DATE FILED: April 20, 2020 4:52 PM

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board

Petitioner:
Kelly Brough

v.

Respondents:
Timothy Tyler and Wendy Howell

and

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

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Case No.: 20SA94

Petitioner's Answer Brief

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **5,141** words (answer brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A) and 28(b).

For each issue raised by Petitioner, the opening brief 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 Colorado Appellate Rules 28 and 32.

s/ Christopher O. Murray
Christopher O. Murray

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SUMMARY OF THE ARGUMENT

This appeal presents two narrow issues. Petitioner challenges the setting of Initiative #247's title and ballot title, because (i) the ballot title should include language required by subsection 20(3)(c) of TABOR, and (ii) the title's use of the TABOR-term "enterprise" to describe a key feature of the Initiative is inaccurate and misleading.

Despite the limited scope of Petitioner's objections to the titles, the Title Board, for the first time on appeal, claims it lacked review authority to resolve Petitioner's objections. By extension, the Board argues the Court should avoid the issues here, because it too lacks review authority. But the Title Board's avoidance theory is premised on the false assumption that Petitioner's objections are necessarily entangled with the constitutionality of the Initiative itself. That's incorrect. Petitioner seeks a limited remedy through this appeal, which does not implicate the constitutionality of the proposed measure. Because Initiative #247 proposes a "tax increase," it must include titles that comport with subsection 20(3)(c) of TABOR. Initiative #247's titles do not; thus, Petitioner seeks reversal of the Title Board's decision and remand for redrafting. Such a challenge to the setting of titles must be permitted under the review process in Colo. Rev. Stat. § 1-40-107.

As to the merits, Respondents dodge Petitioner's objections by arguing that the Division as proposed is a TABOR-exempt enterprise

that merely charges a fee for a service. But that assessment is wrong. The payroll premiums the Division would exact under the Initiative are taxes. The premiums will be mandatory on most every business and employee in Colorado, practically unavoidable, and used to fund the exercise of general police powers over most state workers. A finding that the premiums are taxes is also consistent with the historical understanding of existing state programs (e.g., the state's unemployment insurance program) and similar programs in other states. Thus, because the Division is vested with taxing power, it cannot qualify as a TABOR-exempt enterprise under this Court's precedent.

Two results follow from this truth. *First*, Title Board should have fixed Initiative #247's ballot title consistent with subsection 20(3)(c), requiring the title to begin: "SHALL STATE TAXES BE INCREASED . . . ?" *Second*, the Title Board's use of the TABOR-term "enterprise" in the Initiative's titles is inaccurate and misleading. These errors warrant reversal. Petitioner therefore requests that the Court reverse the Title Board and remand the matter to the Board to redraft Initiative #247's titles consistent with the Court's opinion.

ARGUMENT

I. Objections to Ballot Titles Set in Violation of TABOR Are Properly Raised Under Colo. Rev. Stat. § 1-40-107.

The Title Board raises a new issue on appeal intimating it never had authority to decide Petitioner's objections to Initiative #247's ballot title under subsection 20(3)(c) of TABOR. To support its newfound reticence, the Title Board recasts Petitioner's objections to the titles as a constitutional challenge to the Initiative itself (*see* Title Bd.'s Opening Br. 8), and argues "[a] TABOR challenge to a proposed initiative is beyond the scope of this Court's review of a ballot title" (*id.* at 8-9). But the Title Board's framing paints with too broad a stroke and fails to acknowledge that form-or-content challenges to titles under subsection 20(3)(c) *must* be raised immediately after the titles are set.

Initially, the Title Board's characterization of Petitioner's objections is wrong. From the beginning of these proceedings, Petitioner's objection has been to the setting of Initiative #247's ballot title—specifically that the title must be set consistent with subsection 20(3)(c), because the Initiative proposes a tax increase—and Petitioner has reserved her right to later challenge the constitutionality of the Initiative if it is adopted. (Pet.'s Opening Br. 8 ("To be clear, Petitioner is not raising a challenge to the substantive limits of Initiative #247 itself at this juncture. Rather, the question is whether the Title Board

erred in refusing to set Initiative #247's ballot title consistent with subsection 20(3)(c) of TABOR.").) The limited scope of Petitioner's objection is made plain by the remedy she seeks: for the Court to order the Title Board to redraft Initiative #247's ballot title consistent with subsection 20(3)(c). (*Id.* at 23.) Thus, the Title Board's reformation of Petitioner's ballot-title challenge into a facial constitutional challenge to the Initiative itself is a nonstarter.

Once the issue is properly framed, the correctness of the Title Board's title setting is unmistakably a question within the province of this Court's exclusive review authority under Colo. Rev. Stat. § 1-40-107(2). Any other conclusion would render an objection to the setting of a title under subsection 20(3)(c) unreviewable. For instance, in *Cacioppo v. Eagle County School District Re-50J*, the Court reviewed a post-election challenge to a measure that approved a mill levy increase. 92 P.3d 453, 457 (Colo. 2004). Among the plaintiff's claims was a challenge to the measure's ballot title under subsection 20(3)(c) of TABOR, "because it did not list the full final fiscal-year dollar increase as required for such proposals." *Id.* at 458. The Court noted that, while TABOR "contains many requirements that govern the procedures of elections involving taxes and many that address the substantive limits of ballot issues," the ballot-title provision in subsection 20(3)(c) "relates

to syntax and diction" and "address[es] only the form or content of a ballot title." *Id.* at 464.[1] The Court followed by holding that objections to the form or content of titles must comply with the procedure established for challenging titles. *See id.* (rejecting plaintiff's post-election challenge and stating plaintiff should have followed "the exclusive procedure for all local ballot title contests" in Colo. Rev. Stat. § 1-11-203.5[2]).

The relevant procedure for challenging the setting of titles for statewide measures is set forth in Colo. Rev. Stat. § 1-40-107. Subsection 107(1)(a)(I) provides that "any registered elector . . . who is not satisfied with the titles and submission clause provided by the title board . . . may file a motion for a rehearing with the secretary of state within seven days after the decision is made or the titles and submission clause are set." And a registered elector who "is not satisfied

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[1] The Court distinguished between form-or-content objections to a ballot title and challenges to the substance of the measure. Form-or-content flaws may be legally corrected by the court, thus rectifying the invalid section of the ballot, *id.* at 465; whereas "the contest involves the substance of the ballot issue if, regardless of any contest filed before the election, the ballot issue as approved cannot be upheld under the laws or constitution of the state," *id.* For this reason, when the Title Board or the Court can remedy the defect by changing the language of the title, the challenge is one of form or content.

[2] Section 1-11-203.5's procedure does "not apply to a ballot title for a statewide ballot issue or statewide ballot question that is set by a title setting board or court as provided by law." § 1-11-203.5(6); *see also Cacioppo*, 92 P.3d at 464 ("Section 1-11-203.5 is the exclusive procedure for all *local ballot title contests* and creates no exception to its procedure for claims based on [TABOR]." (emphasis added)).

with the ruling of the title board upon the motion" may appeal the Title Board's decision to this Court. § 1-40-107(2). Accordingly, despite the Title Board's efforts to avoid responsibility for form-or-content challenges to ballot titles under subsection 20(3)(c) of TABOR, such challenges must be raised before the Board or else lost after the election. *See Cacioppo*, 92 P.3d at 465 (holding challenge under subsection 20(3)(c) raises form-or-content objections to the ballot title and "it was not appropriate for the court" to consider challenge outside exclusive procedure set forth for objecting to ballot titles).

Conspicuously absent from the Title Board's opening brief is any suggested alternative forum for Petitioner to challenge Initiative #247's ballot title as violative of subsection 20(3)(c) of TABOR. Instead, the Title Board summarily claims that whether an initiated measure must include a TABOR-compliant title should be litigated in some other forum and is thus premature and outside the scope of this Court's review authority for ballot titles. (Title Bd.'s Opening Br. 11, 12.)

But the Title Board's litigation position here is irreconcilable with its position in another appeal pending before the Court, which also raises a question under subsection 20(3)(c), *see In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2019-2020 #250* (Colo. 20SA91) (*Initiative #250*). Like here, the petitioner in *Initiative #250*

questions "[w]hether the titles were improperly set because, in violation of TABOR, they failed to use the TABOR-specified language for measures that include a tax increase, given that the measure does provide for a tax increase." Pet. for Review 4, *Initiative #250* (Colo. Mar. 11. 2020) (citing Colo. Const., art. X, § 20(3)(c)). Notwithstanding the overlap between this appeal and *Initiative #250*, in its opening brief in *Initiative #250* (filed the same day as its brief here), the Title Board does not claim the Board lacked authority to review the issue, but rather maintains its interpretation of TABOR was correct. Indeed, the Title Board defends its interpretation of the constitution and argues it "correctly determined that because #250—a revenue neutral measure that does not increase state taxes—does not arise under TABOR, the Title Board was not required to include specialized ballot language of Section 3(c) explaining to voters that the measure represented an increase in state taxes." Title Bd.'s Opening Br. 9, *Initiative #250* (Colo. Mar. 31, 2020). That argument is irreconcilable with the Title Board's position here that it does not have the authority to determine whether Initiative #247 triggers the mandatory TABOR-title language.

In truth, accepting the Title Board's position that form-or-content objections to the refusal of (or the imposition of) a TABOR title do not lie with the Board would fashion a black hole for objections to statewide

measures under subsection 20(3)(c). Per the Title Board, such an objection is barred during the title-setting process as ultra vires of the Title Board's and the Court's review authority. Likewise, the objection would be barred after the election under *Cacioppo* and its progeny. But absolute non-reviewability cannot be the answer.

It is for this reason the Court's pre-*Cacioppo* cases, which refused to examine TABOR-title issues at the title-setting stage because the challenges may be made in judicial proceedings after adoption, are inapposite. *See In re Title, Ballot Title, Submission Clause, & Summary for the Proposed Initiative Concerning "Auto. Ins. Coverage"*, 877 P.2d 853, 856 (Colo. 1994) (refusing to answer whether TABOR-compliant title was required because neither the Board nor the Court "can choose between the varying possible interpretations of the status of revenues ultimately collected"); *see also In re Title, Ballot Title, Submission Clause, & Summary Pertaining to Proposed Initiative 1997-98 No. 10*, 943 P.2d 897, 899 (Colo. 1997) (refusing to answer whether "title and summary set by the title board fails to comply with the specific revenue gain disclosure requirements" in TABOR as "premature").

The proper forum to resolve objections under subsection 20(3)(c) to the form or content of a title for a statewide measure must be the process outlined in Colo. Rev. Stat. § 1-40-107. This "comports with the

mandate given to the state title board to set titles that 'correctly and fairly express the true intent and meaning' of a proposed law." *Bruce v. City of Colorado Springs*, 129 P.3d 988, 996 n.8 (Colo. 2006) (citing Colo. Rev. Stat. § 1-40-106(3)(b)). Indeed, whether a ballot title "must be titled 'TAX INCREASE' and conform to the other section (3) requirements that apply to tax increases directly influences the perception and understanding of the voters," and thus implicates the Title Board's core function to set titles so voters have the information to make intelligent decisions on ballot issues. *Id.* at 995-96. In that way, the injury Petitioner alleges (i.e., a ballot title that is incorrect and misleading to the electorate), may only be remedied through the section-107 review process prior to the election. And the Title Board and this Court are in the best position to rectify deficiencies with the language of a ballot title prior to an election, and may do so without passing judgment on the ultimate legality of a measure.

At the very least, however, the Court should take this opportunity to clarify the proper procedure for challenging the setting of a ballot title in violation of subsection 20(3)(c) of TABOR. It is plain there are divergent views on the scope of the Title Board's review authority (even among the Title Board's counsel, *see supra* pp. 6-7), and a decision holding that the Title Board must resolve form-or-content challenges

under subsection 20(3)(c) would harmonize the Court's precedent in this area with its decision in *Cacioppo* and Colo. Rev. Stat. § 1-40-107.

II. Initiative #247's Ballot Title Should Be Set Consistent with Subsection 20(3)(c) of TABOR.

If adopted, Initiative #247 would impose a new payroll tax on most businesses and employees in Colorado. The tax would be involuntary and would fund the creation of a new governmental division, which would broadly wield the State's general police powers over nearly every state worker and private business in Colorado. Indeed, the Division would exercise traditional agency functions, including legislative rulemaking and adjudicatory powers over claims filed under the program, and would have the power to enforce laws and impose civil penalties for noncompliance. Though it bears these unmistakable hallmarks of the general government, Respondents argue the Division is merely a government-owned "business" that only charges a fee for a service. As support, Respondents parrot a legal opinion from the Office of Legislative Legal Services (OLLS) to Speaker of the House Becker, opining that a failed legislative scheme similar to that proposed by Initiative #247 would qualify an enterprise exempt from TABOR. (*See* Resp'ts' Opening Br., Attach. (OLLS Op.).)

Acceptance of Respondents' and the OLLS's understanding of what constitutes an "enterprise" under TABOR would leave no daylight

between traditional government units and government-owned businesses. No "business" has the authority to exact a tax—which is practicably unavoidable—on the vast majority of employers and working-aged persons in Colorado and to use the revenue generated to exercise state police powers over its dragooned customers.

A. Initiative #247's proposed payroll premiums are taxes.

As Petitioner explained in her opening brief, the chosen design for the Division is without equal and represents a new frontier in the quest to shoehorn traditional government functions into government-owned businesses to avoid the strictures of TABOR. For that reason, the Court's prior decisions in this area, some of which Respondents cite as support, do not provide firm guidance on whether the payroll premiums contemplated by Initiative #247 are fees or taxes.

For example, in *Bloom v. City of Fort Collins*, Fort Collins imposed a transportation-utility fee on owners of developed lots facing city-owned streets to fund the maintenance and upkeep of streets. 784 P.2d 304, 305 (Colo. 1989). While the Court held the charge was not a real property tax, because it was a special fee or municipal charge that was reasonably related to maintaining the city streets abutting the subject properties, *id.* at 305-07, the charge was easily avoidable (by foregoing property ownership on a city-owned street) and was limited in the

government function it supported. Such a fee is much different than imposing a mandatory assessment on the state's populace for engaging in a basic necessity of life—to work and earn a wage. Even further, the payroll tax at issue here will fund an entire new governmental office, as opposed to the limited governmental function recognized in *Bloom*.

Similarly, the Court's decision in *Loup-Miller Construction Co. v. City & County of Denver*, 676 P.2d 1170 (Colo. 1984), is of no help. That case involved two local ordinances, one that "created a category of sewer customers called 'residential multiple unit dwelling buildings' (apartment buildings)," which were charged a sewage-service fee, and a second that "established a 'facilities development fee,' a one-time sewer charge to be paid by new customers when they were connected to the city's sanitary sewer system." *Id.* at 1173. Rejecting that the ordinances imposed non-uniform property taxes in violation of the Colorado Constitution, the Court held sewage charges were fees rather than property taxes. *Id.* at 1175-76. Again, these "fees" are nothing like the payroll withholdings Initiative #247 would authorize. They were avoidable, less invasive and temporary, and only supported "the city's readiness to provide sewage service [such as the maintenance of sewer pipes]," *see id.* at 1175, rather than funding a new, statewide government office with full regulatory and police power.

Lastly, as Petitioner explained in her opening brief, *Colorado Union of Taxpayers Foundation v. City of Aspen*, 418 P.3d 506 (Colo. 2018), also does not provide the answer (Pet.'s Opening Br. 11-12). The Court in *City of Aspen* examined whether a $0.20 fee imposed by a municipality on the use of paper-grocery bags constituted a fee or a tax. *City of Aspen*, 418 P.3d at 512. There, "the charge [was] assessed on consumers who choose to purchase non-reusable paper bags; those consumers [paid] $0.20 to the grocery store for each non-reusable bag that they use[d]." *Id.* at 514. The charges were then remitted to the City of Aspen to offset the costs of certain waste-reduction programs and education. *Id.* The reach of the $0.20-bag fee and program in *City of Aspen* is hardly comparable to the mandatory payroll tax and expansive governmental program proposed by Initiative #247.[3]

That said, one state program that does contain *some* similar hallmarks of the Division is the state unemployment insurance

[3] Respondents reliance on *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), to support their argument that the payroll premiums are fees is likewise unpersuasive. There, the Court addressed whether monies transferred to the general fund from special-cash funds triggered TABOR. *Id.* at 249. As the Court noted, "It is undisputed here that, while the monies resided in the special cash funds, they were fees. [Yet] Petitioners argue that when the monies were transferred to the General Fund, they became taxes because they were then used to defray the general expenses of government." *Id.* Thus, in *Barber*, the Court and the parties stipulated to the issue here—namely, whether the charge imposed by the government was a fee or tax in the first instance.

program. In its legal opinion, the OLLS referenced the unemployment insurance program as an exemplar to support its conclusion that H.B. 18-1001 (a legislative precursor to Initiative #247) would have imposed a fee instead of a tax. (OLLS Op. 8.) In the OLLS's view, because the general assembly structured the unemployment insurance program as a TABOR-exempt enterprise, and because statutes are presumed constitutional, that program's premium must be deemed a fee. (*Id.* ("[T]he employer unemployment insurance premium must be a fee, not a tax, because the division of unemployment insurance otherwise would not be able to qualify as an enterprise.").)

Setting aside the OLLS's circular reasoning, the OLLS (and Respondents (*see* Resp'ts' Opening Br. 15-16)) omit the fact that the unemployment insurance program's enterprise status is the product of a relatively recent experiment by the general assembly. *See* Act of July 1, 2009, ch. 363, § 1(2)(a), 2009 Colo. Sess. Laws. 1876, 1876 (codified in Colo. Rev. Stat. § 8-71-103) (designating the "the unemployment compensation section of the division" as an "enterprise for purposes of [TABOR]"). Importantly, this novel designation has not been tested in court, and prior analysis from the Court and the Colorado Attorney General's Office suggest the designation is constitutionally suspect.

For instance, in Formal Opinion 93-3, the Attorney General opined that increases in unemployment tax rates based on a statutory formula codified before the adoption of TABOR were neither "new taxes" nor a "tax rate increase" under TABOR. Colo. AG Formal Op. 93-3 (Apr. 6, 1993). Throughout the opinion, the Attorney General, without equivocation, referred to unemployment premiums as taxes. *See id.* And nowhere in the opinion did the Attorney General suggest the unemployment insurance program was a government-owned business exempt from TABOR. Rather, she concluded, "Because the present tax structure was enacted in 1986, and therefore was in place before TABOR became effective on November 4, 1992, any rate change which occurs by operation of this scheme is not a 'new tax, tax rate increase,' or other event within the meaning of TABOR's subsection (4)." *Id.*

This position is consistent with the litigation position the State took in *Huber v. Colorado Mining Ass'n*, 264 P.3d 884 (Colo. 2011). There, the State pointed out that a court of appeals' decision "ha[d] thrust a significant minority of Colorado taxes into in [*sic*] a gray area by declaring that TABOR retroactively invalidated the model upon which the coal severance tax [wa]s based." State's Opening Br. 36, *Huber v. Colo. Mining Ass'n* (Colo. Oct. 25, 2010). The State explained "the most prominent of these taxes is the unemployment insurance tax

discussed in Formal Opinion 93-3." *Id.* But the State argued, as long as the *tax* followed the pre-TABOR statutory formula, "the *method* of computation itself remains constant," and any "[c]alculation of the rate according to the statutory formula . . . is not a 'tax rate increase' under TABOR." *Id.* at 37. The State warned, "Colorado's unemployment and estate taxes are two clear-cut examples of tax laws that would be called into question should the court of appeals' approach be affirmed." *Id.*

In its decision reversing the court of appeals, the Court heeded the State's warning by pointing out that "several of Colorado's tax statutes include rates expressed as formulas providing for the amount of tax due to fluctuate in response to economic conditions or other external factors." *Huber*, 264 P.3d at 893. "For example, the unemployment insurance tax statute includes a tax rate adjustment formula," and "[t]he taxes owed per employee may increase from year to year based on statutory criteria." *Id.* (citing Colo. Rev. Stat. §§ 8-76-102 to -103). After comparing the unemployment insurance tax to the coal severance tax at issue in *Huber*, the Court concluded "that [TABOR] does not require the Department to obtain voter approval each time it adjusts the amount of coal severance tax due applying section 39-29-106 as written." *Id.*

To be sure, the Court has described the state's unemployment insurance program as one built on the *taxation* of employers. *See, e.g.*,

Harding v. Indus. Comm'n, 515 P.2d 95, 99 (Colo. 1973) ("The act establishes a legislative scheme by which persons may be supported through industry-caused unemployment, from funds created by the taxation of employers."); *Cottrell Clothing Co. v. Teets*, 342 P.2d 1016, 1019 (Colo. 1959) ("*Is the matter of compensation for unemployment a subject so related to the public welfare as to authorize the general assembly, in the exercise of the police power, to enact a law directing the payment of benefits to unemployed persons and levying a tax upon employers to defray the cost thereof?* This question is answered in the affirmative.") And, courts that have examined unemployment insurance programs in other states are in accord with Colorado.[4]

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[4] *See, e.g.*, *State v. Thayer*, 395 A.2d 500, 502 (N.H. 1978) ("Although the employer's obligation has been labelled a 'contribution,' the name which the legislature may give to a money payment is not controlling. *This contribution is an involuntary exaction levied against an employer for the public expense. It is a tax.*" (emphasis added) (citations omitted)); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 504 (1937) (examining Alabama's unemployment compensation scheme and observing "the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power"); *In re Oshkosh Foundry Co.*, 28 F. Supp. 412, 414 (E.D. Wis. 1939) (stating "[a]lthough the Legislature did not designate the contributions as a tax, nevertheless the compulsory payments made for a public purpose come within a definition of a tax" and thus "employer contributions, which must be made by employers under the provisions of Chapter 108, Wisconsin Statutes, are a tax"); *Standard Props. v. Emp't Sec. Bd. of Md.*, 92 A.2d 459, 462 (Md. 1952) ("The Unemployment Compensation Law, which imposes upon employers the obligation to pay a certain percentage of their pay rolls into the unemployment compensation fund, is an exercise of the taxing power of the State. The contribution demanded of the employer by this statute is

Thus, contrary to the OLLS's and Respondents' present belief, the historical understanding of Colorado's unemployment insurance program, including the contemporaneous understanding of that program at the time TABOR was adopted, supports a finding that the payroll premiums to be imposed by the Division under Initiative #247—as government-imposed, involuntary charges on nearly every taxpaying individual and business in the state, which will fund the exercise broad powers over a government-run program—are indeed taxes.

B. Initiative #247's proposed Division is a government district or unit under TABOR.

The Division cannot be an "enterprise" as defined by TABOR because it is authorized to levy payroll taxes. The Court in *Nicholl v. E-470 Public Highway Authority*, plainly stated that "[t]he ability to levy general taxes is inconsistent with the characteristics of a business." 896 P.2d 859, 869 (Colo. 1995). That case involved the E-470 Public Highway Authority, which, among other things, was vested with the right to establish "a tax on the privilege of employment in all or any designated portion of the members of the combination at a rate not to exceed two dollars per month," to collect the same, and to adopt regulations for the collection of such taxes. *See* Act of Mar. 18, 1996,

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an excise tax imposed by the Legislature in the exercise of the police power."). (*See also* Pet.'s Opening Br. 17.)

ch. 13, § 3(m), 1996 Colo. Sess. Laws. 35, 36 (eliminating employment-taxing provision in response to *Nicholl*). The Court concluded that the ability to tax was dispositive of whether the entity qualified as a government-owned business. *Nicholl*, 896 P.2d at 868 ("[W]hile the Authority is 'business-like' . . . it has authority to finance its operations in a manner not typical of a 'business' as the term is commonly used.").

The same can be said about the Division. Initiative #247 gives the Division the unilateral power to levy a mandatory payroll tax. (*See* Initiative #247, 8-13.3-407(2).) The tax, which after the first two years shall be set to cover 135% of the benefits paid during the preceding calendar year plus 100% of the "cost of administration of the payment of those benefits during the immediately preceding calendar year," less the money left over (§ 407(3)(b)), will fund not only the payment of benefits, but the entire administration of the Division, including developing and enforcing rules governing employer and employee conduct (*see, e.g.*, §§ 407(7), 409(8), 412(1), 413). Contrary to Respondents' promise, the Division proposed by Initiative #247 is not intended to provide a government service for a fee; rather, it is a new government office armed with the power to tax nearly every taxpaying Coloradan to fund its regulation of workers and businesses.

Even more, the proposed operational design for the Division disqualifies it as a "business." As Petitioner outlined in her opening brief, the Division will be given significant enforcement, regulatory, and ratesetting powers. (Pet.'s Opening Br. 18.) No business in the ordinary sense of that word has such power. Likewise, there will be no free market for the Division's product, and employees and businesses will have no choice but to purchase paid family and medical leave insurance through the Division at the rate deemed necessary by the director. At bottom, the Division is not a business; it is a governmental unit poorly impersonating a "business" to avoid TABOR.

III. The Term "Enterprise" Should Be Eliminated From Initiative #247's Titles.

To begin, the Court should reject the Title Board's effort to sidestep whether the use of the term "enterprise" to describe the Division in Initiative #247's titles is inaccurate and misleading. (*See* Title Bd.'s Opening Br. 13-14.) The issue was preserved below, as the force of Petitioner's objection before the Title Board was that the Division fails to qualify as a TABOR-exempt enterprise. (*See* Mot. for Reh'g 3-5.) If Petitioner prevails on that point (*see supra* Argument, II.B), it follows that it would be inaccurate to the label the Division an enterprise in a way that would mislead voters (*see* Mot. for Reh'g 5 ("Because [the Division] is not a business, it is not a 'government-owned

business' and cannot qualify as a TABOR-exempt enterprise. Hence, . . . [the Title Board] should set the title in compliance with TABOR.")).

Next, for the same reasons described above, the Division is not a TABOR-exempt enterprise. Accordingly, it is inaccurate to use a constitutionally defined term to pitch the Colorado electorate on a new government program structured in a way that does not comport with the constitutional meaning. Not only is it inaccurate to misuse such a term, but the misstatement is bound to mislead Colorado voters. The 2020 general election is set to be a TABOR-centric year at the ballot box, particularly if Initiative #3 (the proposed repeal of TABOR), *see In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 454 P.3d 1056 (Colo. 2019), and Initiative #271 make the ballot. Groups (for, against, and neutral) have already set out to educate the Colorado public on the intricacies of TABOR, including on TABOR-exempt enterprises. *See, e.g.*, Understanding the TABOR Amendment, BuildingABetterColorado.org, https://bit.ly/3cch0MW (last visited Apr. 14, 2020) (describing "[s]tate enterprises" as "self-supporting, government-owned businesses that receive revenue (usually primarily from fees) in return for the provision of goods or services"); Resources, Vision2020Co.org, https://bit.ly/3b9G7jv (last visited Apr. 14, 2020). Additionally, articles on the topic regularly appear in news outlets. For

these reasons, to the extent they are not already, Colorado voters are likely to be more aware of the workings of TABOR in 2020, and particularly sensitive to TABOR-defined terms.

By using the term enterprise to disguise the actual operation of the Division, Initiative #247's titles will cause confusion and will result in voters voting for the Initiative who might otherwise vote against the measure. The titles set by the Title Board therefore violate Colo. Rev. Stat. § 1-40-106(3)(b)'s express instruction to "avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." The Court should therefore reject the Title Board's use of "enterprise" in the titles, which "dubiously or obscurely" indicate the matters covered. *See In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 647 (Colo. 2010).

CONCLUSION

Petitioner respectfully requests that the Court reverse the Title Board's denial of Petitioner's motion for rehearing, conclude the ballot title for Initiative #247 fails to comply with subsection 20(3)(c) of TABOR and the titles are impermissibly misleading, and remand the Initiative to the Title Board for redrafting.

Dated: April 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 20, 2020, I electronically filed a true and correct copy of the foregoing **Petitioner's Answer Brief** with the clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing to the following:

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