IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #49 ("CONCERNING ELIGIBILITY FOR PAROLE")

Initiative Proponents:
Suzanne Taheri & Michael Fields

Objector:
Christine M. Donner

MOTION FOR REHEARING

By undersigned counsel, Christine M. Donner, a registered voter of the City and County of Denver, objects to the titles set for Initiative #49, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On June 7, 2023, the Title Board set the following ballot title and submission clause for Initiative #49:

> *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, and requiring an offender convicted of any such crime on or after January 1, 2025, who was previously convicted of any two crimes of violence, not just those crimes enumerated in this measure, to serve the full sentence imposed before beginning to serve parole?*

I. The Title Board lacks jurisdiction to set a ballot title for Initiative #49.

A. The Board lacks jurisdiction to set a ballot title for Initiative #49 because the proponents improperly changed designated representatives and the measure does not satisfy the requirement for having completed a review and comment hearing.

The Offices of Legislative Council and Legislative Legal Services waived a review and comment hearing on Initiative #49 under § 1-40-105(2), C.R.S. Specifically, the Offices previously held review and comment hearings on Initiatives #30 and #20, and they considered Initiative #49 to be an amended version of #30 (which was an amended version of #20) but which did not have any "substantial amendments" that required another review and comment hearing. *See* Letter to

S. Taheri and M. Fields, May 8, 2023. The Offices erred, however, and the consequence of their error is that the Board lack jurisdiction to set a title for #49.

The designated representatives of Initiatives #30 and #20 were Suzanne Taheri and Steven Ward. For Initiative #49, Mr. Ward withdrew as designated representative and proponents substituted Michael Fields as the second designated representative. Having changed designated representatives, proponents could not take advantage of the limited exception for review and comment hearing for an amended petition.

Colorado law is clear that, once selected, the designated representatives of a measure must remain engaged throughout the process. The statute provides:

> At the time of any filing of a draft as provided in this article, the proponents shall designate the names and mailing addresses of two persons who shall represent the proponents ***in all matters affecting the petition*** and to whom all notices or information concerning the petition shall be mailed.

C.R.S. § 1-40-104 (emphasis added). The responsibility to participate in "all matters affecting the petition" extends to participating in "all" review and comment hearings:

> ***Both*** designated representatives of the proponents ***must*** appear at ***all*** review and comment meetings.

C.R.S. 1-40-105(1.5) (emphasis added). The statute contains no exception for a designated representative's responsibilities because some other person participated in the process as designated representative for an earlier version of the initiative. As the Supreme Court has explained, the "statutes require []the designation of representatives at the earliest stages of the initiative process" and their "continued, uninterrupted involvement throughout the proceedings before the Title Board." *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 2014 CO 61, ¶ 16. In fact, where "either designated representative fails to attend a meeting, the measure is considered withdrawn by the proponents." C.R.S. § 1-40-105(1.5).

That "continued, uninterrupted involvement" is not present here because Mr. Fields has not "appeared" at "all review and comment meetings" for Initiative #49. He was not the designated representative for #30 or #20 and did not "appear" as designated representative at either of those review and comment hearings, which hearings serve as the review and comment for #49. In other words, he did not participate in review and comment for Initiative #49. The Supreme Court has been clear that the statutory command for both designated representatives to participate is "both unambiguous and inflexible." *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 22 (addressing motions for rehearing).

Because complying with the review and comment requirement for #49 necessarily depends on the hearings held for #30 and #20, both designative representatives did not participate in the review and comment meetings as they were required to do. By switching designated representatives mid-process, they have violated the statute, *see* C.R.S. § 1-40-104 and -105; this Board's rules and regulations, *see* Title Board, Policies and Procedures, ¶ 7 (Dec. 15, 2021) ("If

a designated representative withdraws, the representative cannot be replaced and the Board will deem the initiative to be withdrawn."); and the Supreme Court's holding that designated representatives must be continually involved and may not be changed, *see 2013-2014 #103* and *2011-2012 Nos. 67, 68, & 69, supra*.

Accordingly, because proponents did not comply with the review and comment requirement for #49 because "both" designated representatives did not "appear at all review and comment meetings," C.R.S. § 1-40-105(1.5), the measure is not properly before the Board and the Board lacks jurisdiction to set title.

B. <u>The measure's use of undefined "crime of violence" is incomprehensible, and the Board cannot set a title for a measure that defies understanding.</u>

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. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 468 (Colo. 1999).

Such a circumstance is present with #49 because of its use of "crime of violence," which the Board incorporated into the title: "an offender convicted of any such crime on or after January 1, 2025, who was previously convicted of ***any two crimes of violence***, not just those crimes enumerated in this measure, to serve the full sentence imposed before beginning to serve parole." The measure does not define what "crime of violence" means, and it is a central element of the measure.

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. There are three statutory definitions of "crime of violence": C.R.S. § 18-1.3-406(2)(a), C.R.S. § 16-1-104(8.5)(a)(I), and C.R.S. § 24-10-106.3. There is also a definition of "crime of violence" in federal law. *See* 18 U.S.C. § 16. 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). It also includes conspiracy to commit a crime of violence. *Terry v. People*, 977 P.2d 145, 149 (Colo. 1999). 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.

It remains unclear with this measure what definition of "crime of violence" applies. This issue is not theoretical, as the three Colorado statutes that define the term, while overlapping in some respects, are inconsistent. 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 that title. *Compare* 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) *with* C.R.S. § 17-2-103.5(1)(II)(B) (authorizing revocation of parole of persons who commit crimes of violence under C.R.S. §16-1-104(8.5). While the Court of Appeals has said that only one of the three statutory definitions of "crime of violence" apply in an instance such as this, *see Busch v. Gunter*, 870 P.2d 586, 587 (Colo. App. 1993), has the measure thus incorporated that default definition?

A critically important term in #49 is not clear, meaning the Board cannot discern for itself, or communicate to voters, the measure's reach. When the title says "previously convicted of any two crimes of violence," what crimes does that mean? Where there is such ambiguity, 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).

C. <u>The measure's repeal of the governor's authority to grant parole to persons subject to C.R.S. 17-22.5-303.3 is a second subject, coiled in the folds of this measure, and therefore the Board lacked jurisdiction to set a title.</u>

Proposed section 17-22.5-303.3(2.5) provides that persons who have committed certain crimes are ineligible for parole and must serve their entire sentences. Subsection (2.5) begins, "Notwithstanding any other provision of this title 17[.]" This limitation creates the hidden subject of repealing the governor's related pardon powers for two reasons.

First, C.R.S. 17-22.5-303.3(3) is a "provision of this title 17." Therefore, the restrictions on parole for certain persons covered by subsection (2.5) operate independently of the governor's pardon powers in subsection (3).

Second, under 17-22.5-303.3(3), the governor may grant parole only when an incarcerated person has a "parole eligibility date." Under the new subsection (2.5), certain persons will have no parole eligibility date at all. Without a parole eligibility date, the governor has no authority to exercise any parole powers for persons covered under this subsection.

Voters will not know the restrictive provision they are enacting will operate in this fashion. One of the primary objectives of the single subject requirement is to "prevent surreptitious measures" and "prevent surprise and fraud from being practiced upon voters." C.R.S. 1-40-106.5(1)(e)(II).

Because the provision in question will have exactly that effect on voters, the Board had no jurisdiction to set this title.

II. The ballot title is misleading, unfair, and inaccurate.

A. The titles misrepresent the initiative by referring to parole limitations for offenders convicted of "any" crime of violence.

The titles state that #49 "requir[es] an offender convicted of any such crime on or after January 1, 2025, who was previously convicted of ***any two crimes of violence***, not just those crimes enumerated in this measure, to serve the full sentence imposed before beginning to serve parole…." As discussed above, the measure does not define "crime of violence" and it is unclear which definition applies by the measure's own terms. By modifying "crime of violence" with the word "any," the title compounds the measure's lack of clarity.

"[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). Accordingly, by stating "any" two crimes of violence, the title says that the measure incorporates "all" crimes of violence as defined by statute or as designated by case law.

But 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." *See Busch, supra.* Section 18-1.3-406(2)(a), C.R.S., 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, under *Busch*, there are crimes of violence that would be excluded from #49's changes to the parole system, but voters would not know this because the title states that "any" crimes of violence—that is, "all" 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).

If the Board has jurisdiction to set a title because there is a known meaning associated with "crimes of violence," the new parole restrictions in #49 are not triggered by "any" (i.e. "all") crime of violence. As currently drafted, the titles will mislead voters into thinking that these new restrictions are unbounded by a clear definition.

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."

Not only do the titles tell voters that the new parole restrictions are triggered by "any" crimes of violence, they let voters then know that this new parole consideration relates to various crimes but "not just those crimes enumerated in this measure."

This addition was meant to communicate that parole restrictions stemmed from something other than the listed crimes in the measure. But it muddles the issue by leaving voters with no idea what "crimes of violence" will come into play for purposes of this measure. 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.

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." The title thus fails to meet the clear title requirement.

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.

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." *In re Proposed Initiative 1999-2000 # 258(A*), 4 P.3d 1094, 1100 (Colo. 2000) 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, is a neutral statement; but as 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).

This ballot title uses "crimes of violence" in the titles. This term is used for purposes of political positioning.[1] Recent research shows a skewed voter reaction to "violent crime" without regard to statistical evidence about it.[2] Such language is sure to detract from substantive debate over changes to parole eligibility.

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[1] Such wording is regularly used to set the stage for political campaigns and to enflame voter emotions. For example, one political actor's recent op-ed used "violent crime" in its headline and five other times to persuade voters s to a certain viewpoint, concluding: "As Coloradans drown in crime, there is a lifeboat in the distance with two words on its side becoming clearer every day: 'Election 2022.'" Brauchler, G., *Colorado violent crime is higher than the national average for the first time in decades*," The Denver Post (Oct. 21, 2021); https://www.denverpost.com/2021/10/04/colorado-violent-crime-higher-national-average-brauchler/ (last viewed Apr. 25, 2023). Notably, this opinion piece uses yet a different definition of "violent crime," one that is used by the Federal Bureau of Investigation which does not mirror any Colorado law. *Id.* ("violent crime [is] defined as a homicide, murder, nonnegligent manslaughter, rape, robbery, and aggravated assault").

[2] *See* Pew Research Center, *Violent crime is a key midterm voting issue, but what does the data say?*, https://www.pewresearch.org/short-reads/2022/10/31/violent-crime-is-a-key-midterm-voting-issue-but-what-does-the-data-say/ (last viewed Apr. 26, 2023) ("Media coverage could

D. The title should state that the initiative prevents the governor from exercising his statutory parole powers for persons subject to proposed section 17-22.5.303.3(2.5).

If the Board does not find that this initiative violates the single subject requirement for the reasons stated under argument I.C. above, it must at least tell voters about the repeal of the governor's power to grant parole as to the specific conditions created by subsection (2.5) of this measure.

WHEREFORE, in light of the arguments and legal precedent cited above, the Title Board should dismiss Initiative #49 for lack of jurisdiction, and if it does not do so, it should revise the titles so that they are fair, accurate, and not misleading.

RESPECTFULLY SUBMITTED this 14th day of June, 2023.

RECHT KORNFELD, P.C.

s/ Mark Grueskin

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affect voters' perceptions about violent crime, too, as could public statements from political candidates and elected officials…. More broadly, the public often tends to believe that crime is up, even when the data shows it is down. In 22 of 26 Gallup surveys conducted since 1993, at least six-in-ten U.S. adults said there was more crime nationally than there was the year before, despite the general downward trend in the national violent crime rate during most of that period.").

CERTIFICATE OF SERVICE

I, Kate Sorice, hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #49** was sent this day, June 14, 2023, via email to counsel for the proponents at:

ST@westglp.com

And mailed first-class, postage prepaid to Proponents:

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s/ Kate Sorice