

COLORADO SUPREME COURT  
 2 East 14<sup>th</sup> Ave.  
 Denver, Colorado 80203

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Original Proceeding Pursuant to § 1-40-107(2),  
 C.R.S. (2019-2020)  
 Appeal from the Ballot Title Board

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In the Matter of the Title, Ballot Title, and  
 Submission Clause for Proposed Initiative 2019-  
 2020 #283 (“Paid Family Leave Insurance Program”)

**Petitioner:** Kelly Brough,

v.

**Respondents:** Timothy Tyler and Wendy Howell,

**and**

**Title Board:** Theresa Conley, David Powell, and  
 Julie Pelegrin.

▲ COURT USE ONLY ▲

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Case No.: 2020SA128

**THE TITLE BOARD’S OPENING BRIEF**

## CERTIFICATE OF COMPLIANCE

I 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, I certify that:

- A. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 2,362 words.
- B. The brief complies with C.A.R. 28(a)(7) because for each issue it contains, under a separate heading, a statement of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ Anne M. Mangiardi*

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The Colorado Title Board (“Board”), by and through undersigned counsel, hereby submits its Opening Brief.

### **STATEMENT OF THE ISSUES**

1. Whether the Board correctly concluded that the ballot title for Proposed Initiative 2019-2020 #283 does not need to include the language required for certain ballot measures by subsection (3)(c) of article X, § 20 of the Colorado Constitution.<sup>1</sup>

2. Whether the ballot title is misleading in violation of Section 1-40-106(3)(b), C.R.S. (2019).

### **STATEMENT OF THE CASE AND FACTS**

Proponents Timothy Tyler and Wendy Howell seek to circulate #283 to obtain the requisite number of signatures to place a measure on

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<sup>1</sup> Number 283 is nearly identical to Proposed Initiatives #247 and 248. Before the Board, Petitioner incorporated her legal arguments related to #247’s TABOR issue into her legal arguments related to #248, and incorporated her arguments on both #247 and #248 into her arguments on #283. The Board’s rulings on #247, #248 and #283 are identical. As such, the Board’s Opening Brief for #283 is substantively identical to the Opening Briefs previously submitted for #247 and #248.

the ballot to enact a new part, § 8-13.3-401 *et seq.*, in Colorado’s revised statutes. The proposed initiative seeks to create a new enterprise, the Division of Family and Medical Leave Insurance (the “Division”), to provide and administer family and medical leave insurance for Colorado workers. Record for Initiative #283, p. 2, filed April 15, 2020 (“Record”).

Initiative 283 is nearly identical to proposed initiatives #247 and #248. This Court recently affirmed the Board’s action in setting title on those initiatives, after review of nearly identical objections raised by the same Petitioner. *In re Title, Ballot Title, & Submission Clause for 2019-2020 #247*, 2020SA94, May 1, 2020 Order; *In re Title, Ballot Title, & Submission Clause for 2019-2020 #248*, 2020SA00095, May 1, 2020 Order.

#### **A. Procedural History**

The Board conducted an initial public hearing on March 25, 2020 and set a title for #283.<sup>2</sup> Record, pp. 49-50. Petitioner filed a timely

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<sup>2</sup> The caption mistakenly lists Julie Pelegrin. The title board for this initiative consists of Theresa Conley, David Powell and Jason Gelender.

motion for rehearing on March 31, 2020, *id.*, p. 51, and the Board denied that motion after holding a rehearing on April 8, 2020, *id.*, pp. 54-55. Petitioner then filed a timely petition of review with this Court on April 15, 2020.

On rehearing, Petitioner conceded that the proposed insurance program in #283 meets multiple elements required for enterprise status under TABOR—the proposed enterprise is “government-owned,” has the authority to issue bonds, and will not receive more than ten percent of its funding from state and local government sources. Record, p. 51. Petitioner argued that the program fails the final requirement to be a TABOR enterprise because it is not a “business.” *Id.*<sup>3</sup>

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<sup>3</sup> During the rehearing on Initiative #248, Petitioner also appeared to concede that in #248, the insurance premium is a fee. *Hearing Before Title Board on Proposed Initiatives 2019-2020 #247 & #248* (March 4, 2020), available at <https://tinyurl.com/rudxc84> (statements at timestamp 1:21:45-23:05). At the rehearing on #283, Petitioner incorporated her comments on #248, stating that the two provisions are the same for purposes of Petitioner’s arguments. *Hearing Before Title Board on Proposed Initiative 2019-2020 #283* (April 8, 2020), available at <https://tinyurl.com/ybhgvcho> (statements at timestamps 16:20-27, 23:48-58.)



Petitioner argued that the Division's authority to regulate that private option sets it apart from any private business. Record, pp. 51-52. Therefore, Petitioner maintains that the title for #283 must meet the requirements for a new tax under TABOR, subsection (3)(c).

Petitioner's second issue presented recasts the same TABOR allegations under Section 1-40-106(3)(b), C.R.S., arguing that the title is misleading because it refers to the proposed program as an enterprise.

**B. Relevant Substantive Provisions of Proposed Initiative #283**

The proposed enterprise is an insurance program, funded by insurance premiums paid by Colorado workers and employers, calculated as a percentage of wages. Record, pp. 2-16. The initiative creates a new enterprise, the Division of Family and Medical Leave Insurance, to administer the insurance program. Record, pp. 8-9 (proposed § 8-13.3-408). The initiative specifies that the Division is an enterprise under TABOR so long as it receives less than ten percent of its funding from local and state government, and the Division has bond authority. *Id.*, p. 8 (proposed § 8-13.3-408(2)(a)).

The Division is funded by payroll premiums collected for each eligible employee in the state. *Id.*, pp. 7-8 (proposed § 8-13.3-407). Those premiums “are used exclusively for the payment of family and medical leave insurance benefits and the administration of the program. Premiums established under this section are fees and not taxes.” *Id.*, p. 8 (proposed § 8-13.3-407(7)). Like proposed initiative #248, #283 includes a private option. Record pp. 14-16 (proposed § 8-13.3-421). The Division has some authority for regulation of that private option. *Id.*

### **SUMMARY OF THE ARGUMENT**

Petitioner asks this Court to look beyond the plain language of #283 and speculate as to the outcome of a hypothetical constitutional challenge. Based on Petitioner’s contention that the proposed enterprise is constitutionally deficient under TABOR, Petitioner asks that the title be rewritten to conform to TABOR’s ballot title language for a new tax. Petition, pp. 1-2; COLO. CONST., art. X, § 20(3)(c) (mandating that ballot titles for new tax provisions begin with “SHALL (DISTRICT) TAXES BE INCREASED...”).

This Court recently affirmed the Board's actions in setting title for two nearly identical initiatives, #247 and #248, after reviewing nearly identical objections brought by the same Petitioner here. This Court should reach the same conclusion here, and affirm the Board's actions in setting the title for #283. Petitioner asks this Court to determine whether the proposed initiative would violate TABOR. It is not for the Board or this Court to speculate as to the future legal effects of a ballot initiative. The Title Board is not the forum to litigate whether the proposed initiative would, as applied, meet the constitutional requirements for an enterprise. The Board's action in setting the title for #283 should be affirmed.

## ARGUMENT

- I. **The Board's action in setting the title should be affirmed because the TABOR challenge raised by Petitioner is beyond the scope of the Title Board's role and this Court's review.**

Petitioner objects to the title set for #283 because she believes that the insurance program created by the proposed initiative would not meet the definition of an enterprise under TABOR. Therefore, she

maintains, the Board must set a title incorporating the language mandated by subsection (3)(c) of TABOR for initiatives containing a new tax. Petitioner’s argument is based on a hypothetical constitutional challenge to #283, but the outcome of future litigation over this proposed initiative is not before the Board or this Court. As written, #283 includes all the elements required to create a TABOR enterprise. This Court should affirm the title set by the Board.

**A. Standard of Review and Preservation**

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* This Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 & n.3; *In re Proposed Initiative on “Trespass-Streams with Flowing Water,”* 910 P.2d 21, 26 (Colo. 1996).

“The Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the proposed

amendment.” *In re Title, Ballot Title & Submission Clause for a Petition on Sch. Fin.*, 875 P.2d 207, 210 (Colo. 1994). The Board “may not speculate on the potential effects of the initiative if enacted.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). The Court will reverse the Board’s decision only if the title is “clearly inaccurate or misleading.” *In re Title, Ballot Title & Submission Clause for 2015–2016 #63*, 370 P.3d 628, 635 (Colo. 2016).

This Court “employ[s] all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title & Submission Clause for 2009–2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Unless the title is “so inaccurate as to clearly mislead the electorate,” the Court will uphold the title. *In re Title, Ballot Title & Submission Clause, & Summary for a Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994).

A constitutional challenge to the initiative is beyond the scope of this Court’s review of the Board’s actions. *In re Petition on Sch. Fin.*, 875 P.2d at 211. This Court does not “review the initiative’s ‘efficacy,

construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *In re #89*, 328 P.3d at 176, quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000). A TABOR challenge to a proposed initiative is beyond the scope of this Court’s review of a ballot title. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-98 No. 10*, 943 P.2d 897, 900 (Colo. 1997).

Petitioner preserved this argument by raising it in her motion for rehearing, record, pp. 51-52, and at the rehearing itself.

**B. This Court should decline to rule on the TABOR challenge raised by Petitioner.**

The state constitution requires that the ballot title for any initiative proposing a new tax contain specific language, beginning with “SHALL (DISTRICT) TAXES BE INCREASED...”. COLO. CONST., art. X, § 20(3)(c). Fees charged by a TABOR enterprise are not a tax, do not implicate various aspects of TABOR, and do not require inclusion of

that specific ballot language. *See TABOR Found. v. Colo. Bridge Enterprise*, 353 P.3d 896, 898 (Colo. App. 2014).

Petitioner’s argument comes down to a question of constitutional interpretation: Does the proposed insurance program fail as a TABOR enterprise, thereby triggering subsection (3)(c) of TABOR? *See* Petition, pp. 1-2. Petitioner’s challenge is outside the scope of the Board’s review, as the Board “may not speculate on the potential effects of the initiative if enacted.” *In re #89*, 328 P.3d at 179.

This Court has previously declined to address allegations that a ballot title set by the Board does not include disclosures required by TABOR. *In re 1997-98 No. 10*, 943 P.2d at 900. Petitioners in that case alleged the proposed title failed to comply with TABOR (then commonly referred to as “Amendment 1”) in several respects, including by failing to “comply with the specific revenue gain disclosure requirement of Amendment 1.” *Id.* at 899. This Court held that a TABOR challenge was “premature” and beyond the scope of its review. *Id.* “A determination of whether the initiative violates [TABOR] would

necessarily require us to ‘interpret its language or predict its application if adopted by the electorate’ and this we will not do.” *Id.*

Likewise, Petitioner’s challenge here is both premature and outside the scope of this Court’s review of a ballot title. In order to address Petitioner’s objections, this Court would have to speculate as to the hypothetical impacts of the proposed initiative. *In re #89*, 328 P.3d at 179. The proposed initiative on its face includes all the elements required to be an enterprise under TABOR. Pursuant to TABOR, an “enterprise” is a “government-owned business authorized to issue its own revenue bonds and receiving 10% of annual revenue in grants from all Colorado state and local governments combined.” COLO. CONST., art. X, § 20(2)(d). Petitioner concedes the proposed initiative meets several of these requirements: it is “government-owned,” authorized to issue bonds, and limited to ten percent of funds from state and local sources. Record, p. 51.

Petitioner’s argument is that the proposed enterprise would not be a “business’ within the ordinary meaning and understanding of this



term.” *Id.* Specifically, Petitioner argues that the Division would have some authority over any competitor seeking to offer a private option. *Id.*, pp. 51-52. Prior decisions from this Court and others shows that the TABOR enterprise analysis is a complex, fact specific determination. *See, e.g., Colo. Bridge Enterprise*, 353 P.3d at 898, *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 513-14 (Colo. 2018). An objection to a ballot title is not the forum to litigate this issue. The ballot title should be affirmed.

**II. Petitioner’s second issue presented fails for the same reasons articulated above.**

Petitioner objects to the title of #283 as misleading, in violation of Section 1-40-106(3)(b), C.R.S., because “the proposed governmental division does not satisfy the definition of a TABOR-exempt enterprise under subsection (2)(d) of article X, section 20 of the Colorado Constitution.” Petition, p. 2. The basis for this objection is the same

TABOR enterprise issue discussed above, and fails for the same reasons.

**A. Standard of Review and Preservation**

A ballot initiative title must be fair, clear, accurate, and complete. *In re Title, Ballot Title & Submission Clause, & Summary for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008). The Board's task is to set a fair and accurate title, not to ascertain the measure's efficacy, construction, or future application. *In re #45*, 234 P.3d at 645, 649. This Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.*

Petitioner preserved this argument by raising it in her motion for rehearing. Record, p. 52.

**B. Petitioner's claim that the title is misleading fails for the same reasons as stated above.**

Petitioner's second issue presented recasts the TABOR challenge addressed above as a violation of Section 1-40-106(3)(b), C.R.S., arguing

that the title is misleading because it refers to the proposed program as an enterprise. Because this issue also seeks to prematurely litigate whether the proposed insurance program, if approved by voters, would be an enterprise for TABOR purposes, the Court should decline to address it. *In re 1997-98 No. 10*, 943 P.2d at 900.

### CONCLUSION

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for Initiative #283.

Respectfully submitted this 5th day of May, 2020.

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*s/ Anne M. Mangiardi*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via Colorado Courts E-Filing, at Arvada, Colorado, this 5th day of May, 2020, addressed as follows:

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