BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Leanne Wheeler, Objector,

vs.

Suzanne Taheri and Michael Fields, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #89

Pursuant to C.R.S. § 1-40-107, Leanne Wheeler ("Objector"), registered elector of the State of Colorado, through undersigned counsel, objects to the Title Board's title and ballot title and submission clause set for 2021-2022 #89 ("Initiative #89"), and states as follows:

The Board lacked jurisdiction to consider Initiative #89, as Proponents were required to resubmit it for review and comment, and the Board then exceeded its authority by allowing Proponents to substantively amend the final draft of Initiative #89 during the title setting hearing. Accordingly, the Title Board should grant this Motion and dismiss for lack of jurisdiction.

I. At hearing, the Board allowed Proponents to amend Initiative #89 by making a substantial change in the legal standard for persons convicted of certain crimes.

At the beginning of the title setting hearing for Initiative #89, a member of the Board noted that, after the review and comment hearing with the Offices of Legislative Council and Legislative Legal Services, Proponents amended subsection (1.5) of Section 1 to read "shall begin parole" instead of the original phrase "shall be eligible for parole" which revision is reflected by the amended version of Initiative #89 submitted by Proponents to the Board:

> **(1.5)** ANY PERSON CONVICTED AND SENTENCED FOR SECOND DEGREE MURDER; FIRST DEGREE ASSAULT; FIRST DEGREE KIDNAPPING, UNLESS THE FIRST DEGREE KIDNAPPING IS A CLASS 1 FELONY; SEX ASSAULT UNDER PART 4, ARTICLE 3 OF TITLE 18; FIRST DEGREE ARSON; FIRST DEGREE BURGLARY; OR AGGRAVATED ROBBERY, COMMITTED ON OR AFTER JANUARY 1, 2023, SHALL ~~BE ELIGIBLE FOR~~ BEGIN PAROLE AFTER SUCH PERSON HAS SERVED EIGHTY-FIVE PERCENT OF THE SENTENCE IMPOSED UPON SUCH PERSON. THEREAFTER, THE PROVISIONS OF SECTION 17-22.5-303 (6) AND (7) SHALL APPLY.

Proponents asserted that they erred in amendment subsection (1.5), and that subsection (1.5) should have used the original language "shall be eligible for parole." The Board treated Proponents' mistake as a "grammatical change" or a "technical correction," and it allowed Proponents to change subsection (1.5) back to the original phrase "shall be eligible for parole."[1]

[1] The relevant discussion can be found at 5:47:40 to 5:52:17 of the April 6 hearing, which is available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.

The Board then designated and fixed the following ballot title and submission clause for Initiative #89:

> *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 was convicted on or after January 1, 2023, of second degree murder; first degree assault; first degree kidnapping, unless the first degree kidnapping is a class 1 felony; sexual assault; first degree arson; first degree burglary; or aggravated robbery 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, 2023, and who was previously convicted of two crimes of violence to serve the full sentence imposed before beginning to serve parole?*

II. The Board lacked jurisdiction to consider Initiative #89 because Proponents were required to resubmit the Initiative for review and comment.

During the review and comment process, the Offices of Legislative Council and Legislative Legal Services did not comment on or question the use of "shall be eligible for parole" in subsection (1.5) of the original version of the Initiative.

The review and comment memorandum summarized the purpose of subsection (1.5) as providing that covered offenders must "serve eighty-five percent of the person's sentence before the person ***is eligible for parole***." (Ex. 1, Review and Comment Mem. for 2021-2022 #89 at 2 (emphasis added).) During the review and comment hearing, the Proponents confirmed that staff accurately stated the purpose of the Initiative. (Mar. 22, 2022, Review and Comment Hr'g on 2021-2022 #89 at 10:03:20 to 10:04:32.[2]) Although questions were raised whether the original language in subsection (2.5) should be changed from "shall be eligible for parole" to "shall begin parole," (*see id.* at 10:07:47 to 10:08:44.), no such issue arose with respect to subsection (1.5).

Proponents nonetheless amended subsection (1.5) from "shall be eligible for parole" to "shall begin parole." This is a materially different standard for when an offender would serve parole: from a ***discretionary*** determination of parole eligibility to parole ***as-of-right***. Changing the legal standard in an initiative and the corresponding authority of a governmental body is a "substantial amendment" to an initiative. *See In re Title, Ballot Title and Submission Clause, and Summary Approved February 12, 1992, with Regard to the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Idaho Springs [In re Town of Idaho Springs]*, 830 P.2d 963, 968 (Colo. 1992) (concluding that expanding the regulatory authority of a government agency is "substantial").

Any amendments proponents make must be "***in direct response*** to the comments of the directors" of the legislative offices. *Id.* (emphasis added). Proponents here do not contend that the change to subsection (1.5) was in direct response to the Review and Comment process. The

[2] The hearing recording is available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220322/-1/13053.

Title Board hearing on April 6 made clear that the only suggested change to "begin" was as to a different portion of their measure, subsection (3.5). Thus, the change made was not in direct response to legislative staff and was therefore unauthorized. The Supreme Court has applied and upheld the "direct response" test where a specific question raised a change made by proponents. *In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008) (changes to initiative text conformed with statute where sponsors "made two changes to the measure to reflect the legislative staff's concern about" a specified topic).

As this was a "substantial amendment" to the Initiative that was not directly responsive to the actual comments made at Review and Comment as to subsection (1.5), Proponents were statutorily required to "resubmit[]" Initiative #89 for review and comment. C.R.S. § 1-40-105(2); *see also* Colo. Const. art. V, sec. 1(5). Proponents claimed they did not mean to make this change, even though their language was drafted, amended, and filed by experienced counsel. Regardless, the statute plainly requires resubmission upon which the Board sets a title.

Even though its motive is well-intentioned, the Board's decision to allow textual changes at hearing is a Pandora's box. Based on this precedent, future proponents will ask for changes to their text they did not actually make in their filed documents. Pointing to a Review and Comment memo and a staff suggestion they allegedly meant to incorporate but did not, Proponents will be revising language that is supposed to be "final." For example, given this Board's April 20 agenda containing more than 50 initiatives for initial title setting, *see* Exhibit A, it is not hard to anticipate disruption to the entire initiative process and reasonable Title Board consideration of such proposals that this practice could effect. And it simply isn't authorized by the legislature in the title setting statutes.

To make the change at issue here, Proponents did not resubmit Initiative #89 for review and comment as the Constitution and statutory procedure required, however, and instead improperly submitted it for title setting. As a result, the Board lacked jurisdiction to consider and set a title for Initiative #89. *See In re Town of Idaho Springs*, 830 P.2d at 968.

III. The Board lacked the authority to permit Proponents to substantively revise Initiative #89 outside of the constitutional and statutory procedures.

Colorado law limits the Board's authority to setting the title for an initiative. Neither the Constitution nor the Colorado Revised Statutes provide the Board with authority to allow a substantive amendment to an initiative that has been filed with the Board.

Once the proponents of an initiative file their proposed initiative, the only opportunity to revise that initiative is as part of the review and comment process before the Offices of Legislative Council and Legislative Legal Services. *See* C.R.S. § 1-40-105. Even then, the ability of proponents to amend an initiative is limited to revisions in response to comments received during the review and comment process. C.R.S. § 1-40-105(2). If proponents make substantial amendments beyond the comments they received, they are required to resubmit the initiative for review and comment. *Id.*

Following the review and comment process, proponents submit to the Title Board "an original ***final*** draft that gives the ***final*** language." *Id.* § 1-40-105(4) (emphasis added); *see also* § 1-40-102(4) (defining draft as an initiative's "actual language"). The law limits the Board's authority to setting the title for the measure. Neither the Constitution nor the applicable statute authorize the Board to allow amendments to the substance of a measure that has been submitted to it for title setting. *See* Colo. Const. art. V, sec. 1; C.R.S. § 1-40-106.

Assuming the Board can allow "non-substantive" or "grammatical" corrections to an initiative, that is not the case here. Proponents' revision altered the substantive meaning of subsection (1.5): whether an inmate receives ***automatic*** parole (the text of the Initiative submitted by Proponents to the Board) or is subject to a ***discretionary*** parole determination (the amendment Proponents requested and approved by the Board). This is both a different legal standard for when parole is available and directly changes the authority of the parole board.

Furthermore, this was not a technical correction, or in the Board's words, a grammatical one. "Grammar" means a "normative or prescriptive set of rules setting forth a standard of usage." *American Heritage College Dictionary* 602 (2002). Stated only slightly differently, "grammar" is defined as "the study of the way the sentences of a language are constructed; morphology and syntax." *See* www.dictionary.com/browse/grammar (last viewed April 11, 2022). In plain language, "Grammar is the way that words can be put together in order to make sentences." www.collinsdictionary.com/us/dictionary/english/grammar-pattern. (last viewed April 11, 2022). As such, grammar deals with the structuring of clauses and sentences, such as matching a sentence's subject(s) and verb(s) or determining whether and how words or groups of words modify one another within a sentence.

In contrast, "substantial" is "defined as something being of substance, important or essential." *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 313 n.11 (Colo. 1995) (citing *Webster's Third New International Dictionary* 2280 (1986)). The difference between whether a person is simply "eligible for" parole or whether parole "begins" without any other eligibility determination is not one of "sentence structure" but instead unquestionably a matter of substance; it is important—even essential—to the incarcerated person, the parole board, and to society, and hence to voters.

Here, the Proponents did not ask the Board to change the final draft's use of "begin" in subsection (1.5). Had the wording of the Proponents' final draft not been flagged by one of the Board members, subsection (1.5)—using "begin"—would have been the basis for title setting, petition circulation, and potentially voter approval. *See* C.R.S. § 1-40-102(4) (an initiative "draft" is the proposed text of the initiative which, if passed, becomes the actual language of the constitution or statute"). The Board's intention is generous, but its deviation from the process required by statute is unauthorized. *See In re Title Ballot Title & Submission Clause and Summary for 1997-98 #109*, 962 P.2d 252, 253 (Colo. 1998) (proponents' failure to adhere to filing requirements by submitting multiple, changed versions of their initiative prevented Board from accepting jurisdiction for title setting).

Initiative proponents have a duty to file and abide by the required documents in order to invoke this Board's jurisdiction. *See* C.R.S. § 1-40-106 (words the "actual language," to be

submitted "on the twelfth day before meeting at which the draft is to be considered"). They are not at liberty to change the substance of their amended or final drafts at the beginning of title setting before the Board.

In fact, the Board here did not have a final or amended draft on which to base its title decisions; it only had a verbal indication that such language would be later filed. Nor did the public have the required notice of the substance for the title setting. *See In re Title, Ballot Title and Submission Clause, and Summary Approved April 20, 1994 and May 4, 1994, for the Proposed Initiated Constitutional Amendment Concerning the "Fair Treatment II,"* 877 P.2d 329, 333 (Colo. 1994) (public hearings before the Board "encourage testimony and suggestions as to what might be a fair and proper title and submission clause for a particular initiative"). This title setting based on something other than the actual initiative language is not authorized by any source of law – Constitution, statute, or case law.

The Board could not provide its own, informal avenue for correcting Proponents' errors by allowing a substantive amendment to the final draft during the title setting hearing itself.

IV. The titles violate the clear title requirement.

After the "in connection therewith" clause, the titles use semicolons to separate the crimes that trigger the new limitations on parole.

> *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 was convicted on or after January 1, 2023, of second degree murder; first degree assault; first degree kidnapping, unless the first degree kidnapping is a class 1 felony; sexual assault; first degree arson; first degree burglary; or aggravated robbery to serve eighty-five percent of the sentence imposed before being eligible for parole*

Any voter trying to discern what is covered by the measure and what is not covered will be hard pressed to read the title easily and understand its meaning. These titles do not meet the statutory requirement that they "unambiguously state the principle of the provision sought to be added, amended, or repealed, C.R.S. 1-40-106(3)(b), and should be revised to do so.

WHEREFORE, the titles set April 6, 2022, for Initiative #89 should be reversed and dismissed for lack of jurisdiction or corrected to make them understandable..

RESPECTFULLY SUBMITTED this 13th day of April, 2022.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the Motion For Rehearing for Initiative 2021-2022 #89, was sent this 13th day of April, 2022, by electronic mail, to Proponents, Suzanne Taheri and Michael Fields, via their legal counsel, at:

Suzanne Taheri
Staheri@mavenlawgroup.com

s/ Erin Holweger

Exhibit A

Awaiting initial hearing

** Unofficial caption assigned by legislative staff for tracking purposes.*

#80 Campaign Expenditure Limits* ▼ Details
#93 Percentage of Utility Rates Paid by Investor-Owned Utilities* ▼ Details
#96 Concerning Liquor Licenses* ▼ Details
#97 Concerning Liquor Licenses* ▼ Details
#100 Concerning Liquor Licenses* ▼ Details
#101 Concerning Liquor Licenses* ▼ Details
#102 Concerning Liquor Licenses* ▼ Details
#103 Local Control of Property Tax Revenues* ▼ Details
#104 Supplemental Tax on Luxury Residential Real Property* ▼ Details
#106 New Fee Assessment on Luxury Residential Real Property* ▼ Details
#108 Dedicated State Income Tax Revenue for Affordable Housing Programs* ▼ Details
#109 Calculation of Excess State Revenues Cap* ▼ Details
#110 Property Taxes* ▼ Details
#112 Sales and Delivery of Alcohol Beverages* ▼ Details
#113 Sales and Delivery of Alcohol Beverages* ▼ Details
#114 Sales and Delivery of Alcohol Beverages* ▼ Details
#115 Sales and Delivery of Alcohol Beverages* ▼ Details
#116 Sales and Delivery of Alcohol Beverages* ▼ Details
#117 Sales and Delivery of Alcohol Beverages* ▼ Details
#118 Sales and Delivery of Alcohol Beverages* ▼ Details
#119 Sales and Delivery of Alcohol Beverages* ▼ Details
#120 Sales of Alcohol Beverages* ▼ Details
#121 Sales of Alcohol Beverages* ▼ Details
#122 Third-Party Delivery of Alcohol Beverages* ▼ Details
#123 Third-Party Delivery of Alcohol Beverages* ▼ Details
#124 Third-Party Delivery of Alcohol Beverages* ▼ Details
#125 Third-Party Delivery of Alcohol Beverages* ▼ Details
#126 Sales and Delivery of Alcohol Beverages* ▼ Details
#127 Sales and Delivery of Alcohol Beverages* ▼ Details
#128 Sales and Delivery of Alcohol Beverages* ▼ Details
#129 Sales of Alcohol Beverages* ▼ Details
#130 State Income Tax Rate Reduction* ▼ Details

#131 Financial Assurance for Oil and Gas Operators* ▼ Details
#132 Consumer Choice in Energy* ▼ Details
#133 Consumer Choice in Energy* ▼ Details
#134 Minimum Wage for Workers in Alcohol-Related Businesses* ▼ Details
#135 Local Approval Requirement for Expanded Liquor License* ▼ Details
#136 Colorado Independent Oil and Gas Commission* ▼ Details
#137 Colorado Independent Oil and Gas Commission* ▼ Details
#138 Minimum Wage for Employees of Certain Alcohol-Related Businesses* ▼ Details
#139 Third-Party Delivery of Alcohol Beverages* ▼ Details
#140 Concerning Property Valuation* ▼ Details
#141 Concerning Property Valuation* ▼ Details
#142 Concerning Property Valuation* ▼ Details
#143 Concerning Property Valuation* ▼ Details
#144 Concerning Property Valuation* ▼ Details
#145 Concerning Property Valuation* ▼ Details
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#151 Concerning Property Valuation* ▼ Details

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(initiative list last viewed April 13, 2022)