DATE FILED: March 31, 2020 3:09 PM

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** ▲
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THE TITLE BOARD'S OPENING 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 2,447 words.

B. The brief complies with C.A.R. 28(k) because for each issue it contains, 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 Opening Brief.

STATEMENT OF THE ISSUES

1. Whether the Board correctly concluded that the ballot title for Proposed Initiative 2019-2020 #248 does not need to include the language required for certain ballot measures by subsection (3)(c) of article X, § 20 of the Colorado Constitution.[1]

2. Whether the ballot title is misleading in violation of Section 1-40-106(3)(b), C.R.S. (2019).

[1] Number 248 is nearly identical to Proposed Initiative #247. Number 248 has small variations not relevant here, including the relative share paid by employers and employees and the percentage of wages used to calculate initial premiums. Number 248 also contains an additional provision allowing employers to seek coverage from private insurance companies. Before the Board, Petitioner incorporated her legal arguments related to #247's TABOR issue into her legal arguments related to #248, but noted an additional argument for #248 . The Board's rulings on #247 and #248 are identical. As such, the Board's Opening Briefs for #247 and #248 are substantively identical.

STATEMENT OF THE CASE AND FACTS

Proponents Timothy Tyler and Wendy Howell seek to circulate #248 to obtain the requisite number of signatures to place a measure on the ballot to enact a new part, § 8-13.3-401 *et seq.*, in Colorado's revised statutes. The proposed initiative seeks to create a new enterprise, the Division of Family and Medical Leave Insurance (the "Division"), to provide and administer family and medical leave insurance for Colorado workers. Record for Initiative #248, p. 1, filed March 11, 2020 ("Record").

A. Procedural History

The Board conducted an initial public hearing on February 19, 2020 and set a title for #248. Record, pp. 18-19. Petitioner filed a timely motion for rehearing on February 26, 2020, *id.*, p.20, and the Board denied that motion after holding a rehearing on March 4, 2020, *id.*, p. 26. Petitioner then filed a timely petition of review with this Court on March 11, 2020.

On rehearing, Petitioner conceded that the proposed insurance program in #248 meets multiple elements required for enterprise status under TABOR—the proposed enterprise is "state-owned," has the authority to issue bonds, and will not receive more than ten percent of its funding from state and local government sources. Record, p. 22. Petitioner argued that the program fails the final requirement to be a TABOR enterprise because it is not a "business." *Id.* Petitioner also appears to concede that in #248, the insurance premium is a fee.[2] Instead, Petitioner argued that the Division's authority to regulate that private option sets it apart from any private business. Record, pp. 22-23. Therefore, Petitioner maintains that the title for #248 must meet the requirements for a new tax under TABOR, subsection (3)(c). At the rehearing, the Board recognized that this is a constitutional argument

[2] *Hearing Before Title Board on Proposed Initiatives 2019-2020 #247 & #248* (March 4, 2020), *available at* **https://tinyurl.com/rudxc84** (statements at timestamps 1:21:45-23:05).

outside the scope of the Board's review.[3] Petitioner's second issue presented recasts the same TABOR allegations under Section 1-40-106(3)(b), C.R.S., arguing that the title is misleading because it refers to the proposed program as an enterprise.

B. Relevant Substantive Provisions of Proposed Initiative #248

The proposed enterprise is an insurance program, funded by insurance premiums paid by Colorado workers and employers, calculated as a percentage of wages. Record, pp. 1-16. The initiative creates a new enterprise, the Division of Family and Medical Leave Insurance, to administer the insurance program. Record, p. 8 (proposed § 8-13.3-408). The initiative specifies that the Division is an enterprise under TABOR so long as it receives less than ten percent of its funding from local and state government, and the Division has bond authority. *Id.* (proposed § 8-13.3-408(2)(a)).

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[3] *Hearing Before Title Board on Proposed Initiatives 2019-2020 #247 & #248* (March 4, 2020), *available at* **https://tinyurl.com/rudxc84** (statements at timestamps 1:16:29-18:05).

The Division is funded by payroll premiums collected for each eligible employee in the state. *Id.*, p. 7 (proposed § 8-13.3-407). Those premiums "are used exclusively for the payment of family and medical leave insurance benefits and the administration of the program. Premiums established under this section are fees and not taxes." *Id., p. 8* (proposed § 8-13.3-407(7)). Coverage is elective for self-employed persons, *id.*, p. 11 (proposed § 8-13.3-414), and mandatory for other Colorado workers. *Id.*, p. 3 (proposed § 8-13.3-403(3)). Unlike proposed initiative #247, #248 adds a private option. Record p. 14 (proposed § 8-13.3-421). The Division has some authority for regulation of that election. *Id.*

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to look beyond the plain language of #248 and speculate as to the outcome of a hypothetical constitutional challenge. Based on Petitioner's contention that the proposed enterprise is constitutionally deficient under TABOR, Petitioner asks that the title be rewritten to conform to TABOR's ballot title language for a new tax.

Petition, p. 1-2; COLO. CONST., art. X, § 20(3)(c) (mandating that ballot titles for new tax provisions begin with "SHALL (DISTRICT) TAXES BE INCREASED…").

This Court should affirm the Board's actions in setting the title for #248. Petitioner asks this Court to determine whether the proposed initiative would violate TABOR. It is not for the Board or this Court to speculate as to the future legal effects of a ballot initiative. The Title Board is not the forum to litigate whether the proposed initiative would, as applied, meet the constitutional requirements for an enterprise. 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 objects to the title set for #248 because she believes that the insurance program created by the proposed initiative would not meet the definition of an enterprise under TABOR. Therefore, she maintains, the Board must set a title incorporating the language

mandated by subsection (3)(c) of TABOR for initiatives containing a new tax. Petitioner's argument is based on a hypothetical constitutional challenge to #248, but the outcome of future litigation over this proposed initiative is not before the Board or this Court. As written, #248 includes all the elements required to create a TABOR enterprise. This Court should affirm the title set by the Board.

A. Standard of Review and Preservation

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* This Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 & n.3; *In re Proposed Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 26 (Colo. 1996).

"The Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the proposed amendment." *In re Title, Ballot Title & Submission Clause for a Petition*

on Sch. Fin., 875 P.2d 207, 210 (Colo. 1994). The Board "may not speculate on the potential effects of the initiative if enacted." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). The Court will reverse the Board's decision only if the title is "clearly inaccurate or misleading." *In re Title, Ballot Title & Submission Clause for 2015–2016 #63*, 370 P.3d 628, 635 (Colo. 2016).

This Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title & Submission Clause for 2009–2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Unless the title is "so inaccurate as to clearly mislead the electorate," the Court will uphold the title. *In re Title, Ballot Title & Submission Clause, & Summary for a Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994).

A constitutional challenge to the initiative is beyond the scope of this Court's review of the Board's actions. *In re Petition on Sch. Fin.*, 875 P.2d at 211. This Court does not "review the initiative's 'efficacy, construction, or future application,' as those issues do not come up

unless and until the voters approve the amendment." *In re #89*, 328 P.3d at 176, quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000). 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 preserved this argument by raising it in her motion for rehearing, record, pp. 22-23, and at the rehearing itself.

B. This Court should decline to rule on the TABOR challenge raised by Petitioner.

The state constitution requires that the ballot title for any initiative proposing a new tax contain specific language, beginning with "SHALL (DISTRICT) TAXES BE INCREASED…". COLO. CONST., art. X, § 20(3)(c). Fees charged by a TABOR enterprise are not a tax, do not implicate various aspects of TABOR, and do not require inclusion of that specific ballot language. *See TABOR Found. v. Colo. Bridge Enterprise*, 353 P.3d 896, 898 (Colo. App. 2014).

Petitioner's argument comes down to a question of constitutional interpretation, does the proposed insurance program fail as a TABOR enterprise, thereby triggering subsection (3)(c) of TABOR? Petition, p. 1-2. Petitioner's challenge is outside the scope of the Board's review, as the Board "may not speculate on the potential effects of the initiative if enacted." *In re #89*, 328 P.3d at 179.

This Court has previously declined to address allegations that a ballot title set by the Board does not include disclosures required by TABOR. *In re. 1997-98 No. 10*, 943 P.2d at 900. Petitioners in that case alleged the proposed title failed to comply with TABOR (then commonly referred to as "Amendment 1") in several respects, including by failing to "comply with the specific revenue gain disclosure requirement of Amendment 1." *Id.* at 899. This Court held that a TABOR challenge was "premature" and beyond the scope of its review. *Id.* "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." *Id.*

Likewise, Petitioner's challenge here is both premature and outside the scope of this Court's review of a ballot title. In order to address Petitioner's objections, this Court would have to speculate as to the hypothetical impacts of the proposed initiative. *In re #89*, 328 P.3d at 179. 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). Petitioner concedes the proposed initiative meets several of these requirements: it is "government-owned," authorized to issue bonds, and limited to ten percent of funds from state and local sources. Record, p. 22.

Petitioner's argument is that the proposed enterprise would not be a "'business' within the ordinary meaning and understanding of this term." *Id.* Specifically, Petitioner argues that the Division would have some authority over any competitor seeking to offer a private option.

Id., p. 22-23. Prior decisions from this Court and others shows that the TABOR enterprise analysis is a complex, fact specific determination. *See, e.g., Colo. Bridge Enterprise*, 353 P.3d at 898, *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 513-14 (Colo. 2018). An objection to a ballot title is not the forum to litigate this issue. The ballot title should be affirmed.

II. Petitioner's second issue presented fails for the same reasons articulated above.

Petitioner objects to the title of #248 as misleading, in violation of Section 1-40-106(3)(b), C.R.S., because "the proposed governmental division does not satisfy the definition of a TABOR-exempt enterprise under subsection (2)(d) of article X, section 20 of the Colorado Constitution." Petition, p. 2. The basis for this objection is the same TABOR enterprise issue discussed above, and fails for the same reasons.

A. Standard of Review and Preservation

A ballot initiative title must be fair, clear, accurate, and complete. *In re Title, Ballot Title & Submission Clause, & Summary for 2007-*

2008 No. 62, 184 P.3d 52, 60 (Colo. 2008). The Board's task is to set a fair and accurate title, not to ascertain the measure's efficacy, construction, or future application. *In re #45*, 234 P.3d at 645, 649. This Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.*

Petitioner did not specifically argue in her motion for rehearing or at the rehearing itself that the ballot title is misleading due to TABOR. The motion for rehearing alleged the title is misleading, but for an unrelated reason. Record, p. 23. The only allegation relating to misleading title contained in the motion for rehearing relates to the share of premiums to be paid by employees: "The Title also is impermissibly misleading because it states that the premiums will be 'employer paid,' but then notes that only 50% of the premium is

required to be employer paid." *Id.* This issue was also not raised during the rehearing itself.[4]

"Because [Petitioner] did not raise the issue before the Board [she] cannot now urge this contention as a grounds for reversing the Board." *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000). Accordingly, the Court should not reach the merits of Petitioner's argument.

B. If Petitioner's claim that the title is misleading is preserved, it fails for the same reasons as stated above.

Petitioner's second issue presented recasts the TABOR challenge addressed above as a violation of Section 1-40-106(3)(b), C.R.S., arguing that the title is misleading because it refers to the proposed program as an enterprise. Because this issue also seeks to prematurely litigate whether the proposed insurance program, if approved by voters, would

[4] *Hearing Before Title Board on Proposed Initiatives 2019-2020 #247 & #248* (March 4, 2020), *available at* **https://tinyurl.com/rudxc84** (statements at timestamps 50:46-57:14; 1:11:47-15:59, 1:21:16-24:08.

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

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for Initiative #248.

Respectfully submitted this 31st day of March, 2020.

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s/ Anne M. Mangiardi
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via Colorado Courts E-Filing, at Arvada, Colorado, this 31st day of March, 2020, addressed as follows:

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