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COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019-2020) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #248 ("Paid Family Leave Insurance Program") **Petitioner**: Kelly Brough, **v.** **Respondents**: Timothy Tyler and Wendy Howell, **and** **Title Board**: Theresa Conley, David Powell, and Julie Pelegrin.	▲**COURT USE ONLY**▲
PHILIP J. WEISER, Attorney General ANNE MANGIARDI, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8th Floor Denver, CO 80203 Phone: (720) 508-6349 Fax: (720) 508-6041 Email: anne.mangiardi@coag.gov Registration Number: 44284 *Counsel of Record *Attorneys for the Title Board*	Case No.: 2020SA95

THE TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

A. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 916 words.

B. The brief complies with C.A.R. 28(b) and C.A.R. 28(7)(A) because for each issue, the Title Board's Opening brief contained, under a separate heading, a statement of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ Anne M. Mangiardi

ANNE M. MANGIARDI, 44284*
Assistant Attorney General

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The Colorado Title Board ("Board"), by and through undersigned counsel, hereby submits its Answer Brief.

SUMMARY OF THE ARGUMENT

Proposed initiative 248 ("#248"), on its face, meets all the requirements to be a TABOR enterprise. Petitioner asks the Court to hold that #248 is not an enterprise, despite the plain language of the initiative, because the proposed enterprise would have some power to regulate the proposed insurance program.

To address Petitioner's arguments, this Court would have to engage in a speculative analysis of the potential impact of the initiative. Such speculation regarding the outcome of a hypothetical constitutional challenge is outside the scope of the Board's analysis, and of this Court's review. The Board's action in setting the title for #248 should be affirmed.

ARGUMENT

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

Petitioner acknowledges that her first issue presented raises "a pure question of constitutional interpretation," yet maintains that she "is not raising a challenge to the substantive limits of Initiative #248 itself at this juncture." (Petitioner's Op. Br., p. 8). The arguments in Petitioner's opening brief, including its analysis of TABOR enterprise case law, shows this is a substantive constitutional challenge to the initiative. (Petitioner's Op. Br., pp. 11-19).

A constitutional challenge to the initiative is beyond the scope of this Court's review of the Board's actions. *In re Title, Ballot Title & Submission Clause for a Petition on Sch. Fin.*, 875 P.2d 207, 211 (Colo. 1994). This Court has specifically held that a TABOR challenge to a proposed initiative is beyond the scope of this Court's review of a ballot title. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-98 No. 10*, 943 P.2d 897, 900 (Colo. 1997).

Petitioner quotes *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)), for the proposition that this Court "must engage in some substantive inquiry" as part of a TABOR title challenge. But the Court in *In re No. 30* clarified that its "substantive inquiry" was limited to conclusions which "follow[ed] directly from a facial reading of the initiative[]." *Id.*

Here a "facial reading of the initiative" supports the Title Board's actions because the proposed initiative on its face includes all the elements required to be an enterprise under TABOR. Pursuant to TABOR, an "enterprise" is a "government-owned business authorized to issue its own revenue bonds and receiving 10% of annual revenue in grants from all Colorado state and local governments combined." COLO. CONST., art. X, § 20(2)(d). On its face, the proposed initiative meets these requirements: the premiums it collects are "fees and not taxes," it is government-owned, authorized to issue bonds, and limited to ten

percent of funds from state and local sources. *Id.* (proposed §§ 8-13.3-407(7), 408(2)(a)).

Petitioner is asking this Court to go beyond the face of the initiative to address whether, as a matter of constitutional interpretation, the proposed initiative successfully creates an enterprise. Prior decisions from this Court and others shows that the fee versus tax distinction is a complex, fact specific determination. *See, e.g., Tabor Found. v. Colo. Bridge Enterprise*, 353 P.3d 896, 898-900 (Colo. App. 2014), *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 513-14 (Colo. 2018); *see also Griswold v. Nat'l Fed. of Independent Bus.*, 449 P.3d 373, 382 (Colo. 2019). For example, in *Colorado Bridge Enterprise*, the Court of Appeals considered trial testimony relating to the location of the 168 Colorado bridges then eligible for funding from the enterprise, and evaluated the potential benefits to residents of Grand County. 353 P.3d at 900. Such an analysis would be impossible at this stage, before the initiative has been implemented (or even submitted to voters).

Petitioner's challenge here is both premature and outside the scope of this Court's review of a ballot title. "A determination of whether the initiative violates [TABOR] would necessarily require us to 'interpret its language or predict its application if adopted by the electorate' and this we will not do." *In re 1997-98 No. 10*, 943 P.2d at 900. In order to address Petitioner's objections, this Court would have to speculate as to the hypothetical impacts of the proposed initiative. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). An objection to a ballot title is not the forum to litigate this issue. The ballot title should be affirmed.

II. Even if adequately preserved, Petitioner's second issue presented fails for the same reasons.

Petitioner maintains that she preserved her second issue presented for appeal, but cites only to the section of her Motion for Rehearing where she raised her first issue presented. (Pet. Op. Br. p. 19.) Regardless of whether that issue was in fact adequately preserved, the analysis and outcome are the same for both issues because both

issues turn on whether the initiative would create a TABOR enterprise. Because this issue also seeks to prematurely litigate whether the proposed insurance program, if approved by voters, would be an enterprise for TABOR purposes, the Court should decline to address it. *In re 1997-98 No. 10*, 943 P.2d at 900.

CONCLUSION

The Court should affirm the Board's actions in setting the title for Initiative #248.

Respectfully submitted this 20th day of April, 2020.

PHILIP J. WEISER
Attorney General

s/ Anne M. Mangiardi
ANNE M. MANGIARDI, 44284*
Assistant Attorney General
Attorney for the Title Board
* *Counsel of Record*

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCEF, at Arvada, Colorado, this 20th day of April, 2020 addressed as follows:

Christopher O. Murray Sarah M. Mercer Julian R. Ellis, Jr. Brownstein Hyatt Farber Schreck, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4437 cmurray@bhfs.com smercer@bhfs.com jellis@bhfs.com *Counsel for Petitioner*	Martha M. Tierney Tierney Lawrence LLC 225 E 16th Street, Suite 350 Denver, Colorado 80203 mtierney@tierneylawrence.com *Counsel for Respondents Tyler and Howell*

s/Andrea DeHart
Andrea DeHart