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COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2019-2020 #283

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 #283 pursuant to Section 1-40-107, C.R.S., and as grounds therefore states as follows:

I. 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 #283, 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.

II. THE TITLE AS DRAFTED IS 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).

The Title is impermissibly misleading because the title states 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, use of a loaded TABOR term like "enterprise" misrepresents a central feature of Initiative #283 and will mislead the voting public and cause confusion.

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 31st day of March, 2020.

/s/ Christopher O. Murray
Sarah M. Mercer
Christopher O. Murray
David B. Meschke
Brownstein Hyatt Farber Schreck LLP
410 17th Street, #2200
Denver, Colorado 80202
(303) 223-1100
smercer@bhfs.com
cmurray@bhfs.com
dmeschke@bhfs.com

Attorneys for Objector Kelly Brough

Address of Objector:
1445 Market St.
Denver, CO 80202