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| DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO<br>1437 Bannock Street<br>Denver, Colorado 80202 | |
| **Petitioners**:<br><br>STEVEN WARD, JERRY SONNENBERG, ABE LAYDON, LORA THOMAS, GEORGE TEAL, KEVIN GRANTHAM, STAN VANDER WERF, CARRIE GEITNER, CAMI BREMER, LONGINOS GONZALEZ, JR., CHUCK BROERMAN, AND MARK FLUTCHER, Colorado residents, local elected officials, and registered Colorado voters; CHRISTOPHER RICHARDSON, GRANT THAYER, and DALLAS SCHROEDER, in their official capacity as Elbert County Commissioners; ADVANCE COLORADO, a Colorado nonprofit corporation; CHEYENNE COUNTY, DOUGLAS COUNTY, EL PASO COUNTY, ELBERT COUNTY, FREMONT COUNTY, KIT CARSON COUNTY, LOGAN COUNTY, MESA COUNTY, PHILLIPS COUNTY, PROWERS COUNTY, RIO BLANCO COUNTY, and WASHINGTON COUNTY, Colorado counties; and HIGHLANDS RANCH METROPOLITAN DISTRICT,<br><br>v.<br><br>**Respondents**:<br><br>STATE OF COLORADO, by and through JARED S. POLIS, in his official capacity as Governor of Colorado; and JENA GRISWOLD, in her official capacity as Colorado Secretary of State. | **▲ COURT USE ONLY▲** |
| ***Attorney for Petitioners***<br><br>Suzanne M. Taheri, #23411<br>WEST GROUP LAW & POLICY<br>6501 E. Belleview Ave, Suite 375<br>Englewood, Colorado 80111<br>Phone: (303) 263-0844<br>Email: st@westglp.com | Case No.: 2023CV31432<br><br>Division: 280 |
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## INTRODUCTION

SB23-303 and the measure it refers to the ballot, Proposition HH, address multiple subjects. In addition to providing a small break to assessment rates for property tax, SB23-303 raises (via a statewide de-Brucing) and appropriates millions of dollars for public education and rent relief. Proposition HH goes further. It also functions as a referendum—via HB23-1311—on future TABOR refunds: will they be paid at a flat rate per eligible taxpayer, or based on the taxes paid, which has been the standard practice for 30 years? What's more, the ballot title proposed for Proposition HH in SB23-303 is so incomplete as to be deliberately misleading. All this is in flagrant violation of the state constitution, which requires that measures adopted by the legislature or referred to the people, address only one subject and that the title of measures clearly reflect their substance.

This is probably why the Governor asks the Court to avoid as much of the merits of Petitioners' challenge as possible. He argues that SB23-303, a measure the Governor signed weeks ago, is somehow not yet law and shielded from review. If this were not enough, he also argues that Proposition HH, as a measure referred by the general assembly is not "any measure" subject to pre-election review of its title for compliance with the Single Subject Requirement. The Governor concedes—as he must—that the Court can evaluate Proposition HH's compliance with the Clear Title Requirement and set a new title if necessary. That the Governor would apparently be happy to have this Court clarify a title that unconstitutionally contains more than one subject gives away the game: his jurisdictional arguments fail.

The Court must review SB23-303 for compliance with the Single Subject Requirement. Because it unquestionably encompasses more than one subject, SB23-303 should be declared invalid. That ends this case and vindicates the state constitution.

## ARGUMENT

### I. SB23-303 Violates the Single Subject Requirement.

#### A. The Court has jurisdiction to decide Petitioners' single subject challenge to SB23-303.

The Governor first questions the Court's jurisdiction to decide Petitioners' single subject challenge to SB23-303, arguing a decision on the bill's constitutional infirmities should wait until after the November 2023 election. This plea for avoidance is half-hearted and wrong; SB23-303 is law today and subject to judicial review. (*See* Pet'rs' Opening Br. 8 (citing section 23 of SB23-303).) The general assembly passed SB23-303 on May 15, 2023, and the Governor signed it at a ceremonial event outside a home in Commerce City on May 24, 2023. "An act of the general assembly … take[s] effect on the date stated in the act," Colo. Const. art. V, § 19, and section 23 of SB23-303 states that critical parts of the bill are "effective" upon passage (App. A at 47). That is, when the Governor signed the bill. *See* Colo. Const. art. IV, § 11. Because parts of SB23-303 were "effective" on May 24, and are subject to enforcement, Petitioners' single subject challenge to the bill is ripe for review and the Court's jurisdiction is proper.

The Governor sidesteps these basic legislative mechanics by passingly stating that Petitioners' SB23-303 challenge is limited to those "element[s]" that are "contingent on voter approval at the next election." (Governor's Opening Br. 5.) Not so. Petitioners claim the bill, in its entirety, violates Section 21's single subject command. (Pet'rs' Opening Br. 15.) Indeed, it would make no sense for Petitioners to limit their single subject claim, which, at its core, is a challenge to the bill's breadth, to something less than the entire bill. In the end, the Governor cannot avoid judicial review by artfully repleading Petitioners' challenge to SB23-303.

#### B. SB23-303 presents multiple subjects in violation of the constitution.

Of course, the Governor also insists that SB23-303 complies with the Single Subject Requirement. The Governor's argument? The only subject of the bill is "property tax relief." (Governor's Opening Br. 7.) How is this possible when, in addition to a relatively paltry

reduction in the assessment rates for real property, the bill authorizes state retention of TABOR refunds to pay for increases in state funding to public education and a subsidy to residential tenants? Because, the Governor assures us, these disparate provisions "relate to and implement" the property tax relief proposed in SB23-303. This is too much. While a dollar-for-dollar "backfill" of local property tax revenue "lost" because of lower assessment rates may be permissible, retaining money in excess of the TABOR revenue cap to fund new measures beyond backfilling is not. The TABOR de-Brucing proposed in SB23-303 is legislated to serve not only as a replacement of revenue "lost" by local governments, but as a source of additional revenue for state spending on public education. And even if SB23-303's commitment of new revenue to public education is necessarily related to property tax relief, the bill's provision of $20 million (a "small amount of money" according to the Governor) in rent subsidies cannot be. As anyone who as ever rented a house or apartment knows, residential tenants do not pay property taxes—their landlords do. At bottom, SB23-303 is exactly what the Single Subject Requirement was adopted to prevent: a logrolled measure "[c]ombining subjects" to drum up support "from various factions—that may have different or even conflicting interests … that would fail on their own merits." *In re Title, Ballot Title & Submission Clause for 2011–12 #3*, 274 P.3d 562, 566 (Colo. 2012). The Court should say so.

SB23-303's proposed increase in state public education funding is "not dependent upon or connected with" property tax relief. *See In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 #29*, 972 P.2d 257, 261 (Colo. 1999) (*1999–2000 #29*). This is apparent because the increase in education funding does not "effect or … carry out one general objective or purpose," namely, property tax relief. *See In re Titles, Ballot Titles & Submission Clauses for 2021–22 #67, #115, & #128*, 526 P.3d 927, 930 (Colo. 2022) (quoting *In re Title, Ballot Title & Submission Clause for 2021–22 #16*, 489 P.3d 1217, 1221 (Colo. 2021)).

SB23-303 differs from the situation in *In re Amend TABOR #32*, 908 P.2d 125 (Colo. 1995), cited by the Governor. There, the state supreme court approved a measure as containing a single subject where it created a $60.00 credit for certain state and local taxes and simply required "monthly state replacement of local revenue impacts." *Id.* at 131, app. A. In other words, a true backfill: replacement of revenue lost because of the tax credit created by the measure. *See id.* at 128–29. Here, SB23-303 raises and expressly commits to education funds well in excess of those necessary to backfill revenues lost to the assessment rate cuts. This violates the Single Subject Requirement's underlying concern: that a subject pass on its own merits without comingling support for another subject. *See* Colo. Rev. Stat. § 1-40-106.5(1)(e)(I); *1999–2000 #29*, 972 P.2d at 261 ("[e]ach proposal within an initiative must depend 'on its own merits for passage.'" (quoting *In re Title, Ballot Title, Submission Clause & Summary (1996–17)*, 920 P.2d 798, 802 (Colo. 1996))).[1] The Governor implies that it is possible Colorado could suffer unforeseeable calamity, and the state might not retain enough funds to execute on the additional spending. (*See* Governor's Opening Br. 12.) But this can be said about

[1] The Governor appears to cite the Order in *In re Title, Ballot Title & Submission Clause for 2023–24 #21*, No. 2023SA109 (Colo. May 19, 2023) (*see* Governor's Opening Br. 11 (citing to the correct supreme court case number but referring to 2021–22 initiative)), where the supreme court summarily affirmed the ballot title for an initiated measure proposed by Plaintiff Ward and undersigned counsel. Even though, as is typical in appeals from decisions of the state title board, the supreme court did not provide any reasoning for its decision, Initiative #21 provides a useful contrast to SB23-303. Initiative #21 expressly provides that the purpose of its much more limited de-Brucing is to "offset[] revenue resulting from the cap in property tax." While objectors argued that it may be possible the property tax cap would not result in lost revenues and therefore the de-Brucing would raise more than necessary to accomplish its backfilling purpose, the measure does not expressly plan for and appropriate any extra funds. Why? Because it is exceedingly unlikely that the property tax cap proposed in Initiative #21 would not cause more than $100M in lost local governmental revenue. *See* Fiscal Summary for Initiative 2023–24 #21, Colo. Sec'y of State, https://bit.ly/3Nb83Zx (forecasting "it is expected to reduce property tax revenue by at least $2.2 billion in 2024, at least $2.9 billion in 2025, and larger amounts in future years"). SB23-303 does precisely the opposite: it expressly authorizes the collection and allocation of monies far more than those needed to backfill lost local government property tax receipts. (*See* App. A at 6–7 (Section 3, Colo. Rev. Stat. § 24-77-203(3)(b)(III), (4)).)

almost any proposal: if a disaster strikes and the anticipated revenue for a project does not materialize, the money may be unavailable for use.

Indeed, at this point, the fiscal note on SB23-303 anticipates that, in 2023–24, SB23-303 will result in an additional $72 million in state funding to public education. In 2024–25 this number jumps to $128 million, and, in 2025–26, it increases further to $269 million. (SB23-303 Fiscal Note, attached as App. D.) Legislators routinely rely on fiscal notes to evaluate legislation. Colorado law requires a fiscal impact statement—similar to a fiscal note—be included with every citizen-initiated measure on the ballot. Colo. Rev. Stat. § 1-40-124.5. And in 2021, the general assembly adopted HB21-1321, which requires revenue from a measure's fiscal impact statement be included in the ballot title of citizen-initiated measures. The prime house sponsors of this legislation were Representatives Kennedy and Weissman; the same prime sponsors of SB23-303. Given the fiscal note for SB23-303 makes predictions for the immediate future, the sheer size of the increase in spending on education anticipated, and that state law would require these projections be included in the title of the measure if it were citizen-initiated, it beggars credulity to characterize analysis of the projections as "mere speculation about the potential effects" of SB 23-303. (*See* Governor's Opening Br. 12.) To be sure, the Governor's ostensible concern about speculation appears to go one way: at the same time he argues that the increase in education funding is necessarily connected to property tax relief because it might, depending on what the state spends the money on, save local property-tax payers money. (*See id.*) SB23-303 legislates a significant new state commitment to public school spending that is over and above any money required to "backfill" revenue lost to local governments because of its property tax relief. This is a wholly unconnected and distinct subject.

SB23-303's provision of $20 million in rental assistance is even less defensible on single subject grounds. Property tax relief—the Governor's proposed single subject for SB23-303—is axiomatically something that is available only to people who pay property tax. Residential

tenants do not pay property tax; they pay rent to a landlord who pays property tax. The Governor points to legislators' arguments in the general assembly that they intended to assist tenants who may pay property tax indirectly through increased rent. (Governor's Opening Br. 13.) But if this is the true intent of SB23-303, it is already accomplished by the reduction in assessment rates—tenants indirectly paying property taxes in the form of rent will benefit from their landlords' reduced property tax burden. Hence, the rental assistance provided for in SB23-303 cannot have anything to do with reducing the (nonexistent) property-tax burden of renters. It is about subsidizing residential tenancy. While this may be a worthwhile policy, it is not in any way the same subject as property tax relief. Because SB23-303 encompasses multiple unrelated subjects, the Court should enter a declaratory judgment voiding it.

## II. Prop HH Violates the Single Subject Requirement.

### A. The Court has jurisdiction to decide Petitioners' single subject challenge to Proposition HH.

Like with SB23-303, the Governor claims that Petitioners' single subject challenge to Proposition HH should be a post-election matter. The Governor's view cuts against scores of cases deciding single subject challenges to ballot titles pre-election. *See, e.g.*, *In re Titles, Ballot Titles & Submission Clauses for 2021–22 #67, #115, & #128*, 526 P.3d 927, 930 (Colo. 2022) (holding pre-election that ballot initiatives violated the Single Subject Requirement).

The Governor maintains that special jurisdictional rules apply "[w]hen the legislature enacts a bill referring a proposed law for voter approval." (Governor's Opening Br. 4.) The putative basis for these special rules is *Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996). The Governor, however, overreads *Polhill*. That case involved a pre-election, single subject challenge to a referred constitutional amendment adopted in Senate Concurrent Resolution 95-2 (SCR 95-2). *Id.* at 120. Contrary to this case, SCR 95-2 was not signed by the governor; nor did the

plaintiffs challenge the ballot measure under Colo. Rev. Stat. § 1-11-203.5.[2] In a short, ten-paragraph opinion, the supreme court held that it lacked jurisdiction to hear the challenge. *Id.* at 121. Because neither the general assembly nor the governor had invoked the court's original jurisdiction under article VI, section 3, to answer interrogatories, the court recognized jurisdiction must lie in either "the single-subject requirement itself or a statute." *Id.* The court concluded the Single Subject Requirement in article XIX, section 2, for legislatively referred constitutional amendments "d[id] not confer jurisdiction on the courts to review proposed constitutional amendments before they are submitted to the electorate." *Id.* Nor did the statute authorizing review of citizen-initiated measures, Colo. Rev. Stat. §1-40-107 (1995), "confer jurisdiction upon this court to review legislative referenda." *Id.*

But what was absent in *Polhill*—a constitutional or statutory jurisdictional hook to review a pre-election, single subject challenge—is present here. *First*, a statutory hook. Section 1-11-203.5 confers jurisdiction on the courts to hear "all election contests arising out of a ballot issue or ballot question election concerning the order on the ballot or the form or content of any ballot title." § 1-11-203.5(1). This is precisely what Petitioners challenge: the form and content of Proposition HH's title. The Governor's retort? "[F]orm or content" objections under section 1-11-203.5 do not include single subject challenges. (Governor's Opening Br. 5–6.) The Governor provides two sources for his narrowing interpretation of subsection 1-11-203.5(1), neither of which persuades. Initially, the Governor argues subsection 1-11-203.5(3) expresses a remedy for clear title and order violations (namely, to correct or reorder the title), and this ***remedy*** operates to bar a ***challenge*** based on the Single Subject Requirement. (Governor's Opening Br. 5–6.) The Governor overplays the import of subsection 1-11-203.5(3), as even he acknowledges the

[2] The plaintiffs in *Polhill* challenged the ballot title seven months after SCR 1995 was signed, *see* Compl., *Polhill v. Buckley*, No. 1996CV350 (Colo. Dist. Ct., City & Cnty. of Denver Jan. 24, 1996), well beyond the five-day limitation period in section 1-11-203.5. Given this, it is no surprise the statute was neither referenced nor argued in briefing before the supreme court.

supreme court has said that a challenge seeking to invalidate a measure because it "contain[s] multiple purposes is clearly a challenge to the form or content of the ballot title." (*Id.* at 6, n.6 (quoting *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003).) Next, the Governor claims *Cacioppo v. Eagle County School District Re-50J*, 92 P.3d 453 (Colo. 2004), carves out single subject challenges from section 1-11-203.5. (*See* Governor's Opening Br. 4.) This is wrong. *Cacioppo* concerned a local ballot measure, and the Single Subject Requirement does not apply to local measures, as the Governor notes. (*See id.* at 6, n.6.) *Cacioppo* thus could not answer whether a single subject challenge is allowed under section 1-11-203.5, and therefore is no barrier to the Court's jurisdiction over Petitioners' single subject claim.

*Second*, there's a constitutional hook too. As argued in Petitioners' opening brief, article V, section 1(5.5) of the constitution imposes a Single Subject Requirement on the exercise of general assembly's referendum power.[3] (*See* Pet'rs' Opening Br. 8.) This is apparent from subsection 1(5.5)'s text and history. The text of subsection 1(5.5) speaks of "any measure," which broadly covers any citizen-initiated measure or any legislatively referred referendum, both of which are defined by article V, section 1. (*See id.* at 8, n.3.). As for history and intent, the 1994 Blue Book explained that Referendum A (which added subsection 1(5.5)) would "require … proposals initiated by the people ***and referred by the General Assembly*** be confined to a single subject which shall be clearly expressed in the title." (Pet'rs' Opening Br. 8, n.3 (citing statements in 1994 Blue Book 2).) Subsection 1(5.5) therefore limits the referendum power in subsection 1(3), both as exercised by the people ***and*** the general assembly.

The remedy for "a measure"—whether referred by the people or the general assembly—"contain[ing] more than one subject, such that a ballot title cannot be fixed that clearly expresses

[3] Notably, the Single Subject Requirement for legislatively referred ***constitutional amendments*** is governed by a different constitutional provision. *See* Colo. Const. art. XIX, § 2. Unlike subsection 1(5.5), as the supreme court stated in *Polhill*, "Article XIX, Section 2(3) … does not confer jurisdiction on the courts to review proposed constitutional amendments before they are submitted to the electorate." 923 P.2d at 121.

a single subject," is that "no title shall be set ***and the measure shall not be submitted to the people for adoption or rejection at the polls***." Colo. Const. art. V, § 1(5.5) (emphasis added). Critically, this constitutional remedial scheme is "self-executing." *See* Colo. Const. art. V, § 1(10). While the general assembly has passed legislation directing ballot title challenges to citizen-initiated measures to the state title board, *see* Colo. Rev. Stat. § 1-40-106, measures referred by the general assembly are adjudicated by the courts under Colo. Rev. Stat. § 1-11-203.5, hence Petitioners' first jurisdictional argument. Nonetheless, if the Governor is right and section 1-11-203.5 does not covey jurisdiction to decide Petitioners' single subject challenge, jurisdiction is still proper under article V, subsection 1(5.5), as it is self-executing.

No matter the path—statutory or constitutional—the result is the same: the Court has jurisdiction to decide whether Proposition HH violates the Single Subject Requirement.

### B. Proposition HH presents multiple subjects to voters in violation of the constitution.

Proposition HH logrolls all the subjects contained in SB23-303 articulated *supra* and in Petitioner's Opening Brief. But, it goes even further: it also functions as a surprise referendum on HB23-1311. This second measure, which provides that TABOR refunds—while they last—will be paid at a flat rate to all eligible taxpayers instead of at varying levels tied to taxes actually paid, is related to SB23-303 only by dint of legislative fiat. The Governor attempts to whistle past the graveyard, arguing that precisely because HB23-1311 is not the same bill as SB23-303, and because HB23-1311 encompasses only a single subject, it cannot violate the Single Subject Requirement. (*See* Governor's Opening Br. 8, n.9.) But of course, Petitioners do not argue that HB23-1311 violates the Single Subject Requirement. Rather it is HB23-1311's inclusion in Proposition HH—without so much as a word in the ballot title—that adds to the surfeit of Single Subject Requirement violations presented by Proposition HH. To wit: the change to TABOR refund payment—from being based on taxes actually paid to a flat rate for all taxpayers—

presents an additional subject, completely unrelated to property tax relief. Thus, even if the Court would hold that SB23-303's multiple subjects are somehow permissible under the Single Subject Requirement (they are not), it cannot permit Proposition HH to proceed to the ballot. *See* Colo. Const. art. V, § 1(5.5) ("If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.").

## III. Alternatively, Proposition HH's Ballot Title Violates the Clear Title Requirement and Must Be Corrected by the Court.

The Governor's excuse for Proposition HH's woefully deficient title is that the title "cannot concisely detail" the myriad "mechanics" of the measure, because to do so "would result in an overlong title that creates … voter confusion." (*See* Governor's Opening Br. 18.) Petitioners don't disagree, which is why Proposition HH violates the Single Subject Requirement. To draft a title that "clearly" states all the critical parts of Proposition HH, while at the same time concluding the measure advances a single subject, is a fool's errand.

Nonetheless, if the Court has reached this issue, it must ask: does Proposition HH's title "correctly and fairly express the true intent and meaning" of the measure, and will it be clear to voters "the effect of a 'yes/for' or 'no/against' vote"? *See In re Title, Ballot Title & Submission Clause for 2015–16 #156*, 413 P.3d 151, 153 (Colo. 2016) (*2015–16 #156*) (quoting Colo. Rev. Stat. § 1-40-106(3)(b)). The answer is, no.

*First*, the title, which the Governor promotes is all about tax ***relief***, fails to inform voters of the actual relief proposed. The reason is plain: Proposition HH would only reduce assessment rates by 0.05% (on most non-residential property) to 0.065% (on most residential property). The Governor responds that the titles (both SB23-303's and Proposition HH's) "could not enumerate specific numbers as to the magnitude of property tax relief" yet "remain a clear and brief title." (*See* Governor's Opening Br. 15.) But Petitioners can do it in 20 words: reducing "the residential

assessment rate from 6.765% to 6.7% and reducing the assessment rate for commercial property from 27.9% to 27.85%." (*See* App. C (appendix outlining alternative ballot titles Proposition HH's current language).) Not only that, but it is standard practice to include first-year reductions (*see* below), and in fact required for citizen-initiated measures. *See* Colo. Rev. Stat. § 1-40-106(3)(e). Even more, HB21-1321—also sponsored by SB23-303 sponsors, Kennedy and Weissman—requires revenue from a measure's fiscal impact statement be included in the ballot title for citizen-initiated measures. Surely if citizens can comply, the government can as well.

| Measure | Title |
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| 2022-Proposition 121[4] | Shall there be a change to the Colorado Revised Statutes reducing the state income tax rate ***from 4.55% to 4.40%***? |
| 2021-Proposition 120[5] | Shall there be a change to the Colorado Revised Statutes concerning property tax reductions, and, in connection therewith, reducing property tax revenue by an estimated $1.03 billion in 2023 and by comparable amounts thereafter by reducing the residential property tax assessment rate ***from 7.15% to 6.5%*** and reducing the property tax assessment rate for all other property, excluding producing mines and lands or leaseholds producing oil or gas, ***from 29% to 26.4%*** and allowing the state to annually retain and spend up to $25 million of excess state revenue, if any, for state fiscal years 2022-23 through 2026-27 as a voter-approved revenue change to offset lost revenue resulting from the property tax rate reductions and to reimburse local governments for revenue lost due to the homestead exemptions for qualifying seniors and disabled veterans? |
| 2020-Proposition 116[6] | Shall there be a change to the Colorado Revised Statutes reducing the state income tax rate ***from 4.63% to 4.55%***? |
| 2003-Amendment 32[7] | An amendment to section 3(1)(b) of article X of the constitution of the state of Colorado, concerning the ratio of valuation for assessment for taxation of residential real property, and in connection therewith, setting |

[4] Ballot History for 2022-Proposition 121, Colorado General Assembly (emphasis added) https://bit.ly/3oIXHqm

[5] Ballot History for 2021-Proposition 120, Colorado General Assembly (emphasis added) https://bit.ly/3oIXHqm.

[6] Ballot History for 2020-Proposition 116, Colorado General Assembly (emphasis added) https://bit.ly/3oIXHqm.

[7] Ballot History for 2003-Amendment 32, Colorado General Assembly (emphasis added) https://bit.ly/3oIXHqm.

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| | the ratio ***at eight percent*** of actual value for property tax years commencing on or after January 1, 2004, and eliminating the annual adjustment of the ratio that insures that the percentage of the total statewide assessed value attributable to residential real property remains the same as it was in the previous year. |

In the end, Proposition HH's introduction, "Shall the state reduce property taxes for homes and business," is no more informative than asking, "Should property taxes be lowered?" Nor is it a defense that the specifics may be viewed by reading a 48-page bill or the Blue Book. "It will not do" to simply direct those reading the title to "the body of the act" in search of the bill's true function. *In re Breene*, 24 P. 3, 4 (Colo. 1890). And as for the Blue Book, its drafting is subject to the same legislative oversight that resulted in Proposition HH's title, Colo. Rev. Stat. § 1-40-124.5, which is clearly not keen on disclosure of details and fiscal impacts. *Cf.* John Frank, *Colorado Lawmakers Edit 2016 Voter Guide to Make Opening Primaries Less Appealing*, The Denver Post (Oct. 27, 2016), https://bit.ly/43zUKaM.

*Second*, the Governor readily admits that Proposition HH omits reference to HB23-1131, which would change the method for calculating TABOR refunds (*see generally* Pet'rs' Opening Br., App. B). (*See* Governor's Opening Br. 8, n.9.) But per the Governor, there is no need for him or the general assembly to inform voters that Proposition HH also serves as a referendum on HB23-1311, because that measure a ***separate*** bill. (*Id.*) This strains incredulity. The foundation of the Clear Title Requirement is to avoid the "evils" of "pass[ing] unknown and alien subjects" (*id.* at 14 (quoting *Breene*, 24 P. at 3–4)), and to avoid titles where "the effect of a 'yes/for' or 'no/against' vote will be unclear," *2015–16 #156*, 413 P.3d at 153. Yet, the Governor maintains it's perfectly acceptable to omit from the title the fact that a "yes" vote for Proposition HH will have the effect of fundamentally rewriting how TABOR refunds are calculated and distributed. Such a view of the Clear Title Requirement is indefensible and, if sanctioned, will breed an entire new crop of Trojan-Horse measures in elections to come.

*Third*, the title's departure from prior practices and customs for describing de-Brucing measures to voters gives away the game. As Petitioners explained in their opening brief, the government speaks—here, through the words used to describe Proposition HH and its title—from a place of authority, hence the need to be clear and to avoid misleading titles. But instead of heeding words and phrases that inform, the government departed from these familiar descriptions for reasons only it knows. (*See* Pet'rs' Opening Br. 17, 20.)

The most apparent example of this is the omission of a variation of the phrase, "shall the state be authorized/permitted to retain and spend" beyond constitutional limits. This phrase—which, again, Colorado voters have seen on the ballot for decades—carries an important message: namely, that the state is asking voters for permission to keep and spend money that otherwise must be refunded to eligible taxpayers under TABOR. Proposition HH, however, eschews clarity of intent for words of advocacy that mislead. Indeed, the title merely asks whether the state should reduce property taxes, backfill lost revenue, and fund new education appropriations "by using a portion of the state surplus." (*See* Pet'rs' Opening Br., App. A at 4 (Section 3).) There is nothing in the phrase, "by using a portion of the state surplus," to inform voters that, before these "surplus funds" may be "used," voters must authorize the state to keep the funds; and if they don't provide permission, the funds must be refunded.[8] Recognizing this shortcoming, the Governor pivots and argues the words "state surplus" "clearly expresses to voters that the State will be authorized to retain dollars that would otherwise be refunded to citizen." (Governor's Opening Br. 19.) This is hardly the case;[9] nor does this argument explain

[8] The Governor argues any surprise will be mitigated because "Colorado taxpayers received a $750 check one year ago due to surplus state revenue." (Governor's Opening Br. 19.) But the general assembly and the Governor did not use "state surplus" to describe these checks; rather, they opted for a catchier phrase, "Colorado Cash Back." *See* Colo. Dept. of Rev., About Colorado Cash Back (describing Senate Bill 22-233), https://bit.ly/3MR0lT2.

[9] The word "surplus" means "[a]n amount of something that is more than what is required or used." Surplus, Black's Law Dictionary (11th ed. 2019). A ***surplus*** therefore is different than

why the general assembly and the Governor didn't just stick with the language that has been used for decades ("shall the state be authorized/permitted to retain and spend"), if all along that was the intent.[10] In truth, the only sensible reason for incorporating different—vague—language is that the drafters intended a different meaning.

* * *

Proposition HH's title is anything but clear—whether intentional or not. The remedy for a violation of the Clear Title Requirement is for the Court to correct the title. Colo. Rev. Stat. § 1-11-203.5(3). In correcting Proposition HH's title, Petitioners respectfully point the Court to the proposed alternative titles in Appendix C attached to Petitioners' opening brief.

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a ***refund***, i.e., "[t]he money returned to a person who overpaid." Refund, Black's Law Dictionary (11th ed. 2019). To be clear, no taxpayer filing a state return who is owed money back would consider the money to be a surplus of government funds. The government's choice to use these terms interchangeability is guaranteed to confuse voters.

[10] The Governor's comparison to Initiative 2023–24 #21 fares no better. (*See* Governor's Opening Br. 19–20.) The title for Initiative 2023–24 #21 includes the phrase, "allowing the state to annually retain and spend up to $100 million of excess state revenue." Results for Proposed Initiative #21, Colo. Sec'y of State, https://bit.ly/3IW0hAl. This is the exact language Petitioners claim is missing from Proposition HH's title.

The same goes for the other de-Brucing measure cited by the Governor. (*See* Governor's Opening Br. 20 (citing Proposition 120).) In whole, Proposition 120's title read:

> Shall there be a change to the Colorado Revised Statutes concerning property tax reductions, and, in connection therewith, reducing property tax revenue by an estimated $1.03 billion in 2023 and by comparable amounts thereafter by reducing the residential property tax assessment rate from 7.15% to 6.5% and reducing the property tax assessment rate for all other property, excluding producing mines and lands or leaseholds producing oil or gas, from 29% to 26.4% and allowing the state to annually retain and spend up to $25 million of excess state revenue, if any, for state fiscal years 2022-23 through 2026-27 as a voter-approved revenue change to offset lost revenue resulting from the property tax rate reductions and to reimburse local governments for revenue lost due to the homestead exemptions for qualifying seniors and disabled veterans?

2021 State Ballot Information Booklet, Leg. Council of the Colo. Gen. Assemb. 36, https://bit.ly/3WQQn94. Petitioners agree Proposition 120's title comports with the Clear Title Requirement; however, Petitioners disagree Proposition HH's title looks anything like this title.

In addition to correcting Proposition HH's title, Petitioners request that the Court award Petitioners attorneys' fees and costs, *see* § 1-11-203.5(3) ("[T]he court shall provide in its order the text of the corrected ballot title … and shall award costs and reasonable attorneys fees to the [petitioner]."), and direct Petitioners to file their bill of costs and petition for fees within 14 days of the Court's order correcting Proposition HH's title.

**CONCLUSION**

Based on the foregoing, Petitioners request that the Court enter a judgment declaring SB23-303 violates the Colorado Constitution's Single Subject Requirement and is therefore void. Alternatively, Petitioners request that the Court (1) enter a judgment declaring Proposition HH violates the Single Subject Requirement and (2) enter an injunction against the Secretary of State directing her not to include Proposition HH on the November 2023 election ballot. As a further alternative, Petitioners request that the Court (1) enter a judgment declaring Proposition HH violates the Colorado Constitution's Clear Title Requirement and (2) correct Proposition HH's title by adopting one of Petitioners' proposed alternatives.

Respectfully submitted this 5th day of June, 2023.

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**CERTIFICATE OF SERVICE**

I certify on June 5, 2023, I electronically filed a true and correct copy of **Petitioners' Answer Brief** with the Clerk via the Colorado Courts E-Filing system, which will send notification of such filing to:

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