

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue, 4th Floor Denver, CO 80203</p>	<p>FILED IN THE SUPREME COURT</p> <p>NOV 20 2018</p> <p>OF THE STATE OF COLORADO Cheryl L. Stevens, Clerk</p> <p>▲ COURT USE ONLY ▲</p>
<p><b>In Re: Interrogatories Propounded by Governor John W. Hickenlooper Concerning a Conflict between Section 3 and Section 20 of Article X of the Constitution of the State of Colorado</b></p>	<p>Case No. 2018 SA <u>276</u></p>
<p><b>INTERROGATORIES PURSUANT TO ARTICLE VI, SECTION 3 OF THE CONSTITUTION OF THE STATE OF COLORADO</b></p>	

For the reasons set forth below, I, John W. Hickenlooper, Governor of the State of Colorado, submit the following interrogatories to the Colorado Supreme Court pursuant to Article VI, Section 3 of the Constitution of the State of Colorado. These interrogatories are propounded on a solemn occasion and embody important questions of law concerning the conflict between two sections of the Colorado Constitution—Article X, Section 3(1)(b) (the “Gallagher Amendment”) and Article X, Section 20(4)(a) (“TABOR”)—which is preventing local governments from funding even limited essential services.

This conflict raises questions *publici juris* and is a matter of statewide concern. It has resulted in the steady erosion of the budgets of local governments in communities throughout the State that rely on property taxes. Those cuts impact the entire State because Article IX, Section 17 of the Colorado Constitution requires the State to cover some of this shortfall. While local governments previously absorbed their remaining losses, many have reached a point where they are no longer able to do so and still provide essential services. The situation has come to a head, and this Court's timely intervention is needed to understand what the Colorado Constitution requires. The attached appendix lists organizations that support the submission of these interrogatories.

### **BACKGROUND**

Colorado counties, cities, and special districts, such as those established for fire protection, libraries, and water, depend on property tax revenue to fund their services. LEG. COUNCIL OF THE COLO. GEN. ASSEMBLY, LOCAL GOV'T HANDBOOK 10–11, 18–19 (Jan. 2016).<sup>1</sup> Property tax is determined by first multiplying a property's actual value by a *statewide* assessment ratio to identify its “assessed

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<sup>1</sup> Available at [https://leg.colorado.gov/sites/default/files/local\\_government\\_handbook\\_2016.pdf](https://leg.colorado.gov/sites/default/files/local_government_handbook_2016.pdf) (last visited Nov. 20, 2018).

value.” §§ 39-1-103(5)(a) & -104(1)–(1.5), C.R.S. The assessed value is then multiplied by a *local* mill levy to determine the tax due to the local taxing body. See §§ 39-1-111(1) & -121, C.R.S.; see also COLO. DEP’T OF LOCAL AFFAIRS, UNDERSTANDING PROPERTY TAXES IN COLORADO 2018, at 4 (Aug. 2017).<sup>2</sup> The mill levy is applied uniformly to all types of property in the locality. Colo. Const. art. X, § 3(1)(a). Two constitutional provisions impact this calculation: the Gallagher Amendment and TABOR.

**I. Colorado voters adopted the Gallagher Amendment in 1982 to balance the property tax burden between residential and non-residential property, not to decrease taxes.**

Voters passed the Gallagher Amendment in 1982 to protect residential property from bearing an increasing proportion of the property tax burden as compared to non-residential property. LEG. COUNCIL OF THE COLO. GEN. ASSEMBLY, AN ANALYSIS OF 1982 BALLOT PROPOSALS, at 6 (1982) (“1982 BALLOT ANALYSIS”);<sup>3</sup> COLO. DEP’T OF STATE, 1982 ABSTRACT OF VOTE, at 174–75. To accomplish this goal, the Gallagher Amendment essentially froze the respective percentages of statewide assessed value for residential and non-residential property

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<sup>2</sup> Available at <https://drive.google.com/file/d/11TkW40l5kz4hOupAVQQouprSvUZQBhK2/view> (last visited Nov. 20, 2018).

<sup>3</sup> Available at <https://www.sos.state.co.us/pubs/elections/Results/BlueBooks/1982BlueBook.pdf> (last visited Nov. 20, 2018).

at the levels that existed in 1985. *See* 1982 BALLOT ANALYSIS at 7; Colo. Const. art. X, § 3(1)(b). The percentages may only be modified to account for new construction or certain mineral, oil, or gas production. Colo. Const. art. X, § 3(1)(b). This has resulted in a roughly 45% to 55% split between residential and non-residential property assessed values (the “45/55 split”). *See* § 39-1-104.2(b)–(p), C.R.S.

The Gallagher Amendment also set the non-residential assessment ratio at 29% except for producing mines and lands or leaseholds producing oil or gas. Colo. Const. art. X, § 3(1)(b). Thus, the actual value of most non-residential property multiplied by .29 plus the assessed value of mineral and oil or gas production must equal approximately 55% of statewide assessed value.

The residential assessment ratio (“RAR”), however, is not fixed. Instead, the RAR must increase or decrease as needed to ensure residential property represents approximately 45% of the statewide assessed value. *See id.* The General Assembly evaluates the RAR every two years. § 39-1-104(10.2)(a), C.R.S.

In 1983, the RAR was 21%. Colo. Const. art. X, § 3(1)(b). Because residential property actual values have risen faster than nonresidential property actual values, the RAR has steadily decreased since then to a low of 7.2% for

2017-2018. § 39-1-104.2(3)(a)–(p), C.R.S.; *see* Jefferson Geiger, *Assessment rate projected to keep dropping in Alamosa County*, VALLEY COURIER, Feb. 22, 2018.<sup>4</sup>

The most recent estimate for 2019-2020 is that the RAR will be decreased to 6.11%. COLO. LEG. COUNCIL STAFF, FOCUS COLORADO: ECONOMIC & REVENUE FORECAST, at 4 (Dec. 20, 2017).<sup>5</sup>

Despite impacting assessment ratios, the Gallagher Amendment did not freeze local mill levies. *See* 1982 BALLOT ANALYSIS, at 1–9 (1982). Thus, a local jurisdiction could continue to modify its mill levy (which applies equally to residential and non-residential property) to maintain its property tax revenue notwithstanding the ratios the Gallagher Amendment imposed.

## **II. Colorado voters adopted TABOR in 1992 to require advance voter approval of certain tax policy changes and tax increases.**

In 1992, Colorado voters adopted TABOR. COLO. DEP'T OF STATE, ABSTRACT OF VOTES CAST 1992, at 126, 132; Colo. Const. art. X, § 20. TABOR's central concern is “constraining tax hikes.” *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 106 (Colo. 2018). It does so in several ways, including requiring

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<sup>4</sup> Available at <https://alamosanews.com/article/assessment-rate-projected-to-keep-dropping-in-alamosa-county> (last visited Nov. 20, 2018).

<sup>5</sup> Available at <http://leg.colorado.gov/sites/default/files/dec2017forecast.pdf> (last visited Nov. 20, 2018).

advance voter approval for certain types of tax policy changes and tax increases, including increases to assessment ratios and mill levies. Colo. Const. art. X, § 20(4)(a).

As a result of TABOR, the General Assembly has not increased the RAR even when an increase is necessary to achieve the 45/55 split. *See, e.g.*, COLO. LEG. COUNCIL STAFF, FISCAL NOTE: H.B. 13-1319, at 2 (June 14, 2013); COLO. DEP'T OF LOCAL AFFAIRS, RESIDENTIAL ASSESSMENT RATE STUDY PRELIMINARY FINDINGS 2017-2018, at 26 (Jan. 13, 2017) (“2017-2018 RAR STUDY”).<sup>6</sup> TABOR has forced the General Assembly to use an RAR that failed to achieve the 45/55 split in 14 out of the 26 years since TABOR’s passage. *See* 2017-2018 RAR STUDY, at 3 (showing use of a lower RAR in 1999-2000 and 2005-2016 than called for by preliminary and final RAR studies).

## DISCUSSION

These interrogatories concern the interaction between TABOR and the Gallagher Amendment and the conflict between them. They present questions *publici juris* that this Court should resolve.

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<sup>6</sup> Available at <https://drive.google.com/file/d/0B-vz6H4k4SESeUhyZW9ScHV3NFE/view> (last visited Nov. 20, 2018).

**I. TABOR's impact on the Gallagher Amendment has created an irreconcilable conflict in Colorado's Constitution.**

The ways in which TABOR and the Gallagher Amendment impact both the RAR and the mill levy create constitutional conflicts. TABOR has prevented the legislature from increasing the RAR, as the Gallagher Amendment requires. And TABOR's restrictions on the ability to increase the mill levy without a popular vote is inconsistent with the intent of both provisions.

**A. Preventing the RAR from increasing to maintain the 45/55 split conflicts with the Gallagher Amendment.**

One of the Gallagher Amendment's central features is the 45/55 split. To maintain that split, the RAR must be allowed to increase or decrease as necessary.

But because TABOR has prevented the RAR from increasing, the Gallagher Amendment cannot work as designed. Unless the RAR can be increased as required by the Gallagher Amendment, the 45/55 split cannot be maintained, which frustrates the voters' intent.<sup>7</sup>

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<sup>7</sup> *Huber v. Colorado Mining Ass'n*, 264 P.3d 884 (Colo. 2011), could possibly provide a solution to this conflict. *See Huber*, 264 P.3d at 892. But even after *Huber* was decided, the General Assembly failed to increase the RAR as needed for 2013-2014 and 2015-2016. *See* 2017-2018 RAR STUDY, at 3. And the risks inherent in raising the RAR improperly if the Court concludes *Huber* does not apply are substantial: (1) already-struggling local governments would need to refund improperly collected taxes plus 10% annual simple interest; and (2) if

**B. TABOR's restrictions on mill levy adjustments creates a situation inconsistent with both constitutional provisions.**

Because the Gallagher Amendment's 45/55 split is determined at a statewide level, it can lead to unpredictable, and potentially harmful, local outcomes. The only way for local jurisdictions to mitigate these effects and keep their property tax revenue stable is through adjustments to the mill levy, the part of the property tax calculation the Gallagher Amendment left within local control.

The Gallagher Amendment necessarily relies on local jurisdictions being able to increase their mill levies to fund essential services if the RAR decreases without a commensurate increase in local property values. If this were not the case, the Gallagher Amendment would bankrupt jurisdictions experiencing localized economic depressions because not only would actual property values be lower, but the portion of the actual value to be taxed would also decrease.

By the same token, if a jurisdiction experiences a localized economic boom at a time when the RAR increased, the Gallagher Amendment relies on the local

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increased property taxes led to a TABOR refund, but were later declared improper, local governments may lose not only the tax plus 10% but also all of the money paid out as a TABOR refund. Colo. Const. art. X, § 20(1) & (7)(d). These concerns are only exacerbated by the fact that litigation over the issue would take years, creating significant budget uncertainty for both the State and local jurisdictions.



jurisdiction to reduce its mill levy to avoid excessive taxes. Otherwise, property owners would be required to pay more than necessary to fund local government.

TABOR's restrictions on the free movement of the mill levy destabilizes this system. It is inconsistent with this Court's guidance to read the Constitution to require already-struggling local jurisdictions to fund TABOR elections year after year merely to keep their property tax revenue stable when they can barely fund a fire department or local schools. *See, e.g., Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (holding that TABOR should not be read in a way that "would ... cripple the government's ability to provide services"). It is also inconsistent with TABOR's intent to "constrain[ ] *tax hikes*." *TABOR Found.*, 416 P.3d at 106 (emphasis added). These votes would keep tax revenue stable—*not* increase it.

TABOR also creates a strong disincentive to prosperous local jurisdictions decreasing their mill levies to account for increases in the RAR. Knowing that positive economic times may not last forever, local jurisdictions have every reason to maintain their mill levies instead of lowering them and then needing a TABOR election to increase the levies if the economy declines. This unnecessarily keeps taxes high, which is not TABOR's intent.

Superimposing TABOR on the system the Gallagher Amendment created has caused the system to collapse. As the effects of these two provisions have become clearer, so too has the fact that maintaining the 45/55 split is unworkable and results in a system that is inconsistent with both the Gallagher Amendment and TABOR. The effects have become so severe that they have started to cripple the ability of local government to provide essential services. *See, e.g., Dennis Webb, Impacts of Gallagher amendment heard; panel grapples with fix, THE DAILY SENTINEL*, July 18, 2018.<sup>8</sup> This need not—and under any reasonable interpretation of the Colorado Constitution, should not—continue.

**II. These interrogatories present questions *publici juris*; the Court should exercise its discretion to answer them.**

This Court has discretion to answer a governor’s interrogatories when the interrogatories present questions *publici juris*, “where the interest of the state at large is directly involved.” *In re Hickenlooper*, 312 P.3d 153, 156 (Colo. 2013) (quoting *Wheeler v. N. Colo. Irrig. Co.*, 11 P. 103, 105 (Colo. 1886)). These interrogatories present just such questions.

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<sup>8</sup> Available at [https://www.gjsentinel.com/news/western\\_colorado/impacts-of-gallagher-amendment-heard-panel-grapples-with-fix/article\\_e5ff0e3c-8b0f-11e8-83a6-10604b9f6eda.html](https://www.gjsentinel.com/news/western_colorado/impacts-of-gallagher-amendment-heard-panel-grapples-with-fix/article_e5ff0e3c-8b0f-11e8-83a6-10604b9f6eda.html) (last visited Nov. 20, 2018).

This conflict has ramifications for every Coloradan. Local jurisdictions are at risk of receiving less and less funding when decreases in the RAR outpace local residential property value increases absent expensive TABOR elections.

TABOR's restrictions on the Gallagher Amendment formula also have the potential to create a statewide fiscal crisis. If residential property values decrease throughout Colorado relative to nonresidential property values, the RAR must rise to maintain the 45/55 split. But if TABOR continues to suppress the RAR artificially, that will not be possible, and the fiscal impact will be profound in every local jurisdiction.

Reductions in local revenue also impact statewide resources because the State must provide additional support to school districts that do not receive sufficient local funding. *See* Colo. Const. art. IX, § 17. This reduces the State's ability to fund other statewide priorities, such as transportation.

Additionally, these interrogatories involve a conflict between two amendments to the Colorado Constitution. That conflict implicates the meaning of the central document that governs the relationship between the State and its citizens regarding an essential power of government, taxation.

Finally, these interrogatories should be answered prior to the conclusion of the next legislative session. In 2019, the Gallagher Amendment is expected to require the General Assembly to decrease the RAR again. Depending on how the Court answers these interrogatories, this harmful reduction may be unnecessary.

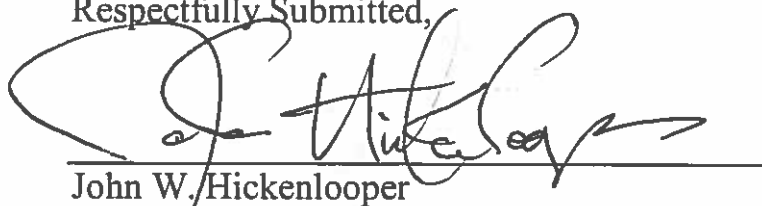
### **INTERROGATORIES**

Colorado is facing a constitutional conflict that is harming some of its most vulnerable communities and has statewide impacts. Delay in answering these questions will result in additional hardships. For these reasons, and those discussed above, I submit the following interrogatories to the Supreme Court for its opinion and certify that they are “important questions upon solemn occasions,” as required by Article VI, Section 3 of the Colorado Constitution:

1. Does Article X, Section 3 of the Colorado Constitution conflict with Article X, Section 20 of the Colorado Constitution such that all or some portion of Section 3 must be deemed overwritten or superseded?
2. If there is a conflict between Article X, Section 3 of the Colorado Constitution and Article X, Section 20 of the Colorado Constitution, which portions of Section 3 has Section 20 invalidated?
3. If the portions of Article X, Section 3 that were superseded by Article X, Section 20 required the reductions in the residential assessment ratio that occurred following the passage of Section 20, at what level may the General Assembly set the residential assessment ratio in future years without advance voter approval as contemplated in Section 20?

Dated this 20th day of November, 2018.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John W. Hickenlooper", written over a horizontal line. The signature is stylized and cursive.

John W. Hickenlooper  
Governor of the State of Colorado

## **APPENDIX A**

### **Supporting Agencies**

#### **Colorado State Fire Chiefs**

The Colorado State Fire Chiefs is a nonprofit corporation organized to support fire departments across the State of Colorado, and represents the nearly 400 municipal fire departments and fire protection districts in the State. The Colorado State Fire Chiefs strongly supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.

#### **Special District Association of Colorado**

The Special District Association of Colorado is a membership organization with over 1,800 member special districts. The Special District Association strongly supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.

#### **Colorado Professional Fire Fighters**

As the Colorado state chartered organization of the International Association of Firefighters since 1947, the Colorado Professional Fire Fighters represents over 4,500 career fire fighters. The Colorado Professional Fire Fighters strongly

supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.

**Colorado Counties, Inc.**

Colorado Counties, Inc. is a non-profit, membership association whose purpose is to offer assistance to county commissioners and to encourage counties to work together on common issues. Colorado Counties, Inc. represents 60 of the 65 counties in the State of Colorado. Colorado Counties, Inc. supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.

**Colorado Association of School Boards**

The Colorado Association of School Boards was established in 1940 to provide a structure through which school board members could unite in their efforts to promote the interests and welfare of Colorado's 177 school districts. The Colorado Association of School Boards represents and advocates for more than 1,000 school board members and superintendents statewide to groups both within and outside the K-12 education community. The Colorado Association of School Boards supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.

### **Denver Metro Chamber of Commerce**

For 150 years, the Denver Metro Chamber of Commerce has been a leading voice for Colorado's business community. The Denver Metro Chamber of Commerce represents more than 3,000 businesses. The Denver Metro Chamber of Commerce supports the submission of interrogatories seeking clarification of the interaction between the Gallagher Amendment and the TABOR Amendment.