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2 East 14th Ave.
Denver, CO 80203</td><td rowspan="3">DATE FILED: May 25, 2023 4:49 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #30 (“Concerning Parole Eligibility”)

Petitioner: Christine M. Donner

v.

Respondents: Steven Ward and Suzanne Taheri

and

Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison</td></tr>
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<tr><td colspan="2">PETITIONER’S OPENING BRIEF</td></tr>
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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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X 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.

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s/ Mark Grueskin
Mark Grueskin
Attorney for Petitioner

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ISSUES PRESENTED

1. Whether Initiative #30 violates the single subject requirement, given that voters will be forced to make a trade-off between: (a) repeal and amendment of existing parole provisions to restrict parole eligibility for certain offenders; and (b) repeal and reenactment of the governor's authority to grant parole for the same offenders based only on the governor's discretion.

2. Whether Title Board lacked jurisdiction to set a title for Initiative #30 as its subject could not be "clearly stated" as required by the Constitution, due to its inherent lack of clarity (and the Board's confusion) about a central issue in this measure – what constitutes a "crime of violence" as the variable that restricts parole eligibility.

3. Whether the titles substantively misstate the measure by referring to parole limitations for offenders convicted of "any" crime of violence, even though Proponents did not intend all "crimes of violence" to be covered by the measure.

4. Whether the titles are misleading because the only information they give voters about "crimes of violence" is that they are "not just those enumerated in this measure."

5. Whether the Board, after correctly striking "crimes of violence" from one part of the titles, erred by retaining and using that political catchphrase elsewhere in the titles.

STATEMENT OF THE CASE

A. Statement of Facts.

Steven Ward and Suzanne Taheri (hereafter "Proponents") proposed Initiative 2023-2024 #30 ("#30" or "Proposed Initiative"). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, the Proponents submitted the required materials, including the final version of the Proposed Initiative, to the Secretary of State for submission to the Title Board. Record ("R.") at 5-6.

Initiative #30 repeals and reenacts portions of existing statute. It also adds new restrictions to parole eligibility. It also reenacts one key provision relating to the governor's authority to parole an offender without involving the State Parole Board. In brief, the measure proposes the following:

- First, it repeals and reenacts, without change, the existing statute providing that a person who commits one of the listed crimes[1] who has been convicted

[1] The listed crimes are second degree murder, first degree assault, first degree kidnapping (unless the first degree kidnapping is a class 1 felony), first or second

of a “crime of violence” can only be eligible for parole after serving 75% of the sentence imposed. *See* C.R.S. § 17-22.5-303.3(1).

- Second, it adds that any person who is twice convicted of one of the Listed Crimes, *see* fn. 1, *supra*, after January 1, 2025 can only be eligible for parole after serving 85% of the sentence imposed. Proposed section 17-22.5-303.3(2); R. at 5.
- Third, it adds that any person who is twice convicted of one of the Listed Crimes, *see* fn. 1, *supra*, before January 1, 2025 *and* who has twice been convicted of a “crime of violence” can only be eligible for parole after serving 85% of the sentence imposed, less any time authorized as earned time pursuant to statute. Proposed section 17-22.5-303.3(3); R. at 5.
- Fourth, it adds that any person who has been convicted of one of the Listed Crimes, *see* fn. 1, *supra*, on or after January 1, 2025 and who has been twice convicted of a crime of violence begins parole after serving the full sentence imposed. Proposed section 17-22.5-303.3(4); R. at 5.
- Fifth, it repeals and reenacts the authority of the governor to grant parole before an offender would otherwise be eligible under this section upon his

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degree sexual assault, first degree arson, first degree burglary, or aggravated robbery (“Listed Crimes”).

decision that there are "mitigating circumstances" and the person's release "is compatible with the safety and welfare of society." Proposed section 17-22.5-303.3(5); R. at 5.

- Sixth, it amends C.R.S. § 17-22.5-403.3(2.5) by changing the date on which one of the Listed Crimes, *see* fn. 1, *supra*, was committed to cover the period from July 1, 2004 to January 1, 2025. Proposed section C.R.S. § 17-22.5-403.3(2.5); R. at 5-6.

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

A Title Board hearing was held on April 19, 2023, at which time titles were set for 2023-2024 #30. On April 26, 2023, Petitioner, Christine M. Donner, filed a Motion for Rehearing, alleging that a title was set for Initiative #30, contrary to the requirements of Colo. Const. art. V, sec. 1(5.5), and that the Title Board set titles which were misleading and confusing as they do not fairly communicate the true intent and meaning of the measure.

Petitioner filed her Motion for Rehearing on April 26, 2023. R. at 13-20. The Title Board's rehearing was held on April 28, 2023, at which time the Motion for Rehearing was granted to the extent of that certain changes were made to the titles

but denied as to other requested relief.[2] The Board amended its ballot title and submission clause to state:

> Shall there be a change to the Colorado Revised Statutes concerning parole eligibility for an offender convicted of certain crimes, and, in connection therewith, requiring an offender who is convicted of second degree murder; first degree assault; class 2 felony kidnapping; sexual assault; first degree arson; first degree burglary; or aggravated robbery on or after January 1, 2025, to serve eighty-five percent of the sentence imposed before being eligible for parole; requiring an offender convicted of committing any such crime on or after January 1, 2025, who has twice previously been convicted of any crime of violence not just those crimes enumerated in this measure, to serve the full sentence imposed before beginning to serve parole; and continuing the governor's authority to grant parole for any such offender before the eligibility date if extraordinary mitigating circumstances exist?

R. at 9. Petitioner timely filed a Petition for Review with this Court on May 5, 2023.

C. Jurisdiction

Petitioner is entitled to review before the Supreme Court pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed the Motion for Rehearing with the Title Board. *See* C.R.S. § 1-40-107(1). Additionally, Petitioners timely filed her Petition for Review seven days from the date of the hearing on the Motion for Rehearing. C.R.S. § 1-40-107(2).

[2] An audio recording of the rehearing on #30 ("Hearing Recording") is available at https://csos.granicus.com/player/clip/380?view_id=1&redirect=true&h=f3edb0d245d9e3ef39dff06c33a3f99d.

SUMMARY OF ARGUMENT

The Title Board lacked jurisdiction to set titles for Initiative #30 for two reasons. First, the Proponents cleverly made this measure one that repeals and reenacts a parole statute. The changes to the statute are all about "tough on crime" messaging, as they make parole more difficult or impossible to get for certain offenders. But Proponents also readopt an existing statute that gives the governor sole discretionary authority to grant parole to any person who would be subject to the new restrictions. In essence, Initiative #30 is both a "stay in jail" card and a "get out of jail free" card. As a repeal-and-reenact measure, it literally has something for everybody. And that is one of the core problems the single subject requirement was enacted to prevent.

The Board also lacked jurisdiction because it didn't understand how a key provision, restricting parole for persons who are convicted of "crimes of violence," would work. There are three statutory definitions of "crimes of violence," but the courts say that term is defined by one of them. Without any clear direction from the initiative text or the Proponents, though, the title says "any" crime of violence is enough to trigger these new parole restrictions. Initiative #30 does not say that, and if the Board does not understand an initiative well enough to set a title, this Court has said that it can't do so. Here, it should have declined to do so.

The title the Board did set was flawed in three ways. First, it says that the new parole restriction comes into play when a person has been convicted of "any" crime of violence. But as noted above, not all three statutes apply, and as they do not all apply to the same crimes, this reference will mislead voters.

Second, the titles make the above-mentioned issue worse by modifying "any crime of violence" with the phrase, "not just those enumerated by this measure." A title should be clear in summarizing the central features in a measure, and this phrase does not directly say what is covered. This reference will confuse voters.

And third, the mere use of "crimes of violence" is problematic, because the Board received data and analysis about how this phrase plays into voters' deep fears. The Board took out one reference to this phrase but kept another one despite its recognition that this can be a politically loaded term in a ballot title.

Each of these titling errors requires that the Court send the measure's title back to be reconsidered and, if the Board can resolve its jurisdictional issues, reworded. If not, then no title should be set.

LEGAL ARGUMENT

I. The Title Board lacked jurisdiction to set titles for Initiative #30.

A. A repeal and reenactment of existing law that forces voters to choose between eliminating any discretion in certain parole decisions but allowing for fully discretionary decision making if the governor is

granting parole requires voters to make the very trade-offs that violate the single subject requirement.

1. Standard of review; preservation of issue for appeal.

The single subject requirement is based in the Colorado Constitution. Colo. Const. art. V, § 1(5.5). The objectives of this requirement include preventing "securing the enactment of measures that could not be carried upon their merits" because multiple subjects are included in one initiative "for the purpose of enlisting in support of the measure the advocates of each measure." C.R.S. § 1-40-106.5(1)(e)(I). In other words, the single subject requirement is a protection against logrolling by initiative proponents. The Court looks to whether a measure combines subjects that have no necessary or proper connection in order to get support "from various factions—that may have different or even conflicting interests." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002).

This issue was preserved in the Motion for Rehearing. R.at 8-9.

2. A reenactment of law that comprises inconsistent policy goals from the main measure is a prime example of log-rolling and violates the single subject requirement.

Initiative #30 is a repeal-and-reenact measure. It repeals existing statute and reenacts the entire statute with amendments, rather than simply amending current

statute. A repeal-and-reenact initiative can confront voters with precisely the conundrum that the single subject requirement is meant to avoid: adopting tougher parole standards for certain offenders, on the one hand, and endorsing an existing work-around of those tougher standards on the other.

That repeal-and-reenact construct for initiatives can be problematic given the single subject requirement. Regarding a previous single subject decision, the Court has observed, "the initiative required voters to vote yes on all of the individual and expressly identified subjects or no on all of them, even though some voters might have preferred to vote yes on some and no on others. As noted above, the single-subject requirement was designed, in part, to avoid exactly this scenario." *In re Title, Ballot Title and Submission Clause for Initiative 2019-2020 #3*, 2019 CO 57, ¶26, 442 P.3d. 867, 871 (citations omitted).

The repealed-and-reenacted portions of C.R.S. § 17-22.5-303.3 present voters with two inconsistent choices. Do they make parole more difficult to obtain by mandating that 85% or 100% of certain offenders' sentences be served, regardless of the Parole Board's otherwise applicable discretion? *See* proposed section 17-22.5303.3 (2)-(4). Or do they readopt a law that gives the governor the ability to make parole decisions for these same individuals based only on a gubernatorial assessment of "mitigating circumstances" and the "safety and

welfare of society"? *See* C.R.S. § 17-22.5-303.3(5) and proposed section 17-22.5-303.5.

The Motion for Rehearing identified that there are well-known local commentators who distrust the governor's decision making when issues of early release from prison are involved. R. at 15, n.2. The chair of the Title Board agreed that such voters would want to vote "yes" for the first portion of the measure and "no" on the second. Hearing Recording at 49:35-50:00; 56:05-20; 1:28:45-59 (pointing out that certain voters will be forced to "vote in opposite directions"). The Attorney General's designee on the Board agreed with the chair that voters would be put in this difficult position. *Id*. at 1:00:10-1:02:10. The conflict between presenting these conflicting provisions in the same measure is exactly the dilemma for voters the single subject requirement was enacted to avoid.

These two provisions share a common overarching notion of parole. But they don't serve a common purpose. The mandatory service of 85% or 100% of a sentence is a "tough-on-crime, we can't trust the Executive Branch of government to make responsible parole decisions" approach. But the provision that vests absolute discretion about parole in the governor appeals to voters who feel there ought to be leniency to the extent of virtually unbridled discretion, even as to repeat offenders. In that way, Initiative #30 offers a little something for everyone.

In single subject parlance, this measure seeks to "attract[] support from various factions which may have different or even conflicting interests." *In re Title, Ballot Title and Submission Clause for "Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995). That, it cannot do.

This overreach violates the single subject requirement. As such, the Board erred in deciding this matter comprises a single subject, and its decision should be reversed.

B. No title can be set for an initiative where the Board did not know exactly what the initiative addresses.

1. Standard of review; preservation of issue for appeal.

The Title Board cannot set a ballot title where it does not know what the initiative does, as that inquiry goes to the identification of the single subject itself. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 468-69 (Colo. 1999). An initiative's single subject must "be clearly expressed in its title.'" Colo. Const. art. V, § 1(5.5); *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶22, 369 P.3d 565, 568. Where the Board cannot identify how a measure's key features will operate, it is unable to identify the measure's single subject and lacks jurisdiction over the initiative. *#25, supra*, 974 P.2d at 468.

2. The measure limits parole for offenders who commit a "crime of violence," but no one in this process – including Title Board members – knew what qualifies as a "crime of violence."

Existing law limits parole eligibility for persons who have committed a "crime of violence" without defining that term or providing a cross-reference to it. Neither Proponents nor the Title Board identified the extent of this term when the title was initially set.

The Motion for Rehearing pointed out that there are three statutory definitions of "crime of violence" R. at 9-10, n. 3-5 citing C.R.S. § 18-1.3-406(2)(a),[3] C.R.S. § 16-1-104(8.5)(a)(I),[4] and C.R.S. § 24-10-106.3.[5] There is also

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[3] Under C.R.S. § 18-1.3-406(2)(a):

> (I) "Crime of violence" means any of the crimes specified in subparagraph (II) of this paragraph (a) committed, conspired to be committed, or attempted to be committed by a person during which, or in the immediate flight therefrom, the person:
> (A) Used, or possessed and threatened the use of, a deadly weapon; or
> (B) Caused serious bodily injury or death to any other person except another participant.
> (II) Subparagraph (I) of this paragraph (a) applies to the following crimes:
> (A) Any crime against an at-risk adult or at-risk juvenile;
> (B) Murder;
> (C) First or second degree assault;
> (D) Kidnapping;
> (E) A sexual offense pursuant to part 4 of article 3 of this title;
> (F) Aggravated robbery;
> (G) First degree arson;
> (H) First degree burglary;

(I) Escape;
(J) Criminal extortion; or
(K) First or second degree unlawful termination of pregnancy.
(b) (I) "Crime of violence" also means any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (I), "unlawful sexual offense" shall have the same meaning as set forth in section 18-3-411 (1), and "bodily injury" shall have the same meaning as set forth in section 18-1-901(3)(c).
(II) The provisions of subparagraph (I) of this paragraph (b) shall apply only to felony unlawful sexual offenses.

[4] Under C.R.S. § 16-1-104(8.5)(a)(I):

> "Crime of violence" means a crime in which the defendant used, or possessed and threatened the use of, a deadly weapon during the commission or attempted commission of any crime committed against an elderly person or a person with a disability or a crime of murder, first or second degree assault, kidnapping, sexual assault, robbery, first degree arson, first or second degree burglary, escape, or criminal extortion, or during the immediate flight therefrom, or the defendant caused serious bodily injury or death to any person, other than himself or herself or another participant, during the commission or attempted commission of any such felony or during the immediate flight therefrom.
> (II) "Crime of violence" also means any unlawful sexual offense in which the defendant caused bodily injury to the victim or in which the defendant used threat, intimidation, or force against the victim. For purposes of this subparagraph (II), "unlawful sexual offense" shall have the same meaning as set forth in section 18-3-411(1), C.R.S., and "bodily injury" shall have the same meaning as set forth in section 18-1-901 (3)(c), C.R.S.

a definition of "crime of violence" in federal law. *See* 18 U.S.C. § 16. Without knowing which definition applied to the statute being amended, the Board set a single subject both at the initial hearing on this measure and at the rehearing.

It was only when Petitioner pointed the Board and Proponents to a Court of Appeals decision, *Busch v. Gunter*, 870 P.2d 586 (Colo. App. 1993), that there was any information before the Board that one statute could be a default definition for "crime of violence" in the statutory parole restriction in current law. The Court of Appeals observed:

> [T]he term 'crime of violence' is not defined in the statutory provisions applicable to Title 17. However, it is defined in Title 16 as meaning a crime in which the defendant uses, or possessed and threatened the use of, a deadly weapon during the commission of certain crimes. Section 16-11-309(2)(a)(I). Without a contrary definition appearing in Title 17, we must assume that the General Assembly intended that the term 'crime of violence' have a similar meaning in situations such as the one presented here.

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[5] Under C.R.S. § 24-10-106.3(2)(b):

> "Crime of violence" means that the person committed, conspired to commit, or attempted to commit one of the following crimes:
> (I) Murder;
> (II) First degree assault; or
> (III) A felony sexual assault, as defined in section 18-3-402, C.R.S.

Id. at 587. At rehearing, Petitioner also informed the Board that C.R.S. § 16-11-309 was repealed and then recodified at C.R.S. § 18-1.3-406(2)(a). Hearing Record at 1:22:25-1:23:45.

The Board did not know what statute gave meaning to "crime of violence." And this issue can be confusing. The three statutes, while overlapping in some respects, are inconsistent. *See* Hearing Record at 1:26:20-59. For example:

- C.R.S. § 16-1-104(8.5)(a)(II)(H) treats any "robbery" as a crime of violence whereas C.R.S. § 18-1.3-406(2)(a) only treats "aggravated robbery" as a crime of violence.
- C.R.S. § 16-1-104(8.5)(a)(II)(F) treats either "first or second degree burglary" as a crime of violence whereas C.R.S. § 18-1.3-406(2)(a) only treats "first degree burglary" as a crime of violence.
- C.R.S. § 18-1.3-406(2)(a) treats "first or second degree unlawful termination of pregnancy" as a crime of violence whereas C.R.S. § 16-1-104(8.5)(a)(I) treats neither offense as a crime of violence.
- And C.R.S. § 24-10-106.3(2)(b) is the most limited of the three, including only murder, first degree assault, and felony sexual assault.

Notably, Title 17 of the Colorado Revised Statutes (amended by this initiative) does not help resolve which statutory definition might be applicable.

There are cross-references to both C.R.S. § 18-1.3-406 and C.R.S. § 16-1-104 within Title 17. *See* C.R.S. § 17-22.5-303(6) (precluding consideration of parole more than once every five years for persons who commit crimes of violence under C.R.S. § 18-1.3-406 (authorizing revocation of parole of persons who commit crimes of violence under C.R.S. §16-1-104(8.5)).

Additionally, these statutory definitions are not the full extent of the legal meaning of "crime of violence." A "crime of violence" includes an attempt to commit such a crime. *People v. Laurson*, 70 P.3d 564, 567 (Colo. App. 2002) (courts treat "attempt" as a crime of violence). It also includes conspiracy to commit a crime of violence. *Terry v. People*, 977 P.2d 145, 149 (Colo. 1999) (courts treat such a "conspiracy" as a crime of violence). And *per se* crimes of violence are treated on par with those that are listed in statute. *Chavez v. People*, 2015 CO 62, ¶13, 359 P.3d 1040, 1043 (*per se* crimes of violence and statutorily defined crimes of violence are both treated as crimes of violence in sentencing).

Proponents suggested that "crimes of violence" could be modified by "as defined by statute." To the Board chair, at least, this seemed to mean that all three state statutes would have to be referenced, but she concluded, "I don't know if they go to one (statute)." Hearing Recording at 54:20-55:10. Ultimately, though, this proposal was rejected for a very specific reason, according to one Board member.

"I'm concerned with putting 'as defined by statute' because it's not defined in this statute, and the Board doesn't know – the Board and the public isn't going to know what statute it applies to." To which the Board chair replied, "Which causes me concern for lack of clarity." *Id*. at 1:21:45-1:22:22.

A critically important term in #30 was not clear to Board members, meaning they could neither discern for themselves, or communicate to voters, the measure's reach. Where that is the case, the Board lacks jurisdiction to set a title. "If the Board 'cannot comprehend the initiatives well enough to state their single subject in the titles . . . the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.'" *In re Title, Ballot Title & Submission Clause, & Summary for Initiative 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999), citing *#25, supra*, 974 P.2d at 465. As one Board member candidly stated, "I don't know which statute you would look at" to define "crimes of violence." Hearing Recording at 1:27:45-55.

Therefore, the Board erred.

II. The Title Board set a ballot title that will mislead and confuse voters.

A. The titles misrepresent the initiative by referring to parole limitations for offenders convicted of "any" crime of violence, although Proponents did not intend all "crimes of violence" to be covered by the measure.

<u>1. Standard of review; preservation of issue for appeal.</u>

A ballot title must be a brief, clear description of a ballot measure. C.R.S. § 1-40-106(3)(b). It need not include every detail in the measure. But a title is inadequate if "it is so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative." *#73, supra*, 2016 CO 24, ¶34. A title that is "[s]o general" as to prevent a voter from "understand[ing] the effect of a 'yes/for' or 'no/against' vote… does not satisfy the clear title requirement." *Id.*, ¶32.

This issue was preserved in Petitioner's argument that the original title, which used "any such crime," was unclear and would prevent voters from understanding what crimes were referenced. R. at 13.

<u>2. The titles inaccurately communicate that all crimes of violence, regardless of where they are defined by law or in case law, will be used to restrict parole under this measure.</u>

The titles state that #30 "requir[es] an offender convicted of committing any such crime on or after January 1, 2025, who has twice previously been convicted of **any crime of violence** not just those crimes enumerated in this measure, to

serve the full sentence imposed before beginning to serve parole…." (Emphasis added).

As discussed above, the Board was unsure which crimes of violence were actually contemplated to be covered by this measure. The courts have said that only one of the three statutory definitions of "crime of violence" apply in an instance such as this one. *See Busch, supra* (citing C.R.S. § 16-11-309(2)(a)(I), since repealed and recodified as C.R.S. § 18-1.3-406(2)(a)). Also as discussed above, the courts have included as "crimes of violence" any attempt or conspiracy to commit such a crime, as well as *per se* crimes of violence.

This Court has established the breadth of the term "any" many times. "[T]he word 'any' means 'all.'" *BP Am. Prod. Co. v. Colo. Dept. of Rev.*, 2016 CO 23, ¶ 18, 369 P.3d 281, 286. "Any" is not susceptible to implied exceptions. *Colo. State Bd. of Accountancy v. Zaveral Boosalis Raisch*, 960 P.2d 102, 106-07 (Colo. 1998). And when voters approve an initiative that uses the word "any," it carries this same meaning and "is broad and all-inclusive." *Rutt v. Colo. Educ. Assn.*, 184 P.3d 65, 75 (Colo. 2008) (construing "any communication" in constitutional amendment, adopted by voters, governing the financing of political campaigns).

Unless expressly provided by law, "crime of violence" cannot have a different meaning in C.R.S. § 17-22.5-303.3(1) – which is unchanged by #30 – and

the new subsections added to that statute, proposed section 17-22.5-303(3) and (4). "Because the language in (one subsection of the parole statute) exactly matches the language in (another subsection of the same parole statute), we hold that the meaning of that language is identical." *People v. Cooper*, 27 P.3d 348, 349 (Colo. 2001); *see also People v. Luther*, 58 P.3d 1013, 1014-15 (Colo. 2002) (a parole statutes is applied "to give consistent, harmonious and sensible effect to all its parts") (citation omitted). Thus, unless "crime of violence" has no clear meaning in which case the Board should not have set a title, *see supra*, that term must be limited to a single meaning.

As noted above, the definition the Court of Appeals used in applying C.R.S. § 17-22.5-303.3(1) is less inclusive than other statutory definitions of "crime of violence." C.R.S. § 18-1.3-406(2)(a) is not as broad as C.R.S. § 16-1-104(8.5)(a)(I) in its treatment of certain crimes classified as robbery and burglary, for example. Thus, there are crimes of violence that would be excluded from #30's changes to the parole system, but voters would not know this. But the title states that "***any***" crimes of violence will trigger the new parole restrictions. Where a title misstates a key element of an initiative, that title is misleading. *See In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11, 16

(Colo. 2000) (striking title language that incorrectly reflected scope of a key aspect of initiative).

The core problem with using “any crime of violence” is that the audience for a ballot title cannot be left to wonder about legal distinctions in this regard. As the chair of the Title Board stated, “This is not the courts. Or the legislature. This is the public. And they do not what is in statute necessarily. They are not here to litigate….” Hearing Recording at 1:07:22-32; *see also* 1:14:40-1:15:30 (chair outlining the more substantial information in the legislative process as opposed to a ballot title). In this way, the chair correctly identified that the title must meet voters’ needs to “intelligently” cast their ballots. *#73, supra*, 2016 CO 24, ¶34. But the Board’s title did not ultimately provide the clarity that would allow voters to cast their ballots with the key information they need.

Thus, if the Board had jurisdiction to set a title because there was a known meaning associated with “crimes of violence,” the new parole restrictions in #30 are not triggered by “any” crime of violence. Nevertheless, the titles will mislead voters into thinking that these new restrictions are unbounded by a clear definition. Accordingly, the Title Board should be ordered to correct this error.

B. The titles will confuse voters by referring to parole restrictions changed for offenders who commit any crime of violence, "not just those enumerated in this measure."

1. Standard of review; preservation of issue for appeal.

The Board must craft a title that "clearly and concisely reflects the central features of a proposed initiative." *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 970 (Colo. 1992). A title is flawed where its choice of language in relating those central features is misleading or inaccurate, "thus inevitably inviting voter confusion." *Id*.

This issue was preserved in Petitioner's argument that the title was misleading by referring to "crimes of violence including" Listed Crimes. R. at 13. The Board response to that concern (using "not just those enumerated in this measure" instead) did not "identify what other crimes are included" in "crimes of violence," *id.*, as Petitioner sought. It was also addressed at rehearing. Hearing Recording at 1:24:25-40.

2. The Board exacerbated the potential for voter uncertainty and confusion by modifying "any crime of violence" with "not just those enumerated in this measure."

The Board effectively acknowledged the lack of clarity in this measure by using a catch-all phrase in an attempt to inform voters about "crimes of violence."

It let them know that this new parole consideration relates to various crimes but "not just those enumerated in this measure."

This addition was meant to communicate that parole restrictions stemmed from something other than the Listed Crimes: second degree murder, first degree assault, first degree kidnapping (unless the first degree kidnapping is a class 1 felony), first or second degree sexual assault, first degree arson, first degree burglary, or aggravated robbery. But it muddled the issue by leaving voters with no idea what "crimes of violence" will come into play for purposes of this measure.[6]

In this way, the title is misleading and inaccurate. It tells voters only what "crimes of violence" are *not* – "not just those enumerated in this measure." It doesn't tell voters what "crimes of violence" *are* or provide any real clarity about that term. Yet, that is precisely the job of a clear title. A title must make clear "the effect of a 'yes/for' or 'no/against' vote" and "correctly and fairly express the true intent and meaning" of the initiative. C.R.S. § 1-40-106(3)(b). Those tests are not satisfied by a title that only generally states what the Proponents' do *not* intend or do *not* mean.

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[6] Even the Board chair acknowledged this phrase was "too casual." Hearing Recording at 1:100:409-55.

Further, the title must be informative for voters, "whether familiar or unfamiliar with the subject matter of a particular proposal," so that they can "determine intelligently whether to support or oppose such a proposal*." In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶23, 328 P.3d 155, 162 (citation omitted). Voters who are told only that there are additional, unspecified crimes that will tip the parole scales for certain offenders are left to wonder what the measure really does, particularly if they are "unfamiliar… with the subject matter."

This means the title falls short of its legal objective. "[G]enerally stating in a title that the initiative specifies… procedures without in any way describing those procedures does not provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal." *#73, supra*, 2016 CO 24, ¶32 (dealing with new recall and successor election procedures). Similarly, here, telling voters only that the list they see in the ballot title is not the list that triggers new parole restrictions gives them no ability to "determine intelligently" whether the measure warrants their support or opposition.

Therefore, the Board should be directed to provide the clarity in the titles that the statute requires.

C. The Board erred by using "crimes of violence" in the titles, as it is a slogan or catchphrase that will be used as a political touchpoint rather than as material information for voters.

1. Standard of review; preservation of issue for appeal.

A catch phrase is a term or phrase in a ballot title that "mask[s] the policy… [and] tips the substantive debate surrounding the issue to be submitted to the electorate." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). A title may not employ a catch phrase simply because that phrase is included in the initiative itself. *Id.* To establish that such wording is a political slogan, there must "convincing evidence" of its capacity to unduly influence the electorate. *In re Title, Ballot Title & Submission Clause for Initiative 1997-1998 #105*, 961 P.2d 1092, 1100 (Colo. 1998).

This issue was preserved below. R. at 12, 15-21.

2. The Title Board erred by striking one reference to "crimes of violence" as a catch phrase but keeping another such reference in the titles.

A ballot title should strive to be both informative and neutral. Neither of these goals can be achieved if it includes politically loaded jargon.

To be specific, a ballot title should allow voters to consider the merits of a proposal without using language that appeals to voters' emotions. "By drawing

attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *#258(A), supra*, 4 P.3d at 1100. A catch phrase "encourage[s] prejudice in favor of the issue and, thereby, distract[s] voters from consideration of the proposal's merits." *Id.* Sometimes that slogan, when used in another context, could be a neutral statement. But when it is used in the ballot title, it becomes politically charged wording that diverts voters from the measure's relative merits. *Id.* (holding that the term "as rapidly and effectively as possible," used in relation to teaching children English, was improper catch phrase).

Such is the case with "crimes of violence." Petitioner provided the Board with evidence that voters are motivated to act in an election context, based solely on fear of violent crime.

According to the Pew Research Center, 61% of voters say "violent crime is very important" when making decisions in candidate races. R. at 18. This figure is higher in certain identified demographic groups: three-quarters of voters 65 and older saying it is a "very important" issue; 81% of black voters say it is "very important" in their voting decisions; and 65% of Hispanic voters say it is "very important" in their electoral behavior. *Id.* at 18-19.

This is such a political hot button that "the public often tends to believe that crime is up, even when the data shows it is down." *Id*. at 20. Voters may ignore the overall numbers and focus their impressions and voting on whatever crime they fear most. "Voters also might be thinking of specific kinds of violent crime – such as murder which has risen substantially – rather than the total violent crime rate, which is an aggregate measure that includes several different crime types, such as assault and robbery." *Id*. at 20. Thus, identifying the specific crimes at issue, as argued above, might have actually defused "crimes of violence" as a catch phrase. But the Title Board did not take this step, preserving the catch phrase and failing to provide the details that would have allowed voters to perhaps minimize it.

The potential for violent crime to act as a distraction at the ballot box is particularly great when it is linked to parole. According to one prominent academic, "public anxiety is over crime is being turned into a wedge issue" at elections. *Id*. at 16. And "parole reform" is one of a handful of issues that is "being blamed for a rise in crime." *Id*.

The Title Board was not entirely insensitive to this concern. It removed one reference to "crimes of violence" and one reference to "violent crime" that appeared in the original title that stated: "Shall there be a change to the Colorado Revised Statutes concerning parole eligibility for an offender convicted of a

violent crime, and, in connection therewith, requiring an offender who is convicted of committing **crimes of violence**….” R. at 2 (emphasis added). But it retained the reference to “crimes of violence” in the final title in the clause stating: “requiring an offender convicted of committing any such crime on or after January 1, 2025, who has twice previously been convicted of any **crime of violence**….” R. at 3 (emphasis added).

The retention of “crimes of violence” even once was error by the Board. It is a phrase that plays to voters’ deep political fears, whether it is warranted factually or not. Removing one of the references to this phrase was a politically and legally sensitive step by the Board. Retaining another of the references to this phrase was error. And the title should be revised to correct that error.

CONCLUSION

The Title Board’s candor about how this measure will force voters to make fundamental policy trade-offs to get just half of what they want was admirable. But it should have led to a different result. This initiative combines new parole restrictions with reenactment of virtually unlimited gubernatorial authority to grant parole. As Board members noted, this will put voters in exactly the position the single subject requirement was supposed to stem – forcing many of them to accept one part of an initiative they oppose in order to get what they want in another part

of the proposal. The Board should have rejected this measure as comprising two subjects.

Moreover, while petition proponents don't necessarily have to have all the answers about how their measure will operate if adopted, they do need to know – and be able to relate in the title setting process – how their measure's central provisions will function. This is key to setting a fair and clear title for voters.

Here, new parole restrictions will be triggered, at least in part, by offenders who are convicted of the commission of "crimes of violence." The Board and Proponents did not know what that key term meant. And the Board recognized that voters would be adrift in trying to figure out what that term means for purposes of their consideration of this measure. This gap presents a major jurisdictional issue the Board could not cure.

Finally, the title reflects the Board's concern with the lack of clarity built into this initiative. The title mistakenly tells voters that "any" crime of violence will trigger these restrictions, but no Board member and neither Proponent contended that this actually reflects Initiative #30's text.

Also, the title was changed to refer to crimes, "not just those enumerated in the measure." But this encapsulation is exceedingly vague and did not provide

voters with the information they need to know what will drive certain parole changes. It did not produce a clear title.

Lastly, in striking "crimes of violence" once in the title, the Board retained that phrase in the title even though it is a political catch phrase. That was error.

These titling decisions, individually and cumulatively, warrant correction so voters' decisions to support or oppose Initiative #30 are made "intelligently."

Respectfully submitted this 25th day of May, 2023.

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CERTIFICATE OF SERVICE

I, Kate Sorice, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 25, 2023, to the following:

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