

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Scott Wasserman and Ann Adele Terry,
Objectors,

v.

Dave Davia and Michael Fields,
Designated Representatives of Initiative 2023-2024 #296.

**MOTION FOR REHEARING ON
INITIATIVE 2023-2024 #296**

Through their legal counsel, Scott Wasserman and Ann Adele Terry, registered electors of the City and County of Denver, submit this motion for rehearing on Initiative 2023-2024 #296, and state:

On April 18, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #296:

Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of \$670 million in property tax revenue by a change to the Colorado Revised Statutes concerning reductions in property taxes, and, in connection therewith, reducing the assessment rate for certain nonresidential property by 1% per year for five years until the assessment rate is 24% of the property value, which assessment rate applies for every subsequent property tax year; and reducing the assessment rate for residential property by 0.37% per year for five years until the assessment rate is 5.3% of the property value, which assessment rate applies for every subsequent property tax year?

In setting this title, the Board erred in the ways set forth below.

I. Initiative #296 violates the constitutional single subject requirement.

Wrapped into Initiative #296's changes to the assessed value rates for real property in Colorado is a classic single subject violation: logrolling. The measure asks voters to provide commercial property owners with a 5-percentage point reduction in the assessed rate for their properties. In exchange, residential property owners receive a 1.85-percentage point reduction. The measure is thus designed to entice different political constituencies (commercial property owners and residential property owners) to come together to support a measure that combines distinct policy choices to build a winning political coalition. The Constitution does not allow this.

A. Residential Property Tax.

Property taxation is a highly charged political topic in Colorado, with concerns driven most recently by the historic increases in residential real property values. This caused many homeowners to face eye-popping changes to their property taxes.¹ This is an issue with substantial political valiance. For example, a November 2023 poll found that a majority of voters are unhappy with their property taxes:

However, voters do have a strong opinion about how much they pay in taxes – **61% think they're too high** (27% about right). Voters earning less than \$50k stand at 68% too high / 19% about right, voters earning \$50k-100k stand at 64% too high / 25% about right, and voters earning \$100k+ stand at 53% too high / 35% about right.

Colo. Polling Institute, “What do Colorado voters think about the direction of the state and who do they trust?,” Nov. 2023, <https://www.copollinginstitute.org/research/colorado-issues-november-2023> (emphasis in original). The residential property tax issue is so important to voters that the General Assembly referred a measure to voters in the 2023 election (so-called HH) to address it, and, when that failed, the Governor called a rare special session of the General Assembly. As the Governor explained in calling the extraordinary session,

With home values rising at historic rates across Colorado, Coloradans face ***an immediate crisis*** with a forty-percent average increase in their property tax bills if property tax bills are not reduced. Taxpayers are facing higher property tax bills not just this year but in future years, and these are immediate, statewide concerns.

... Without the passage of Proposition HH at the ballot, there remains ***an immediate and dire need*** for solutions to help Coloradans impacted by rising property values.

Office of the Gov., Executive Order D 2023 24, “Call for the First Extraordinary Session of the Seventy-Fourth General Assembly,” Nov. 9, 2023, at 1-2 (emphasis added), *available at* https://leg.colorado.gov/sites/default/files/images/november_2023_special_session_letter_to_the_general_assembly.pdf. As the Governor continued, the issue extends beyond homeowners to renters who can face steep increases in their monthly rent as landlords pass on the increased residential property tax burden:

Increasing property taxes not only impacts homeowners but also renters that bear the burden of increased costs on landlords. Renters are most vulnerable to increased property taxes because they do not benefit from the corresponding gain in equity, making it harder for hardworking Colorado renters to thrive and have economic freedom.

¹ See, e.g., Aldo Svaldi, “Unprecedented gains in Colorado home values preview budget-busting property tax hikes next year,” *The Denver Post*, Apr. 26, 2023, *available at* <https://www.denverpost.com/2023/04/26/colorado-home-values-property-taxes-increase/>.

Id. at 1. The political appeal of residential property tax relief is thus apparent, as it brings a substantial preexisting coalition of homeowners and renters to the table.

B. Commercial Property Tax.

On the other side of the table are commercial property owners who have a longstanding objection to Colorado’s property tax scheme based on the impact of the Gallagher Amendment. Under the Gallagher formula, which aimed to protect residential property owners, as residential property values increased, residential assessment rates were pushed down—way down—to maintain a fixed ratio of commercial to residential property tax burden. Gallagher created a zero-sum game—every increase in residential property values forced the residential assessment rate down and increased the disparity in assessment rates between residential and commercial properties.

After decades under Gallagher, the disparity between residential and commercial assessment rates grew to a level in 2020 that a business coalition, including Colorado Concern, described as having created the conditions to deliver a “crushing blow to small businesses and other commercial property owners in Colorado.” NFIB *et al.*, “Iceberg Ahead: The Hidden Tax Increase Below the Surface of the Gallagher Formula,” Oct. 2020, at 16, *available at* <https://assets.nfib.com/nfibcom/Gallagher-Tax-Increase-Report-FINAL-10-12-2020.pdf>. The problem, according to Colorado Concern and its coalition members, is that property tax rules in Colorado “require commercial property owners...to pay a property tax rate 4 times higher than residential property owners.” *Id.* at 1. They warned that if the Gallagher Amendment was not repealed, the disparity would soon require commercial property owners to “pay an assessment rate 5 times higher than residential.” *Id.*

As the coalition’s words make clear, the problem for commercial property owners is the disparity between residential and commercial assessment rates. The passage of Amendment B in 2020 stopped the disparity from growing greater but left the commercial property assessment rate at 29% of actual value, as opposed to a much lower residential property assessment rate, which now sits at 7.15%.

C. Logrolling—enticing voters to reduce commercial assessed value to get a reduction in residential assessed value.

The distress of residential property taxpayers creates the conditions in which commercial property taxpayers can entice support to bring down that 29% rate by offering residential taxpayers some modest relief in their property taxes. In other words, support commercial property tax relief in exchange for residential property tax relief—but that is logrolling.

The Constitution provides that initiated measures may only have “one subject,” and where a measure has more than one subject “no title shall be set and the measure shall not be submitted to the people...” Colo. Const. art. V, sec. 1(5.5). Among the “evils” the single subject limitation guards against is

especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.

C.R.S. § 1-40-106.5(1)(e)(I). As the Court has described it, this is “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 Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 23.

Proponents here will argue that there is only one subject in their measure, “reducing property taxes.” However, while the residential and commercial property assessment rate cuts in their measure generically concern “property taxes,” this is an instance in which Proponents are combining disparate subjects under the “type of overly broad theme that [the Supreme Court has] rejected.” *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶ 22.

The measure does not impose a uniform approach to reducing property taxes in Colorado. Instead, as noted above, Proponents have selected *different* assessed rate reductions for *different* classes of property:

- Residential property: reduction of assessed value rate from 7.15% to 5.3%, which is a 1.85-percentage point change;
- Certain nonresidential property (i.e. commercial): reduction of assessed value rate from 29% to 24%, which is a 5-percentage point change.
- Agricultural property, producing mines, oil and gas: no change.

(Proposed C.R.S. § 39-1-104 & -104.2) A commercial property rate reduction of 5-percentage points is not necessarily connected with a 1.85-percentage point reduction in residential rates, or with leaving the assessed value for other types of property unchanged. Stated plainly, for example, a voter may ask: is the rate cut for commercial property too much with the residential rate cut being too little?

This is the same scenario the Court recently considered with respect to Initiatives 2021-2022 #67, #115, and #128. These initiatives each sought to increase the retail availability of alcohol, and they did so by authorizing (1) the sale of wine in grocery stores and (2) third-party alcohol delivery. 2022 CO 37, ¶ 1. Although concerned that some voters would support one component of the measure but not the other, *id.* ¶ 5, the Board determined that it had jurisdiction to set titles because the changes sufficiently related to increasing the retail sale of alcohol, *id.* ¶ 22. The Court reversed.

It explained that a measure cannot survive single subject scrutiny where its different subjects are simply “related when considered at a high level of generality.” *Id.* ¶ 19. It concluded that grocery store wine sales and alcohol delivery presented such a problem. The Court noted that expanding alcohol access in grocery stores “has been a topic of legislative and public debate for decades,” and that “public debate remains unsettled.” *Id.* ¶ 21. Alcohol delivery also “presents a similarly unsettled policy choice.” *Id.* ¶ 22. Given the unsettled nature of these questions, the Board found the logrolling dilemma was present because “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.* ¶ 23. That the policy choices both implicated the retail sale of alcohol (or alcohol generally) was not enough to establish the requisite connection under the constitutional single subject standard. *See id.* ¶¶ 23-24.

The same problem is present here. Many voters have no interest in commercial property taxes—or in fact may oppose a commercial property tax reduction—but they have a substantial interest in the property tax that applies to their home given the recent *historic* increases they have faced. Initiative #296 asks voters to accept lower property taxes on some categories of property, like commercial and industrial, in exchange for some relief in their residential property tax burden. Alternatively, commercial property owners may well believe that residential property rates are too low but accept a further reduction in those rates because of their desire to reduce commercial property rates.

But the single subject requirement precludes proponents from attempting to build support for one aspect of a measure (e.g., a substantial reduction for commercial and industrial property assessed rates) by including an unrelated “sweetener” (e.g., a modest reduction for residential property assess rates). As Proponents are engaged in prohibited logrolling to unite these otherwise different political groups, the Board should find that it lacks jurisdiction.

II. The title set is incomplete and misleading.

The title set by the Board is incomplete and misleading because it does not completely describe the assessed value rate cut. The title should include, as the measure does, the current assessed rates for commercial and residential property so that voters fully understand the rate cuts they are being asked to approve:

Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of \$670 million in property tax revenue by a change to the Colorado Revised Statutes concerning reductions in property taxes, and, in connection therewith, reducing the assessment rate for certain nonresidential property by 1% per year for five years until the assessment rate is reduced from 29% to 24% of the property value, which assessment rate applies for every subsequent property tax year; and reducing the assessment rate for residential property by 0.37% per year for five years until the assessment rate is reduced from 7.15% to 5.3% of the property value, which assessment rate applies for every subsequent property tax year?

Accordingly, the Board should correct the title set forth above.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #296 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading and incomplete ballot title that has been set.

Respectfully submitted this 24th day of April, 2024.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #296** was sent this day, April 24, 2024, via first-class mail, postage paid and via email to:

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