

COLORADO SUPREME COURT

2 East 14th Avenue  
Denver, CO 80203

Original Proceeding Pursuant to  
§ 1-40-107(2), C.R.S. (2021-2022)  
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and  
Submission Clause for Proposed Initiative  
2023-2024 #30

**Petitioner:** Christine M. Donner,

v.

**Respondents:** Steven Ward and Suzanne  
Taheri,

**and**

**Title Board:** Theresa Conley, Jeremiah  
Barry, and Kurt Morrison.

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Case No. 2023SA119

**THE TITLE BOARD'S OPENING BRIEF**

## 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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,758 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

*/s/ Michael Kotlarczyk*

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## ISSUES ON REVIEW

I. Whether the Title Board correctly determined that it had jurisdiction to set a title on 2023-2024 #30.

II. Whether the Title Board set a clear title.

## STATEMENT OF THE CASE

Proposed initiative 2023-2024 #30 limits the availability of parole for certain violent offenders. *See Record*, p 5, filed May 5, 2023. The measure repeals and reenacts, with amendments, § 17-22.5-303.3 of the Colorado Revised Statutes. *See id.* That statute currently provides that when an offender (a) is sentenced for one of several listed crimes and (b) previously was convicted of “a crime of violence,” then that offender is not eligible for parole until he has served 75% of his sentence. § 17-22.5-303.3(1). Under #30, those convicted of the listed crimes would have to serve 85% of their sentences before being eligible for parole, regardless of whether they committed a prior crime of violence. *Record*, p 5. And individuals convicted of one of the listed crimes and two prior crimes of violence would have to serve 100% of their sentence before being

paroled. “Crime of violence” is not defined either in the current statute or in #30. *See id.*; *see also* § 17-22.5-303.3.

The current statute also permits the Governor to grant parole to offenders otherwise covered by the statute. § 17-22.5-303.3(1). That provision is unchanged by #30. *See* Record p 5.

At its April 19, 2023, meeting, the Title Board concluded that the measure contained a single subject and set a title. *Id.* at 2. Petitioner Christine M. Donner filed a timely motion for rehearing challenging both whether the Board had jurisdiction and whether the title was sufficiently clear. *Id.* at 7. The Board considered the motions at its April 28, 2023 meeting. *Id.* at 3-4. By a 2-1 vote, the Board granted the motion only to the extent that it made changes to the title, and otherwise denied the motion.

The title fixed by the Board for #30 is as follows:

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.

*Id.* at 3.

Petitioner now challenges whether the Board had jurisdiction to set a title for #30 (Issues 1 and 2 in the petition) and whether the title it set fairly and accurately characterizes the measure (Issues 3, 4, and 5).

*See* Pet. for Review 4-5.

### **SUMMARY OF ARGUMENT**

The Title Board set an appropriate title for 2023-2024 #30.

Petitioner first argues that the Board lacked jurisdiction to set a title.

Petitioner contends that the Governor's parole authority under the statute is a second subject because the initiative would change the scope

of the Governor's parole authority. But #30 does not change the

Governor's parole powers that currently exist in statute. Petitioner's



argument is concerned with indirect effects of the measure on existing law, which this Court has held is not enough to create a second subject.

Petitioner also argues that the Board could not set a title because the measure does not define a “crime of violence.” But once again, this is a feature of existing law and not changed by #30. Just because a measure may require some future judicial interpretation to delineate its precise application does not mean the measure lacks a single subject.

Finally, Petitioner’s clear title objections also fail. The Board did not mislead voters or sow confusion when it qualified the phrase “crime of violence” by explaining that the term was not limited to the crimes listed in the measure. That is consistent with Colorado law and provides more, not less, information to voters. Nor is “crime of violence” an impermissible catchphrase. That term is used in current statutes and in #30, and it fairly describes the scope of the proposed initiative in plain language.

## ARGUMENT

### I. The Title Board had jurisdiction to set a title.

#### A. Standard of review and preservation.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will “overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). “In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. In doing so, the Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional

single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Title Board agrees this issue is preserved. Whether the single subject of the measure can be clearly stated even though the measure doesn’t define “crime of violence” (*infra* at I.B) was raised in the motion for rehearing. Record, pp 9-11. Whether the measure contains a second subject because the scope of the Governor’s parole power would change if #30 is enacted (*infra* at I.C) presents a closer preservation question. In her motion for rehearing, Petitioner argued that “the governor cannot now grant parole” (Record, p 8), which is just wrong—current law provides that “the governor may grant parole” in certain circumstances. § 17-22.5-303.3(3). However, Petitioner did make the argument stated in the Petition at the rehearing itself and the Board had the opportunity to consider that argument. *Hearing Before Title*

*Board on Proposed Initiative 2023-2024 #30* (Apr. 28, 2023),

<https://tinyurl.com/yc2yzt8d> (“Hearing”) at 46:45.

**B. The subject of the measure is clearly stated.**

Petitioner argues in her petition that the subject of #30 could not be clearly stated in the title because “crime of violence” is not defined in the measure. Pet. 4 (issue 2). But the “Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the” measure in order to set a title. *In re Title, Ballot Title, & Submission Clause for a Petition on School Finance*, 875 P.2d 207, 210 (Colo. 1994). Nor does the potential need for future judicial interpretation of a measure render the Board unable to set a title. The Court held that to the extent an initiative’s use of the term “nonexempt well” was unclear, the Board could still set a title even though the term’s “definition must await future legislative and judicial construction and interpretation” *In re Title, Ballot Title, & Submission Clause for 1997-1998 #75*, 960 P.2d 672, 673 (Colo. 1998). The same is true here—future courts may need to define “crime of violence” to make clear

whether particular crimes are included or excluded from that term, but the term itself is not so unclear that the meaning of this initiative is unknowable to voters.

That is especially true here, because any lack of clarity around the term “crime of violence” exists in current Colorado law and is not introduced by this measure. The current version of § 17-22.5-303.3 does not define “crime of violence,” and it has already been subject to judicial interpretation. *See Busch v. Gunter*, 870 P.2d 586, 587 (Colo. App. 1993) (interpreting “crime of violence” in § 17-22.5-303.3 by reference to Title 16). The mere fact that #30 continues to use a term that the statute already uses does not create a second subject.

**C. The provision of the measure continuing the Governor’s parole power under § 17-22.5-303.3 is not a second subject.**

Under current law, the Governor may grant parole to violent offenders subject to section -303.3 when extraordinary mitigating circumstances exist. *See* § 17-22.5-303.3(3). The proposed initiative does not change a word of this provision. Record, p 5. Petitioner nevertheless

argues that because other parole provisions in section -303.3 change, the scope of the Governor's authority to grant parole necessarily changes as well. Pet. 4 (issue 1).

Petitioner's argument is misplaced. "The mere fact that a proposed [initiative] may affect the powers exercised by government under preexisting [law] does not by itself demonstrate that the proposal embraces more than one subject." *In re Title, Ballot Title, & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1077 (Colo. 2010). This is because "[a]ll proposed . . . laws would have the effect of changing the status quo in some respects if adopted by the voters." *In re Title, Ballot Title, & Submission Clause for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). The same reasoning applies here. While #30 may alter the scope of the Governor's parole authority because it alters the availability of parole under section -303.3, that does not create a second subject. Rather, this is the sort of "indirect" effect on existing law created by a proposed initiative that this Court has held does not create

a second subject. *In re Title, Ballot Title, & Submission Clause for 2005-2006 #73*, 135 P.3d 736, 740 (Colo. 2006).

**II. The title set by the Board satisfies the clear title standard.**

**A. Standard of review and preservation.**

When considering a challenge to a title, the Court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. “The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *Id.* The Court will reverse the title set by the Board “only if a title is insufficient, unfair, or misleading.” *Id.* ¶ 8.

The Title Board agrees this issue is preserved in part. Petitioner argued in her motion that “crimes of violence” is a catchphrase (*infra* at II.B). See Record, p 12. Petitioner also adequately challenged the

inclusion of the phrase, “not just those enumerated in this measure” (*infra* at II.C). That language was added at the rehearing and so could not have been challenged in the motion for rehearing. *Compare* Record, p 2 *with* Record, p 3. But Petitioner did object to that language at the rehearing and the Board had the opportunity to consider Petitioner’s opposition to that language. *See* Hearing at 1:23:30.

The Board does not agree that the issue raised in II.D is preserved, for the reasons stated below.

**B. The phrase “crimes of violence” is not a catchphrase for purposes of this title.**

Petitioner argues that the phrase “crimes of violence” used in the title is a political catchphrase. Pet. 5 (issue 5). The Board “must avoid using catch phrases when setting a title.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶ 31. But “phrases that merely describe the proposed initiative are not impermissible catch phrases.” *Id.* Nor is a phrase a catchphrase “when it contributes to a voter’s rational comprehension and does not promote impulsive choices based on false assumptions about the initiative’s purpose and its effects



if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 29 (quotations omitted).

Here, the title takes the phrase “crimes of violence” from currently existing law. *See* § 17-22.5-303.3(1). Accordingly, “the titles’ use of the term [‘crimes of violence’] was drawn directly from the text of the Proposed Initiative[], and its inclusion in the title provided an accurate description of what the Proposed Initiative[] would do.” *Id.* “The phrase is descriptive and informative based on the common understanding of the words used.” *In re 2019-2020 #3*, 2019 CO 107, ¶ 29. By the measure’s own terms, it applies only when an offender was previously convicted of a “crime of violence.” *See* Record, p 5. The phrase is descriptive and excludes nonviolent crimes. Use of this descriptive phrase thus “contributes to a voter’s rational comprehension” of #30 and “does not promote impulsive choices based on false assumptions about the initiative’s purpose and its effects if enacted.” *In re 2019-2020 #3*, 2019 CO 107, ¶ 28 (quotations omitted). The Board thus acted within its considerable discretion when using the phrase “crimes of violence.”

**C. The Board did not create voter confusion by qualifying the phrase “crimes of violence.”**

Petitioner next argues that the Board created voter confusion by qualifying the term “crimes of violence” with the phrase “not just those enumerated in this measure.” Pet. 4 (issue 4). In fact, the title decreases voter confusion. The current statute lists several specific crimes and limits an offender’s eligibility for parole if he was previously convicted of “a crime of violence.” § 17-22.5-303.3(1). The Colorado Court of Appeals previously held that the phrase “crime of violence” was not limited to those crimes specifically enumerated in § 17-22.5-303.3(1). *See Busch*, 870 P.2d at 587 (defining “crime of violence” to have the same meaning as the term did in § 16-11-309(2)(a)(I)). It is thus accurate to say that, under the current version of section -303.3, the phrase “crime of violence” is not limited to those crimes enumerated in the statute.

Proposed initiative 2023-2024 #30 keeps much of this same structure. It first lists several crimes, then limits parole eligibility to (a) 85% of time served for any individual convicted of an enumerated crime

and (b) 100% of time served for individuals convicted of an enumerated crime and who were previously convicted of a “crime of violence.” Since both the measure itself and the title list several crimes, the qualifying phrase “not just those enumerated in this measure” clarifies for voters that “crimes of violence” could refer to other crimes than the ones listed in the title. The title’s use of that phrase thus clarifies something that may otherwise be confusing to voters, and is an appropriate exercise of the Board’s discretion.

**D. Petitioner did not preserve any objection to the use of the term “any” in #30.**

Finally, Petitioner intends to argue that “the Board substantively misstated the measure in referring to parole limitations for an offender convicted of ‘any’ crime of violence, given that Proponents did not intend all ‘crimes of violence’ to be covered by the measure.” Pet. 4 (issue 3).

The Board does not agree that this issue was raised before the Board.

The language Petitioner objects to was added during the rehearing. *See* Hearing at 1:10:00. But when Petitioner addressed the Board after the Board made that change, Petitioner did not argue that the word “any”

was problematic or contrary to the Proponents' intent. *See id.* at 1:24:15. Therefore, because the issue was not raised before the Board, it has not been preserved for this Court's review. *See, e.g., In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) (refusing to address issue not raised before Title Board).

The Board does not presently offer any argument on the merits of this issue. Because it was not raised before the Board, it is unclear what Petitioner's argument is, particularly because Proponents expressly agreed with the use of the word "any" in the title at the rehearing. *See* Hearing at 1:19:45. If this argument is developed in Petitioner's Opening Brief, the Board reserves the right to respond in its Answer Brief.

## CONCLUSION

The Court should therefore affirm the title set by the Title Board on 2023-2024 #30.

Respectfully submitted on this 25th day of May, 2023.

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*/s/ Michael Kotlarczyk*

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 25th day of May, 2023, addressed as follows:

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