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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' OPENING 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 4246 words.

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

For the party raising the issue:

X 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:

☐ 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 Opening Brief in support of the title, ballot title and submission clause that the Title Board set for Proposed Initiative 2019-2020 #247 ("Initiative").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title violates subsection 3(c) of article X, section 20 of the Colorado Constitution because it does not contain a TABOR-compliant title?
2. Whether the Title set by the Title Board for the measure is misleading because it states that the measure would "create[e] the division of family and medical leave insurance as an enterprise within the department of labor?"

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for Initiative #247. On January 21, 2020, Proponents filed the Initiative with the directors of the Legislative Council and the Office of Legislative Legal Services. Pursuant to C.R.S. §1-40-105(2), the Offices of Legislative Council and Legislative Legal

Services conducted a review and comment hearing on the Initiative as required by C.R.S. §1-40-105(1) on February 4, 2020.

Proponents filed the Initiative with the Secretary of State's office on February 7, 2020. At the Title Board hearing on February 19, 2020, the Title Board found that the Initiative contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and C.R.S. §1-40-106.5. The Title Board set the Title for the Initiative.

On February 26, 2020, Petitioner Kelly Brough filed a Motion for Rehearing. On March 4, 2020, the Title Board made one modification to the title and denied the remainder of the Motion for Rehearing in its entirety. Petitioner Kelly Brough filed a Petition for Review, pursuant to C.R.S. §1-40-107(2) on March 11, 2020.

STATEMENT OF FACTS

Initiative #247 amends the Colorado Revised Statutes to create a paid family and medical leave insurance program for Colorado workers authorizing paid family and medical leave for a specified period of time for a covered employee who has a serious health condition, is caring for a new child or for a family member with a serious health condition, or has a need for leave related to a family

member's military deployment, or has a need for safe leave to address the effects of domestic violence or sexual assault. Initiative §8-13.3-404.

The purposes and findings section of the Initiative includes a statement that "the creation of a statewide paid family and medical leave insurance enterprise is in the public interest and will promote the health, safety, and welfare of all Coloradans, while also encouraging an entrepreneurial atmosphere and economic growth." Initiative §8-13.3-402(6).

To effectuate these purposes, the Initiative creates a statewide paid family and medical leave insurance enterprise within the Department of Labor and Employment to be known as the Division of Family and Medical Leave Insurance ("Division"), Initiative §8-13.3-408(1); and authorizes the Division to collect 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), 407; to issue revenue bonds, Initiative §8-13.3-408(2)(d); to expend revenues generated to pay family and medical leave benefits and associated administrative costs, Initiative §8-13.3-407(7); and to exercise other powers necessary to enforce and carry out the program's purposes. The Initiative creates the Family and Medical Leave Insurance Fund ("Fund") into which the Division will deposit all premiums paid and bond revenue, and from which all family and

medical leave benefits and administrative costs will be paid, Initiative §8-13.3-418. Money in the Fund must be continuously appropriated to the Division to carry out the purposes of the Initiative and is not available for the general expenses of the state, Initiative §8-13.3-418(1).

The Initiative states that it is an enterprise for purposes of section 20 of article X of the Colorado Constitution, as long as the Division retains authority to issue revenue bonds and receives less than ten percent of its total annual revenues in grants, as defined in section 24-77-102(7), from all Colorado state and local governments combined. Initiative §8-13.3-408(2). The Initiative also expressly provides that "[f]or so long as it constitutes an enterprise …, the Division is not subject to section 20 of article X of the Colorado Constitution." Initiative §8-13.3-408(2).

The Title set for the Initiative by the Title Board correctly and fairly expresses the true intent and meaning of the Initiative and will not mislead the public. The Initiative establishes an enterprise that collects a fee, not a tax. The Title follows the Initiative's structure, using similar, and often identical, language.

The Title set for Initiative #247 at the rehearing on March 4, 2020 reads:

> Shall there be a change to the Colorado Revised Statutes concerning the creation of a paid family and medical leave program in Colorado, and, in connection therewith, authorizing paid family and medical leave for a covered employee who has a serious health condition, is

caring for a new child or for a family member with a serious health condition, or has a need for leave related to a family member's military deployment or for safe leave; establishing a maximum of 16 weeks of family and medical leave, with an additional 10 weeks for pregnancy or childbirth complications; requiring job protection for and prohibiting retaliation against an employee who takes paid family and medical leave; to pay for the program, requiring a premium of 1.04% of each employee's wages through December 31, 2024, and as set thereafter by the director of the division of family and medical leave insurance; authorizing an employer to deduct up to 25% of the premium amount from an employee's wages and requiring the employer to pay the remainder of the premium; permitting self-employed individuals to participate in the program; creating the division of family and medical leave insurance as an enterprise within the department of labor and employment to administer the program; and establishing an enforcement and appeals process for retaliation and denied claims?[1]

[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 identical, and, thus, the briefs are identical except for the Statements of Facts. 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.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion drafting the title for Initiative #247.

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.

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.

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); see also *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999) (observing that this court will reverse a title only if it contains a "material omission, misstatement, or misrepresentation").

B. The Initiative Creates an Enterprise and Is Not a District.

The Initiative creates an enterprise and not a district and its revenue comes from collection of fees and not from imposition of taxes.

TABOR's requirement of prior voter approval for new taxes, and its associated special ballot title language, applies only to a "district." Colo. Const. art. X, § 20 (4)(a). TABOR defines "district" as "the state or any local government, excluding enterprises." Colo. Const. art. X, § 20 (2)(b). 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 creates a government-owned business. The Division of Family and Medical Leave Insurance ("Division") is government-owned because it will be created within the Department of Labor and Employment – a principal department of state government. The Division is a business because it will "pursue[] a benefit and generate[] revenue by collecting fees from service uses." *TABOR Found. v. Colo. Bridge Enter*., 353 P.3d 896, 905 (Colo. App. 2014), *cert denied, Tabor Foundation v. Aden*, 2015 WL 3956128.

At the rehearing, Petitioner argued that the Division cannot be considered a government-owned business because it does not qualify under the ordinary meaning and understanding of the term "business." To support this argument, Petitioner cited to *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 869 (Colo. 1995). *Nicholl* is distinguishable here. In *Nicholl*, the proposed enterprise operated a limited access highway to which it gave access in exchange for the payment of a toll and user fees, but it also had the ability "to levy general taxes," a power "inconsistent with the characteristics of a business." *Nicholl*, 896 P.2d at 868-69.

Holding that the entity in *Nicholl* was a district and not an enterprise, this Court concluded that "the power to unilaterally impose taxes, with no direct relation to services provided, is inconsistent with the characteristics of a business as that term is commonly used … [n]or is it consistent with the definition of 'enterprise' read as a whole." *Id.* at 869.

Here, because the Division meets the definition of an enterprise and provides a government service for a fee, 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.

C. The Premium Is a Fee and Not a Tax.

The primary purpose of a tax is to raise revenue for general governmental expenses. But, the primary purpose behind the Initiative's Premium is not to raise revenue; the primary purpose of the Premium is to defray the costs of providing paid family and medical leave benefits and the costs of administering the program. Because the Premium is not a tax, TABOR's election requirements do not apply. *See Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 509 (Colo. 2018); *see also Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989) (The purpose of a tax is to "provide revenues in order to defray the general expenses of government as distinguished from the expense of a specific function or service.");

Barber v. Ritter, 196 P.3d 238, 248 (Colo. 2008) ("Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service.")

"To determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed." *Barber*, 196 P.3d at 248. This inquiry requires examination of several factors.

The first step is to review the language of the enabling statute. If the language states that a primary purpose is to raise revenues for general governmental spending, it is a tax; but if it indicates that the primary purpose of the charge is to finance a particular service, then the charge is a fee. *Id.* at 249.

The second step is to look to the primary or principal purpose for which the money is raised, not the manner in which it is ultimately spent. *Id.* (if the primary purpose for the charge is to raise revenues for general governmental spending, then the charge is a tax); *see Bloom*, 784 P.2d at 307-08.

The third step is to look to see if the primary purpose of the charge is to finance or defray the cost of services provided to those who must pay it. *Barber*, 196 P.3d at 241, 249. Any fee amount must be reasonably related to the overall

cost of the service; however, mathematical exactitude is not required. *Bloom*, 784 P.2d at 308.

Notably, a proposed 2018 paid family and medical leave enterprise that planned to collect premiums and pay benefits in a manner similar to the Initiative, was found to be TABOR-compliant by the Colorado Office of Legislative Legal Services ("OLLS"). During the 2018 Colorado legislative session, some legislators introduced House Bill 18-1001, titled "Concerning the Creation of a Family and Medical Leave Insurance Program."[2] House Bill 18-1001, which did not become law, contained many of the same provisions that are found in the Initiative, including creation of a new enterprise called the division of family and medical leave to be housed within the Colorado Department of Labor, authorized to collect premiums to defray the costs of the leave benefits and to pay out leave benefits to eligible employees, and required to hold all generated revenues in a fund kept separate and apart from the Colorado general fund.[3]

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[2] House Bill 18-1001 is archived on the Colorado General Assembly's website at: https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_1001ren.pdf

[3] One difference between the Initiative and House Bill 18-1001 is that in the Initiative, the premium is shared between the employee and the employer, while in the legislation, the premium was paid entirely by the employee. This difference does not change the outcome that in both cases the premium is a fee and not a tax.

In February 2019, OLLS issued a Legal Opinion to answer the question whether the premiums collected by the division of family and medical leave in H.B. 18-1001 would have been a fee, and not a tax, that the division (as an enterprise) could have charged without triggering TABOR's election requirements. *See Exhibit A, February 26, 2019 Legal Opinion of Colorado Office of Legislative Legal Services, pp. 5-8.* OLLS determined that H.B. 18-1001's premium would have been a fee and not a tax and that the division of family and medical leave created by the legislation would have qualified for enterprise status under TABOR. *Id.*

The Initiative's similarities to House Bill 18-1001, along with an analysis of each of the three factors set forth above confirm that the Premium in the Initiative is a fee and not a tax.

1. The Language of the Initiative Supports a Fee Determination.

The language of the Initiative is clear that it intends the Premium charge to be a fee, not a tax. The Initiative states that the Premium is not a tax but is instead a fee imposed by the new Division of Family and Medical Leave Insurance to defray the costs of the family and medical leave program, which provides services to those upon whom the fee is imposed, and at rates reasonably calculated based on the leave benefits that each person receives. *See* Initiative §8-13.3-402(4)(a); §8-

13.3-407(7); §8-13.3-418(1); *see also City of Aspen*, 418 P.3d at 514 ("Because the stated purpose of the ordinance is to protect the health, safety, and welfare of citizens and visitors of Aspen, and because Aspen labeled the charge a fee, we conclude that the ordinance does not facially purport to levy a tax.")

2. The Primary Purpose of the Premiums Is to Pay Out and Administer Paid Family and Medical Leave Benefits.

The primary purpose of the Premiums collected pursuant to the Initiative is to pay out and administer family and medical leave benefits to Colorado workers. The Division can only collect the Premiums to defray the costs to pay out and administer the paid family and medical leave benefits. Initiative §8-13.3-407(7). The Division cannot use the Premiums for any other purpose. *Id.* Indeed, the measure specifies that money in the Fund shall be continuously appropriated to the Division for the purposes set forth in the Initiative and no part of the Fund shall be used for any other purpose. Initiative §8-13.3-418.

Because all revenue raised by the Division, whether from collection of the Premium or from issuance of bonds, is kept in a separate treasury account - the Fund - to be used only for the Division's authorized purpose; and because the revenue may only be used for the purposes outlined in the Initiative and not to defray the costs of general state expenses, the Premium is a fee, not a tax.

3. The Primary Purpose of the Premium Is to Defray the Cost of Providing Family and Medical Leave Insurance to Those Who Pay the Premium.

The third factor in answering the tax or fee question is whether the primary purpose of the charge is to finance or defray the cost of services provided to those who must pay it. *See Barber*, 196 P.3d at 241, 249. (A charge is a fee when the primary purpose is to "defray the costs of services provided to those charged" or to "finance a particular service utilized by those who must pay the charge").

The Initiative states that "employee and employer contributions are collected at rates reasonably calculated to provide the program's leave benefits and supporting administration." Initiative §8-13.3-402(4)(a). Importantly, there is no requirement that there be a direct nexus between an individual's use of the service or benefit, and the permissibility of a user fee. Indeed, this Court has made clear that even imposing a fee that generates revenues for street maintenance but not for any specific property does not support a conclusion that the charge is a tax, and not a fee. *See Bloom*, 784 P.2d at 309. This Court has also upheld a fee charged to persons who may not utilize the services at all. *See id.* at 310-11 (noting that the city could have elected to impose its transportation utility fee on all adult residents of the city, but instead imposed it on owners and occupants of developed lots that would benefit from the street maintenance program); *see also Loup-Miller Constr. Co. v. City & Cnty. of Denver*, 676 P.2d 1170, 1173-75 (Colo. 1984) (holding that

a sewage facilities development fee assessed to defray potential future costs of increasing capacity for new sewer connections was a fee, not a tax, although no new sewer service was actually provided and the fee was a charge for the city's readiness to provide future service).

A failure to provide a service to each individual or all individuals charged does not automatically render a charge a tax. *See Barber*, 196 P.3d 248-50; *City of Aspen*, 418 P.3d at 514-15. Essentially, so 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. Notably, a fee need not be voluntary to qualify as a fee rather than a tax. *See Bloom*, 784 P.2d at 310 (noting that the supreme court has "never held . . . that a service fee must be voluntary").

In contrast to the premium in House Bill 18-1001, which was to be entirely employee-paid, and to the premiums collected by another employment-centered enterprise, the Colorado unemployment insurance program whose premiums are entirely employer-paid, here, both employers and employees pay a portion of the Initiative's Premium and both receive a value in return. The employer and employee both benefit by sharing the cost of the Premium with each other; the employer has access to a family and medical leave insurance program that pools

costs statewide and is more affordable than paying leave benefits to their employees directly out of pocket; the employer benefits from savings due to greater employee retention and improved productivity, loyalty, and morale from employees who appreciate the availability of the paid leave; and the employee has access to a paid family and medical leave benefit to protect them and provide financial security when the worker has a serious health condition, is caring for a new child or seriously ill family member, needs leave related to a family member's military deployment, or needs to address the effects of domestic violence or sexual assault.

As long as the Premium 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. *See TABOR Found. v. Colo. Bridge Enter.*, 353 P.3d at 903.

D. Enterprises Are Not Subject to the TABOR-Compliant Ballot Title Language.

TABOR requires prior voter approval for tax increases and requires the ballot titles to begin: "SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY…? Colo. Const., art. X §20(3)(c). TABOR specifically exempts enterprises from such prior voter approval and the specified ballot title language. Colo. Const., art. X §20(2)(d),

(4). Because the Title Board accurately determined that the Division is an enterprise, it also determined that the Initiative need not contain TABOR-compliant ballot language in its Title. *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.

The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996). Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (*quoting In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). When reviewing the Titles for clarity and accuracy, we 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.

B. The Title and Submission Clause Is Not Misleading.

The Title is clear and does not mislead the voters. "While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative." *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations omitted). Here, the Title thoroughly but succinctly captures the key features of the measure, is not likely to mislead voters as to the Initiative's purpose or effect, nor does the Title conceal some hidden intent.

Petitioner claims that the title is misleading for much the same reasons she articulated in part I above. She contends that the Division does not satisfy the definition of an enterprise under TABOR and so the Title's inclusion of term "enterprise" is misleading. Yet, as briefed above on pp. 7-13, 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 at 58. Only in a clear case should a title prepared by the Title Board be held invalid. *In re Title, Ballot Title & Submission*

Clause Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982, 649 P.2d 303, 306 (Colo. 1982). This is not such a case.

CONCLUSION

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

Respectfully submitted this 31st day of March 2020.

TIERNEY LAWRENCE LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2020 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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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.

DATE FILED: March 31, 2020 2:20 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, JENA GRISWOLD, Secretary of State of the State of Colorado, do hereby certify that:

the attached is a true and exact copy of the legal opinion from the Office of Legislative Legal Services entered into the record by the proponents at the March 4, 2020 Title Board for Proposed Initiatives "2019-2020 #247 and #248 'Paid Family and Medical Leave Insurance Program'".....

. . . . . **IN TESTIMONY WHEREOF** I have unto set my hand . . . . . and affixed the Great Seal of the State of Colorado, at the City of Denver this 31st day of March, 2020.

Jena Griswold

SECRETARY OF STATE

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LEGAL OPINION

TO: Speaker KC Becker

FROM: Office of Legislative Legal Services

DATE: February 26, 2019

SUBJECT: Whether the premium that the division of family and medical leave proposed by H.B. 18-1001 would have imposed would have been a fee that the division could have charged without voter approval in advance without being disqualified as an enterprise.[1]

Legal Question

H.B. 18-1001[2] would have created the division of family and medical leave insurance (division) within the department of labor and employment. The bill also would have authorized the division to collect a premium (premium) from Colorado workers under a newly created family and medical leave insurance program (program) and to spend premium revenue to pay family and medical leave benefits to eligible individuals. The

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[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly. OLLS legal memoranda do not represent an official legal position of the general assembly or the State of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the general assembly, OLLS legal memoranda generally resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly's plenary power.

[2] For purposes of this memorandum, references to H.B. 18-1001 refer to the reengrossed version of H.B. 18-1001. The Senate State, Veterans, and Military Affairs Committee postponed the bill indefinitely on April 30, 2018.

Taxpayer's Bill of Rights (TABOR)[3] requires a district to obtain voter approval before levying a new tax and limits annual district fiscal year spending, but specifies that an enterprise is not part of a district. To qualify as an enterprise, an entity must satisfy three explicit TABOR requirements and must not have the power to impose taxes, and it appears that the division would have satisfied the three explicit TABOR requirements. Would the premium have been a fee, and not a tax, that the division could have charged without prior voter approval and without being disqualified as an enterprise?

Short Answer

Yes. The premium would have been a fee, not a tax, and therefore the division could have charged the fee without voter approval in advance and without being disqualified as an enterprise. In addition, so long as the division satisfied the other TABOR requirements for enterprise status, its revenue would not have been counted against the state fiscal year spending limit.

Discussion

1. H.B. 18-1001 would have created the division, authorized the division to charge the premium, and declared the division to be an enterprise for purposes of TABOR.

H.B. 18-1001 proposed the creation of the program within the division. The program would have provided paid family and medical leave to employees who met specified criteria. To pay for the program, employees in the state would have been required to pay the premium in an amount based on their yearly wages. The director of the division would have determined the initial premium amount, with the limitation that the amount could not exceed .99% of an employee's yearly wages. After the first year of the program, the director would have been required to set the premium amount based on the amount of claims paid in the prior year as a portion of total annual covered wages.

If an employee who paid the premium took leave for an approved purpose under the program, the employee would have been eligible to receive weekly pay during that leave in an amount ranging from 66% to 95% of the employee's weekly wage,

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[3] Colo. Const. art. X, § 20.

depending on how the employee's wages compared to the annual mean wage. The division would have been declared to be an enterprise so long as it satisfied TABOR requirements.[4]

2. An entity must satisfy certain requirements to qualify as an enterprise, charges levied by an enterprise cannot be taxes and therefore do not require voter approval, and an enterprise's revenue is not counted against a district's fiscal year spending limit.

The requirements of TABOR, including, as relevant here, the requirement of prior voter approval for new taxes[5] and the limitation on state fiscal year spending,[6] apply only to a "district". TABOR defines "district" as "the state or any local government, excluding enterprises."[7] 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."[8] Additionally, the Colorado Supreme Court has held that an entity having the power to impose taxes is not an enterprise.[9] Because only a district can impose taxes and an enterprise is not part of a district for purposes of TABOR, an enterprise is not required to obtain voter approval for its charges (because the charges are not taxes) and its revenue is not subject to any district fiscal year spending limit.

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[4] As proposed by H.B. 18-1001, § 8-13.3-303 (2)(a), C.R.S., stated:

> (2) (a) The division constitutes an enterprise for purposes of section 20 of article X of the state constitution, as long as the division retains authority to issue revenue bonds and the division receives less than ten percent of its total annual revenues in grants, as defined in section 24-77-102 (7), from all Colorado state and local governments combined. For as long as it constitutes an enterprise pursuant to this section, the division is not subject to section 20 of article X of the state constitution.

[5] TABOR states, in relevant part, that "districts must have voter approval in advance for ... any new tax ...". Colo. Const. art. X, § 20 (4)(a).

[6] TABOR states, in relevant part, that "[t]he maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991." Colo. Const. art. X, § 20 (7)(a). While not otherwise applicable to the legal analysis in this memorandum, TABOR also imposes annual limits on "each local district's fiscal year spending" and "each district's property tax revenue. Colo. Const. art. X, § 20 (7)(b) and (7)(c).

[7] Colo. Const. art. X, § 20 (2)(b).

[8] Colo. Const. art. X, § 20 (2)(d).

[9] *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 869 (1995).

3. The division would have been able to satisfy the three explicit constitutional requirements for an enterprise.

The constitutional definition of "enterprise" set forth above includes the following three requirements for enterprise status: (1) An enterprise must be a government-owned business; (2) An enterprise must have authority to issue its own revenue bonds; and (3) An enterprise must receive less than ten percent of its revenue from state and local government grants. The division would have met or been able to meet these three requirements.

The division would have been a government-owned business. The division would have been government-owned because it would have been created within a principal department of state government. The division would have been a business because the Colorado Court of Appeals has held that an entity designated by the state as an enterprise is a business if it "pursues a benefit and generates revenue by collecting fees from service users,"[10] and the division would have done just that. The division would have administered the program, which would have required the division to impose and collect a premium from employees in exchange for providing employees the benefit of paid family and medical leave. In addition, because, as set forth in detail in section 4 of this memorandum, the premium is a fee, not a tax, the division's power to impose and collect the premium would not have prevented it from being a business.[11]

The division also would have had the authority to issue revenue bonds[12] and would have been able to avoid receiving excessive state and local government grants. The division's funding would have come exclusively from a newly created family and medical leave insurance fund, which would have included money credited to it from the premiums paid by covered employees, proceeds of any revenue bonds issued by the division, and interest and investment income. While the division would have been authorized to accept gifts, grants, and donations, H.B. 18-1001 did not directly provide any state or local government grants or appropriations to the division or the fund, and it seems unlikely, given its self-funding mechanisms and the benefits of being exempt from TABOR, that the division would ever have accepted any other state or local

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[10] *TABOR Found. v. Colo. Bridge Enter.*, 2014 COA 106, ¶60.

[11] *See Nicholl,* 896 P.2d at 869 ("The ability to levy general taxes is inconsistent with the characteristics of a business.").

[12] As proposed by H.B. 18-1001, § 8-13.3-303 (2)(d), C.R.S., stated:

> (2) (d) The division is hereby authorized to issue revenue bonds for the expenses of the division, which bonds may be secured by any revenues of the division.

government grants in an amount sufficient to cause it to lose enterprise status. Consequently, the division would have been an enterprise unless the premium that the division would have imposed to pay for the program were a tax rather than a fee.

4. The premium proposed in H.B. 18-1001 would have been a fee.

A tax is "designed to raise revenues to defray the general expenses of government, but [a fee] is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service."[13] While the imposition of a new tax requires prior voter approval under TABOR,[14] the imposition of a fee does not. Under Colorado case law, "to determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed."[15]

The Colorado Supreme Court in *Barber v. Ritter* gave several factors to help determine that primary purpose:

1. The language of the enabling statute and whether it indicates that the primary purpose is to raise revenue for general spending or to finance a particular purpose;
2. The primary or principal purpose for which the money is raised, not the manner in which it is ultimately spent; and
3. Whether the primary purpose of the charge is to finance or defray the cost of services provided to those who must pay it.[16]

4.1. The language of H.B. 18-1001 indicates that the general assembly intended the premium to be a fee charged to fund a particular purpose.

In the legislative declaration in H.B. 18-1001, the general assembly stated that "providing the workers of Colorado with family and medical leave insurance will encourage an entrepreneurial atmosphere, encourage economic growth, and promote a healthy business climate ...." The legislative declaration specified that the premiums

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[13] *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008).

[14] Colo. Const. art. X, § 20 (4)(a).

[15] *Barber*, 196 P.3d at 248 (citing *Bloom v. City of Ft. Collins*, 784 P.2d 304, 308 (Colo. 1989) and *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986)).

[16] *Id.* at 248-250.

collected under the family and medical leave program were to be "used exclusively for the payment of family and medical leave benefits and the administration of the family and medical leave insurance program." Additionally, the bill specified that the premiums established under the program were fees and not taxes.

In *Colo. Union of Taxpayers Found. v. City of Aspen*, the Colorado Supreme Court found that because the stated purpose of the charge in question in that case was to protect the health, safety, and welfare of citizens and visitors to Aspen and because Aspen labeled the charge a fee, the ordinance, on its face, was not a tax.[17]

Similarly, the legislative declaration in H.B. 18-1001 indicated an intent to start a family and medical leave insurance program for the benefit of employees in the state and to fund the program with premiums paid by each employee. The bill also specifically referred to the premium as a fee and not a tax. Like the ordinance in Aspen, H.B. 18-1001 would not have facially levied a tax.

4.2. The premium would have been imposed for the primary purpose of funding the program.

H.B. 18-1001 would have required each employer to collect the premium amount from each employee and transmit that amount to the division for deposit into the family and medical leave insurance fund. Money in the fund would have been used only to pay for family and medical leave benefits, repay any revenue bonds issued by the division, and administer the program. The bill would have prohibited the general assembly from appropriating money from the fund for the general expenses of the state. Further, money in the fund at the end of any state fiscal year would not have reverted to the general fund.

> If the primary purpose is to raise revenue for general governmental use, it is a tax. Conversely, if a charge is imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct and indirect costs of providing a service or regulating an activity under the scheme, then the charge is not raising revenue for the general expenses of government, and therefore, not a tax.[18]

The primary purpose of the premium would have been to provide funding for the program. The premium would not have raised revenue for the general expenses of the

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[17] *Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶29.

[18] *Id.*, at ¶26 (citing *Bloom*, 784 P.2d at 308; *Zelinger*, 724 P.2d at 1358; *Western Heights Land Corp. v. City of Fort Collins,* 362 P.2d 155, 158 (Colo. 1961)).

government, evidenced by language in the bill that would have prohibited the general assembly from appropriating money from the family and medical leave insurance fund for such general expenses.[19] If an eligible individual had taken leave for one of the qualifying purposes specified in the bill, the individual would have received a weekly benefit amount ranging from 66% to 95% of the eligible individual's weekly wage and the benefit would have been paid from the fund.

4.3. The premium would have been used to defray the cost of providing family and medical leave benefits to the employees who paid it.

The premium would have been reasonably related to the overall cost of the program. For the first year of the program, each employee would have been required to pay a premium equal to a percentage of the employee's total annual covered wages, not to exceed .99%. In subsequent years, the director of the division would have been required to set the premium at an amount equal to a percentage of each employee's total annual covered wages based on the prior year's total claims payments. If an employee later became eligible to receive benefits under the program, the benefit amount would have ranged from 66% to 95% of the employee's weekly wage. The initial premium amount would have been based on a percentage of wages, and the benefit amount also would have been based on a percentage of the employee's wages. The premium amount therefore would have been reasonably related to the benefit amount.

> [A]s 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.[20]

Every employee required to pay the premium would have been eligible to later receive family and medical leave insurance benefits if the employee experienced a qualifying event. Everyone who paid the premium would have been eligible to later receive benefits, and anyone who did not pay the premium would not have been eligible to

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[19] As proposed by H.B. 18-1001, § 8-13.3-309 (1)(a), C.R.S., stated, in relevant part:

> (1) (a) There is hereby created in the state treasury the family and medical leave insurance fund. Money in the fund may be used only to pay revenue bonds issued in accordance with section 8-13.3-303 (2)(d) and to pay benefits under, and to administer, the program pursuant to this part 3, including outreach services developed under section 8-13.3-304 (5). ... The general assembly shall not appropriate money from the fund for the general expenses of the state.

[20] *Tabor Found.*, 2014 COA 106, ¶40.

receive benefits. The premium thus would have been imposed only on those who would have been reasonably likely to benefit from paid family or medical leave.

Finally, a comparison of the premium with the premium imposed in the state of Colorado's unemployment insurance program further supports a conclusion that the premium would have been a fee and not a tax. The division of unemployment insurance is an enterprise. The unemployment insurance program collects premiums from employers in the state and uses the premiums to pay benefits to individuals who are unemployed. The premiums paid by employers are based on the amount of total annual covered wages paid and benefits paid to employees are based on a formula that determines an amount based on an individual's previous income.

It is presumed that the unemployment insurance program statutes enacted by the general assembly are constitutional.[21] Because those statutes are presumed constitutional, the 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. Like the unemployment insurance program, the benefits that the family and medical leave program would have paid out would have been based on the eligible individual's income. Unlike the unemployment insurance program, the person who would have paid the premium is the same person who would have received the benefit of the program.

The unemployment insurance program is funded through employer premiums, not premiums paid by employees, even though employees, not employers, are the ones who ultimately receive the benefits.[22] As the employees who would have paid the premium under the family and medical leave program and the employees who would have received family and medical leave benefits under the program are the same group, the relationship is significantly stronger than the relationship between the employer premium payer and the employee benefits recipient in the presumed constitutional unemployment insurance program.

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[21] *See People v. Longoria,* 862 P.2d 266, 270 (Colo. 1993) ("A statute enjoys a presumption of constitutionality, and the party challenging it bears the burden of proving unconstitutionality beyond a reasonable doubt."); § 2-4-201 (1)(a), C.R.S. ("In enacting a statute it is presumed that ... [c]ompliance with the constitutions of the state of Colorado and the United States is intended;").

[22] §§ 8-71-103 (2)(a), 8-73-101 to 8-73-114, and 8-76-101 (1), C.R.S.

Conclusion

The premium that would have been imposed by H.B. 18-1001 would have been a fee, not a tax. The bill showed clear legislative intent to establish a fee to fund the program. The primary purpose of the premium would have been to pay for the program and not to pay for the general expenses of government. Finally, the premium would have been reasonably related to the cost to operate the program and would have been charged to the people who were reasonably likely to benefit from the program.

Because the premium would have been a fee and not a tax, the division of family and medical leave insurance would have been able to qualify as an enterprise for purposes of TABOR. Consequently, the division would not have required voter approval to charge the premium, and premium revenue, as well as any other division revenue, would not have been counted against the state fiscal year spending limit.