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

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

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #247

Petitioners: KELLY BROUGH

v.

Respondents: TIMOTHY TYLER AND WENDY HOWELL

and

Title Board: THERESA CONLEY; DAVID POWELL; and JULIE PELEGRIN

▲COURT USE ONLY▲

Attorneys for Respondents
Martha M. Tierney, No. 27521
Tierney Lawrence LLC
225 E.16TH AVE, SUITE 350
Denver, CO 80203
Phone: (720) 242-7577
E-mail: mtierney@tierneylawrence.com

Case No.: 2020SA94

RESPONDENTS' ANSWER BRIEF

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). It contains 3224 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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 (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

X 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.AR. 32.

By: s/Martha M. Tierney

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Timothy Tyler and Wendy Howell (jointly "Proponents" or "Respondents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause that the Title Board set for Proposed Initiative 2019-2020 #247 ("Initiative") and in response to the Petitioner's Opening Brief.[1]

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion drafting the title for Initiative #247. A constitutional challenge to the Initiative is beyond the scope of this Court's review of the Title Board's actions.

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[1] Proponents filed a second measure, Proposed Initiative 2019-2020 #248, that is also before this Court in Case No. 2020SA95. The legal issues in the two cases are almost identical, and, thus, the briefs are very similar. The measures differ only slightly as follows: #247 allows 16 weeks of paid family and medical leave with an additional 10 weeks for pregnancy or childbirth complications, while #248 allows 12 weeks of paid family and medical leave with an additional 4 weeks for pregnancy or childbirth complications. In #247, the initial premium is 1.04% of wages per employee, while it is 0.88% of wages per employee in #248. Initiative 248 caps the premium the Director sets after the initial premium at 1.2% of wages per employee, while Initiative 247 has no such cap. Initiative 247 allows an employer to deduct up to 25% of the premium from an employee's wages, while Initiative 248 allows an employer to deduct up to 50% of the premium from an employee's wages. Initiative 248 contains a local government opt-out, and exempts employers who offer an approved private paid family and medical leave plan to their employees, while Initiative 247 does not contain these two provisions.

The Initiative establishes the Division of Family and Medical Leave Insurance ("Division"). The Division is an enterprise under TABOR because it is a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined. An enterprise may have enforcement, regulatory and rate-setting powers. The Division provides a government service for a fee that is directly related to the services provided.

As an enterprise, the Division collects a fee, not a tax, and a title containing TABOR-compliant language pursuant to Colo. Const., art. X, §20(3)(c) is inappropriate. The Title fairly and accurately sets forth the major features of the Initiative and is not misleading. The use of the term enterprise in the Title is appropriate because the Initiative creates an enterprise as defined by Colorado law.

The Title Board is only obligated to fairly summarize the central points of a proposed measure, and, need not refer to every nuance and feature of the proposed measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

There is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative Does Not Require a TABOR Title Because It Contains a Fee and Not a Tax.

A. Standard of Review.

Petitioner does not state the correct standard of review for reviewing the Title Board's actions in setting a title for a proposed ballot initiative. When reviewing a challenge to the Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action." *Cordero v. Leahy (In re Initiative for 2013-2014 #90),* 328 P.3d 155, 158 (Colo. 2014). The Court "will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading." *Earnest v. Gorman (In re Initiative for 2009-2010 #45)*, 234 P.3d 642, 648 (Colo. 2010).

A constitutional challenge to the Initiative is beyond the scope of this Court's review of the Title Board's actions. *In re Title for a Petition on Sch. Fin.*, 875 P.2d 210, 211 (Colo. 1994). 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 Initiative for 2013-2014 #89,* 328 P.3d 172, 176 (Colo. 2014).

Proponents agree that Petitioner preserved for appeal the issue whether the Initiative's title should contain the specific language set forth in Colo. Const. art. X

§20(3)(c). Petitioner raises for the first time, however, in her Opening Brief the argument that the premiums imposed by the Initiative are a "qualifying event" under subsection 20(4)(a) of TABOR, which would also trigger the TABOR ballot title language. *See Pet. Open. Brf. at p. 11 n.4*. This argument was not preserved below and cannot be raised for the first time now.[2] *See In re Initiative for 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000). The issue also fails because it would require this Court to review the initiative's "efficacy, construction, or future application," which is inappropriate at this stage. *In re Initiative for 2013-2014 #89*, 328 P.3d at 176.

B. TABOR Language Is Not Appropriate in the Title of the Initiative.

Respondents do not dispute that subsection 20(3)(c) of TABOR requires TABOR ballot title language for tax increases. The Initiative, however, is not a tax increase and thus, TABOR language in its title is inappropriate. The Initiative creates an enterprise that charges a fee, and fees charged by a TABOR enterprise are not a tax and do not implicate TABOR ballot title language. *See TABOR*

[2] Title Board Hearing on Proposed Initiatives 2019-2020 #247 and #248, March 4, 2020, see https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 47:58-1:38:39.

Found. V. Colo. Bridge Enterprise, 353 P.3d 896, 898 (Colo. App. 2014), *cert denied, Tabor Foundation v. Aden*, 2015 WL 3956128.

Petitioner denies that she is raising a challenge to the substantive components of the Initiative itself, but that is indeed her argument. *See Pet. Open. Brf. at p. 8.* She claims that the Title Board erred when it declined to find that the proposed paid family leave insurance program is not an enterprise and rejected her request to insert the TABOR ballot title language. She claims this even though the Initiative states that the Division of Family and Medical Leave Insurance ("Division") is an enterprise, and the measure contains provisions authorizing the Division to issue its own revenue bonds and receive under 10% of annual revenue in grants from all Colorado state and local governments combined. Initiative §8-13.3-408(2)(a). Additionally, the measure is housed within the Colorado Department of Labor and Employment and generates revenue by collecting fees from workers and employers who benefit from the program. Initiative §8-13.3-402(4), §8-13.3-408(1).

In support of her argument, Petitioner relies on *In re Initiative for 1997-1998 # 84*, 961 P.2d 456, 460 n.5 (Colo. 1998), but that reliance is misplaced. In that case, this Court stated,

> [O]ur conclusion that the state must reduce state spending programs follows directly from a facial reading of the initiatives. This conclusion is in keeping with our observation in *In re 1997-98 # 30*

> that 'we must engage in some substantive inquiry but avoid predicting legal consequences.'

Id., (emphasis supplied)*, citing In re Initiative for 1997-1998 # 30*, 959 P.2d 822, 825 n.2 (Colo. 1998) ("We must exercise caution to avoid determining how a measure, not yet approved by the voters, may apply.")

Here, a facial reading of the Initiative reveals that it creates an enterprise that imposes a fee and not a tax. Additionally, the Initiative's language reveals the Proponents' intent to make the paid family and medical leave insurance premium a source of revenue for the specific government service of paying for and administering paid family and medical leave benefits. Further, the Initiative declares that the premium provides a specific benefit to workers and employers – the persons upon whom the fee is imposed - and at rates reasonably calculated to defray the cost of providing the benefit. Initiative §8-13.3-402(4)(a), §8-13.3-407(7).

C. <u>The Premium Is a Fee and Not a Tax</u>.

Petitioner next argues that the insurance premiums imposed by the Initiative are "unavoidable" and that makes the premiums a tax. *See Pet. Open. Brf. at p. 11.* Petitioner contends that the premiums are distinct from the fees this Court has held are exempt from TABOR, because those fees "bear[] a reasonable relationship to the services provided and the comprehensive regulatory regime associated with the

services provided." *Id. at pp. 11-12, citing Colo. Union of Taxpayers Found. v. City of Aspen,* 418 P.3d 506, 513 (Colo 2018), and *Colo. Bridge Enter.,* 353 P.3d at 899. This argument also fails.

Here, the Premium bears a direct relationship to the services provided and the comprehensive regulatory regime associated with the services provided. Specifically, the paid family and medical leave insurance enterprise is authorized to "[c]ollect insurance premiums from employers and employees at rates reasonably calculated to defray the costs of providing the program's leave benefits to workers…." Initiative §8-13.3-402(4)(a). "The premiums collected … are used exclusively for the payment of family and medical leave insurance benefits and the administration of the program." Initiative §8-13.3-407(7).

"As long as a charge is reasonably related to the overall cost of providing the service and is imposed on those who are reasonably likely to benefit from or use the service, the charge is a fee and not a tax." *Colo. Bridge Enter.,* 353 P.3d at 903. Nor does the fee need to be voluntary in order to qualify as a fee rather than a tax. *Id., citing Bloom v. City of Ft. Collins*, 784 P.2d 304, 310 (Colo. 1989) (noting that the supreme court has "never held . . . that a service fee must be voluntary").

Moreover, the Premium is no more "unavoidable" than many other fees charged by existing TABOR-exempt enterprises. For example, the Colorado

Division of Unemployment Insurance is an enterprise that collects compulsory premiums from Colorado employers to pay unemployment insurance benefits to Colorado workers. The unemployment insurance premium is not charged based on an employee's actual claim for unemployment insurance. C.R.S. §8-70-113, §8-71-103(2). The rate of the premium is based on the number of employees and the size of the payroll. C.R.S. §8-76-102.5.

Similarly, the Colorado Bridge Enterprise ("CBE") is an enterprise that collects a fee on vehicle registrations to finance, repair, reconstruct and replace any designated bridge in the Colorado highway system. C.R.S. §43-4-805(2)(b), (c). The vehicle registration fee is not dependent upon a particular vehicle's actual use of a CBE bridge, and the amount of the fee depends upon the type and weight of the particular vehicle. C.R.S. §43-4-805(5)(g)(1).

Here, the Premium is collected from employers, and partially from employees, only if the employer chooses to pass along a portion of the cost of the Premium to the employee, or if a self-employed employee opts to participate. Initiative §8-13.3-407(4), (5). The Premium amount varies based on a percentage calculation of an employee's wages and is not dependent upon employee use of the benefit. Initiative §8-13.3-407(3).

As discussed at length in Respondents' Opening Brief at Section I.C, pp. 9-14, based upon the language of the Initiative, the principal purpose for which the Premium is raised -to pay family and medical leave benefits and administer the program- and because the primary purpose of the Premium is to finance or defray the cost of the paid family and medical leave benefits to those who must pay the Premium, the Premium here is a fee and not a tax. *See also Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

D. <u>The Initiative Creates a TABOR-Exempt Enterprise</u>.

The Initiative creates a TABOR-exempt enterprise and not a district. TABOR defines "enterprise" as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20 (2)(d). The Initiative's enterprise meets this definition.

1. <u>The Division is a Government-Owned Business</u>.

In her Opening Brief, Petitioner contends that the Division cannot be considered a government-owned business because it does not qualify under the plain meaning of the term "business." *Pet. Opening. Brf. at p. 16.* To support this argument, Petitioner again cites to *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 869 (Colo. 1995). *Nicholl,* however, does not support her position.

The plaintiff in *Nicholl* contended that the E-470 Public Highway Authority ("Authority") could not qualify as a government-owned business because its activities were "essentially governmental in nature." *Id.* at 868 n.9. This Court disagreed, holding that this interpretation is "not supported by the text of [TABOR]." *Id.* Even though the Authority engaged in activities that were essentially governmental – it levied involuntary vehicle registration fees through which it financed its operations - this Court confirmed that it was only the power to levy general taxes, with no direct relation to services provided, and not the power to levy involuntary fees, that disqualified the Authority as an enterprise. *Id.* at 868-69.

Moreover, *Colorado Bridge Enterprise* directly addressed and rejected any sort of private-sector analogue test for what constitutes a government-owned business. The court in *Colorado Bridge Enterprise* concluded that an enterprise need not "gain its revenue from 'market exchanges taking place in a competitive, arms-length manner.'" 353 P.3d at 905 (citation omitted). Enterprises need only "provid[e] a government service for a fee," even if that fee is involuntary and is imposed to provide benefits not just to fee-payers, but also to the general public and even to "visitors to the state." *Id.* at 902, 905. In the wake of *Nicholl* and *Colorado Bridge Enterprise*, there is no private-sector analogue test that

determines whether an entity qualifies as a government-owned business under TABOR.

Here, the Division is a government-owned business because it will be created within the Department of Labor and Employment, and because it does not have the power to levy general taxes, but will "pursue[] a benefit and generate[] revenue by collecting fees from service uses." *Colo. Bridge Enter.*, 353 P.3d at 905; *see also Nicholl,* 896 P.2d at 868-69.

Petitioner's reliance on a 2006 Internal Revenue Service memo analyzing California's paid family and medical leave insurance program and concluding the premiums were a payroll tax for purposes of deductibility under the federal Internal Revenue Code is unconvincing and not relevant to the Court's inquiry of whether the Initiative creates a TABOR-exempt enterprise under Colorado law. The memo makes clear that it is not rendering an opinion as to how state law would treat the insurance payments, and the California program is sufficiently distinguishable from the Initiative's policy as to render the opinion inconsequential.

2. An Enterprise May Have Enforcement, Regulatory and Rate-Setting Powers.

Petitioner also argues that the Division cannot be a government-owned business because it has significant enforcement, regulatory and rate-setting powers.

Pet. Opening Brf. at p. 18. Yet, the Division's enforcement, regulatory, and rate-setting powers are no more significant that other existing TABOR-exempt enterprises.

By way of example, the Colorado Division of Unemployment Insurance is an enterprise that has enforcement, regulatory and rate-setting powers. C.R.S. §8-70-102.5, 104; §8-72-114; §8-76-104.

Notably, in addition to the 2019 OLLS Legal Opinion discussed in Respondents' Opening Brief, wherein OLLS opined that the premiums collected by the division of family and medical leave in previously proposed H.B. 18-1001 would have been a fee, and not a tax, thereby avoiding TABOR's ballot title requirements, *See Exhibit A to Respondents' Open. Brf., February 26, 2019 Legal Opinion of Colorado Office of Legislative Legal Services, pp. 5-8,* the Colorado Attorney General's Office in 2016 issued Formal Opinion 16-01 opining that a proposed hospital provider fee (subsequently passed and now codified at C.R.S. §25.5-4-402.4) was a TABOR-exempt enterprise collecting fees and not taxes. *See Colorado Attorney General Formal Opinion 16-01*, February 29, 2016, p. 6. ("AG Opinion").[3]

[3] Colorado Attorney General Formal Opinion 16-01, February 29, 2016. *See* https://coag.gov/app/uploads/2019/07/no-16-01.pdf

In the AG Opinion, the Attorney General discusses state enterprises at length, describing how some are narrowly focused (*see* C.R.S. §24-82-103, creating an enterprise to manage state-owned parking lots), and some serve broader purposes (*see* C.R.S. §43-4-805, enterprise to manage statewide transportation infrastructure projects; C.R.S. §33-9-105, enterprise to operate programs with the Division of Parks and Wildlife; and C.R.S. §8-71-103, administering state unemployment insurance program).

The AG Opinion observes this Court's decision in *Nicholl* is the only published decision that has struck down an enterprise designation. *AG Opinion, p. 7.* Note that *Nicholl* rested upon "the power to unilaterally impose taxes, with no direct relation to the services provided." *Nicholl*, 896 P.2d at 869. Yet, after *Nicholl*, the General Assembly amended the relevant statute to bring the entity into compliance with *Nicholl*'s broad test for enterprise without changing any powers the enterprise had previously exercised. *Id.*

Here, because the Division meets the definition of an enterprise and provides a government service for a fee *that is directly related to services provided*, the Initiative creates an enterprise that satisfies Colorado law and the TABOR-compliant ballot title language pursuant to Colo. Const., art. X, §20(3)(c) is

inappropriate. The Title Board should be affirmed. *See Bickel v. City of Boulder*, 885 P.2d 215, 234-235 (Colo. 1994).

II. USE OF THE TERM "ENTERPRISE" IN THE TITLE IS NOT MISLEADING.

A. Standard of Review.

Petitioner generally cites to the correct standard of review for reviewing a clear title. Importantly, when reviewing the Titles for clarity and accuracy, this Court only reverse the Title Board's decision if the Titles are "insufficient, unfair, or misleading." *In re Initiative for 2009-2010 #45*, 234 P.3d at 648. Respondents also point out that while Petitioner claimed the Initiative's Title was misleading, she did not argue it was misleading because it used the word "enterprise," but instead argued other grounds that the Title Board rejected.[4] Thus, Petitioner has not preserved this issue for appeal and should not be permitted to raise it for the first time now. *In re Initiative for 1999-2000 #265*, 3 P.3d at 1215-16.

[4] Title Board Hearing on Proposed Initiatives 2019-2020 #247 and #248, March 4, 2020, see https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 50:46-57; 1:11:47-15:59; 1:21:16-24:08.

B. The Title Is Not Misleading.

If the Court permits the misleading title claim to be heard, it should reject it because the Title is clear and does not mislead the voters.

Petitioner argues, for much the same reasons she articulates in Section I of her Opening Brief, that the Initiative does not create a TABOR-exempt enterprise so the Title should not contain that term. This argument must also be rejected.

First, with this issue Petitioner again seeks to prematurely litigate whether the Initiative is or is not a TABOR-exempt enterprise, if approved by voters, so the Court should decline to address it. *In re Initiative for 1997-1998 # 10*, 943 P.2d 897, 900 (Colo. 1997). Second, the Division does meet the definition of an enterprise; the Premium is a fee, not a tax; and the Title does not mislead with its inclusion of the term "enterprise."

The Court is not to "consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title "fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). This Court should affirm Title Board's actions.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board for Proposed Initiative 2019-2020 #247.

Respectfully submitted this 20th day of April 2020.

TIERNEY LAWRENCE LLC

By: s/Martha M. Tierney
Martha M. Tierney, No. 27521
225 E 16th Ave., Suite 350
Denver, Colorado 80203
Phone Number: (720) 242-7577
E-mail: mtierney@tierneylawrence.com
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2020 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

Christopher O. Murray, Esq.
Sarah M. Mercer, Esq.
Julian R. Ellis, Jr., Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4437
cmurray@bhfs.com
smercer@bhfs.com
jellis@bhfs.com
Attorneys for Petitioner

Anne Mangiardi, Esq.
Michael Kotlarczyk, Esq.
Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
anne.mangiardi@coag.gov
Michael.kotlarczyk@coag.gov
Attorneys for Title Board

s/Martha M. Tierney

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.