.R.S. § 1-40-106(3)(b). Based on Proponents’ decision to use the word “veterinarian,” the titles as drafted, which refer to veterinarians holding a Colorado license, is inaccurate and misleading.

B. The titles must accurately explain the meaning of veterinary telehealth.

Proponents and the Board take different approaches to this issue. Proponents principally contend that the issue was insufficiently described below (it is unclear if they contend the issue was not preserved). (*See* Proponents’ Opening Br. at 5.) The Board, in turn, says the titles adequately define “veterinary telehealth.” (Bd.’s Opening Br. at 12.)

1. This issue was preserved and clearly explained.

In their Motion for Rehearing, Petitioners clearly argued that the titles set by the Board need to define “veterinary telehealth” as the “practice of veterinary medicine.” The motion argued:

The titles are incomplete and misleading because it provides only a partial definition of “veterinary telehealth,” which is a substantial and controversial new standard, by omitting from the titles that, under the measure’s definition, “veterinary telehealth” is “the practice of veterinary medicine.” Instead of informing voters that “veterinary telehealth” is the practice of veterinary medicine, the titles state only that those using “veterinary telehealth” may “assess, diagnose, or treat an animal.”

(CF p. 13-14.) The motion then explained that accurately describing the definition of “veterinary telehealth” in the titles is important because the measure misuses the term “telehealth” (as opposed to “telemedicine”). (*Id.* p. 14.) Thus, if Proponents

argue that the Court should not consider this issue, they are wrong, as Petitioners raised and argued it below.

2. Explaining the measure’s substantive authorization is not quibbling over a “best possible title.”

In effect, the Board (and to a lesser extent Proponents) argues that its description of “veterinary telehealth” is good enough and that Petitioners are simply arguing the Board could have set a better title. (Bd.’s Opening Br. at 12.)

However, the entire purpose of Initiative #144 is to authorize “veterinary telehealth.” If nothing else, the titles need to accurately describe what “veterinary telehealth” means. The fundamental problem is that “veterinary telehealth” extends beyond “assessing, diagnosing, and treating” an animal to include the “practice of veterinary medicine.” The “practice of veterinary medicine” is not synonymous with “assessing, diagnosing, and treating” an animal; it has a broader statutory meaning. *See* C.R.S. § 12-315-104(14). That is, “assessing, diagnosing, and treating” an animal does not mean the “practice of veterinary medicine.” Voters will not know based on the titles that, in voting for Initiative #144, they are authorizing the “practice of veterinary medicine” through “veterinary telehealth.” Given that is the entire point of the measure, the titles are not, as the Board says, good enough; they are incomplete and misleading.

C. The titles' partial description of the measure's prescription drug authority is misleading and incomplete.

1. Proponents and the Board conflate the measure's two prescription drug provisions.

It appears that Proponents and the Board both argue that, in addressing the measure's authority to prescribe controlled substances in the titles, the Board adequately described the measure's general prescription drug authority. (*See* Proponents' Opening Br. at 6; Bd.'s Opening Br. at 12.) However, these are different concepts—in the measure and in terms of common understanding.

The measure has separate provisions and limitations on a veterinarian's prescribing authority when practicing telehealth. First, it provides that a veterinarian can generally prescribe any prescription drug so long as it complies with federal and state law. (CF p. 4, Proposed C.R.S. § 12-315-127(7)(a).) Second, the measure includes a narrower provision for controlled substances with specific limitations. (*Id.*, Proposed C.R.S. § 12-315-127(7)(b).) These are, in other words, two different authorities with different limitations. Describing the *narrower* authority in the titles necessarily does not accurately describe the measure's other *broader* authority.

“Controlled substances” and “prescription drugs” are, moreover, different concepts. “A controlled substance is generally understood to be ‘any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.’” *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (quoting *The Random House Dictionary of the English Language* (2d ed. 1987)); *see also* C.R.S. § 18-18-102(5) (“‘Controlled substance’ means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article...”); *id.* § 18-18-102 (establishing standards on “dispens[ing] a controlled substance”). A prescription drug, in contrast, means “a drug that can be bought only as prescribed by a physician -- compare over-the-counter [drug].” *Syntex Laboratories, Inc. v. Department of Treasury*, 470 N.W.2d 665, 668 (Mich. App. 1991) (quoting *Webster’s Third New International Dictionary* (Unabridged Edition (1961))); *see also* C.R.S. § 12-280-103(43) (defining “prescription drug”). In fact, some controlled substances that have no known medical use cannot be prescribed. *See* C.R.S. § 18-18-414(1)(a). When voters see “controlled substance” in the titles, they will understand that as referring to opioids and other similarly regulated drugs, and not antibiotics, heart worm prevention, and medicated eyedrops.

Given the different legal meanings and common understanding of these concepts, the titles should inform voters that Initiative #144 authorizes veterinarians to order not only controlled substances but prescription drugs more generally.

2. The titles should describe the limitations on prescribing controlled substances.

Proponents and the Board contend that the Board’s statement in the titles that there are “parameters” on prescribing controlled substances is sufficient. (Proponents’ Opening Br. at 6; Bd.’s Opening Br. at 14.) Of course, titles do not have to spell out every detail of a measure, and as Proponents note, brevity is a goal in title setting. But these general propositions give way to overarching requirements that titles avoid public confusion and adequately inform voters about a measure so they can make an informed decision as to whether to support it or not. The Court has explained the balance thus:

[I]f 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.

In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Proposed Election Reform Amendment, 852 P.2d 28, 32 (Colo. 1993). Neither Proponents nor the Board contest the serious public policy concerns attendant to the prescribing, availability, and diversion of controlled substances, which, as Petitioners explained in their opening brief, are concerns that apply in the context of veterinary medicine. And it is against that uncontested public concern that the Board should have included the specific limitations on the prescribing of controlled substances rather than the general reference to “parameters.”

CONCLUSION

For the reasons given in their opening brief and above, Petitioners respectfully request that this Court hold the Board lacked jurisdiction to set titles for Initiative #144 or, alternatively, remand to the Board to correct the titles.

Respectfully submitted this 8th day of April, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONERS' ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, April 8, 2024, to the following:

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