<table>
<tr><td>COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">DATE FILED: January 30, 2023 6:02 PM

▲COURT USE ONLY▲</td></tr>
<tr><td>Original Proceedings Pursuant § 1-40-107(2), C.R.S.
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #3

Petitioner: Rebecca R. Sopkin

v.

Respondents: Dalton Kelley and Dee Wisor

Title Board: Jason Gelender, Melissa Kessler and David Powell</td></tr>
<tr><td>ATTORNEYS FOR RESPONDENTS:
Dalton Kelley, #53948
Dee P. Wisor, #7237
BUTLER SNOW LLP
1801 California Street, Suite 5100
Denver, CO 80202
Phone: 720-330-2300
Fax: 720-330-2301
E-mail: dalton.kelley@butlersnow.com
dee.wisor@butlersnow.com</td><td>Supreme Court Case No.:
2023SA15</td></tr>
<tr><td colspan="2">RESPONDENTS’ OPENING BRIEF</td></tr>
</table>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 6,324 words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b), because it contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

Respondents Dalton Kelley and Dee Wisor (the "Proponents"), registered electors of the State of Colorado (the "State"), and the designated representatives and proponents of Proposed Initiative 2023-2024 #3, unofficially captioned "Establishment of a New Attainable Housing Fee" ("Initiative #3"), respectfully submit this Opening Brief in support of the title, ballot title and submission clause (the "Title") set by the Title Board for Initiative #3.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title set by the Title Board for Initiative #3 contains a single subject as required by Colo. Const. art. V, § 1 (5.5) and § 1-40-106.5, C.R.S. (2022).

2. Whether the Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure.

STATEMENT OF THE CASE

I. Nature of the case and summary of the proceedings before the Title Board.

This is an original proceeding pursuant to § 1-40-107(2), C.R.S. (2022) regarding the setting of the Title by the Title Board for Initiative #3. Proponents filed

Initiative #3 with the Colorado Secretary of State on November 8, 2022. R., p. 2.[1] The Title Board held a public hearing on Initiative #3 on December 21, 2022, pursuant to § 1-40-106, C.R.S. (2022). R., p. 7. The Title Board unanimously determined that Initiative #3 contained a single subject as required by Colo. Const. art. V, § 1 (5.5) and § 1-40-106.5, C.R.S. (2022) and set the Title for Initiative #3. Hearing Before the Title Board on Proposed Initiative 2023-2024 #3 (December 21, 2022), (at 6:30, 28:20, 1:07:30) available at: https://csos.granicus.com/player/clip/343?view_id=1&redirect=true&h=787ff6643ee8c5ff73279474b65cb10f.

Petitioner, Rebecca R. Sopkin (the "Petitioner"), as a registered elector of the State, filed a motion for rehearing on December 28, 2022 (the "Motion for Rehearing"), alleging that Initiative #3 attempts to raise taxes without amending the Colorado Constitution, violates the single-subject requirement, and neglects any mention of rental property which the proposed statute clearly includes. *See* R., p. 14-15.

The Title Board held a rehearing on January 4, 2023. R., p. 10; Rehearing Before the Title Board on Proposed Initiative 2023-2024 #3 (January 4, 2023),

[1] Citations to the Title Board Record (the "Record") are to the certified copy of the Record submitted with the Petition for Review. Page number references are to the PDF page number since the Record is not paginated.

available at: https://csos.granicus.com/player/clip/350?view_id=1&redirect=true&h=6727bf9c59eb898b9371718dbbc555f2.

At the rehearing, the Title Board granted the Motion for Rehearing only to the extent that changes were made to the Title to mention rental property and denied the rest of the Motion for Rehearing. *Id.* (at 46:32). The Petitioner filed a Petition for Review with this Court pursuant to § 1-40-107(2), C.R.S. (2022) on January 10, 2023, seeking review of whether the Title Board had jurisdiction to set the Title for Initiative #3 and whether the Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure.

II. Statement of Relevant Facts.

Initiative #3 is a proposed statute that would add part 12 to article 4 of title 29 of the Colorado Revised Statutes. R., p. 2. Initiative #3 is a proposed statute that seeks to increase the amount of revenue available to the Division of Housing within the Colorado Department of Local Affairs (the "Division") to support new or existing programs that support the provision of Attainable Housing (defined below) by imposing a new Community Attainable Housing Fee (the "Attainable Housing Fee"). R., p. 4-5. "Attainable Housing" is defined in Initiative #3 as "housing that is attainable by a household that makes between eighty percent and one hundred and

twenty percent of the area median income and is priced so that the household need not spend more than thirty percent of its income on housing costs." R., p. 3.

Initiative #3 imposes the Attainable Housing Fee upon the recording of deeds at a rate of 0.1% of the amount of the full actual consideration paid or to be paid for the real property, including the amount of any liens on the property created or imposed as a result of the conveyance, minus $200,000. R., p. 4. The Attainable Housing Fee is paid by the purchaser of real property when the deed is offered for recording. *Id.* The revenue received from the purchaser, except 5% of the amount collected which is retained by the county clerk and recorder for computing and collecting the Attainable Housing Fee, is deposited into the newly created "Colorado Attainable Housing Fund" (the "Fund"). R., p. 4-5.

Initiative #3 provides that "[i]n no event shall the money in the Fund be used to raise revenues for general governmental spending." R., p. 5. Initiative #3 requires all money on deposit in the Fund to be expended on "new or existing programs that support: (a) the construction, maintenance, rehabilitation, or repair of Attainable Housing in the State for rental purposes or home ownership, or (b) the provision of financial assistance, including without limitation grants or loans, to natural persons, nonprofit entities, and political subdivisions of the State to enable persons to finance the purchase, refinancing, rehabilitation, or repair of Attainable Housing." *Id.*

Initiative #3 requires any new or existing programs supported by the Attainable Housing Fee to be administered by the Division as part of its regulatory scheme. *Id.* Initiative #3 also requires all money in the Fund that is not expended at the end of any fiscal year and all interest earned on the investment or deposit of money in the Fund to remain in the Fund, and prohibits the transfer of such money to the general fund or to any other fund administered by the Division. *Id.*

Initiative #3 finds and declares that the primary purpose of imposing the Attainable Housing Fee upon the transfer of real property is to finance Attainable Housing in Colorado communities and is set at an amount that reflects the benefit enjoyed by the owners of real property as described therein. R., p. 3. Initiative #3 finds and declares that property owners in a community benefit from a workforce residing in the community and available to fill jobs needed by local business owners. R., p. 2. Initiative #3 also finds and declares that communities will be stronger and more resilient where workers can live close to their jobs and be invested in the community and that property owners benefit from a level of service achieved through fully staffed businesses, schools, hospitals, healthcare providers, emergency service providers, nonprofits, and governmental departments. R., p. 2-3.

After consideration and deliberation at the initial hearing and at the rehearing, the Title Board set the ballot title and submission clause for Initiative #3 as follows:

> Shall there be a change to the Colorado Revised Statutes concerning funding to increase attainable housing, and, in connection therewith, on and after January 1, 2024, imposing a community attainable housing fee, payable by the purchaser, upon the recording of deeds for real property equal to 0.1% of the amount by which the purchase price exceeds $200,000; defining attainable housing as housing that is attainable by a household that makes between 80% and 120% of the area median income and is priced so that the household need not spend more than 30% of its income on housing costs; requiring the net fee revenue to be deposited in the Colorado attainable housing fund and used only to fund new and existing programs administered by the division of housing that support the financing, purchase, refinancing, construction, maintenance, rehabilitation, or repair of attainable housing in Colorado for rental purposes or home ownership; and exempting the fee revenue from the limitation on state fiscal year spending?

R. 9-10; Rehearing Before the Title Board on Proposed Initiative 2023-2024 #3 (January 4, 2023), available at: https://csos.granicus.com/player/clip/350?view_id=1&redirect=true&h=6727bf9c59eb898b9371718dbbc555f2.

SUMMARY OF ARGUMENT

Each of the issues presented for review turns on whether the Attainable Housing Fee is correctly characterized, because the crux of each of the Petitioner's allegations is that Initiative #3 is imposing a tax and, therefore, must amend the Colorado Constitution.

First, the Title Board had jurisdiction to set the Title for Initiative #3 because Initiative #3 contains a single subject as required by Colo. Const. art. V, § 1 (5.5)

and § 1-40-106.5, C.R.S. (2022). Amendment of the Colorado Constitution is not an implied subject of Initiative #3, because such an amendment is not necessary to impose the Attainable Housing Fee since the Attainable Housing Fee is a fee, not a tax. Colo. Const. art. X, § 20 (8)(a) prohibits new or increased transfer taxes on real property but does not prohibit the imposition of other types of charges that are not taxes.

The primary purpose of imposing the Attainable Housing Fee upon the transfer of real property is to finance Attainable Housing in Colorado communities and is set at an amount that reasonably relates to the overall cost to the State of providing funding for new or existing programs that support Attainable Housing. The Attainable Housing Fee would be imposed pursuant to the people's power to initiate legislation to provide services and regulate activities, rather than the people's power to impose new taxes, and would be codified as part of the regulatory scheme pertaining to the regulation and provision of housing.

Second, the Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure, because the proposed statute imposes a fee for financing Attainable Housing, rather than a new transfer tax on real property. As such, Initiative #3 it is not in conflict with Colo. Const. art. X, § 20 (8)(a).

ARGUMENT

I. Initiative #3 Contains a Single Subject.

Initiative #3 contains a single subject because it tends to effectuate the one general objective of making more revenue available to the Division for new or existing programs that support the provision of Attainable Housing by imposing a new Attainable Housing Fee. Initiative #3 imposes an Attainable Housing Fee, which is a fee to fund Attainable Housing and is not a transfer tax on real property. As such, an amendment to the Colorado Constitution is not required. Therefore, the Title Board did not err when it concluded that Initiative #3 contains a single subject and set the Title as a change to the Colorado Revised Statutes.

A. Standard of Review; Preservation of Issue.

In reviewing actions of the Title Board on single subject, the Court "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's actions." *Matter of Title, Ballot Title, & Submission Clause for 2013-14 #89*, 328 P.3d 172, 176 (Colo. 2014). The Court liberally construes the single subject requirement and "only overturn[s] the Title Board's finding that an initiative contains a single subject in a clear case." *Id.* The Court liberally construes "the single subject requirement both because of the Title Board's considerable discretion in setting the title and the ballot title and submission clause and in order to avoid unduly restricting the

initiative process." *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #315*, 500 P.3d 363, 367 (Colo. 2020).

Proponents agree that the Petitioner preserved the single subject argument, because the Petitioner is a registered elector who filed a motion for rehearing pursuant to § 1-40-107(1), C.R.S. (2022). R., p. 14-15.

B. Amendment of the Colorado Constitution is not an implied subject of Initiative #3, because such an amendment is not necessary to impose the Attainable Housing Fee.

The Colorado Constitution provides that "[n]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title…" Colo. Const. art. V, § 1 (5.5). Section 1-40-106.5(3), C.R.S. (2022) provides that in setting the title for an initiative, the Title Board "should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills." Additionally, the Title Board is required to describe a proposition in a ballot title as a "change to the Colorado Revised Statutes" and an amendment as an "amendment to the Colorado constitution." § 1-40-106(3)(c), C.R.S. (2022).

"When an initiative tends to effectuate one general objective or purpose, then the initiative presents only one subject." *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #315*, 500 P.3d at 367. "An initiative contains multiple

subjects if its text relates to more than one subject and if the measure has at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d 257, 261 (Colo. 1999) (internal quotations omitted).

Initiative #3 is a proposed statute that seeks to increase the amount of revenue available to the Division to support new or existing programs that support the provision of Attainable Housing by imposing a new Attainable Housing Fee. The Title Board unanimously found at the initial public hearing on Initiative #3 held on December 21, 2022, and at the rehearing on Initiative #3 held on January 4, 2023, that Initiative #3 contains a single subject and set the Title for Initiative #3 as a change to the Colorado Revised Statutes.

The Petitioner alleged in the Motion for Rehearing and in the Petition for Review submitted to the Court that the Attainable Housing Fee is a tax that could only be imposed if Article X, Section 20(8)(a) of the Colorado Constitution ("Section (8)(a)") is amended. Section (8)(a) provides that "[n]ew or increased transfer tax rates on real property are prohibited." The Colorado Constitution would only need to be amended if the Attainable Housing Fee is a tax, rather than a fee or another type of charge, since the Court has found that Section (8)(a) is only concerned with taxes. *Chronos Builders, LLC v. Dep't of Lab. & Emp., Div. of Fam.*

& Med. Leave Ins., 512 P.3d 101, 105 (Colo. 2022). However, under Colorado law, the Attainable Housing Fee is a fee, not a tax. Therefore, amending the Colorado Constitution is not an implied subject of Initiative #3.

i. Not every charge that is triggered by the recording of a deed is a real estate transfer tax.

"[R]ead in its entirety, section (8)(a) is only concerned with taxes." *Chronos Builders, LLC*, 512 P.3d at 105. Section (8)(a) only prohibits "[n]ew or increased transfer tax rates on real property." Section (8)(a) does not prohibit the imposition of other types of charges, such as new fees, that are imposed when real property is transferred, similar to the Court's conclusion in *Chronos* that the final sentence of Section 8(a) "only precludes added taxes or tax-like surcharges to taxable net income in connection with a change in income tax law." 512 P.3d at 105. Thus, the recording of a deed can serve as the trigger for imposing a charge that is not a tax without turning the charge into a transfer tax on real property.

Rather than focusing on what type of event triggers the charge, the inquiry should be whether the charge that is imposed when a deed is recorded is imposed to raise revenue for general governmental spending (a tax) or whether the primary purpose is to defray the reasonable direct and indirect costs of providing a service (a fee) like the Court does in other contexts. *See Colorado Union of Taxpayers Foundation v. City of Aspen*, 418 P.3d 506, 513 (Colo. 2018) ("*City of Aspen*").

ii. The Attainable Housing Fee is a fee because the primary purpose of imposing the Attainable Housing Fee is to finance Attainable Housing in Colorado communities; not to raise revenue for general governmental purposes.

"To determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the *dispositive criteria* is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (emphasis added). Accordingly, the analysis for determining whether a charge is a tax or another type of charge turns on the government's primary purpose for enacting the charge. *See City of Aspen*, 418 P.3d at 513; *Barber*, 196 P.3d at 248.

"If the primary purpose [of imposing a charge] is to raise revenue for general governmental use, it is a tax. Conversely, if the charge is imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct and indirect costs of providing a service or regulating an activity under that scheme, then the charge is not raising revenue for the general expense of government, and therefore, [is] not a tax." *City of Aspen*, 418 P.3d at 513 (internal citations omitted); *see Bloom v. City of Fort Collins*, 784 P.2d 304, 311 (Colo. 1989) (holding that where "a municipality imposes a special fee upon owners or occupants of developed lots fronting city streets for the purpose of providing revenues for the maintenance of city streets, and where the fee is reasonably

designed to defray the *cost of the service provided by the municipality*, such fee is a valid form of governmental charge…") (emphasis added).

In another formulation, the Court held that "a charge is a 'fee,' and not a 'tax,' when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged." *Barber*, 196 P.3d at 250. A charge may incidentally benefit the general public without becoming a tax. *City of Aspen*, 418 P.3d at 515.

The Court has defined a "special fee[2]" as a "charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental services." *Barber*, 196 P.3d at 248; *Bloom*, 784 P.2d at 308. "A special fee, however, might be subject to invalidation as a tax when the *principal purpose* of the fee is to raise revenue for general [governmental] purposes rather than to defray the expenses of the *particular service for which the fee is imposed*." *Barber*, 196 P.3d at 248 (quoting *Bloom*) (emphasis added).

[2] As noted in *Krupp v. Breckenridge Sanitation District*, the Court has used the terms "service fee," "special fee," and "special charge" interchangeably in its case law to describe a charge that is reasonably designed to meet the overall costs of the specific service for which the fee is imposed. 19 P.3d 687, n. 11 (Colo. 2001).

1. Label and stated purpose.

The Court initially looks at the label of the charge and the stated purpose of the charge. *See City of Aspen*, 418 P.3d at 514; *Barber*, 196 P.3d at 249 (stating that the Court looks to "the language of the enabling statute for its expression of the primary purpose for the original imposition of the charge.").

Initiative #3 labels the Attainable Housing Fee as a fee. Additionally, Initiative #3 provides that "the primary purpose of imposing a Community Attainable Housing Fee upon the transfer of real property is to finance Attainable Housing in Colorado communities…" This is similar to the declaration in the Paid Family and Medical Leave Insurance Act ("PFMLI Act") at issue in *Chronos Builders, LLC* that expressly provided that the premium at issue was a fee to be used "to defray the cost" of providing paid family and medical leave to Colorado employees. 512 P.3d at 106.

2. Practical realities of how the charge operates.

The Court then looks to the "practical realities of how the charge operates to determine if [the] charge is in fact imposed to defray the direct or indirect costs of regulation [or providing a service] and if the amount of the fee is reasonable in light of those costs, or if the charge's primary purpose is to raise revenue for general governmental use." *City of Aspen*, 418 P.3d at 514.

Initiative #3 requires 95% of the amount of the Attainable Housing Fee that is collected by the county clerk and recorder to be remitted to the Fund and allows the county clerk and recorder to retain 5% of the amount collected to help defray the cost of computing and collecting the Attainable Housing Fee. This is similar to the structure in *City of Aspen*, where grocers collected the charge for non-reusable bags and were authorized to retain a portion of the charge to, among other things, improve or alter infrastructure to allow for the implementation, collection and administration of the charge, and were required to remit the remainder of the fee revenue to the city to be deposited into the "Waste Reduction and Recycling Account." *City of Aspen*, 418 P.3d at 509-10.

Additionally, Initiative #3 provides that "in no event shall the money in the Fund be used to raise revenues for general governmental spending." Initiative #3 requires all money on deposit in the Fund to be expended on new or existing programs that support: "(a) the construction, maintenance, rehabilitation, or repair of Attainable Housing in the State for rental purposes or home ownership, or (b) the provision of financial assistance, including without limitation grants or loans, to natural persons, nonprofit entities, and political subdivisions of the State to enable persons to finance the purchase, refinancing, rehabilitation, or repair of attainable housing." Initiative #3 also requires all money in the Fund that is not expended in

any fiscal year and all interest earned on the investment or deposit of money in the Fund to remain in the Fund, and prohibits the transfer of such money to the general fund or to any other fund administered by the Division.

Thus, unlike the "pour-over" provision in *Bloom* that would have allowed excess fee revenues not required to satisfy the purpose of the ordinance to be transferred to any other fund of the city, Initiative #3 requires all of the Attainable Housing Fee revenue remitted to the Fund, and interest thereon, to be used for new or existing programs that support the provision of Attainable Housing. Compare *Bloom*, 784 P.2d at 311 (finding an ordinance provision that would allow the city to transfer any excess fee revenue to any other fund of the city would render the fee the functional equivalent of a tax) with *Zelinger v. City & County of Denver*, 724 P.2d 1356, 1358-59 (Colo. 1986) (holding a storm drainage fee to be a valid fee where the revenues derived from the fee were deposited into a special fund that was restricted to use for expenses related to storm drainage activities) and *Barber*, 196 P.3d at 250 (finding that there was "no indication in the language of these cash funds' enabling legislation that, at the time the enactments at issue were passed and the fees collected, the intent of the legislature was anything other than to use the fees to subsidize the costs of special services.").

Furthermore, the purchasers of property subject to the Attainable Housing Fee receive the benefits of new or existing programs targeted at making more Attainable Housing available because they, as property owners, enjoy the benefits of stronger and more resilient communities where workers can live close to their jobs and be invested in the community and enjoy a level of service achieved through fully staffed businesses, schools, hospitals, healthcare providers, emergency service provides, nonprofits, and government departments.

This is similar to *Bloom*, where all fees collected by the city were used for "the purpose of maintaining the network of city streets without regard to whether the city's expenditures specifically relate[d] to any particular property from which the fees for said purpose were collected." *Bloom*, P.2d at 310 (internal quotations omitted). As stated by the *Bloom* Court "[t]he owners and occupants of developed lots subject to the fee receive the benefit of a program of city maintenance calculated to provide effective access to and from residences, buildings, and other areas within the city." *Id.*

Similarly, in *Anema v. Transit Construction Authority*, the Court rejected the contention that no concrete benefit accrued to the employers paying an employer assessment fee for the construction of rapid rail transit because the Transit Construction Authority lacked the authority to build the rapid rail transit. 788 P.2d

1261, 1267 (Colo. 1990). The *Anema* Court opined that the "appellants take too narrow a view of the benefits involved" and upheld the employer assessment as a fee, because the fees went towards feasibility planning and "[i]t was reasonable to assume that employers within the service area would benefit from the development of such planning." 788 P.2d at 1267; s*ee also Loup-Miller Construction Co. v. City & Cnty. of Denver*, 676 P.2d 1170, 1173-75 (Colo. 1984) (holding that minimum fees imposed on customers that constituted a charge for the city's readiness to provide sewage service were fees, not taxes, although no new sewer service was actually provided to the fee payer); *TABOR Foundation v. Colorado Bridge Enterprise*, 353 P.3d 896, 901-903 (Colo. App. 2014) (holding that the bridge safety surcharge was a fee, not a tax, even though there was testimony that certain fee payers owned cars that would never cross any Colorado Bridge Enterprise bridges, because the fee payers received the benefits of the Colorado Bridge Enterprise's services—making safe bridges available and could utilize Colorado Bridge Enterprise bridges); *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1194 (Colo. App. 2005) (Graham, J., dissenting) (noting that the street lighting fee was imposed on a property owner even if they had no service from street lights).

Last, similar to the Court's reasoning in *Bloom* that the "city council also could have elected to impose the fee on a larger segment of the public—for example,

all licensed drivers residing within the city or all adult residents of the city (rather than on the owners and occupants of developed lots)," Initiative #3 could impose the Attainable Housing Fee on all property owners living in Colorado because they receive the benefits attributable to the provision of Attainable Housing outlined in Section 29-4-1201 of Initiative #3. *Bloom*, 784 P.2d at 310. However, the Proponents chose to only impose the Attainable Housing Fee on the purchasers of real property upon the recording of a deed, similar to the choice in *Bloom* to impose the transportation utility fee upon the owners and occupants of developed lots monthly, as part of their utility bill. *Id.* at 305. "[T]he mere existence of alternatives is not a sufficient reason to invalidate the particular method chosen." *Id.* at 310.

Additionally, the Court has held that "a charge may incidentally benefit the general public without becoming a tax." *City of Aspen*, 418 P.3d at 515. Even if the benefits of Initiative #3's regulatory scheme of making more revenue available to support the provision of Attainable Housing by imposing the Attainable Housing Fee are enjoyed by more than just the fee payers, the Attainable Housing Fee is not a tax so long as the amount charged bears a reasonable relationship to the State's cost of funding new or existing programs that support the provision of Attainable Housing. *See id.* (finding that the fact that the benefits of the waste reduction program were shared by citizens and visitors who never paid the fee did not present

a problem because the amount charged for the bag bore a reasonable relationship to Aspen's cost of permitting the use of the bag); *see also Bloom*, 784 P.2d at 310 (finding that the class of persons liable for the fee, the owners or occupants of developed lots fronting city streets, was not so limited in relation to the nature of the service as to render the ordinance invalid).

Therefore, the practical realities of the structure of Initiative #3 reveal that the primary purpose of imposing the Attainable Housing fee is to defray the direct and indirect costs of financing Attainable Housing in Colorado communities because the money deposited into the Fund can only be used to fund programs that support Attainable Housing, money deposited into the Fund cannot be transferred to other funds, and the fee payers (property purchasers) benefit from the funding of Attainable Housing through the level of service achieved through fully staffed employers.

iii. The amount of the Attainable Housing Fee is reasonably designed to offset the overall cost of making revenue available to the Division to support new or existing programs that support the provision of Attainable Housing.

The amount of the fee must be reasonably related to the overall cost of the service for which it is imposed. *Bloom*, 784 P.2d at 310-11. "Mathematical exactitude, however, is not required, and the particular mode adopted by a [governmental entity] in assessing the fee is generally a matter of legislative

discretion." *Id.* at 308. "Because the setting of rates and fees is a legislative function that involves questions of judgment and discretion, [the Court] will not set aside the methodology chosen by an entity with ratemaking authority unless it is inherently unsound." *Krupp*, 19 P. 3d at 694.

The Attainable Housing Fee would be imposed at a rate of 0.1% of the amount of the final actual consideration paid or to be paid for the real property, including the amount of any liens on the property created or imposed as a result of the conveyance, minus $200,000. The purchasers of property subject to the fee receive the benefit of new or existing programs targeted at making more Attainable Housing available so that property owners can enjoy the benefit of a level of service achieved through fully staffed businesses, schools, hospitals, healthcare providers, emergency service provides, nonprofits, and government departments, and Initiative #3 finds and declares that the Attainable Housing Fee "is set at an amount that reflects the benefit enjoyed by the owners of real property as described [therein]."

Several factors, including the acute shortage of Attainable Housing in Colorado, make it difficult to determine how much revenue is needed annually to defray the costs of new or existing programs that support "(a) the construction, maintenance, rehabilitation, or repair of Attainable Housing in the State for rental purposes or home ownership, or (b) the provision of financial assistance, including

without limitation grants or loans, to natural persons, nonprofit entities, and political subdivisions of the State to enable persons to finance the purchase, refinancing, rehabilitation, or repair of attainable housing."

The Fiscal Summary of Initiative 3 estimates that the Attainable Housing Fee will increase State revenue by approximately $70 million annually. Initiative #3 requires all of the money in the Fund to be expended on new or existing programs that support Attainable Housing, prohibits the transfer of such money to the general fund or to any other fund administered by the Division, and requires all money in the Fund that is not expended in any fiscal year and all interest earned on the investment or deposit of money in the Fund to remain in the Fund. Therefore, the estimated $70 million generated annually can only be spent on new or existing programs that support Attainable Housing and, as such, will bear a reasonable relationship to the cost of funding up to 100% of new or existing programs that support the provision of Attainable Housing. Additionally, there have been no assertions that the method of calculation is inherently unsound.

iv. The Attainable Housing Fee would be imposed as part of the people's power to legislate, not as part of their power to impose taxes, and is codified as part of the State's regulatory scheme for providing housing.

"[T]o determine whether a government has enacted a tax, or levied another type of charge, [the Court] must determine if the government is exercising its

legislative taxation power or its regulatory police power." *City of Aspen*, 418 P.3d at 513.

The proposed statutory language in Initiative #3 makes no references to the Attainable Housing Fee as a transfer tax on real property, similar to how the statutory language in the PFMLI Act makes no reference to the premium as a tax on income. *See Chronos Builders, LLC.*, 512 P.3d at 106. Further, Initiative #3 would be codified in article 4 of title 29 of the Colorado Revised Statutes (concerning housing) rather than title 39 (concerning taxation). *See Id.*

Additionally, Initiative #3 is being proposed through the people's power to initiate proposed State legislation to provide services and regulate activities independent of the General Assembly, pursuant to Colo. Const. art. V, § 1, rather than the people's power to impose new taxes, pursuant to Colo. Const. art. X, § 20. *See City of Aspen*, 418 P.3d at 512-13 (discussing the distinction between the legislative power to tax and the regulatory police power and stating that the Court must determine if the government is exercising its legislative taxation power or its regulatory police power to determine whether the government has enacted a tax or another type of charge). Initiative #3 is a proposed statute that seeks to regulate housing in a similar manner to § 29-4-701 *et seq.*, C.R.S. (2022) by providing financial assistance aimed at reducing the shortage of Attainable Housing in order

to promote the health and welfare of Colorado communities by enabling workers to live in the communities in which they work, which enables communities to be stronger and more resilient.

C. Conclusion - Initiative #3 contains a single subject.

Initiative #3 contains a single subject because it tends to effectuate the one general objective of making more revenue available for new or existing programs that support the provision of Attainable Housing by imposing a new Attainable Housing Fee. Initiative #3 does not contain an implied subject regarding amending the Colorado Constitution because the Attainable Housing Fee is a fee, not a tax. The Court should only grant the Petitioner's requested relief regarding single subject if the Court finds that Initiative #3 is clearly trying to amend the Colorado Constitution by imposing the Attainable Housing Fee without saying so.

Initiative #3 imposes a fee because: (i) the Attainable Housing Fee is imposed pursuant to the people's power to legislate to provide services and regulate activities, (ii) Initiative #3 labels the Attainable Housing Fee as a fee, (iii) Initiative #3 makes clear that the revenue is to be used only on programs that support Attainable Housing, (iv) Initiative #3 prohibits the transfer of fee revenue in the Fund to other funds, (v) Initiative #3 imposes the Attainable Housing Fee on property owners who benefit from the funding of new and existing programs that support Attainable

Housing, and (vi) the Attainable Housing Fee is reasonably calculated to offset the overall cost to the State of providing funding for new and existing programs that support Attainable Housing.

II. The Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure, because the proposed statute imposes a fee for financing Attainable Housing, not a new transfer tax on real property for general governmental use, and, therefore, there is no need for the Title to contain language about amending the Colorado Constitution.

A. Standard of Review; Preservation of Issue.

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause, and [the Court] will reverse the Board's decision only when the title is insufficient, unfair, or misleading." *Matter of Title, Ballot & Submission Clause for 2019-2020 #315*, 500 P.3d at 366 (internal quotations omitted). The Court will only reverse the Title Board's action in preparing the title and submission clause for an initiative "if they contain a material and significant omission, misstatement, or misrepresentation." *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d at 266.

The Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions" in reviewing the Title Board's title settings." *Matter of Title, Ballot & Submission Clause for 2019-2020 #315*, 500 P.3d at 366. The Court takes a limited review of the Title Board's actions and does not address the merits

of the proposed initiative. *Id.* Rather, the Court examines the initiative's wording by employing the general rules of statutory construction, giving words and phrases their plain and ordinary meaning, to determine whether the wording comports with the constitutional requirements. *Id.*

The scope of the Court's review is limited to ensuring that "the title, ballot title and submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board. *Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 105 (Payments by Conservation Dis. To Pub. Sch. Fund & Sch. Districts)*, 961 P.2d 1092, 1096 (Colo. 1998), *as modified on denial of reh'g* (Aug 10, 1998).

Proponents agree that the Petitioner preserved the argument regarding the fairness and meaning of the Title, because the Petitioner is a registered elector who filed a motion for rehearing pursuant to § 1-40-107(1), C.R.S. (2022). R., p. 14-15.

B. The Attainable Housing Fee is not a new transfer tax on real property, therefore, the Title set by the Title Board correctly and fairly expresses the true meaning and intent of Initiative #3.

The Title set by the Title Board for Initiative #3 correctly and fairly expresses the true meaning and intent of the measure, because the proposed statute imposes a fee for supporting new or existing programs that fund Attainable Housing, rather

than a new transfer tax on real property imposed for general governmental use. As such, Initiative #3 is not in conflict with Section (8)(a) and does not need to amend Section (8)(a).

By alleging that the Title set for Initiative #3 is in direct contradiction to Section (8)(a), the Petitioner must be alleging that the use of the term "fee" is unfair or misleading. The Petitioner seems to be implying that the Attainable Housing Fee is a tax rather than a fee, which has been addressed above. As discussed above, the Attainable Housing Fee is a fee and not a tax. As such, the Title set by the Title Board fairly and correctly reflects the intent and meaning of Initiative #3, which is a to change to the Colorado Revise Statutes to impose an Attainable Housing Fee to support new or existing programs that support the provision of Attainable Housing.

CONCLUSION

For the foregoing reasons, the Title Board correctly determined that Initiative #3 contains a single subject and the Title fairly and correctly reflects the meaning and intent of Initiative #3. The Proponents respectfully request the Court deny the relief request in the Petition for Review and affirm the Title Board's setting of the Title for Initiative #3.

Respectfully submitted this 30th day of January, 2023.

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237
BUTLER SNOW LLP

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 2023, the foregoing document was filed with the court via CCEF. True and accurate copies of the same were served on the following via CCEF:

Rebecca R. Sopkin, Esq.
720 Kipling St. #12
Lakewood, CO 80215
Attorney for Petitioner

Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Attorney for the Title Board

/s/ Dalton Kelley
Dalton Kelley, #53948

/s/ Dee P. Wisor
Dee P. Wisor, #7237