COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2019-2020 #248

## MOTION FOR REHEARING

On behalf of Kelly Brough, registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing for Initiative 2019-2020 #248 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

### I. INITIATIVE #248 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

While the measure purports to concern the establishment of a paid medical and family leave "insurance" program, it contains multiple separate subjects, in violation of section 1 (5.5) of article V of the Colorado Constitution and section 1-40-106.5, C.R.S. These multiple subjects allow the initiative's proponents to strategically combine separate proposals into a single measure to alleviate their potential concern that one of the subjects might fail if presented to voters alone. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). In a presidential election year where tax policy, education funding, and spending on other essential government services (*e.g.*, transportation, healthcare, and housing) have been, and will continue to be, hot button topics, Initiative #248 impermissibly aims to appeal to separate and distinct voting blocs for passage.

The following separate components of the measure are distinct and without a necessary or proper connection. *See, e.g., In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 878 (Colo. 2007).

1. The measure creates a paid medical and family leave program

2. The measure purports to create a state enterprise to provide paid medical and family leave "insurance" funded by "premiums" paid by employers and employees.

3. The measure permits local governments to opt-out of the requirements of the law.

4. The measure establishes requirements for privately-provided paid medical and family leave programs and authorizes the Director of the Paid Family Medical Leave Program and Division (the "Division") to approve such plans.

5. The measure provides for mandatory notice requirements for employees taking paid medical and family leave.

6. The measure creates an obligation for employees who take paid medical and family leave in accordance with its terms to continue to pay for healthcare coverage provided by their employer or risk losing such healthcare coverage.

7. The measure creates a private right of action against employers for retaliation against persons taking paid medical and family leave.

8. The measure requires that the Director of the Division institute rules providing for fines of up to $500.00 per violation against employers who he or determines have violated the rules of the program.

9. The measure gives the Director the Division authority to set premiums for the program after December 31, 2024.

Therefore, the Title Board lacks jurisdiction to set title for Initiative #248 because it succumbs to the dangers of omnibus measures and impermissibly joins at least nine "incongruous subjects in the same measure," instead of having the passage of "each proposal depends on its own merits." *In Re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 646 (Colo. 2010).

Moreover, the measure is not saved by the proponents' characterization of the provisions as all falling under the umbrella topic or theme of "paid family and medical leave." The Colorado Supreme Court has held that that "water," "revenue changes," and "local regulation of oil and gas development" are three examples of "overarching themes" that did not qualify as single subjects when the proposed initiatives associated with those themes contained disconnected or incongruous provisions. *See In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076,1080 (Colo. 1995) (holding that the theme of "water" did not satisfy the single subject rule when the measure contained two separate subjects – water conservation district elections and the public trust doctrine); *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (holding that the umbrella subject of "revenue changes" did not alter the fact that the measure contained two unrelated subjects – a tax credit and changes to the procedural requirements for ballot titles); *In re Title, Ballot Title and Submission Clause for 2013–2014 #90 and #93*, 2014 CO 63, ¶ 53 (holding that "the overarching theme of

'local regulation of oil and gas development' does not qualify as a single subject because the Proposed Initiatives contain disconnected and incongruous provisions that vest local governments with authority to regulate oil and gas development on the one hand and limit takings law on the other"). The theme of "paid family and medical leave" is at least as equally broad as these other umbrella topics, especially considering the measure contains provisions establishing a non-income-based corporate tax and funding for education and growth challenges.

## II. THE TITLE BOARD MUST SET A TABOR TITLE FOR THE MEASURE BECAUSE THE MEASURE IMPOSES A NEW PAYROLL TAX.

Article X, Section 20 of the Colorado Constitution (hereinafter the "Taxpayer Bill of Rights" or "TABOR") requires that except in situations of grave fiscal shortfall or other emergency the title for any ballot measure which will impose "any 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" in the State or any political subdivision thereof must begin with the language "SHALL TAXES BE INCREASED . . . ." Colo. Const. Art. X, §20(3)(c) and (4)(a). Here, the proponents of the measure have argued and the Title Board has agreed that a TABOR-compliant ballot title is unnecessary because the proposed Division will function as a state "enterprise" exempt from TABOR. Colo. Const. Art. X, §20(2)(b). But the Division cannot qualify as an enterprise under Colorado law.

An enterprise is defined in TABOR 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). To be sure, the measure provides that the Division will have bonding power and notes that Division risks loss of enterprise status if it receives more than ten percent of its total revenues in grants from all Colorado state and local governments combined. *See* Initiative #248, Section 8. But the Title Board must also determine whether the Division as proposed is a "government-owned business." It is not, because the Division, as proposed, is not a "business" within the ordinary meaning and understanding of this 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. Industrial Comm'n*, 60 P.2d 924, 926 (Colo. 1936). Characteristics of the Division as proposed render it not a business and therefore not a TABOR-exempt enterprise. The Division as contemplated will have significant enforcement, regulatory and rate-setting powers which are inconsistent with the ordinary understanding of a business. The Division will have the power to regulate and indeed allow or disallow competing products (privately provided paid medical and

family leave plans). No ordinary business has the ability to regulate and police its competitors. The Division is not a business in the ordinary understanding of that term in Colorado and federal law. Because it is not a business, it is not a "government owned business" and cannot qualify as a TABOR-exempt enterprise. Hence, to the extent the Title Board finds that it has jurisdiction to set a title, it should set a title in compliance with TABOR.

## III. THE TITLE AS DRAFTED IS MISLEADING

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. *In re Title, Ballot Title, & Submission Clause for 2007–2008 # 62*, 184 P.3d 52, 58 (Colo. 2008) (explaining that the clear title requirement requires that the title "fairly reflect 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 Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010) (explaining that a title set by the Title Board will be overturned if it is "insufficient, unfair, or misleading"). Therefore, the Title should be amended to accurately describe the premium as at least 50% employer paid.

## CONCLUSION

Accordingly, the Objector respectfully requests that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 26th day of February, 2020.

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