DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Petitioners: 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, v. **Respondents**: 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 Suzanne M. Taheri, #23411 WEST GROUP LAW & POLICY 6501 E. Belleview Ave, Suite 375 Englewood, Colorado 80111 Phone: (303) 263-0844 Email: st@westglp.com	Case No.: 2023CV31432 Division: 280
Petitioners' Opening Brief	

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INTRODUCTION

Colorado's constitution mandates that legislation be confined to a single subject clearly expressed in the legislation's title. This protects Coloradans debating legislation—whether in the general assembly or at the polls—from being forced to choose between something they support and something they don't. It also protects against Coloradans being bamboozled into supporting complex legislation touching disparate areas of life and later being surprised by the effect of the decision they made. This case forces the Court to confront legislation and a referred ballot question that violates this common-sense requirement.

On the final day of the 2023 regular legislative session, the general assembly passed two bills covering at least five disparate subjects and made them both subject to a common vote by the people. Taken together, Senate Bill 23-303 (SB23-303) and House Bill 23-1311 (HB23-1311) function to permit the state to retain up to $10 billion in excess state revenue that would otherwise be returned to taxpayers under TABOR. Known colloquially as de-Brucing, this would likely result in the eventual end to TABOR refunds altogether. These bills also change the way TABOR refunds get paid while they still exist: instead of refunds based on taxes paid, they will be distributed on a flat basis to all eligible taxpayers. In addition to these two changes to TABOR refunds, these bills temporarily reduce property tax rates by approximately 0.05% to 0.065%, authorize tens of millions of dollars in new education funding, and appropriate up to $20 million for tenant rental assistance. These bills require all of this to be decided by the vote of Coloradans on a single ballot measure—whose title at once ignores some of these changes and obfuscates most of the remainder.

Because the title of the proposed ballot measure was set by the general assembly and governor, Petitioners are forced to bring this election contest to vindicate the state constitution. The general assembly is free to propose a statewide de-Brucing measure. It is free to adopt (or propose) property tax relief. It is free to increase funding to education. It can of course make an

appropriation for rent relief, and it can probably even change the method by which taxpayers receive their TABOR refunds. It just can't do it all in the same bill or referred measure.

RELEVANT BACKGROUND

I. Factual Background.

For almost 40 years, the average Coloradan—that is Coloradans who did not own commercial property—enjoyed constitutional insulation from rising property taxes. This protection was repealed in 2020, just before property values skyrocketed in the aftermath of the Covid-19 pandemic. The combination of significantly higher property valuations and the potential for suddenly rising assessment rates has spurred action from the general assembly. The legislative session, however, passed legislation that impermissibly ties a host of measures to generally popular and necessary property tax relief.

SB23-303, the law at issue in this case, was adopted at the eleventh hour on the last day of the legislative session. (*See* App. A.) This legislation ostensibly represents an attempt to address property tax in a long-term manner. But it does little to address property taxes: it reduces assessment rates by 0.05% (on most non-residential property) to 0.065% (on most residential property), while at the same time addressing much more than property tax relief. For example, at a committee hearing on the bill, one of SB23-303's primary Senate sponsors explained,

> [W]e are really trying to accomplish meaningful property tax relief for Colorado homeowners, while ***simultaneously making sure we have sustainable funding mechanisms for K12 and our local districts*** like ambulance districts, etc., and I think the mechanisms that are put forward in Senate Bill 303 do a good job of balancing those two needs.

Reduce Property Taxes and Voter-Approved Referendum: Hearing on S.B. 22-303 Before the Sen. Comm. on Appropriations, 74th Gen. Assemb., First Reg. Sess. (Colo. May 2, 2023) (emphasis added) (statement of Sen. Chris Hansen), *available at* https://bit.ly/3ILsoSy (at 12:09:03 p.m.). As the subjects addressed by SB23-303 continued to multiply, the sponsor of a

house amendment, which added a $20 million appropriation for rental assistance to the already complex bill, promoted the amendment by saying,

> Members, I am here because, you know, we look at the fact that, you know, that this helping our property owners, and we need to look at how we're ***also helping other people in our state***. We know that 40% of Coloradans are renters. And because of that, I move Amendment L-91 and ask for it to be properly displayed.

Debate on S.B. 22-303 Before the Full House, 74th Gen. Assemb., First Reg. Sess. (Colo. May 7, 2023) (emphasis added) (statement of Rep. Serena Gonzales-Gutierrez), *available at* https://bit.ly/3WAnEFn (at 3:44:38 p.m.). Consistent with the stated intent of its supporters in the general assembly, SB23-303 is a Christmas tree of a statute. In addition to reducing the assessed valuations for classes of real property for ten years, the law:

- Creates new subclasses of property, sets requirements for qualifying properties into these subclasses, and establishes assessment rates for these subclasses.
- Permits the state to retain a portion of funds that would otherwise be refunded to taxpayers under TABOR. This would "de-Bruce" state revenue up to a new limit that adds 1% annually to the calculation. Over the ten years covered by the measure, the TABOR cap would increase to $2.2 billion over the current cap, resulting in an additional $10 billion in revenue retained by the state.
- Appropriates $128 million to a local government "backfill" cash fund, $117.7 million to school finance, and $72 million into the state public school fund. This $72 million is new money, not a replacement of funds that may be "lost" due to reduced property taxes.
- Allocates up to $20 million toward a state rental assistance program.
- Provides that the first $140,000.00 of assessed value on a residential property serving as the primary residence for a senior citizen is exempt from taxes, essentially modifying, but continuing an exemption already existing in Colorado law.
- Ties all of this to the passage of a referred measure, Proposition HH, the title of which states only: "SHALL THE STATE REDUCE PROPERTY TAXES FOR HOMES AND BUSINESSES, INCLUDING EXPANDING PROPERTY TAX RELIEF FOR SENIORS, AND BACKFILL COUNTIES, WATER DISTRICTS, FIRE DISTRICTS, AMBULANCE AND HOSPITAL DISTRICTS, AND OTHER LOCAL GOVERNMENTS AND FUND SCHOOL DISTRICTS BY USING A PORTION OF THE STATE SURPLUS UP TO THE PROPOSITION HH CAP AS DEFINED IN THIS MEASURE?"

- Finally, and perhaps tellingly, SB23-303 expressly exempts Proposition HH's woefully deficient title from the statutory requirement that a referred measure specifically state that it proposes a change to the Colorado revised statutes.

The general assembly adopted SB23-303 on May 8, 2023.

On the same day, the general assembly also passed HB23-1311. (App. B) This second law—which the general assembly also conditioned on the adoption of Proposition HH—materially changes the methodology for the distribution of TABOR refunds. It mandates that all eligible Colorado taxpayers receive a TABOR refund in the same flat amount rather than the current system based on excess taxes paid. Governor Polis signed HB23-1311 and SB23-303 on May 24, 2023, at the same ceremonial signing.

II. Procedural Background.

On May 15, 2023, days after the general assembly passed SB23-303 and HB23-1311, Petitioners Ward and Advance Colorado filed their verified complaint under Colo. Rev. Stat. § 1-11-203.5, against the State of Colorado, Governor Polis, and Secretary Griswold, challenging both SB23-303 and Proposition HH as violating the Colorado Constitution. Petitioners Ward and Advance Colorado later filed first and second amended complaints. The second amended complaint—filed the same day SB23-303 and HB23-1311 were signed by the Governor—adds local elected officials and voters, twelve counties in Colorado, and the Highlands Ranch Metropolitan District, and raises two claims challenging both SB23-303 and Proposition HH: (1) the bill and proposition violate the Colorado Constitution's single subject mandate (first cause of action), and (2) the bill and proposition violate the Colorado Constitution's clear title mandate (second cause of action). (Second Am. Compl. ¶¶ 70–78.) Petitioners seek both declaratory and injunctive relief, which is further outlined in the argument sections below.

This contest is an "election contest[] arising out of a ballot issue or ballot question election" under Colo. Rev. Stat. § 1-11-203.5. Section 203.5 "provides a twenty-day process for the court to hear complaints." *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 460

(Colo. 2004). A case is initiated by verified petition, and respondents "shall answer under oath within five days after service." § 1-11-203.5(2). The court must then "set the matter for trial on the merits and … adjudicate it within ten days of the date of filing of the answer." *Id.*

Appreciating the compressed schedule imposed by section 1-11-203.5, counsel for Petitioners and Respondents conferred and proposed a briefing schedule requiring simultaneous opening briefs on Tuesday, May 30, 2023, and simultaneous answer briefs on Monday, June 5, 2023. The briefs are limited to 20, double-spaced pages. The Court approved the parties' briefing schedule, making a final decision due on or before Friday, June 9, 2023.

III. Background and History of the Colorado Constitution's Single Subject and Clear Title Requirements for Bills and Referred Measures.

This case centers on two constitutional requirements that have existed in the Colorado Constitution in some form since statehood. Article V, Section 21 of the Colorado Constitution (Section 21) commands that

> No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title … .

See also Colo. Const. art. V, § 21 (1876) (same). This simple—yet critical—provision is a directive ***by people*** to the general assembly. It limits the legislative power by prohibiting "the joining in the same bill subjects diverse in their natures" (Single Subject Requirement) and prohibiting "the insertion of clauses in a bill of which the title gives no intimation" (Clear Title Requirement). *People v. Fleming*, 3 P. 70, 71 (Colo. 1884).

Colorado was not alone in adopting the Single Subject and Clear Title Requirements. At least 43 states have either a Single Subject or Clear Title Requirement. *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. Pitt. L. Rev. 803, 870 n.43 (2006). Nor was the genius of these Requirements an innovation. As early as 98 B.C., when "social relations became more complex" and laws "necessarily departed from simplicity," the Romans recognized the need to guard against "crafty" lawmakers who "learned how to carry a doubtful proposal by

harnessing it up with one more favored." Robert Luce, Legislative Procedure: Parliamentary Practices and the Course of Business in the Framing of Statutes 548–49 (1922).

What was true 2,100 years ago, remains true today. The animating purpose behind the Single Subject and Clear Title Requirements is to protect the people and legislators from being "misled" and from "surprise and imposition." *Fleming*, 3 P. at 71. These limitations ensure "each legislative proposal depends upon its own merits for passage and protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex bill." *In re Title, Ballot Title & Submission Clause for 2001-02 #43*, 46 P.3d 438, 440 (Colo. 2002) (quoting *In re Breene*, 24 P. 3, 4 (1890)), *disapproved on other grounds in In re Title, Ballot Title & Submission Clause for 2019-20 #3*, 442 P.3d 867 (Colo. 2019).

The general assembly itself has promoted these constitutional requirements in legislative findings and declarations. It has declared "the constitutional single-subject requirement … was designed to prevent or inhibit various inappropriate or misleading practices that might otherwise occur." Colo. Rev. Stat. § 1-40-106.5(1)(d). Heeding the courts' interpretation of Section 21's Single Subject and Clear Title Requirements, the general assembly accepted that the Single Subject Requirement "forbid[s] the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection," § 1-40-106.5(1)(e)(I), and that the Clear Title Requirement "prevent[s] surreptitious measures and apprise[s] the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters," § 1-40-106.5(1)(e)(II).

The people of Colorado have more recently reaffirmed the safeguards imposed by the Single Subject and Clear Title Requirements. In 1994, the people amended the state constitution to expand Section 21's Single Subject and Clear Title Requirements to initiated and referred

measures.[1] *See* 1994 State Ballot Information Booklet, Leg. Council of the Colo. Gen. Assemb. 2, https://bit.ly/3Wz0leZ (1994 Blue Book). Referendum A "require[d] that 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." *Id.*; *see also* Colo. Const. art. V, § 1(5.5), art. XIX, § 2(3). This was intended to "keep unrelated or misleading provisions out of initiated and referred measures." 1994 Blue Book 3. Quite simply, "[p]roponents of initiated proposals, and the general assembly with referred measures, should be required to present coherent ideas for change rather than roaming through Colorado law selecting a change here and another change there." *Id.*

Study of the text and history of the Single Subject and Clear Title Requirements reveal several important truths. *First*, the Requirements serve as a constitutional shield imposed by the people to ensure the general assembly—and the people—exercise their power to adopt positive law both deliberately and clearly. *Second*, the Requirements have a rich history informed by parliamentary norms that pre-date Colorado's statehood. *Third*, the people of Colorado appreciate the Single Subject and Clear Title Requirements' check on lawmaking power and understand how to amend the constitution if they believe this check should be altered.

It is against this textual and historical backdrop that Petitioners make their claims.

ARGUMENT

I. Proposition HH and SB23-303 Violate the Colorado Constitution's Single Subject and Clear Title Requirements, and Petitioners' Challenge is Ripe.

Both Proposition HH and SB23-303 must comply with the Single Subject and Clear Title Requirements.[2] Since statehood, all "bills [in Colorado] other than general appropriation bills must encompass only a single subject," *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1383

[1] The people of Colorado reserved the powers of initiative and referendum in the constitution in 1910. *See* Ch. 3, Colo. Const. art. V, § 1, 1910 Colo. Sess. Laws 11, 11–14.

[2] Petitioners do not allege that HB23-1311 violates the single subject or clear title requirements.

(Colo. 1985) (citing Colo. Const. art. V, § 21), which "shall be clearly expressed in its title," Colo. Const. art. V, § 21. SB22-303 is not an appropriations bill; so unquestionably, the bill is subject to the Single Subject and Clear Requirements. And SB23-303 is ripe for challenge. The Governor signed SB22-303 on May 24, 2023, and the constitution makes plain a bill "become[s] law" upon the governor's signature. *See* Colo. Const. art. IV, § 11. (*See also* App. A at 47 (Section 23 ("**Effective Date**") stating "[s]ection 3[;] section 39-1-104.2 (3.7) enacted in section 9 of this bill[;] section 39-3-210 (1)(a.3), (1)(e), and (2.5) enacted or amended in section 14 of this act[;] section 18[;] this section 23[;] and section 24 of this act take effect upon passage" of SB22-2023).) Thus, Petitioners challenge to SB23-303 is timely.

Likewise, Proposition HH is subject to the Single Subject and Clear Title Requirements. At least two constitutional provisions compel this conclusion. *First*, because Proposition HH is referred in SB23-303, and SB23-303 itself is subject to Section 21's Single Subject and Clear Title Requirements, it only follows that Proposition HH (the signature piece of SB23-303) also must satisfy Section 21's single subject and clear title mandates. *Second*, article V, section 1(5.5) of the constitution imposes Single Subject and Clear Title Requirements on measures referred by the general assembly. The second legislative power reserved by the people in the constitution is the power of referendum. Colo. Const. art. V, § 1(3). The power of referendum may be initiated by the people (a recission referendum) or the general assembly (a referred measure). *See id.* Referendum A, approved by voters in 1994, extended the Single Subject and Clear Title Requirements to "all measures," including referenda, which include referred measures. *See* Colo. Const. art. V, § 1(5.5).[3] This makes practical sense too; it avoids the untenable conclusion that,

[3] The relevant portion of article V, section 1(5.5) states, "[I]f any subject shall be embraced in ***any measure*** which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. 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

while the general assembly (in passing bills) and the people (in initiating measures) must follow the Single Subject and Clear Title Requirements, the general assembly is nonetheless exempt from the Requirements if it "refers" a measure.

Lastly, Petitioners' challenge to Proposition HH is proper and timely. "[A]ll 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*** shall be summarily adjudicated by the district court sitting for the political subdivision within which the contest arises prior to the election." Colo. Rev. Stat. § 1-11-203.5(1) (emphasis added). The Election Code defines "ballot question" as a "state or local government matter involving a citizen petition ***or referred measure***." *See* § 1-1-104(2.7) (emphasis added). And it defines "ballot issue" as "a state or local government matter arising under [TABOR]," including de-Brucing measures referred by the general assembly, as defined in subsections 1-41-102(c), (e)(4). *See* § 1-1-104(2.3); *see also* § 1-11-203.5(2) ("[t]he contestee shall be the state in the case of a statewide ballot issue or statewide ballot question"). Proposition HH is a referred measure within the scope of section 1-11-203.5, and Petitioners challenge the form and content of the title of the statewide measure.[4]

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polls." (Emphasis added.) The 1994 Blue Book reinforces Petitioners' reading of the constitution, describing Referendum A as an amendment to the Colorado Constitution to "require that 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." *See* 1994 Blue Book 2 (emphasis added); *see also id.* at 3 ("This proposal requires that initiated or referred amendments to the Colorado Constitution and to the statutes of the state of Colorado embody only one subject.").

[4] Petitioners acknowledge the court in *Polhill v. Buckley* turned down a pre-election, single subject challenge to a proposed constitutional amendment referred through a senate resolution. 923 P.2d 119, 112 (Colo. 1996). Petitioners' challenge, however, differs in several important ways. *First*, the senate resolution in *Polhill* was not signed by the governor, nor did it purport to bind before a vote by the people. SB22-303 was singed by Governor Polis and is law today. *Second*, the challenge in *Polhill* was not brought under section 1-11-203.5. Indeed, the supreme court recognized the general assembly could vest courts with jurisdiction to review measures before an election, but the plaintiff had not identified such a grant. That's not the case here; Petitioners have sued under a jurisdiction-conveying statute. *See* § 1-11-203.5.

II. Proposition HH and SB22-303 Violate the Colorado Constitution's Single Subject Requirement.

Proposition HH could scarcely be a better reminder of the wisdom of the Single Subject Requirement. It combines consideration of at least five different subjects across two separate legislative bills; it cannot satisfy the Single Subject Requirement and must not be certified to the ballot. And, because SB23-303 itself violates the Single Subject Requirement, it must be set aside as void.

A. Standards for deciding single subject questions.

The Single Subject Requirement "serves the beneficent purpose of making each legislative proposal depend upon its own merits for passage." *In re House Bill No. 1353*, 738 P.2d 371, 372 (Colo. 1987). A measure violates this Requirement if it "relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other." *In re Title, Ballot Title & Submission Clause for 2011-12 #3*, 274 P.3d 562, 565 (Colo. 2012) (*2011-12 #3*) (quoting *People ex rel. Elder v. Sours*, 74 P. 167, 177 (Colo. 1903)). That is, the measure "must effect or carry out only one general object or purpose," *In re Title, Ballot Title & Submission Clause for 2005-06 #74*, 136 P.3d 237, 239 (Colo. 2006), but that's not to say an "overarching theme" will save the measure "if it contains separate and unconnected purposes," *2011-12 #3*, 274 P.3d at 565–66. In the end, a measure covering more than one subject and that has at least two distinct separate purposes violates the Single Subject Requirement. *In re Titles, Ballot Titles & Submission Clauses for 2021-22 #67, #115, & #128*, 526 P.3d 927, 930 (Colo. 2022) (*2021-2022 #67, #115, & #128*).

The "dangers" avoided by hewing to the Single Subject Requirement are well documented. Indeed, the driving purpose is "to prevent or inhibit … inappropriate or misleading practices that might otherwise occur." For one, "[c]ombining subjects" to drum up support "from various factions—that may have different or even conflicting interests—could lead to the enactment of measures that would fail on their own merits." *2011-12 #3*, 274 P.3d at 566.

Another, the Single Subject Requirement helps avoid "surprise and fraud" on voters. *Id.* Ultimately, the people have decided that if there is going to be positive law that binds them, the proposed law should be presented clearly and address a single subject so the people (or the governor through veto) can weigh the law's relative worth and vote up or down.

B. Proposition HH individually violates the Single Subject Requirement.

Proposition HH presents a particularly—perhaps singularly—flagrant violation of the Single Subject Requirement. Not content to present an incomplete question on the four subjects addressed in SB23-303, the general assembly and Governor have mandated that Proposition HH will also function as a referendum on HB23-1311. In so doing, the general assembly and Governor have proposed a measure that not only addresses multiple subjects, but it addresses multiple laws. Because a ballot title necessarily cannot be fixed that clearly expresses a single subject for Proposition HH, no title may be constitutionally set for the measure, and it must not be submitted to the people for adoption or rejection at the polls.

The substance of SB23-303 is at stake in Proposition HH along with the entirety of HB23-1311. (*See* App A at 47 (Section 23(1), providing that SB23-303 "takes effect only if a majority of voters approve the ballot issue … ."); [5] App. B at 3 (Section 2(2)(a), providing that the "act takes effect only if, at the November 2023 statewide election, a majority of voters approve the ballot issue submitted for their approval or rejection pursuant to section 24-77-202, C.R.S., as enacted by Senate Bill 23-303").) The measure addresses at least five subjects across

[5] Only the referral of Proposition HH itself, a requirement that the property tax administrator convene a working group to make recommendations on how to streamline and improve the designation of a subclass of residential property in the event of Proposition HH's passage, a change to include a city and county in the definition of county and remove the same from the definition of municipality, a requirement that county treasurers report to the property tax administrator estimates for tax revenue reductions and any increases in assessed value resulting from SB22-238 and SB23-303, and a requirement that the executive director of the Department of Revenue calculate TABOR refunds that may be owed to Coloradans with or without the effect of SB23-303 remain effective if Proposition HH is rejected by voters. (*See* App. A at 47 (Section 23(2)).

these two laws. *First*, Proposition HH addresses the rate of property tax assessments; it generally reduces them for most classes of property, including newly created subclasses of property, for a period of ten years. (*See* App. A at 12–22 (Sections 7–9).) *Second*, it requests voter approval for the state to retain funds to "backfill" lost revenue ***and*** to pay for new expenditures like education. (*See id.* at 3–7 (Section 3).) This latter aspect—funding new expenditures as opposed to backfilling lost revenue—has never been done before. *Third*, Proposition HH appropriates an amount to the housing development grant fund to be used for tenant rent. (*See id.*) *Fourth*, the measure alters the method for calculating the funds subject to refunds under Colo. Const. art. X, § 20 (TABOR), and eventually sunsets such entirely. (*See id.*) *Fifth* and finally, Proposition HH serves as a referendum on HB23-1311, which addresses a fifth subject: the distribution of TABOR refunds. HB 23-1123 provides that, for the 2022 fiscal year, TABOR refunds will be even among qualifying Colorado taxpayers, not based on taxes paid during the fiscal year. (App. B at _.) HB23-1123 conditions this change on the adoption of Proposition HH.

This multiplicity of subjects implicates the central purposes of the Single Subject Requirement: the prevention of logrolling and public surprise at the effect of a measure. *First*, the Single Subject Requirement prevents logrolling: "the joining together of multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or even conflicting interest." *In re Proposed Initiative Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995), *see also In re Title, Ballot Title & Submission Clause for 2017-18 #4*, 395 P.3d 318, 321 (Colo. 2017) (*2017-18 #4*) (noting logrolling allows the adoption of multiple proposals in one measure that would fail if presented independently). By combining temporary property tax relief with the dedication of money to existing education funds and other public expenditures, an appropriation for rent relief, and the retention of state revenue that is otherwise subject to TABOR refunds, Proposition HH is a quintessential example of logrolling.

Add in HB23-1311's requirement that Proposition HH functions as a referendum on its provision for the even distribution of TABOR refunds and you have a logrolling singularity.

Courts considering whether a measure logrolls typically look to see whether the measure forces a legislator or voter to simultaneously vote for something he does not support to get something he does (or vice versa). For example, in *2021-22 #67, #115, & #128*, the supreme court recently held that three initiatives, each of which would simultaneously increase the authority of food retailers to sell wine and authorize third-party providers to deliver alcohol from licensed retailers to consumers, addressed two subjects and therefore violated the single subject rule. 526 P.3d at 930. In so holding, the supreme court noted that "some voters might well support home delivery of alcohol while preferring to keep wine out of grocery stores, and others might feel precisely the opposite." *Id.* at 932.

So too here, but in spades. A voter could—easily—be understood if he supported property tax relief, but not the retention of state revenues subject to refund under TABOR to fund state expenditures beyond backfilling. Indeed, this would make sense: one policy (property tax relief) will tend to lessen his tax burden, the other (retention of revenue that would otherwise be refunded to taxpayers) would tend to increase that burden. Similarly, a voter could logically be against retaining revenue to fund education, but in favor of rent relief. Indeed, a voter could be against everything proposed in SB23-303, but for the even distribution of TABOR refunds. This is because these subjects are not "necessarily and properly connected," *In re Title, Ballot Title & Submission Clause for 2021-22 #16*, 489 P.3d 1217, 1221 (Colo. 2021) (*2021-22 #16*), nor do they "tend to effect or to carry out one general objective or purpose," *id.* (quoting *2017-18 #4*, 395 P.3d at 321). Because the provisions of Proposition HH are "disconnected or incongruous" and cover "more than one subject [having] at least two distinct and separate purposes which are not dependent upon or connected with each other," *2021-22 #16*, 489 P.3d at 1221, Proposition HH violates the Single Subject Requirement.

Proposition HH also implicates the Single Subject Requirement's purpose to prevent fraud upon the public and resulting surprise at the content of a measure. *See In re Title, Ballot Title & Submission Clause for 2009-10 #91*, 235 P.3d 1071, 1079 (Colo. 2010) ("[t]he single-subject rule also serves to prevent voter surprise by prohibiting proponents from hiding effects in the body of a complex proposal"); *see also Edwards v. Denver & R.G.R. Co.*, 21 P. 1011, 1013 (Colo. 1889) ([t]he purpose of this constitutional provision is to prevent surprise and deception through legislation pertaining to one subject, under title relating to another"). Colorado courts have required that the single subject of a bill be so clear that "the connection should be within the comprehension of the ordinary intellect." *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #25*, 974 P.2d 458, 460–61 (Colo. 1999). Perhaps unsurprisingly, not all five disparate subjects addressed by Proposition HH made it into its title. The general assembly would have the people consider this language,

> SHALL THE STATE REDUCE PROPERTY TAXES FOR HOMES AND BUSINESSES, INCLUDING EXPANDING PROPERTY TAX RELIEF FOR SENIORS, AND BACKFILL COUNTIES, WATER DISTRICTS, FIRE DISTRICTS, AMBULANCE AND HOSPITAL DISTRICTS, AND OTHER LOCAL GOVERNMENTS AND FUND SCHOOL DISTRICTS BY USING A PORTION OF THE STATE SURPLUS UP TO THE PROPOSITION HH CAP AS DEFINED IN THIS MEASURE?

(App. at 4 (Section 3).) Even reading this title in an obsequiously generous manner, the subject of a referendum on HB23-1311's flat distribution of TABOR refunds is wholly absent. As explained in III.B, *infra*, this—in addition to other failures—also violates the Clear Title Requirement. For the purposes of the Single Subject Requirement, the complete absence of at least one of five subjects addressed by Proposition HH from its proposed ballot title necessarily implicates the interest against fraud on the voters considering the proposal and resulting surprise, particularly given the length and complexity of Proposition HH. The Proposition's full text nowhere mentions its function as a referendum on HB23-1311's TABOR refund; this makes Proposition HH's title a clear violation of the Single Subject Requirement.

Because Proposition HH violates the Single Subject Requirement, there necessarily is no title that can be set for the measure and therefore may not be submitted to the voters for their approval. *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.") Hence, the only appropriate relief for Proposition HH's violation of the Single Subject Requirement is a declaratory judgment that Proposition HH's title as set by SB23-303 violates the Single Subject Requirement, and an injunction enjoining the Secretary of State from placing Proposition HH on the November 2023 ballot.

C. SB22-303 in its entirety violates the Single Subject Requirement.

As discussed above, SB23-303 itself encompasses at least four disparate subjects. As such, it also, and independently, violates the Single Subject Requirement. *See People ex rel. Dunbar v. Gilpin Inv. Co.*, 493 P.2d 359, 361 (Colo. 1972) (citing *Redmon v. Davis*, 174 P.2d 945 (1946)). As legislation that has been passed and signed into law by the Governor, SB23-303 is subject to a declaration that it is in contravention of the constitution and void. *See Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 209 (Colo. 1991) (affirming judicial authority to issue declaratory judgment of invalidity for noncompliance with article V, section 22b). The Court should enter such a declaratory judgment. Because the effect of such a declaration would be to invalidate SB23-303 in its entirety, this would also have the effect of obviating the need for a separate declaration and injunction regarding Proposition HH.

III. Proposition HH Violates the Colorado Constitution's Clear Title Requirement.

A. Standards for deciding clear title questions.

The Clear Title Requirement is distinct from the Single Subject Requirement: even if a measure has a single subject, it may be unconstitutional if that single subject isn't clearly expressed in the title. The supreme court first interpreted this requirement in the late nineteenth

century in *In re Breene*, 24 P. 3, 4 (1890). There, the court overturned the conviction of the state treasurer (Breene) for lending public monies for private gain holding that the statute used to convict him did not satisfy the Clear Title Requirement. *Id.* at 3. The court articulated the standard for determining compliance with the Clear Title Requirement as follows:

> ***It will not do to say that the general subject of legislation may be gathered from the body of the act***, for, to sustain the legislation at all, it must be expressed in the title. Moreover, we are bound to assume that ***the word "clearly" was not incorporated into the constitutional provision under consideration by mistake***. It appears in but few of the corresponding provisions of other state constitutions; a fact that could hardly have been unobserved by the convention. That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. ***The matter covered by legislation is to be "clearly," not "dubiously" or "obscurely," indicated by the title***. Its relation to the subject must not rest upon a merely possible or doubtful inference. ***The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.***

Id. at 4 (emphasis added). Since application of the Clear Title Requirement to "all measures" under Referendum A, the supreme court has incorporated the *Breene* standard to measures designated for the ballot. *See In re Public Rights in Waters II*, 898 P.2d at 1079 ("[T]his [Clear Title Requirement] parallels the same requirement in Article V, Section 21, concerning the single subject requirement for bills and is intended to prevent voter surprise or uninformed voting caused by items concealed within a lengthy or complex proposal.").

Further, the requirement for compliance with the Clear Title Requirement is particularly acute when the government is the proponent of a measure. The government speaks from a position of entitlement and deference and therefore is uniquely situated to mislead. For this reason, courts have struck ballot measures as violating constitutional due process because their titles were "so misleading as to deceive voters about the subject of the measure." *See, e.g.*, *Caruso v. Yamhill Cnty. ex rel. Cnty. Com'r*, 422 F.3d 848, 863–64 (9th Cir. 2005); *Nat'l*

Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 858 (9th Cir. 2002). Constitutional concerns thus must inform how the Court applies the clear title standard to Proposition HH.

B. Proposition HH violates the Clear Title Requirement.

Proposition HH presents an overt violation of the Clear Title Requirement for at least three reasons. *First*, Proposition HH's title provides no detail whatsoever on the rate or amount of the tax reduction. Rather, it imperiously asks, "[s]hall the state reduce property taxes for homes and business"? Surely knowing the specific reduction promised (6.765% to 6.7% on residential property tax assessment rate and 27.9% to 27.85% on the commercial property tax assessment rate) are details the title should share with voters. *Second*, its title (quoted *supra*) makes absolutely no mention, dubious or otherwise, of the fact that it serves as a referendum on HB23-1131, and that it will authorize a $20 million appropriation for rental assistance. This is enough to disqualify the title set by SB23-303. *Third*, Proposition HH's title uses confusing and obfuscating language to present the de-Brucing question that is the measure's ostensible raison d'être. Instead of the familiar invocation of "may the state keep/retain and/or spend" excess TABOR funds, the Proposition creates a term that borders on Orwellian in the TABOR context: "State Surplus" and asks merely whether voters would like the state to "use a portion of the State Surplus" to pay for a cornucopia of public projects (beyond backfilling) up to the "Project HH Cap as defined in the measure." Under *Breene*, this simply will not do; "[i]t will not do to say that the general subject of legislation may be gathered from the body of the act." 24 P. at 4. Yet, to the extent the body of Proposition HH reveals the subjects it addresses—and the body says nothing about the measure's effect on HB23-1311—this is exactly what SB23-303 requires a voter considering Proposition HH to do: scour the body of the measure to sus out its multiple subjects. For these reasons, Proposition HH fails the Clear Title Requirement. To the extent the Court believes it can be permitted on the ballot despite its violation of the Single Subject Requirement—and to be clear, it cannot—the Court must set a new title for the measure.

C. Subsection 203.5(3) requires the Court to correct unclear titles, if possible.

If an unclear title can be corrected, Colo. Rev. Stat. § 1-11-203.5(3) instructs that "the court shall provide in its order the text of the corrected ballot title … to be placed upon the ballot." To be clear, Petitioners' position is that the single subject violations in Proposition HH's title cannot be remedied by judicial rewrite. If, however, the Court disagrees with the single subject challenges and finds Proposition HH's title nonetheless violates the Clear Title Requirement, subsection 1-11-203.5(3) requires a judicial rewrite of the title.

In rewriting Proposition HH's title, the titles of de-Brucing measures referred by the general assembly in prior elections are instructive. These titles reflect a custom as to what voters expect when the general assembly refers a measure and asks to retain and spend state revenues that otherwise would be refunded to the people. There are five such exemplars:

Measure	Title
2019-Proposition CC[6]	WITHOUT RAISING TAXES AND TO BETTER FUND PUBLIC SCHOOLS, HIGHER EDUCATION, AND ROADS, BRIDGES, AND TRANSIT, WITHIN A BALANCED BUDGET, MAY THE STATE KEEP AND SPEND ALL THE REVENUE IT ANNUALLY COLLECTS AFTER JUNE 30, 2019, BUT IS NOT CURRENTLY ALLOWED TO KEEP AND SPEND UNDER COLORADO LAW, WITH AN ANNUAL INDEPENDENT AUDIT TO SHOW HOW THE RETAINED REVENUES ARE SPENT?
2015-Proposition BB[7]	May the state retain and spend state revenues that otherwise would be refunded for exceeding an estimate included in the ballot information booklet for proposition AA and use these revenues to provide forty million dollars for public school building construction and for other needs, such as law enforcement, youth programs, and marijuana education and prevention programs, instead of refunding these revenues to retail marijuana cultivation facilities, retail marijuana purchasers, and other taxpayers?

[6] Ballot History for 2019-Proposition CC, Colorado General Assembly, https://bit.ly/3oIXHqm.

[7] Ballot History for 2015-Proposition BB, Colorado General Assembly, https://bit.ly/3oIXHqm.

2005-Referendum C[8]	WITHOUT RAISING TAXES AND IN ORDER TO PAY FOR EDUCATION; HEALTH CARE; ROADS, BRIDGES, AND OTHER STRATEGIC TRANSPORTATION PROJECTS; AND RETIREMENT PLANS FOR FIREFIGHTERS AND POLICE OFFICERS, SHALL THE STATE BE AUTHORIZED TO RETAIN AND SPEND ALL STATE REVENUES IN EXCESS OF THE CONSTITUTIONAL LIMITATION ON STATE FISCAL YEAR SPENDING FOR THE NEXT FIVE FISCAL YEARS BEGINNING WITH THE 2005-06 FISCAL YEAR, AND TO RETAIN AND SPEND AN AMOUNT OF STATE REVENUES IN EXCESS OF SUCH LIMITATION FOR THE 2010-11 FISCAL YEAR AND FOR EACH SUCCEEDING FISCAL YEAR UP TO THE EXCESS STATE REVENUES CAP, AS DEFINED BY THIS MEASURE?
2000-Referendum F[9]	Shall the state of Colorado be permitted to annually retain up to fifty million dollars of the state revenues in excess of the constitutional limitation on state fiscal year spending for the 1999-2000 fiscal year and for four succeeding fiscal years for the purpose of funding performance grants for school districts to improve academic performance, notwithstanding any restriction on spending, revenues, or appropriations, including without limitation the restrictions of section 20 of article X of the state constitution and the statutory limitation on state general fund appropriations?
1998-Referendum B[10]	Shall the state of Colorado be permitted to annually retain up to two hundred million dollars of the state revenues in excess of the constitutional limitation on state fiscal year spending for the 1997-98 fiscal year and for four succeeding fiscal years for the purpose of funding school district capital construction projects, state and local transportation needs, and capital construction projects of state colleges and universities, notwithstanding any restriction on spending, revenues, or appropriations, including without limitation the restrictions of Section 20 of Article X of the state constitution and the statutory limitation on state general fund appropriations, and, in connection therewith, requiring annual transfers of such excess revenues for these purposes, specifying the allocation of such excess revenues for these purposes, specifying the fund to which a portion of the excess revenues is to be transferred for school district capital construction, establishing a special account in the capital construction fund to which a portion of the excess revenues is to be transferred for higher education capital construction, and specifying the allocation of the portion

[8] Ballot History for 2005-Referendum C, Colorado General Assembly, https://bit.ly/3oIXHqm.

[9] Ballot History for 2000-Referendum F, Colorado General Assembly, https://bit.ly/3oIXHqm.

[10] Ballot History for 1998-Referendum B, Colorado General Assembly, https://bit.ly/3oIXHqm.

	of the excess revenues transferred to the highway users tax fund for state and local transportation needs?

Each title evidences at least three commonalities. *First*, each title contains slight variations on one of the two phrases: "may the state keep/retain and spend" or "shall the state be authorized/permitted to retain and spend." *Second*, each title exhaustively lists what the retained funds will be spent on and matters contingent upon passage. *Three*, each title acknowledges that the state is asking to spend/keep/retain funds above the constitutional limitation. Proposition HH does none of these.

If the Court corrects Proposition HH's title under subsection 1-11-203.5(3), the Court should consider Petitioners' proposed alternatives included in Appendix C.

CONCLUSION AND REMEDY

Based on the foregoing, Petitioners request that the Court enter a judgment declaring SB22-303 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 30th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify on May 30, 2023, I electronically filed a true and correct copy of **Petitioners' Opening Brief** with the Clerk via the Colorado Courts E-Filing system, which will send notification of such filing to:

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