SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue | Denver, CO 80203	
Original Proceeding: District Court, City & County of Denver, No. 2023CV031432; Hon. David Goldberg, J.	
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; and JENA GRISWOLD, in her official capacity as Secretary of State.	▲**COURT USE ONLY**▲ Case No. 2023SA150
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PETITIONERS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 32, including all formatting requirements set forth in those rules. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

This brief complies with the word limit in set forth in the Court's June 14, 2023 order, because it contains 6,299 words and does not exceed 9,500 words.

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INTRODUCTION

SB 303 and Proposition HH combine incongruous subjects into a single bill and a single ballot measure. While these measures reduce property taxes and provide for backfilling of local government revenue, they also leverage billions of dollars in de-Brucing to establish new state-level spending. Proposition HH goes even further, changing this year's TABOR refund methodology via HB 1311. These disparate subjects are not logically or necessarily connected to property tax reductions. SB 303 and Proposition HH are therefore void.

The Governor offers no defense of HB 1311's inclusion in Proposition HH. Instead, he urges the Court to exempt it from single subject review entirely, characterizing it as mere "contingent" legislation. There is no precedent for that approach, and it would create a gaping loophole in the single subject requirement.

Nor does the Governor dispute that SB 303 and Proposition HH authorize new state-level spending and that this new spending goes beyond backfilling. Instead, he attempts to waive away the problem as "speculative." But there is nothing speculative about the new state-level

spending authority in SB 303 and Proposition HH. Indeed, what the Governor fails to mention is that the "backfilling" is only ***partial***. It is, by design, guaranteed ***not*** to fully reimburse local governments for lost property tax revenue, while it empowers the State itself to spend the remainder of retained revenue from the massive de-Brucing created by SB 303 and Proposition HH. Thus, SB 303 and Proposition HH do not merely backfill ***local*** governments. They increase ***state-level*** spending authority, overwhelmingly in the area of education. The result is a significant shift in the state–local balance over education funding, a subject divorced from the distinct subject of property tax relief.

If this Court does not void SB 303 and Proposition HH for violating the single subject requirement, Proposition HH's deficient ballot title must at the very least be reformed to avoiding misleading voters. The Governor's justifications for the existing title are both inaccurate and self-defeating. Even the Governor's own examples contradict his arguments.

Finally, this Court should reject the Governor's proposed limitation on pre-election judicial review of referred measures. This

limitation is contrary to constitutional language making clear that both initiated ***and*** referred measures must comply with single subject and clear title requirements. It also represents a significant, unwarranted expansion of existing precedent.

ARGUMENT

I. The Governor mischaracterizes SB 303 and Proposition HH to evade the single subject requirement.

The Governor's chief justification for the multitude of subjects within SB 303 and Proposition HH—that "property tax relief is a complex endeavor," Gov'r's Op. Br. at 1—is no justification at all. The constitution does not exempt "complex" policy matters from the single subject requirement. The opposite is true. Complex legislation is precisely why the single subject requirement exists. *In re Title, Ballot Title & Submission Clause for 2013-14 #129*, 2014 CO 53, ¶ 14 (explaining that the single subject requirement prevents "inadvertent passage of a surreptitious provision 'coiled up in the folds' of a ***complex bill***" (emphasis added)).

While SB 303 and Proposition HH are indeed complex, their provisions nonetheless must be untangled to determine whether they

improperly include multiple subjects. Because SB 303 and Proposition HH do contain multiple subjects, they are void.

A. Whether "contingent" or not, HB 1311's single-year change to TABOR refunds has nothing to do with future property tax reductions, future state spending, and future de-Brucing.

The most obvious defect in Proposition HH is that it combines not only multiple subjects but also multiple subjects from entirely different statutes that could—and should—stand or fall on their own merits. *In re 2013-14 #129*, 2014 CO 53, ¶ 14 (explaining that legislation must "depend[ ] upon its own merits for passage"). The Governor's response to this apparently unprecedented problem is to categorically exempt "contingent legislation" from single-subject review. The Governor asserts that because HB 1311 is "contingent," it "does not implicate the single subject requirement" at all. Gov'r's Op. Br. at 41. The district court reached the same erroneous conclusion, holding that "conditional legislation" cannot "violate[ ] the single-subject requirement, ***even where the subjects are not necessarily related***." Pet'rs' Op. Br., Ex. E at 19 (emphasis added). There is no legal support for this notion, which, if affirmed, would create an enormous loophole in the single

subject requirement.[1] The Governor's arguments in defense of this loophole are meritless.

First, the Governor cites HB 22-1302 as a recent example of permissible contingent legislation. *See* Gov'r's Op. Br. at 41–42. HB 22-1302, however, bears no resemblance to SB 303 and HB 1311. That bill was truly contingent. It included interconnected provisions on the subject of health-care practice transformation, some of which were contingent on the passage of HB 22-1278 and HB 22-1411. H.B. 22-

[1] This loophole would exist regardless of whether the offending legislation was a referred measure or a non-referred bill. It is easy to imagine the General Assembly forcing the Governor to accept, and therefore decline to veto, multiple "conditional" bills although he might prefer only one to be enacted. The single subject requirement is meant to combat, not facilitate, this practice. *Parrish v. Lamm*, 758 P.2d 1356, 1362 (Colo. 1988) (explaining that the single subject requirement is meant to "enable the governor to consider each piece of legislation ***separately*** in determining whether to exercise veto power" (emphasis added)). Yet the Governor's position in this case, as well as the district court's, permits the General Assembly to violate the single subject requirement by passing multiple bills and bundling them together as "contingent," regardless of whether they include disparate subjects, preventing the Governor from exercising independent veto power over them.

1302, 2d Reg. Sess., 73rd Colo. Gen. Assem. at §§ 3–5, 7.[2] HB 22-1278, in turn, established the "Behavioral Health Administration," which is explicitly referenced in Section 3 of HB 22-1302 and was required to ***implement*** that provision. H.B. 22-1278, 2d Reg. Sess., 73rd Colo. Gen. Assem.[3] HB 22-1411, meanwhile, concerned measures to ensure Colorado's compliance with federal funding requirements and contained ***mutually contingent*** provisions that could take effect only if HB 22-1302 also became law. H.B. 22-1411, 2d Reg. Sess., 73rd Colo. Gen. Assem. at § 24(f).[4] In other words, the relevant contingent provisions of the 2022 bills were all related to one another, all concerned the same subject, and all depended on each other.

In stark contrast, HB 1311 concerns a subject (a single-year change to TABOR refunds) divorced from SB 303, and that subject does not logically or necessarily depend on any provisions of SB 303 to be

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[2] Available at https://leg.colorado.gov/sites/default/files/2022a_1302_signed.pdf

[3] Available at https://leg.colorado.gov/sites/default/files/2022a_1278_signed.pdf

[4] Available at https://leg.colorado.gov/sites/default/files/2022a_1411_signed.pdf

effective. Nothing about HB 1311 ***requires*** SB 303; both can stand on their own. In fact, just last year, the General Assembly passed a refund measure that was, in relevant respects, identical to HB 1311. That bill, SB 22-233, was true single subject legislation. S.B. 22-233, 2d Reg. Sess., 73rd Colo. Gen. Assem.[5] It enacted a one-time change to the TABOR refund methodology, allowing a refund amount of $400 for every qualified individual or $800 for every qualified joint tax filer. *Id.* at § 2. It was not contingent on any other bill or statute. After the General Assembly passed it and the Governor signed it, SB 22-233 became effective immediately. The bill did not include a referred measure, nor was it made conditional on the passage of a separate referred measure called for by an entirely different statute.

The General Assembly could have followed that same approach here. Instead, the General Assembly conditioned HB 1311 on the passage of the referred measure arising from SB 303, a statute containing entirely different subjects. In doing so, the General

[5] Available at https://leg.colorado.gov/sites/default/files/2022a_233_signed.pdf

Assembly improperly bundled the disparate subjects of the two separate statutes into a single referendum, in violation of the single subject requirement.

The Governor next argues that contingent legislation does not undermine the purposes of the single subject requirement, citing *Parrish v. Lamm*, 758 P.2d 1356 (Colo. 1988). Gov'r's Op. Br. at 42. *Parrish*, however, had nothing to do with contingent legislation or referenda. Moreover, the *Parrish* court focused on the purposes of the single subject requirement under article V, section 21, the single subject requirement for ***bills***. *Id.* at 1362. Those purposes are to "(1) to notify the public and legislators of pending bills so that all may participate in the legislative process; (2) to guarantee that each legislative proposal passes on its own merit; and (3) to enable the governor to consider each piece of legislation separately in determining whether to exercise veto power." *Id.* (citations omitted). While Petitioners agree these purposes are generally relevant here, there is one key difference. When reviewing ***referred*** measures like Proposition HH, the relevant consideration is not the legislature's or the Governor's ability to independently accept or

reject two separate bills. Instead, the relevant consideration is the ***voters'*** ability determine whether to independently approve each piece of legislation. *See In re Proposed Initiative for 1997–98 # 84*, 961 P.2d 456, 460-61 (Colo. 1998) (holding that proposed initiative violated single subject requirement in article V, section 1(5.5) where "[v]others would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs"). Here, the purposes of the single subject requirement have not been satisfied. The voters, unlike the Governor and the General Assembly, have never had—and never will have—an opportunity to consider HB 1311 as a stand-alone change to the law.[6]

The Governor also asserts—for the first time—a connection between HB 1311's provisions and the subjects in Proposition HH and

[6] The district court made the same error. It reasoned that because Proposition HH "by its terms, does not concern itself with HB23-1311," and because HB 1311's conditional nature is "openly expressed in a separate bill, which was itself approved on its own merits," HB 1311 is therefore not "'coiled up in the folds' of Proposition HH." Pet'rs' Op. Br. Ex. E at 19–20. That is incorrect. Again, while the General Assembly and Governor have had the opportunity to separately consider SB 303 and HB 1311, the ***voters*** will never have that opportunity.

SB 303: that HB 1311 provides a one-time flat refund to all taxpayers (before SB 303's property tax reductions and de-Brucing even go into effect) to "ensure[ ] that individuals with lower incomes are not negatively impacted by the voters' decision to use some surplus revenue to backfill the tax reductions in SB303." Gov'r's Op. Br. at 11; *see also* Gov'r's Op. Br. at 17 ("HB1311 represents the General Assembly's recognition that Proposition HH, if approved by voters, will impact TABOR refunds and the General Assembly's policy decision that individuals with lower incomes should be insulated from those impacts.").[7] This assertion is incorrect and nonsensical. HB 1311's single-year change to the TABOR refund methodology for ***this*** fiscal year has nothing to do with SB 303, which changes the total amount of TABOR refunds to be refunded to taxpayers in ***future*** years (if any).

The Governor's suggestion that HB 1311 will "insulate" lower income taxpayers from the reduction in TABOR refunds is false.

[7] It is unclear whether the Governor actually intends this to be an argument regarding single subject. He mentions it only as a background point in the statement of facts in his brief, not as part of his single-subject argument.

HB 1311 provides a one-time refund increase for certain taxpayers in FY 2023 that is divorced from the effect of SB 303 in ***future*** years. It therefore does nothing to protect taxpayers—lower income or otherwise—from the increasing diminishment of TABOR refunds over the subsequent decade. Accordingly, even if the Governor's novel argument was properly considered at this stage, it lacks merit. Additionally, this argument was not one of the grounds relied on by the district court. The district court offered ***no*** justification for allowing HB 1311 to be bundled with the provisions of SB 303. It simply declined to consider the single subject problem created by HB 1311. *See* Pet'rs' Op. Br. Ex. E at 18–20.

Finally, the Governor makes an argument divorced from reality: that "the legislature is not seeking … voter authorization of HB 1311." Gov'r's Op. Br. at 42–43. HB 1311 states, unambiguously, that it "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." Pet'rs' Op. Br. Ex. C at Section 2 (emphasis added). The

General Assembly could have avoided this violation of the single subject requirement by doing what the Governor claims it did, i.e., passing HB 1311 bill as a "stand-alone measure," without making it conditional on the voters' approval of Proposition HH. Gov'r's Op. Br. at 17. Instead, it tacked HB 1311 onto a referendum that itself already combines disparate subjects. This runs afoul of the single subject requirement, which prohibits precisely this type of bundling of incongruous issues.

B. The Governor admits that SB 303 and Proposition HH authorize billions in de-Brucing to enable new state-level spending separate from the partial backfilling of lost local property tax revenue.

The subject of SB 303 and Proposition HH is ostensibly "reducing property taxes." Gov'r's Op. Br. at 30; *see also* Pet'rs' Op. Br. Ex. E at 18-17 ("[T]he object of the legislation is to afford property tax relief to homes and businesses without undercutting the funding of entities that rely on such tax income."). The Governor suggests that the de-Brucing and spending provisions in SB 303 and Proposition HH are related to the subject of property tax reductions because they are merely intended to backfill lost local revenue: "[r]etaining revenue to backfill property

tax losses caused by SB303 is connected to the bill's subject." Gov'r's Op. Br. at 32; *see also id.* at 49.

But, as the Governor is forced to admit, SB 303 and Proposition HH do not merely "backfill." They establish new spending authority, separate from backfilling.[8] For example, the Governor admits that Proposition HH empowers the State to provide for education spending "***beyond*** what is needed to backfill lost school district revenue." *See* Gov'r's Op. Br. at 35 (emphasis added); *see also* Gov'r's Op. Br. at 36, 50 ("something more than backfilling may occur"). This is confirmed by the language of SB 303 itself, which states that money in the Proposition HH General Fund Exempt account each year beginning with FY 2023–24 would first be used to "provide reimbursements to local governments" (i.e. backfill), then provide up to $20 million to the Housing Development Grant Fund, and then any money "in excess" of the latter two spending provisions will be transferred to the State

[8] The backfilling provided for in SB 303 and Proposition HH is also limited in future years, further increasing the State's new spending authority.

Education Fund. Pet'rs' Op. Br. Ex. A at 6.[9] SB 303 and Proposition HH thus accomplish a goal that, while perhaps laudable, is distinct from property tax relief: new ***state***-level spending authority for public education, separate from replacement (i.e., "backfilling") of lost ***local*** property tax revenue.

To explain away this new state spending authority, the Governor attempts to obfuscate it, asserting that it is speculative and uncertain. He claims that "[t]o the extent the State might spend money that ***could*** be retained in the Ed Fund beyond what will be necessary to backfill school districts," this is "conjecture [ ] beyond the single subject analysis." *See* Gov'r's Op. Br. at 36–37 (emphasis in original). The Governor reiterates this same argument several times, claiming that new state-level spending depends on "the State's uncertain financial outlook" and is "speculative." Gov'r's Op. Br. at 37–38. The Governor

[9] This is distinct from the separate $72 million transfer to the State Public School Fund directly from the State General Fund in early 2024, which does not depend on or originate from any de-Brucing. Pet'rs' Op. Br. Ex. A at 45; *see also* Pet'rs' Op. Br. Ex. B at 6. The Governor's Opening Brief contains no discussion or defense of this separate state-level education spending, which alone is a violation of the single subject requirement.

goes so far as to assert, without authority, that due to the "speculative nature of this additional money," "[v]oters will not be induced to vote for Proposition HH just so there ***might*** be money retained in the Ed Fund beyond what will be necessary to backfill that ***might*** be used for non-revenue replacement purposes." Gov'r's Op. Br. at 38 (emphasis in original).

The new state-level spending authority in SB 303 and Proposition HH, however, is not "speculative." SB 303 and Proposition HH actually confer that spending authority on the State. In fact, SB 303 and Proposition HH ***guarantee*** that any "backfilling" is necessarily ***partial*** and will ***never*** fully compensate local governments for the full amount of lost property tax revenue, instead creating new state-level education spending authority. Pet'rs' Op. Br. Ex. A at 41 (creating a limit for local government reimbursements of 20% of the amount in the Proposition HH General Fund Exempt Account). The explicit limitation on backfilling is expected to result in a 43% reduction in the amount that would otherwise be needed to backfill local governments for FY 2024–25—and a whopping 73% reduction for FY 2025–26. Pet'rs' Op. Br.

Ex. B at 15. Because the remainder is earmarked for state-level education spending, this partial backfilling results in correspondingly ***greater*** state control over education spending. Thus, SB 303 and Proposition HH are not merely "backfilling" measures directly connected to the subject of property tax reductions. They represent a significant shift in the control of education spending in Colorado.

The Governor provides a telling example of how this new state-level spending authority could work in practice. He suggests that "***if*** excess money in the Ed Fund is used for school construction, that would remove a project that property owners in that school district would otherwise have to pay for through their property taxes." Gov'r's Op. Br. at 38 (emphasis added). The Governor's example confirms the presence of state spending authority beyond backfilling and demonstrates that this new funding is administered at the state, not the local, level. Even if the State decides to spend new "excess" funds in the State Education Fund to infill one particular local district's education-related needs by paying for construction in that district, that is a state-level decision. It is not ***local*** education spending and it is not "backfilling."

The incongruous $20 million transfer to the Housing Development Grant Fund is another example of new funding, separate from local government backfilling. *See* Pet'rs' Op. Br. Ex. B at 8 (explaining that money used to "reimburse local governments for lost property tax revenue" is separate from "transfers to the Housing Development Grant Fund"). The Governor seeks to defend this new state-level funding as "reflect[ing] the economic reality that property taxes are typically passed on to, and thus paid by, tenants, connecting it to the subject of property tax relief." Gov'r's Op. Br. at 39. Whether or not this is true as an economic matter, SB 303 and Proposition HH ***also reduce property taxes***. Accordingly, this new state-level spending is not logically or necessarily connected to the actual reduction in property taxes—it is a distinct spending provision, presumably meant to entice renters to support legislation that reduces taxes for other voters, namely, property owners who pay property taxes.

The only authority the Governor cites in support of his "backfilling" theory is *In re Amend TABOR No. 32*, 908 P.2d 125 (Colo. 1995). Gov'r's Op. Br. at 34. But that case proves the point. *In re Amend*

TABOR involved a true tax-relief-plus-backfilling measure—a $60 credit for certain state and local taxes coupled with "monthly state replacement of local revenue impacts." 908 P.2d at 131. Here, in contrast, SB 303 and Proposition HH go beyond backfilling, creating new state-level spending authority. If *In re Amend TABOR* is the rule (as the Governor argues), this case is a glaring exception.

II. The ballot title for Proposition HH is deficient and must be amended.

A. Petitioners' proposed amendments are necessary to cure the deficiencies in Proposition HH's title.

Petitioners' proposed amendments to Proposition HH's title are necessary to inform voters: (i) that Proposition HH permits the state to retain and spend funds that would otherwise be returned to voters; (ii) of the scale of Proposition HH's de-Brucing and property tax reductions; (iii) that Proposition HH creates new state-level spending, separate from partial local government backfilling; and (iv) that Proposition HH, through HB 1311, alters the TABOR refund methodology for this fiscal year.

Petitioners' amended title begins with customary de-Brucing language that voters have come to expect, while disclosing the magnitude of the proposed increase to the state revenue limitation: "SHALL THE STATE RETAIN AND SPEND STATE REVENUES THAT OTHERWISE WOULD BE REFUNDED TO TAXPAYERS, BY ADDING 1% TO THE REVENUE LIMITATION FOR STATE FISCAL YEARS 2023-24 THROUGH 2031-32." This replaces the obscure language in the existing title, which states only: "BY USING A PORTION OF THE STATE SURPLUS UP TO THE PROPOSITION HH CAP AS DEFINED IN THIS MEASURE." Nothing about this language informs voters that they would otherwise be refunded this money or that they are authorizing the State to keep $10 billion of TABOR refunds over the next decade.

Next, the amended title addresses the actual magnitude of proposed property tax reductions: "TO FUND REVENUE REDUCTIONS FROM REDUCING THE RESIDENTIAL PROPERTY TAX ASSESSMENT RATE FROM 6.765% TO 6.7% AND REDUCING THE PROPERTY TAX ASSESSMENT RATE FOR COMMERCIAL

PROPERTY FROM 27.9% TO 27.85% FOR THE FIRST YEAR AND IMPLEMENTING FURTHER REDUCTIONS THROUGH 2032, INCLUDING PROPERTY TAX RELIEF FOR SENIORS, AND TO FUND THE STATE PUBLIC SCHOOL FUND AND OFFSET LOST REVENUE RESULTING FROM THE PROPERTY TAX RATE REDUCTIONS." By contrast, the proposed language in SB 303 offers no indication of the scale of the property tax reductions: "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." The same section of the proposed amended title also informs voters that by voting yes, they will "FUND THE STATE PUBLIC SCHOOL FUND" separate from offsetting lost local government revenue from reductions to property taxes. By contrast, the current title states only "AND FUND SCHOOL DISTRICTS," misleading voters into believing they are

funding local school districts directly, instead of providing for ***state***-level spending authority.[10]

Last, the final clause of the amended title alerts voters to the effect of HB 1311: "WHILE ALSO APPROVING CHANGES ADOPTED IN HOUSE BILL 23-1311 TO THE TABOR REFUND METHOD?" Again, the current title contains ***no mention*** of this critical fact and keeps it hidden from voters.

Each of these deficiencies must be corrected for Proposition HH's title to satisfy the clear title requirement.[11]

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[10] The Governor admits new state-level spending authority is created through Proposition HH, although he focuses on new spending through the "State Ed Fund." *See* Gov'r's Op. Br. at 36, 50. This appears to be based on SB 303's funding of the State Education Fund "in excess of" backfilling. *See* "Pet'rs' Op. Br. Ex. A at 6. Petitioners accordingly suggest as alternative language, instead of "AND TO FUND THE STATE PUBLIC SCHOOL FUND," the following: "AND TO AUTHORIZE STATE-LEVEL EDUCATION SPENDING."

[11] Alternatively, the Court should use one of the proposed titles included in Pet'rs' Op. Br. Ex. F.

B. The existing title disguises new state-level education spending authority, uses language contrary to the Governor's own cited examples, and entirely ignores HB 1311.

The Governor's attempt to defend the existing title for Proposition HH fails for the reasons detailed above, and his cited examples of other de-Brucing measures actually reflect language supporting ***Petitioners'*** proposed amendments.

First, the Governor asserts that "voters will not be surprised by the possibility that retained revenues could provide additional funding for school districts via the Ed Fund." Gov.'s Op. Br. at 50. As detailed above, the grant of state power to keep and spend retained funds beyond amounts necessary to backfill is neither uncertain nor provides for replacement of local government funds. Instead, it constitutes new state-level spending authority separate from local government backfilling. Accordingly, this is new education funding and the title must be amended to avoid misleading the voters.

Second, the Governor seeks to avoid standard de-Brucing language by asserting that "there is no constitutionally mandated language" for this type of disclosure. Gov.'s Op. Br. at 50–51. This

ignores the conventional language that has been repeatedly approved by the Title Board and this Court and presented to voters. Indeed, the Governor's own examples include precisely the type of language Petitioners are seeking in the amended title. First, the Governor selectively quotes from Proposition 120's ballot language, using ellipses to omit the fact that its title included a broad indication of the ***scale*** of the de-Brucing at issue. *See* Gov.'s Op. Br. at 51. The full language of the Proposition 120 ballot title is presented here:

> 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?[12]

[12] *See* https://tinyurl.com/2646s96k. As indicated in the Blue Book, the description of Proposition 120 in the voter information guide

Proposition 120 illustrates how a ballot title for a measure reducing property taxes can and should be drafted. It proves details to voters on the scale of the changes involved. Even the portion of the Proposition 120 ballot title quoted by the Governor contains the standard "retain and spend … excess state revenue" framing of a de-Brucing measure: precisely the correction Petitioners seek here and which the Governor resists. The same is true for the two other examples cited by the Governor. Gov'r's Op. Br. at 51–52. Indeed, Petitioners themselves included those latter two examples in their list of examples to use as guidance. *See* Pet'rs' Op. Br. at 37–38.

The Governor also cites the language of a title for a citizen initiative proposed by one of the Petitioners in this action, suggesting that the title's use of "excess state revenue" as a "voter-approved revenue change" is comparable to the "state surplus" phrasing the General Assembly adopted in the Proposition HH title. The Governor misleadingly omits the other

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differed from the language in the ballot question due to a subsequent change in the law prior to the election. *Id.*

language in that proposed title which, again, includes the more standard de-Brucing formulation of "***allowing the state to annually retain and spend up to*** $100 million of excess state revenue, if any, as a voter-approved revenue change to offset reduced property tax revenue and to reimburse local governments for fire protection." Petitioner Ward's Initiative 2023-2024 #21 (emphasis added).[13]

Last, the Governor continues to insist that HB 1311 should be hidden from voters, arguing that Proposition HH's title "fairly reflects what voters are being asked to approve." *Id.* at 52 and 54. As detailed above and in Petitioner's Opening Brief, and as is evident from HB 1311 itself, this is false. *See* Pet'rs' Op. Br. Ex. C at Section 2. Without any mention of HB 1311's change to this year's TABOR refund methodology, Proposition HH's ballot title cannot possibly "reflect what voters are being asked to approve."

[13] Available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2023-2024/21Results.html

III. There is no basis to grant SB 303 and Proposition HH immunity from immediate judicial review.

The Governor agrees this Court has jurisdiction to review Proposition HH's ballot title under C.R.S. § 1-11-203.5. Gov'r's Op. Br. at 2, 16. At the same time, he argues that this Court should avoid constitutional review of SB 303 and Proposition HH until after the election. To reach this conclusion, the Governor relies on an incorrect interpretation of article V, section 1(5.5) of the Colorado Constitution and proposes to expand the holding of *Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996). Gov'r's Op. Br. at 21–26; Pet'rs'. Op. Br. Ex E at 4–10. These arguments lack merit.

A. The Governor ignores the plain language of article V, section 1(5.5) of the Colorado Constitution and the 1994 Blue Book.

The Governor asserts that article V, section 1(5.5) of the Colorado Constitution extends the single subject requirement ***only*** to citizen-initiated petitions, exempting legislatively referred measures from its scope. Gov'r's Op. Br. at 22. This is incorrect. The Governor ignores the 1994 Blue Book, which made clear to Colorado voters that they were voting to expand the single subject requirement to both initiated ***and***

referred measures.[14] *See* 1994 State Ballot Information Booklet, Leg. Council of the Colo. Gen. Assem. 2, https://bit.ly/3Wz0leZ ("1994 Blue Book") at 2 (explaining that Referendum A, which added article V, section 1(5.5) of the Colorado Constitution, 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." (emphasis added).) This was intended to "keep unrelated or misleading provisions out of initiated and referred measures." 1994 Blue Book 3. As the 1994 Blue Book explained: "[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.* Accordingly, the text of subsection 1(5.5) speaks of "any measure," which covers any citizen-initiated measure or any legislatively referred referendum, both of which are defined by article V, section 1.[15] The

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[14] The Governor does so despite elsewhere arguing that the Blue Book is a reliable source of information available to voters in search of details of ballot measures. *See* Gov's Op. Br. at 46.

[15] Other subsections of article V, section 1 also reflect the intended equal treatment of both initiated and referred measures. *See*, *e.g.*, Art.

district court similarly offered no explanation for why it ignored these clear descriptions of legislative intent. Pet'rs' Op. Br. Ex E at 5–8.

The Governor also seeks to rely on *Campbell v. Buckley*, 203 F.3d 738 (10th Cir. 2000), incorrectly citing it for the proposition that "section (1)5.5 does not govern legislative referenda." That is not *Campbell*'s holding.[16] The *Campbell* court quoted the language of article V, section 1(5.5) and also acknowledged that the appellants there had raised an equal protection argument premised on the assertion that legislatively referred measures cannot be challenged for single subject compliance until after voter approval. *Id.* at 741, 747 n.57, and 747. But nowhere in its opinion did the Tenth Circuit ratify that allegation or

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V, section 1(7) ("The secretary of state shall submit ***all measures initiated by or referred to the people*** for adoption or rejection at the polls, ***in compliance with this section***. In submitting the same and in all matters pertaining to the form of all petitions, the secretary of state and all other officers ***shall be guided by the general laws***") (emphasis added);

[16] The parenthetical ascribed by the Governor to *Campbell* is accurate, but does not support the proposition for which the Governor cites *Campbell*. The parenthetical notes the court's listing of different Constitutional single subject requirements, but never states that section 1(5.5) ***excludes*** referenda. Gov'r's Op. Br. at 23.

hold that "section (1)5.5 does not govern legislative referenda." Instead, the Tenth Circuit ultimately affirmed the district court's decision upholding the constitutionality of Colorado's title setting requirements for ballot initiatives.

Moreover, while the Governor admits that article V, section 21 imposes a "single subject requirement that applies to both SB303 and Proposition HH," he denies that such a challenge can be raised pre-election, relying entirely on *Polhill*. *See* Gov'r's Op. Br. at 21–22. The Governor's position is thus that the constitutional provision expressly applying the single subject requirement to measures to be voted on by the people (article V, section 1(5.5)) is inapplicable to Proposition HH, while the constitutional provision applying the requirement to ***bills*** is applicable to Proposition HH, even though that provision does not mention ballot measures at all. This illogical position is contradicted by both the text and legislative history of article V, section 1(5.5). And, as described below, the Governor's reliance on *Polhill* is flawed.

B. The Court should reject the Governor's proposed expansion of *Polhill*.

The Governor, like the district court below, relies principally on *Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996) in seeking to postpone judicial scrutiny under the constitutional single subject and clear title requirements until after the November election. Gov'r's Op. Br. at 19–20; Pet'rs' Op. Br. Ex E at 4–10. In doing so, the Governor relies on a critical misinterpretation of *Polhill*.

As explained in greater detail in Section III of Petitioner's Opening Brief, *Polhill's* facts and holding are limited, including because in *Polhill* this Court was examining a referred Constitutional Amendment proposed via legislative resolution, not an already-enacted statute signed by the Governor that also contains a referred measure, as here. In short, *Polhill* did not involve a challenge to an enacted law. Here, however, SB 303 is indisputably already signed into law. Because SB 303 is already enacted, it is immediately subject to judicial review and falls outside the scope of *Polhill*, and this includes the referred

measure arising from SB 303.[17] Moreover, the relevant Constitutional provision in this action, article V, section 1(5.5), was not at issue in *Polhill*, which involved a challenge under article XIX, section 2(3). Article V, section 1(5.5) unambiguously provides for ***pre***-election challenges:"[i]f 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." Const. art. V, § 1(5.5) (emphasis added). The latter provision is not contained in article XIX, section 2(3), the single subject requirement at issue in *Polhill*. Providing for ***pre***-election review of legislative measures going to the ballot makes eminent sense, given the avoidable and significant harm and cost to the electorate in forcing a vote on a constitutionally defective referred measure or citizen-initiated petition. This Court should, accordingly,

[17] It does not matter how much of SB 303 is contingent on Proposition HH. The fact is, it is completed legislation that has been signed by the Governor. That is what distinguishes it from the resolution at issue in *Polhill*.

reject the Governor and district court's proposed expansion of *Polhill*, which is contrary to the voters' adoption of 1994's Referendum A.

The Governor, as did the district court, also relies on *Cacioppo v. Eagle County School* District Re-50J, 92 P.3d 453 (Colo. 2004), in seeking to delay scrutiny of SB 303 and Proposition HH. *See* Gov'r's Op. Br. at 23–26; Pet'rs' Op. Br. Ex E at 6–7. Like *Polhill*, *Cacioppo* is distinguishable. As detailed in Section III of Petitioner's Opening Brief, *Cacioppo* concerned a local ballot measure, the single subject requirement does not apply to local measures, and the petitioner in *Cacioppo* was not seeking to present a single subject challenge to the local ballot measure. Instead, the petitioner in *Cacioppo* challenged the ballot over failures to comply with TABOR disclosure requirements and the use of ambiguous and misleading language. 92 P.3d at 456–69. This Court determined that these challenges either (1) involved only the form or content of the ballot title, could thus have been heard by the district court, and were appropriately time-barred or (2) were not ripe for decision. *Id.* None of these were Constitutional single subject or clear title challenges to a state-level measure. Accordingly, *Cacioppo*

could not answer whether such challenges are allowed under section 1-11-203.5.

Moreover, to the extent *Cacioppo* creates a dichotomy preventing pre-election review of "substantive" constitutional challenges, single subject and clear title challenges both do, in fact, relate to the "form and content of the ballot title" and are therefore within the scope of C.R.S. § 1-11-203.5. *See also* Pet'rs' Op. Br. at 44–47. This Court confirmed precisely that principle in deciding that a challenge to a referred local ballot issue brought a year after the election was time-barred under C.R.S. § 1-11-203.5. There, the Court held that "Plaintiffs' argument that the ballot issue was invalid because it contained multiple purposes ***is clearly a challenge to the form or content of the ballot title***." *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003) (emphasis added). The district court disregarded this language based on an erroneous interpretation of *Cacioppo*, and the Governor repeats this same mistake. Pet'rs' Op. Br. Ex. E at 7 n.7; Gov'r's Dist. Ct. Op. Br. at 6 n.6. For the reasons above, *Cacioppo* is readily distinguishable and inapplicable to the circumstances here. Section 203.5 provides

jurisdiction to adjudicate Petitioners' constitutional challenges to SB 303 and Proposition HH before the upcoming election.

CONCLUSION

The Court should declare that SB 303 and Proposition HH are void and enjoin Proposition HH from being placed on the November ballot. In the alternative, the Court should amend Proposition HH's title to comply with the clear title requirement.

Dated: July 12, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of

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