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<tr><td>SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203</td><td rowspan="2">DATE FILED: May 10, 2024 4:11 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
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 #298 (“Valuation for Assessments”)

Petitioners: Scott Wasserman and Ann Terry,

v.

Respondents: Dave Davia and Michael Fields,

and

Title Board: Theresa Conley, Christy Chase, and Kurt Morrison</td><td></td></tr>
<tr><td>Attorneys for Petitioners:

Thomas M. Rogers III, #28809
Nathan Bruggeman, #39621
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, Colorado 80202
303-573-1900 (telephone)
303-446-9400 (facsimile)
trey@rklawpc.com; nate@rklawpc.com

Edward T. Ramey, #6748
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
303-949-7676 (telephone)
eramey@TLS.legal</td><td>Case Number: 2024SA141</td></tr>
<tr><td colspan="2">PETITIONERS’ OPENING BRIEF</td></tr>
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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 C.A.R. 28(g).

Choose one:

X It contains 3,714 words (figure on page 15 manually counted).

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

/s Nathan Bruggeman
Nathan Bruggeman
Attorney for Petitioners

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INTRODUCTION

Initiative #298 asks one group of property owners to, in the words of the Board, "hold [their] nose" and support property tax relief for a different group of property owners to receive some tax relief themselves. That is a classic case of logrolling—taking subjects that attract different political support and balling them up in one measure to increase the odds the measure passes.

Residential property taxes and commercial property taxes both, of course, involve "property taxes," but that sort of unifying theme fails to satisfy the single subject requirement when voters view the issues differently. It asks voters to make a tradeoff by accepting something they want in exchange for something they may not support. Ballot initiative proponents have substantial leeway to craft their measures in Colorado, but the Constitution does not permit logrolling through the combining of two subjects in a single measure. The Board recognized Initiative #298's logrolling problem, but it erred by not returning the measure to Proponents. This Court should reverse.

ISSUES PRESENTED

1. Whether the Title Board lacked jurisdiction to set a title on single subject grounds because the taxation of residential property is separate and distinct

from the taxation of nonresidential property, including commercial property, and the combining of these different subjects is an improper attempt to create a political coalition to secure passage of the measure.

STATEMENT OF THE CASE

A. Statement of Facts.

Dave Davia and Michael Fields (hereafter "Respondents") proposed Initiative 2023-2024 #298 (the "Initiative" or "Initiative #298"). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted a final version of the Initiative to the Secretary of State for purposes of submission to the Title Board.

1. The Initiative.

Initiative #298 purports to provide property tax relief. It accomplishes this be reforming one element of Colorado's property tax equation[1]: the "valuation for

[1] Property taxes are determined by multiplying the "actual value" of property by the "assessed rate" that applies to the type of property at issue. The result of that calculation is then multiplied by the "tax rate," which is determined based upon the "mills" imposed by the taxing authorities (e.g. the county, school district, special districts). The result of that calculation is the property tax owed for a given property. *See* Div. of Prop. Taxation, Colo. Dep't of Local Affairs, "Understanding

assessment of tax" or "assessed value" for properties. Petitioners propose two changes to Colorado's assessed value:

- For nonresidential property such as commercial property or vacant land, they seek to lower the assessed value rate from 29% to 25.5%;
- For residential property, including multifamily property, they seek to lower the assessed value rate from 7.15% to 5.7%;
- For property constituting mines, oil and gas lands/leaseholds, agricultural property, and renewable energy production property, they propose no change to the assessed rate.

(CF p. 3 (Proposed C.R.S. §§ 39-1-104 & 39-1-104.2).)

B. Nature of the Case, Course of Proceedings, and Disposition Below.

The Title Board heard the measure on April 18, 2024, at which time it set a title. (*Id.* at 5.) On April 24, 2024, Respondents filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set a title and that the title set by the Board was incomplete and misleading. (*Id.* at 9-14.)

The Board heard the Motion for Rehearing on April 26, 2024. ***All*** three members of the Board recognized that the measure presented a logrolling problem. The Attorney General's representative explained it thus:

Property Taxes in Colorado," last visited Apr. 29, 2024, https://dpt.colorado.gov/understanding-property-taxes-in-colorado.

> The voter sees this on the ballot and says, "I really am not okay with lowering taxes for businesses at all, but I want to lower my own taxes. And to do that I have to hold my nose and vote for corporate, commercial property tax reduction just so I can get my own tax cut." That's the part that really sticks out in my mind. How many voters would be in the position of having a false choice in front of them?

(Apr. 26, 2024, Title Bd. Hr'g at 2:28:32 to 2:28:58[2].) The Chair agreed with the concern—"that is a good point" (*id.* at 2:28:59)—and, in fact, conceded that there is a "little bit of a false choice in this one," (*id.* 2:29:47 to 2:29:50). The representative for the Office of Legislative Legal Services similarly agreed that the logrolling concern is "a valid point." (*Id.* at 2:29:01.)

Nonetheless, the Board granted the motion only to the extent it made changes to the title. (CF p. at 7.)

SUMMARY OF ARGUMENT

The single subject requirement prohibits initiative proponents from combining different subjects in one measure with the intent of cobbling together a political coalition. That is what Initiative #298 does. It seeks to take advantage of various constituencies' property tax complaints to unite those constituencies in a

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[2] The Board incorporated its discussion from Initiative #296 into the record for Initiative #298, as the issues presented to and considered by the Board were the same. (Apr. 26 Hr'g at 2:41:47 to 2:41:55.)

political coalition. But residential property taxes and commercial property taxes present distinct policy and political questions—is one group's rate too high and the other's too low, should one group shoulder more burden to pay for critical government services than the other, is the Colorado system unfair to commercial property tax owners, and so on. Under this Court's long-standing precedent, Proponents cannot smooth over these differences under a general theme of "property taxes." The Board recognized this problem, and it should have acted on it. But it did not, and this Court now should.

LEGAL ARGUMENT

I. Initiative #298 violates the Constitution's single subject limitation.

A. Standard of Review; Preservation of Issue Below.

An initiative cannot contain "more than one subject." Colo. Const. art. V, sec. 1(5.5). Where a measure "contains more than one subject," "no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." *Id.* An initiative satisfies the single subject requirement where its provisions are "necessarily and properly connected." *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 13 (internal quotation marks and citation omitted). "In other words, a measure violates the single subject requirement if its provisions are not 'dependent

upon or connected with each other.'" *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 244 (Colo. 1999) (quoting *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amend. to the Const. of the State of Colo. Adding Subsection (10) to Section 20 of Article X (Amend TABOR 25)*, 900 P.2d 121, 125 (Colo. 1995)).

As the General Assembly and this Court have recognized, the single subject requirement principally guards against two evils. *First*, it prevents so-called "logrolling," in which proponents combine "incongruous subjects in the same measure" "for the purpose of" creating a political coalition to support the measure that might not otherwise support the different elements of the measure. C.R.S. § 1-40-106.5(1)(e)(I). In other words, different subjects must be passed on their own merits. *Second*, it ensures that initiative proponents do not coil "surreptitious measures" together that would surprise voters—"that is, to prevent surprise and fraud from being practiced upon voters." *Id.* § 1-40-106.5(1)(e)(II). *See also generally, e.g.*, *In re Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶¶ 11-15 (reviewing single subject limitation); *In re Title, Ballot Title and Submission*

Clause, and Summary for Initiative 1999-2000 #25, 974 P.2d 458, 460-65 (Colo. 1999) (same).

This Court reviews the Title Board's actions with "deference," *see In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 18, and it "employs all legitimate presumptions in favor of the propriety of the Board's actions," *see In re Title, Ballot Title and Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1076 (Colo. 2010). It is generally only in a "clear case" that the Court will overturn the Board's single subject determination. *See In re Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 9.

Petitioners preserved this issue in their motion for rehearing and during the hearing. (CF p. 9-13; Apr. 26 Hr'g, *supra*, at 2:05:30 to 2:12:08, 2:21:00 to 2:21:55, 2:40:55 to 2:41:45 (incorporating positions from rehearing on Initiative #296, which are the same).)

B. Logrolling is analyzed through the voters' understanding of a measure's subjects.

As the Court has explained, the application of the "necessarily-and-properly-related test" does not occur in a vacuum. Rather, given the purpose of the single subject requirement to protect the voters, it must "take[] into account whether ***voters*** might favor only part of an initiative and the potential for ***voter*** surprise." *In*

re Title, Ballot Title and Submission Clause for 2021-2022 #16, 2021 CO 55, ¶ 16 (emphasis added). In other words, it is an analysis centered on voters and how they will view the subjects of a measure—and not general or high-level connections that can be drawn within a measure.

The Court has recently considered this principle at length. The measures in *2021-2022 #67, #115, & #128* 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 Court 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: "The mere fact that both topics involve the regulation of alcohol is not enough to make them necessarily and properly connected." *Id.* ¶ 23. This high-level connection between the subjects broke down because of the how voters could see the subjects differently, which directly implicated the single subject requirement's prohibition on "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." *Id.* (quoting *In re Title, Ballot Title, Submission Clause, and Summary Adopted Apr. 5, 1995, by the Title Bd. Pertaining to a Proposed Initiative "Pub. Rts. in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995)).

C. At what levels to set the residential property assessment rate and the commercial property assessment rate presents distinct policy and political questions for voters.

Initiative #298 asks voters to provide commercial property owners with a 4.5-percentage point reduction in the assessed rate for their properties. In exchange, residential property owners receive a 1.45-percentage point reduction. While generically relating to "property taxes," the setting of residential and commercial property tax assessment rates presents distinct political and policy questions.

1. 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, which caused many homeowners to face eye-popping changes to their property taxes. 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 (emphasis in original).[3]

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).[4] As the Governor continued, the issue extends beyond homeowners to

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[3] The report is available at https://www.copollinginstitute.org/research/colorado-issues-november-2023

[4] The Governor's order is available at https://leg.colorado.gov/sites/default/files/images/november_2023_special_session_letter_to_the_general_assembly.pdf

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.

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

2. 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 substantially 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. *See generally* Leg. Council of the Colo.

Gen. Assembly, "2020 State Ballot Information Booklet," Research Pub. No. 748-1 (Sept. 11, 2020), at 7-10.

After decades under Gallagher, the disparity between residential and commercial assessment rates grew to a level in 2020 that a business coalition described it 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.[5] The problem, according to the business coalition, 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. *See also, e.g.*, 2020 State Ballot Information Booklet, *supra*, at 12 ("Arguments for Amendment B… If the Gallagher Amendment is not repealed,

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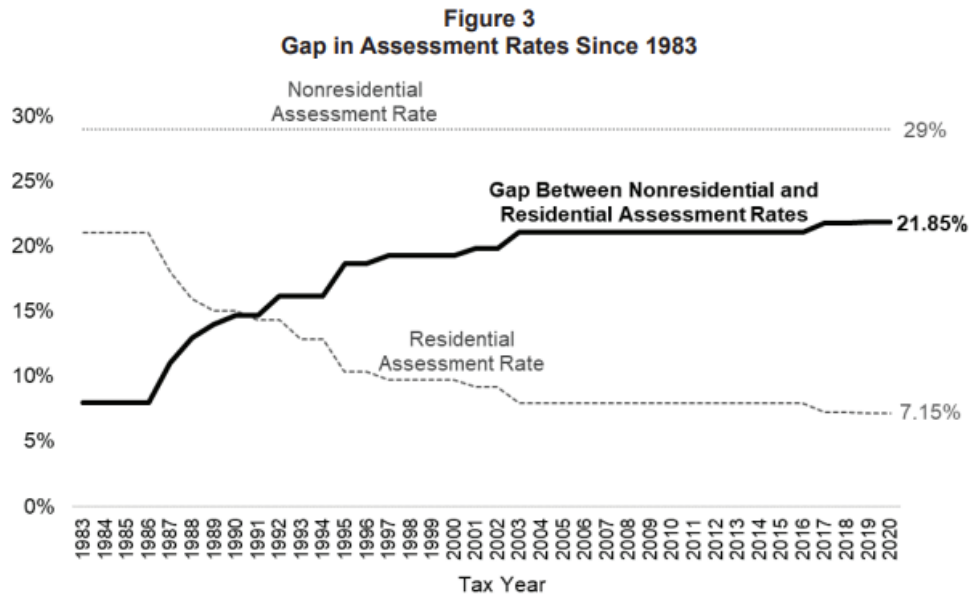
[5] The report is available at https://assets.nfib.com/nfibcom/Gallagher-Tax-Increase-Report-FINAL-10-12-2020.pdf

owners of high-end homes in Denver's wealthiest neighborhoods would get a tax cut next year, while ***small businesses and farmers would pay a larger share of property taxes***. The Gallagher Amendment causes ***small businesses to be taxed at a rate four times higher than residential property owners***…" (emphasis added)).

The passage of Amendment B in 2020 stopped the disparity between residential and commercial property rates from increasing, but it left the commercial property assessment rate at 29% of value, as opposed to a much lower residential property assessment rate, which now sits at 7.15%.

3. Residential and commercial property taxes have been "un-coupled."

As the Board recognized, voters "deliberately un-coupled" commercial and residential property taxes by passing Amendment B, (Apr. 26 Hr'g at 2:24:29 (statement of Mr. Morrison)), but that un-coupling left in place the distinctive and different treatment of property taxes that had resulted from Gallagher. The 2020 Bluebook emphasized how Gallagher had protected residential property taxes for decades at the expense of commercial properties:



2020 State Ballot Information Booklet, *supra*, at 10. Because of the Gallagher formula, residential property tax rates generated little attention—until Amendment B passed and the explosion of property values in the last few years.

The repeal of Gallagher thus created distinctive policy and political choices around property taxes. For commercial property owners, as noted above, there is the unresolved question of what is the "fair" or "right" assessment rate, as they still operate under the 29% rate. For residential property owners, they are now feeling the effects of rising property values, as previously Gallagher would have provided them with protection. The shock from their rising residential property taxes, as noted above and recognized by both the Governor (in calling the special session on

property taxes) and the General Assembly (in referring HH and then passing legislation in the special session), reflects the changed dynamics. Commercial and residential property tax rates are not "just property taxes" anymore. Instead, they are distinct topics of legislative and public debate, and they constitute separate subjects in the measure.

D. The measure presents voters with a "false choice."

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. That's a logrolling violation—which the Board recognized but failed to act on.

Two members of the Board went so far as to describe the measure as presenting voters with a "false choice." (Apr. 26 Hr'g at 2:28:53 to 2:28:56, 2:29:47 to 2:29:50.) Through this "false choice," one group of taxpayers must support a tax cut they may not support to "get [their] own tax cut." (*Id.* at 2:28:48.) The pressure on these voting groups, in particular homeowners and renters who are facing an "immediate crisis" and are in "dire need" of tax relief, *see* Executive Order D 2023 24, *supra*, at 1-2, is not hypothetical or speculative as explained

above due to the significant and rapid increases in property values. Given these conditions, even though a voter may not support a tax cut for the other constituency, the voter will "hold [their] nose" and vote for it to receive some tax relief. (Apr. 26 Hr'g at 2:28:40 to 2:28:48.)

Proponents argued below, and the Board seemed to accept, that a cut to the residential assessment rate and a different cut to the commercial assessment rate were sufficiently connected under the theme of "keeping property taxes low." But that is exactly the sort of unifying label or high-level theme that cannot be used to unite separate subjects. *See, e.g.*, *2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 1 ("retail sale of alcohol"); *In re 2021-2022 #16*, 2021 CO 55, ¶ 22 ("animal cruelty"); *In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶ 34 ("redistricting in Colorado"); *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 10 ("recall of government officers"); *In re Title, Ballot Title and Submission Clause for 2007-2008, #17 (New State Dep't and Elected Bd. for Env't. Conservation*, 172 P.3d 871, 875-76 (Colo. 2007) ("environmental conservation" and "conservation stewardship"). A commercial property rate reduction of 4.5-percentage points is not necessarily connected with a 1.45-percentage point reduction in residential rates, or with leaving the assessed

value for other types of property unchanged due to the distinct political and policy questions attendant to the taxation of each kind of property.

Many voters have no interest in commercial property taxes—or 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 increases they have faced. Initiative #298 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 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). *See* C.R.S. § 1-40-106.5(1)(e)(I). As the measure impermissibly logrolls disparate interests to unite these otherwise different political groups, the Board should have found that it lacked jurisdiction.

CONCLUSION

Respondents respectfully request that this Court affirm the Board's determination that Initiative #298 violated the constitutional single subject requirement and, therefore, it lacked jurisdiction to set a title.

Respectfully submitted this 10th day of May, 2024.

s/ Nathan Bruggeman
Thomas M. Rogers III, #28809
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
trey@rklawpc.com
nate@rklawpc.com

s/ Edward Ramey
Edward T. Ramey, #6748
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
Phone: 303-949-7676
eramey@TLS.legal
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONERS' OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 10, 2024, to the following:

Counsel for the Title Board:

Michael Kotlarczyk
Kyle Holter
Peter Baumann

Counsel for Petitioners:

Suzanne Taheri
Sarah Mercer

/s Erin Mohr