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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BUILDING OWNERS AND MANAGERS ASSOCIATION, *et al.*, Plaintiffs-Appellees, v. BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF CHICAGO, *et al*, Defendants-Appellants.	Appeal from the Circuit Court of Cook County, County Division Case No, 2024 COEL 000001 Hon. Kathleen M. Burke, Judge Presiding

Brief of Amicus Curiae Illinois Policy
In Support of Plaintiffs-Appellees

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Points and Authorities

Introduction

In November 2023, the Chicago City Council approved a ballot referendum question[1] that, if approved by the voters, would decrease the tax on real estate sales of under one million dollars and increase the tax on the portion of any real estate sale over one million dollars.

The ballot referendum is bad policy. First, despite being billed as a "mansion tax," the new taxes will not primarily fall on mansion sales. Most sales above one million dollars are commercial properties, not private residences. Often, these are run by mom-and-pop businesses—a key contributor to Illinois' job growth—struggling to make ends meet amid Chicago's crime-and-tax-filled hostile business environment. Kicking them again on their way out the door is just one final act of cruelty.

Next, the tax is unlikely to raise the money expected. Consider that Los Angeles recently implemented a similar policy, which only brought in about 15% of its expected revenue.[2] Moreover, here as there, the tax is likely to have a deleterious effect on investment in Chicago, as investors seek lower-tax cities.

[1]The text of the ballot initiative is available at https://occprodstoragev1.blob.core.usgovcloudapi.net/matterattachmentspublic/db8b5770-b37a-4b55-9625-7c0f55538927.pdf

[2] Diana Ionescu, Planetizen, "LA 'Mansion Tax' Yielding Less Revenue Than Predicted," Jan. 14, 2024, https://www.planetizen.com/news/2024/01/127036-la-mansion-tax-yielding-less-revenue-predicted (last visited 3/1/24).

Finally, even if it does raise money, the ballot initiative offers no explanation of how that money will be raised to combat homelessness—or even any sort of binding language on the government to ensure that the money will not be diverted elsewhere. Its ostensible legislative purpose is to "combat[] homelessness" by "providing permanent affordable housing and services," but the language of the ballot initiative itself—that which will appear on the ballot for the voter to read—makes no mention of how this will be done. It simply asks the voter whether the City should change the transfer tax rates and says that the revenue "is to be used for the purpose of addressing homelessness."

But the ballot referendum only asks voters whether the City shall adjust the rates. It doesn't ask voters whether the City should use the money raised to combat homelessness or even how it should do so. This would pummel the City's already-suffering real estate market without binding the City to use the funds to help the homeless. The ballot language does its best to obscure this fact.

That might be because the City doesn't want its hands tied when it comes to distributing any new funds it gets. After all, Chicago already has plenty of money (approximately $700 million) left over in federal COVID-19 relief funds. Why is that money not being spent on ameliorating homelessness? The fact that only a fraction of those funds has been spent—and could be spent here—does not suggest that the money raised by this ballot initiative will be spent any more effectively.

Interest of the Amicus Curiae

Illinois Policy is a research and education organization that promotes personal and economic freedom through free markets and limited government. Headquartered in Chicago, the Institute's focus includes budget and tax, good government, and jobs and economic growth. As the strongest voice for taxpayers in the state, Illinois Policy's interest in this case is to ensure the harmful effects of the proposed ballot initiative are considered by this court, including the initiative's disproportionate effect on commercial properties that could further hamper Chicago's economic recovery.

Argument

I. The "Mansion Tax" will primarily affect the sale of commercial property, hampering Chicago's economic recovery.

The real estate transfer tax, despite its branding as a "mansion tax," is not limited to residential property. It instead increases taxes on transfers of *all* property valued between one million dollars and $1.5 million by 166.67%; increases taxes on transfers over $1.5 million by 300%; and decreases the tax on transfers under one million dollars by a modest 20%.

And it turns out that non-residential property makes up the bulk of real estate transactions over one million dollars. In fact, between April 2021 and April 2022, commercial property outsold residential property by a ratio of 9 to

1. Dennis Rodkin, *Not Just a 'Mansion Tax': This Plan Would Triple the Transfer Tax on Commercial Building Sales, Too*, Crain's Chicago Business (Apr. 19, 2022).[3]

The City should not be increasing the financial burden of businesses now, when Chicago's economy shows no signs of recovering from the COVID-19 pandemic. Office vacancy is 23.8%, compared to pre-pandemic levels of 13.8%. Danny Ecker, *Downtown Office Vacancy Ended 2023 at Another Record High*, Crain's Chicago Business (Jan. 10, 2024)[4].

Chicago also has the worst rate among major cities of distressed commercial real estate loans, with the rate of delinquent or specially serviced commercial mortgage-backed securities at 22.7%. This is over three times the rising national rate of 6.8%. TRD Staff, *Distressed SRE Loans Surge Nationwide*, The Real Deal: Real Estate News (Sept. 20, 2023).[5]

And one of the reasons for the City's current economic distress is its already-high tax burden. It has the second-highest commercial property tax rate in the nation, which is more than double the U.S. average for the largest cities in each state. Lincoln Institute of Land Policy, *50-State Property Tax*

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[3] https://www.chicagobusiness.com/residential-real-estate/chicago-proposal-would-triple-transfer-tax-buyers-property-1-million-or (last visited 3/2/24)

[4] https://www.chicagobusiness.com/commercial-real-estate/downtown-office-vacancy-chicago-2023-record-high (last visited 3/2/24)

[5] https://therealdeal.com/national/2023/09/20/distressed-commercial-real-estate-loans-surge-nationwide (last visited 3/2/24)

Comparison Study 3 (July 2022)[6]; *see also* Justin Carlson, *Chicago has 2nd Highest Commercial Property Taxes in U.S.*, Illinois Policy Institute (July 7, 2023).[7] This is compounded by the second-highest corporate income tax rate in the nation. Bryce Hill, *Illinois Corporate Income Tax Hits No. 2 in Nation*, Illinois Policy Institute (Jan. 29, 2024).[8]

The state's corporate tax environment is made even worse by Illinois' cap on Net Operating Losses (NOLs) on corporate tax returns. Net operating loss provisions are an important part of the state's tax code, which ensure that businesses are treated fairly with respect to taxation, regardless of changes in their profitability. Capping these provisions can lead to companies paying far higher effective tax rates than the state's statutory corporate income tax rate. Because of this, every state tax code and the federal tax code contain net operating loss provisions. Only two other states—Pennsylvania and New Hampshire—place caps on the amount of losses a business can claim. Carol Portman, *Net Operating Losses in Illinois and Around the Country: Matching Taxes to the Business Cycle*, Taxpayers' Federation of Illinois (Oct. 2021)[9]; *see*

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6 https://www.lincolninst.edu/publications/other/50-state-property-tax-comparison-study-2021 (last visited 3/2/24)

7 https://www.illinoispolicy.org/chicago-has-2nd-highest-commercial-property-taxes-in-u-s/ (last visited 3/2/24)

8 https://www.illinoispolicy.org/illinois-corporate-income-tax-rate-hits-no-2-in-u-s/ (last visited 3/2/24).

9 https://www.illinoistax.org/index.php/net-operating-losses-in-illinois-and-around-the-country-matching-taxes-to-the-business-cycle-carol-portman/ (last visited 3/2/24)

also Timothy Vermeer, *Net Operating Loss Provisions: State Treatment and the Economic Benefits*, Tax Foundation (Jan. 13, 2022).[10]

If that wasn't enough, Illinois is also one of the few states in the nation that levies a corporate franchise tax. In addition to the financial burden of paying the tax, the franchise tax requires corporations to estimate their tax burden through a convoluted process that carries significant compliance costs regardless of their ultimate tax liability. Taxpayers' Foundation of Illinois, *Illinois' Franchise Tax: An Archaic Outlier* (Apr. 2023).[11]

Chicago also has the second-highest combined state and local sales tax rate of any large city in the nation. Only Tacoma, Washington levies a higher combined state and local sales tax rate (10.3%) than Chicago's 10.25% combined sales tax rate. Even other high-tax cities such as New York (8.875%), San Francisco (8.625%), and Los Angeles (9.5%) have substantially lower sales tax rates than Chicago. Bryce Hill, *Illinois Sales Taxes Highest in Midwest*, Illinois Policy Institute (Feb. 14, 2024).[12]

The increase in the real estate transfer tax on properties valued at over one million dollars will disproportionately affect commercial properties relative to residential properties. This tax increase will exacerbate Chicago's

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[10] https://taxfoundation.org/research/all/state/state-net-operating-loss-provisions/ (last visited 3/2/24)

[11] https://www.illinoistax.org/index.php/tax-facts-an-illinois-chartbook-how-does-illinois-compare-2/ (last visited 3/2/24).

[12] https://www.illinoispolicy.org/illinois-sales-taxes-highest-in-midwest/ (last visited 3/2/24).

already overly burdensome tax environment for businesses. The result could be an even more significant drag on Chicago's business climate, in particularly for smaller businesses that are a major driver of Chicago's economy. Where Chicago should be seeking to ameliorate the tax and regulatory burden on commercial businesses, the increase in the real estate transfer tax would do the opposite.

II. A new tax amid Chicago's economic decline will not generate the expected revenue.

Because the transfer tax will accelerate Chicago's economic decline, there is no way that it will generate the revenue the City expects. Businesses are fleeing the City because of the hostile economic environment discussed above and are willing to sell their properties at a loss to do so. For example, Oregon-based Menashe Properties' recent purchase of a 29-story office building in the Loop (the first commercial property sale downtown in almost a year) sold at a 63% discount. Menashe Properties paid just $45 million for the 623,675-square-foot building. Nearly a decade earlier, it had sold for $122 million. Danny Ecker, *Oregon Investor Completes the First Loop Office Tower Purchase in More than a Year*, Crain's Chicago Business (Sept. 21, 2023).[13] This is not, as the City might imagine, due to lingering post-pandemic economic distress. Other cities are recovering from COVID-19 just fine. *See*

[13] https://www.chicagobusiness.com/commercial-real-estate/menashe-properties-buys-loop-office-tower (last visited 3/2/24).

Brian J. Rogal, *Demand for Office Space Nearly Back to Pre-Pandemic Levels in Some Cities, but not in Chicago, Report Finds*, Chi. Trib. (Feb. 6, 2024).[14]

Empty buildings mean lower commercial property values, and that, in turn, means lower tax revenues for the City. Chicago's proposed real estate transfer tax hike would exacerbate this trend by increasing the real estate transfer tax on commercial property buyers, who can choose to just stop buying.

Failing to reach projected revenues isn't just conjecture. It has already happened in Los Angeles, where a similar "mansion tax" on land transactions over $5 million has brought in less revenue than expected. It was projected to raise upwards of $900 million each year. But since it went into effect in April 2022, it has raised only about $142 million. Sarah Holder, *As "Mansion Tax" Catches on in U.S. Cities, Los Angeles Offers Lessons*, Crain's Chicago Business (Jan. 13, 2024).[15]

III. The City has no plan to spend the money.

The ballot language contains no specific plan or roadmap to help the homeless, much less binding language to ensure the City spends the money raised responsibly. This is unsurprising given the City's track record of financial mismanagement.

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[14] https://www.chicagotribune.com/2024/02/06/demand-for-office-space-nearly-back-to-pre-pandemic-levels-in-some-cities-but-not-in-chicago-report-finds/ (last visited 3/2/24).

[15] https://www.chicagobusiness.com/politics/what-chicago-can-learn-los-angeles-mansion-tax (last visited 3/2/24).

For example, the City was granted $52 million in federal funds for homeless programs; it has, as of last August, spent only 15% of that. Rachel Hinton et al., *City has Spent Only 15% of $52 Million in Federal Money Dedicated for Homeless Programs*, Book Club Chicago (Aug. 11, 2023).[16] Meanwhile, $250 million of federal COVID-19 relief funds also languish in the City's coffers. Heather Cherone, *Just 29% of Federal COVID-19 Relief Funds Meant to Transform Chicago Have Been Spent: Data*, WTTW (Feb. 12, 2024).[17] Chicago has budgeted $39.8 million in federal funding to homeless relief, but has so far only spend $12.9 million of it. *Id.* And instead of using those federal funds for their intended purpose, Mayor Johnson has been raiding them for other purposes, such as the $95 million he spent on migrants from the southern border. *Id.* The City's own aldermen are aware of the budget mismanagement, as reflected in statements such as "[w]e certainly should have spent the bulk of this money . . . when the pandemic was raging," *id.*, "[w]e have to take a hard look at why we let millions of dollars sit on the shelf while people were suffering," *id.*, and "[w]e're asking for more when we don't know how to use what we already have," Fran Spielman, *"Bring Chicago Home" Referendum to Reduce Homelessness*

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[16] https://blockclubchicago.org/2023/08/11/city-has-spent-only-15-of-52-million-in-federal-money-dedicated-for-homeless-programs/ (last visited 3/2/24).
[17] https://news.wttw.com/2024/02/12/just-29-federal-covid-19-relief-funds-meant-transform-chicago-have-been-spent-data (last visited 3/2/24)

Through Tax on High-End Property Sales Clears City Council, Chi. Sun-Times (Nov. 7, 2023).[18]

Rather than raise more money the City has no plan to spend, the City could do things to increase the housing supply line, such as streamline construction approvals, so developers don't spend as much time and money dealing with unnecessary regulatory obstacles or outdated building codes. It could partner with local developers to rehabilitate any of the 13,000 housing units in Chicago that are currently vacant because they either need repairs or have been condemned. United States Census Bureau, B25130 Other Vacancy Status.[19] It could reduce property tax burdens to encourage development or residential developments in particular. The City has plenty of options; it doesn't need to immediately choose the one that will only inflict more pain on its already-distressed property market—and face the legal challenge Plaintiffs-Appellees have presented.

Conclusion

If passed, the ballot initiative would raise the real estate transfer tax on properties valued over one million dollars, which will disproportionately

[18] https://chicago.suntimes.com/city-hall/2023/11/7/23950713/chicago-city-council-real-estate-transfer-tax-bring-chicago-home-referendum-passes (last visited 3/2/24).

[19] https://data.census.gov/table/ACSDT1Y2022.B25130?q=housing%20vacancy%20chicago&g=060XX00US1703114000 (last visited 3/3/2024) (Click the "Geos" tab, enter "Chicago," select "Chicago City, Cook County, Illinois. Results include 7,711 units that need repair and 5,329 units that are abandoned or condemned.)

affect commercial properties. Chicago businesses are already burdened with high income, sales, and property taxes causing businesses to flee the City. Adding an additional tax burden on these businesses only gives them more incentive to leave. And that means that the increased real estate transfer tax would likely result in less revenue than the City predicts. Worse, the purported purpose of the tax increase—to raise revenue to combat homelessness—is unnecessary as the City already has funds that could be used to address homelessness which it is not using. In addition to the legal deficiencies that Plaintiffs have articulated in this case, the ballot initiative represents bad policy.

Dated: March 4, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.

/s/ James McQuaid

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, James McQuaid, an attorney, certify that on March 4, 2024, I caused the foregoing Brief of Amicus Curiae Illinois Policy in Support of Plaintiffs-Appellees to be served via electronic mail on all attorneys on the attached service list.

/s/ James McQuaid

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