DATE FILED: March 31, 2020 7:19 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	▲ **COURT USE ONLY** ▲
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Petitioner's Opening 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 **5,363** words (opening brief does not exceed 9,500 words).

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

For each issue raised by Petitioner, the 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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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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2. The title and ballot title of a proposed initiative should be clear and allow the electorate to determine intelligently whether to support or oppose the proposal. Initiative #248 states it would "creat[e] the division of family and medical leave insurance as an enterprise within the department of labor and employment," but the proposed governmental unit does not satisfy the definition of a TABOR-exempt enterprise under subsection (2)(d) of article X, section 20 of the Colorado Constitution. Do Initiative #248's titles violate Colo. Rev. Stat. § 1-40-106(3)(b), because they are inaccurate and misleading?

STATEMENT OF THE CASE

Timothy Tyler and Wendy Howell (Respondents) have proposed a series of initiatives that would require most working Coloradans and

businesses to fund and participate in a "paid family and medical leave insurance program," to be administered by the division of family and medical leave insurance within the department of labor and employment.[1] This appeal from the Title Board concerns one of those initiatives, Initiative 2019-2020 #248 (Initiative #248), which proposes to amend Colorado statute to add the "Paid Family and Medical Leave Insurance Act." (*See generally* Initiative #248, §§ 8-13.3-401 to -428.)

If passed, among other things, Initiative #248 would establish:

- ***Eligibility*** for "covered individuals" to claim family and medical leave: including the birth or adoption of a child; caring for a family member; a serious health condition; qualifying exigency leave, e.g., leave related to a covered individual's family member's active duty; and safe leave, e.g., leave because a covered individual or covered individual's family member is a victim of domestic violence. (§ 404.)
- ***Duration*** of the paid leave: 12 weeks per year, except a covered individual may take an additional four weeks for a serious health condition related to pregnancy complications or childbirth. (§ 405(1).)
- ***New payroll tax*** to be imposed: 0.88% of wages per employee from January 1, 2023 to December 31, 2024. (§ 407(3)(a).) Starting in 2025, the director would have the authority to set a new rate every year based on a statutory formula: the rate may

[1] The initiatives include #247, #248, and #283. At this time, only #247 and #248 have been appealed to this Court. *See In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2019-2020 #247 (Paid Family & Med. Leave Ins. Program)* (Colo. 20SA94); *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2019-2020 #248 (Paid Family & Med. Leave Ins. Program)* (Colo. 20SA95).

not exceed 1.2% and must be sufficient to cover 135% of benefits paid the prior year plus 100% of the administrative costs, less the net assets remaining in the fund. (§ 407(3)(b).)

- ***Allocation of new payroll tax***[2] to be imposed: up to 50% of the payroll tax on wages may be imposed on the employee, with the remainder paid by the employer. (§ 407(5).)
- ***Division of family and medical leave insurance***, which the Initiative characterizes as an "enterprise" to avoid TABOR, and grants the Division exclusive power over the program. (§ 408.) The Initiative authorizes private plans, but clarifies that private plans are subject to the Division's approval, regulatory oversight, and must pay the Division's costs and expenses for the administration of private plans. (§ 421.)
- ***Family and medical leave insurance program***, to be governed by the Division, including through the Division's rulemaking, adjudicatory, and enforcement powers. (§ 416.)
- ***Family and medical leave insurance account fund*** in the state treasury to house the payroll taxes collected from employers on behalf of employees and businesses, save for those participating in Division-approved private plans. (§ 418.)

The Title Board conducted its initial public hearing on Initiative #248 and set the title on February 19, 2020. Petitioner timely filed a motion for rehearing in which she challenged Initiative #248 and the titles set by the Title Board. *First*, she pointed out Initiative #248 contained multiple separate and distinct subjects in violation of the single-subject requirement in Colo. Const. art. V, § 1(5.5). (Mot. for Reh'g 1-3.) *Second*, the titles violated TABOR because (i) the ballot title

[2] Initiative #248 works hard to avoid the "tax" label, even invoking the "fee" versus "tax" distinction in the text of the initiative: "Premiums established under this section are fees and not taxes." (§ 407(7).)

failed to include mandatory TABOR language, *see* Colo. Const. art. X, § 20(3)(c), and (ii) the title used a misleading TABOR term (enterprise) in describing the Division, *see* Colo. Const. art. V, § 1(5.5); Colo. Rev. Stat. § 1-40-106(3)(b). (*See* Mot. for Reh'g 3-4.) *Third*, the title was inaccurate and misleading for an additional reason, as it indicated the payroll tax would be "employer paid," which is untrue. (*Id*. at 4.)

The Title Board considered Petitioner's motion at its March 4, 2020 hearing and, except for her third argument related to whether the payroll tax would be employer paid, denied the motion. Accordingly, the Title Board set the final ballot title for Initiative #248 as:

> *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 12 weeks of family and medical leave, with an additional 4 weeks for pregnancy or childbirth complications, with a cap on the weekly benefit amount; requiring job protection for and prohibiting retaliation against an employee who takes paid family and medical leave; permitting self-employed individuals to participate in the program; allowing a local government to opt out of the program; exempting employers who offer an approved private paid family and medical leave plan; to pay for the program, requiring a premium of 0.88% of each employee's wages, up to a cap, 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 50% of the premium amount from an employee's wages and requiring the employer to pay the remainder of the premium; 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?

Petitioner timely sought review of the Title Board's action under Colo. Rev. Stat. § 1-40-107(2). (*See* Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative #248.)

SUMMARY OF THE ARGUMENT

If passed, Initiative #248 would break new ground in Colorado. While the underlying mission of providing paid family and medical leave to nearly every employed Coloradan may be worthwhile—and even more acutely so during the current times—Initiative #248's chosen design to administer the program is without equal. The Initiative would: create the division of family and medical leave insurance; delegate to the Division traditional agency functions, including legislative rulemaking, adjudicatory powers over claims filed under the program, and the power to enforce laws and impose civil penalties for noncompliance; and, significantly, impose mandatory payroll "premiums" on almost every business and working person in the state and empower the Division to set the rate for such premiums. The

reason the "without equal" label fits here is because the Division would not be designated as a traditional government district or unit, but rather as a TABOR-exempt "enterprise" authorized to exact "fees" (as opposed to "taxes") from Coloradans.

Although Initiative #248 is constitutionally suspect, the issue before the Court is whether the Title Board erred in setting the title and ballot title for the Initiative. It erred in two ways. *First*, the Title Board erred by not fixing Initiative #248's ballot title consistent with subsection 20(3)(c) of TABOR, specifically requiring the title to begin: "SHALL STATE TAXES BE INCREASED . . . ?" Subsection 20(3)(c) requires initiated measures to include TABOR language for "tax increases." Initiative #248 plainly increases payroll withholdings and, despite the fee *nomen*, the premiums imposed are taxes. The premiums will be mandatory on most businesses and employees, practically unavoidable, and used to fund the exercise of general police powers over most state workers. They are taxes. For a similar reason, the Division does not qualify as a TABOR-exempt enterprise. While the Division may be "government-owned," it is in no way a "business." Under this Court's decisions, businesses do not have the power to tax, which the

Division clearly would. Therefore, the Title Board should have included TABOR language in Initiative #248's ballot title.

Second, the Title Board erred in approving an inaccurate and misleading title and ballot title for Initiative #248. The titles state the Initiative will "creat[e] the division of family and medical leave insurance as an *enterprise* within the department of labor and employment to administer the program." (Emphasis added.) As previously explained, the Division is not a TABOR-exempt enterprise and describing it as such is inaccurate. Further, inaccurate use of a TABOR-defined term like "enterprise" misrepresents a central feature of Initiative #248 and will mislead the voting public and cause confusion. The Court should reverse and remand to the Title Board for redrafting.

ARGUMENT

I. The Title Board's Failure to Include a TABOR-Compliant Ballot Title for Initiative #248 Was in Error.

A. Standard of review and preservation.

This Court is vested with the authority to review the rulings of the Title Board. Colo. Rev. Stat. § 1-40-107(2). While the Court's "review of actions taken by the Title Board is of a limited scope," *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo.

2008), and the Court defers to the Title Board's discretion in setting the title, ballot title, and submission clause, *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016), the interpretation of a constitutional provision is a question of law that this Court reviews de novo, *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018). And Petitioner's first issue presents a pure question of constitutional interpretation, namely whether TABOR's ballot-title mandate in Colo. Const. art. X, § 20(3)(c) requires a TABOR-compliant title with the preface, "SHALL STATE TAXES BE INCREASED."

To be clear, Petitioner is not raising a challenge to the substantive limits of Initiative #248 itself at this juncture. Rather, the question is whether the Title Board erred in refusing to set Initiative #248's ballot title consistent with subsection 20(3)(c) of TABOR. Accordingly, although the Court avoids weighing the merits or suggesting how an initiative might be applied when reviewing titles for compliance with single-subject and clear-title requirements, *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014), the Court "must engage in some substantive inquiry" of the Initiative to determine whether it triggers TABOR, *see In re Title, Ballot Title, & Submission Clause, Summary for 1997-98 No. 84*, 961 P.2d 456, 460 n.5

(Colo. 1998) (quoting *In re Title, Ballot Title, & Submission Clause, Summary for 1997-98 No. 30*, 959 P.2d 822, 825 n.2 (Colo. 1998)).

Petitioner preserved this issue for review in her motion for rehearing before the Title Board. (*See* Mot. for Reh'g 3-4.)

B. Subsection 20(3)(c) of TABOR requires TABOR language for "tax increases."

Subsection 20(3)(c) of TABOR stipulates that the ballot titles of initiated measures proposing "tax increases" must begin with mandatory TABOR language. That language requires the title to start: "SHALL [STATE] TAXES BE INCREASED . . . ?" TABOR's ballot-title requirement serves to inform the electorate and further TABOR's stated purpose of reasonably restraining the growth of government. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 995 (Colo. 2006).

Indeed, this Court has said that "the primary purpose of [TABOR's] election notice provisions [i.e., those in subsections 20(3)(b) and 20(3)(c)] is 'to provide the electorate with the information necessary to make an intelligent decision on ballot issues involving debt and/or tax increases.'" *Bruce*, 129 P.3d at 995 (quoting *Bickel v. City of Boulder*, 885 P.2d 215, 236 (Colo. 1994)). In that way, the setting of a TABOR-compliant ballot title "directly influences the perception and understanding of the voters," *id.*, and "comports with the mandate given

to the [Title Board] to set titles that 'correctly and fairly express the true intent and meaning' of a proposed law." *Id.* at n.8 (quoting Colo. Rev. Stat. § 1-40-106(3)(b)). Thus, when a proposed initiative would impose a tax increase, the Title Board *must* include a TABOR-compliant ballot title to allow the electorate to make an intelligent decision.

Assuming the new 0.88% payroll withholding is in fact a tax (discussed *infra* Argument, I.C), it is without question Initiative #248 would *increase* the employment taxes imposed on both employees and businesses. In *Bruce*, the Court indicated that a tax increase suggests "the tax burden borne by an individual taxpayer will be greater than its present amount." *Id.* at 995. That is, the tax burden upon an individual taxpayer will increase in a meaningful sense. *Id.* If Initiative #248 becomes law, employees' payroll withholdings will increase by up to 0.44% of their wages, and employer contributions of withholdings will increase by at least 0.44% of wages.[3] Thus, a person making $50,000 will incur $220 per year in additional withholdings because of the new tax, and that person's employer must also pay $220—for each similarly

[3] The 0.88% rate is only fixed for the first two years of the paid family and medical leave program. Starting in 2025, the Division has the authority to set a new percentage rate, up to 1.2%, pursuant to a prescribed statutory formula. (*See* Initiative #248, § 8-13.3-407(3)(b).)

situated employee. The cumulative effect of this new payroll tax will be significant; the fiscal impact statement for the Initiative forecasts that the new tax is expected to raise "state revenue . . . by $612.0 million in FY 2022-23 and $1.2 billion in FY 2023-24." (Fiscal Impact Stmt. 3.) By any measurement, such an increase in annual payroll taxes should trigger subsection 20(3)(c)'s TABOR-title language.[4]

C. Initiative #248's mandatory payroll withholding levied on employees and businesses is a tax, not a fee.

The new "premiums" that Initiative #248 would impose on employees and businesses for paid family and medical leave insurance are unavoidable. This inability to choose to avoid the premiums imposed by Initiative #248 distinguishes them from the *fees* the Court has held are exempt from TABOR—e.g., when a charge bears a "reasonable relationship" to the services provided and the "comprehensive regulatory regime" associated with the services provided. *Colorado Union of Taxpayers Found. v. City of Aspen*, 418

[4] The new payroll tax is also a qualifying event under subsection 20(4)(a) of TABOR. The Respondents have never argued Initiative #248 addresses situations of grave fiscal shortfall or other emergency, and the Initiative would impose a "new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain." Colo. Const. art. X, § 20(4)(a).

P.3d 506, 513 (Colo. 2018) (holding $0.20 fee imposed on paper-grocery bags by municipality constitutes a TABOR-exempt fee because it bears reasonable relationship to service of recycling bags and regulations associated with that service). But unlike in *City of Aspen*, there are no viable alternatives, such as bringing one's own grocery bag or simply gathering up provisions in one's arms to avoid the charge. Rather, to avoid the premiums here, only draconian options will do. For non-federal employees, it's self-employment, unemployment, or leaving Colorado—none of which are real alternatives for most people in the state.[5] And for employers, it's terminating all employees or moving to another state.

The unavoidability of Initiative #248's mandatory payroll withholding also distinguishes it from the fees at issue in *TABOR Foundation v. Colorado Bridge Enterprise*, 353 P.3d 896 (Colo. App. 2014), a case Respondents relied on before the Title Board. *Colorado Bridge Enterprise* involved a bridge-safety surcharge on vehicle

[5] Initiative #248 allows "local governments" to opt out of the paid family and medical leave program, in which case employees of local governments have the option to participate in the state program by paying the employee portion of the payroll withholding to the Division. (Initiative #248, §§ 8-13.3-407(4)(b), 422(1), (2).) It is unclear at this time whether local governments will exercise the right to opt out.

registrations based on the type and weight of a particular vehicle to pay for the costs of completing designated bridge projects throughout the state. *Id.* at 899. As such, the surcharge only applied to individuals and businesses that owned and registered vehicles in Colorado.[6] That is, the surcharge was easily avoidable and only imposed on those individuals and businesses that chose to own and register a vehicle. For thousands of Coloradans, that meant they could avoid the bridge-safety surcharge. Moreover, even for those Coloradans subject to the surcharge, they could choose to purchase a vehicle of a different type or of a lighter weight to lessen the financial impact of the surcharge.

Further, the government enterprise in *Colorado Bridge Enterprise* was much more limited in its scope and power than the Division contemplated by Initiative #248. At the time of trial, only 168 bridges out of approximately 3,500 in the state had been identified as qualifying for Bridge Enterprise funds. *Id.* at 900. And the designated bridges were located in one-half of Colorado's sixty-four counties. *Id.* While the Bridge Enterprise had the power to set and impose the bridge-safety

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[6] Additionally, the implementing statute exempted various vehicles from the surcharge, including "any rental vehicle on which a daily vehicle rental fee is imposed," Colo. Rev. Stat. § 43-4-805(g)(III), and any vehicle for which the department of revenue had issued a horseless carriage special license plate," § 805(g)(VII).

surcharge, Colo. Rev. Stat. § 43-4-805(g)(I), the implementing statute clarified the surcharge was to be collected through the existing vehicle registration process and the statute did not grant the full panoply of agency powers—to legislate, adjudicate, and enforce.

This is in stark contrast to the Division imagined by Initiative #248. Not only does the Division have the power to impose payroll "premiums" for family and medical leave insurance on nearly every business and working individual in Colorado, but it also can:

- **§ 409(7):** promulgate rules for civil fines and impose those fines for failure to comply with section 409's leave-and-employment protection provisions.
- **§ 410(3):** determine by rule the interaction between the benefits conferred by Initiative #248 and workers' compensation benefits.
- **§ 412(1):** establish a system to adjudicate family-and-medical leave claims.
- **§ 413(1):** make decisions disqualifying covered individuals from the program for willful misrepresentations or willful withholding of material facts.
- **§ 413(2):** pursue reimbursements of erroneous payments made to covered individuals, including for willful misrepresentations.
- **§ 421:** regulate private plans, including approving plans, withdrawing approval of plans, requiring surety bonds, adjudicating claim appeals, enforcing rules and regulations of the program, and taxing private-plan participants for the administration costs and expenses of the plans.

What Initiative #248 proposes is the formation of a government unit

with an independent revenue stream, which exercises vast, unchecked powers over a paid family and medical leave program and fund, including regulatory control over private plans under the program.

In designing Initiative #247 this way, Respondents have created what will amount to a new, independent branch of government that will have the power to tax Coloradans, legislate through rulemaking, and exercise adjudicatory and enforcement powers. Not only is this unprecedented and offensive to the Constitution's guarantee of a republican form of government, *see* U.S. Const. art. IV, § 4, but it asks too much of the Court's more recent tax-versus-fee decisions. Even though the final destination for the mandatory payroll taxes may not be the general-fund account, and the Initiative #248 drafters state the collections will not be available for *general* government use, they are still taxes. When a government body exacts a mandatory charge on nearly every taxpaying individual and business, and uses that money to fund the exercise of general police powers over a broad swath of conduct, it must be a tax.

D. The Division proposed by Initiative #248 is a government district or unit, not a TABOR-exempt enterprise.

Before the Title Board, Respondents ducked a TABOR title by

claiming the proposed Division will function as a state "enterprise" otherwise exempt from TABOR. *See* Colo. Const. art. X, § 20(2)(d), (4). TABOR defines "enterprise" to "mean[] 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." *Id.* Although Initiative #248 states the Division will have bonding power and notes the Division risks loss of its enterprise status if it receives more than 10% of its total revenues in grants from all Colorado state and local governments combined (*see* Initiative #248, § 8-13.3-408(2)(a)), the Title Board must also determine whether the Division is a "government-owned business." It is not.

The Division as proposed is not a business within the plain meaning of that term. "The term 'business' is generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 868 (Colo. 1995) (citing *Lindner Packing & Provision Co. v. Indus. Comm'n*, 60 P.2d 924, 926 (Colo. 1936)). But this Court has reminded that the ability to levy taxes is inconsistent with the characteristics of a business and disqualifies an entity as an enterprise under TABOR. *Id.* at 869.

Initiative #248 vests the Division with the right to levy a

mandatory payroll tax—styled as "payroll premiums"—to be remitted to the Division beginning January 1, 2023, "in the form and manner determined by the Division." (*See* Initiative #248, 8-13.3-407(2).) And, while the rate is set as 0.88% for the first two years, the director of the Division is empowered to set the rate of the payroll tax thereafter at an amount not to exceed 1.2% but sufficient 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).) In truth, these taxes will cover much more than the payment of benefits and the administration of those payments; they will pay for the general "administration of the program," including developing and enforcing rules governing employer and employee conduct. (*See, e.g.*, §§ 407(7), 409(7), 412(1), 413.) Nor are private plans exempt from paying for the Division's regulatory efforts. The Initiative states that "[e]ach entity offering a private plan . . . shall reimburse the division for the costs arising out of the private plans in the amount, form, and manner determined by the director by rule." (§ 421(7).)

The Internal Revenue Service (IRS) has agreed that mandatory withholdings for paid family and medical leave are indeed payroll taxes.

Specifically, the IRS determined that payroll withholdings levied by California to finance its family temporary disability insurance program are payroll taxes that may be deducted from federal taxable income under section 164 of the Internal Revenue Code. (Mot. for Reh'g 4 (citing attached Memorandum, Office of Chief Counsel Number 200630017 (July 28, 2006)).) The IRS's determination that withholdings for state-mandated "insurance" are taxes was based on the mandatory nature and that they are "imposed and collected for the purpose of raising revenue to be used for a governmental function that serves public purposes, namely, to allow individuals to take time off from work to care for a seriously ill child, parent, or domestic partner; or to bond with a new child." *Id.* The IRS's characterization of California's program almost perfectly matches the taxing scheme proposed by Initiative #248.

But even if the Court determines the proposed "premiums" do not vest the Division with taxing authority under *Nicholl*, the Division's other characteristics disqualify it as a business for purposes of TABOR. The Division will have significant enforcement, regulatory, and rate-setting powers. Further, the Division will have the power to regulate and indeed allow or disallow competing products (privately provided paid medical and family leave plans). Even further, the Division is

empowered to regulate those private plans' ongoing compliance with the law *and* will have the power to tax the Division's costs and expenses for related administration on the private-plan participants. No business has power to regulate its direct competitors and bill them a fee for that oversight. In truth, in an attempt to fabricate a "market" for paid family and medical leave insurance to remedy the shortcomings of a related initiative (Initiative 2019-2020 #247), the drafters exposed the governmental bonafides of the proposed program. The Division is not a business under the ordinary understanding of that term. And because the Division is not a business, it follows it cannot be a "government-owned business" and cannot qualify as a TABOR-exempt enterprise.

* * *

Because Initiative #248 would impose a mandatory payroll tax that would increase taxes for the vast majority of Coloradans, a TABOR-compliant ballot title is required under subsection 20(3)(c) of TABOR. The Title Board's failure to require TABOR language for Initiative #248's title was therefore in error.

II. The Title Board Erred in Using the Term "Enterprise" to Describe the Division in Initiative #248's Titles.

A. Standard of review and preservation.

The Title Board is "vested with considerable discretion in setting

the title and the ballot title and submission clause," but the Court must reverse the Board's decision if a title "is insufficient, unfair, or misleading." *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 442 P.3d 867, 869 (Colo. 2019) (quoting *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014)). In examining an initiative's wording to determine whether its title comports with the clear-title requirement, the Court "employ[s] the general rules of statutory construction and give[s] words and phrases their plain and ordinary meanings." *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016).

Petitioner specifically objected to the Title Board's use of the term "enterprise" to describe the Division in her motion for rehearing before the Title Board. (*See* Mot. for Reh'g 3-4.)

B. Titles must be accurate and not misleading.

The constitution requires an initiated measure's subject to be "clearly expressed in its title." Colo. Const. art. V, § 1(5.5). "In setting a title, the title board shall consider the public confusion that might be caused by misleading titles" and "shall unambiguously state the principle of the provision sought to be added . . . ." Colo. Rev. Stat. § 1-40-106(3)(b). To accomplish this, "[t]he titles, standing alone, should

be capable of being read and understood, and capable of informing the voter of the major import of the proposal." *In re Title, Ballot Title, & Submission Clause for Proposed Initiatives 2001-2002 #21 & # 22*, 44 P.3d 213, 222 (Colo. 2002). That is, "[t]he matter covered by [the initiative] is to be clearly, not dubiously or obscurely, indicated by the title. [And its] relation to the subject must not rest upon a merely possible or doubtful inference." *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d 458, 462 (Colo. 1999).

In the end, "[t]he purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose." *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010). The Court therefore rejects titles that are "misleading, inaccurate, or fails to reflect the central features of the proposed initiative." *In re Title, Ballot Title, Submission Clause, & Summary With Regard to Proposed Pet. for Amend. to Const. of State Adding Se. 2 to Art. VII*, 900 P.2d 104, 108 (Colo. 1995).

C. Describing the Division as an "enterprise" in the titles is inaccurate and misleading.

By inaccurately using a constitutionally defined term to describe the Division in the title and ballot title of Initiative #248, the Title

Board approved titles that will mislead the electorate and cause public confusion. Both the title and ballot title state that Initiative #248 will "creat[e] the division of family and medical leave insurance *as an enterprise* within the department of the labor and employment to administer the program." (Emphasis added.) But, the term "enterprise" carries a specific constitutional meaning: an enterprise is 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). Because the Division is not a "business," but rather a government unit with legislative, adjudicatory, enforcement, and taxing power, it is inaccurate and misleading to describe the Division as an enterprise.

As previously argued (*supra* Argument, I.D), the Division proposed by Initiative #248 has almost none of the hallmarks of a "business." No business has the authority to require their customers (here, employees and employers) to purchase the service or product it sells. Yet, Initiative #248 would authorize the Division to impose mandatory payroll premiums, which employers must withhold from their employees' wages and remit to the Division's designated fund (Initiative #248, § 8-13.3-407(1), (2)), or a private plan or private plan's

third-party provider (§§ 407(8), 421(2)). Likewise, no business has the ability to exercise enforcement power and impose civil fines (up to $500 per violation), and adjudicate the assessment of such fines, on its clients—nor would it want to. Yet, Initiative #248 grants the Division that power. (§ 409(8).) And, no business has control on the relevant market such that it can regulate its direct competitors and bill them a fee for that oversight. Yet, that is the "market" Initiative #248 envisions. (§ 421.) In truth, the Division is not a business; rather, it is a governmental unit misleadingly labeled an enterprise to avoid TABOR and its form-and-content requirements for ballots.

Not only is the use of enterprise inaccurate, but it misrepresents a central feature of Initiative #248 and is therefore bound to mislead the voting public and cause confusion. This is especially true considering the significance of the enterprise moniker in the context of TABOR. The current titles therefore violate this Court's admonition that matters covered by an initiative should not be "dubiously or obscurely" indicated by the title. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45,* 234 P.3d 642, 647 (Colo. 2010) (quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d at 462 (Colo. 1999)). Also, by using the term enterprise and disguising the true

intent and operation of the Division, Respondents sweep into the yes-for fold voters who might otherwise vote against the measure. The Title Board must "avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear," which is the case here. *See* Colo. Rev. Stat. 1-40-106(3)(b).

Because the use of the term enterprise in Initiative #248's titles is inaccurate and misleading, the Title Board erred in approving the Initiative's titles over Petitioner's objection.

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 #248 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: March 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 31, 2020, I electronically filed a true and correct copy of the foregoing **Petitioner's Opening 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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