COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 4, 2022 1:21 PM FILING ID: EA7CEB53122CD CASE NUMBER: 2022SC78
Certiorari to Colorado Court of Appeals Court of Appeals Case No. 2022CA000091	
Appeal from the Denver District Court, Honorable Judge Michael Martinez, Judge Case No. 2021CV32203	
Petitioner-Appellant: CHRONOS BUILDERS, LLC, v. **Petitioner-Appellee:** DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISON OF FAMILY AND MEDICAL LEAVE INSURANCE.	
Attorney for Petitioner-Appellant: DANIEL E. BURROWS, 40284 Advance Colorado 1312 17th St. Unit 2029 Denver, CO 80202 (720) 588-2008 Email: dan@advancecolorado.org **Attorneys for Petitioner-Appellee:** PHILIP J. WEISER, Attorney General NOAH C. PATTERSON, Assistant Solicitor General, 42339* DAVIN W. DAHL, Senior AAG, 40439* SHELBY A. KRANTZ, AAG, 53866* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8th Floor Denver, CO 80203 Telephone: 720-508-6361 (Patterson); x6587 (Dahl); x6437 (Krantz) Email: noah.patterson@coag.gov; davin.dahl@coag.gov; shelby.krantz@coag.gov *Counsel of Record	▲ **COURT USE ONLY** ▲ Case No.

JOINT PETITION FOR WRIT OF CERTIORARI PURSUANT TO C.A.R. 50

CERTIFICATE OF COMPLIANCE

I certify that this Petition complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements. Specifically, I certify that this Petition complies with C.A.R. 53(f)(1) in that it contains 2,321 words, exclusive of appendices.

I acknowledge that the Petition may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

/s/ Noah C. Patterson
NOAH C. PATTERSON, 42339*
Assistant Solicitor General

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Appellant below, Chronos Builders, LLC, and Appellee below, the Division of Family and Medical Leave Insurance ("the Division"), file this Petition jointly.

INTRODUCTION

The Colorado Constitution provides that "[a]ny income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge." COLO. CONST. art. X, § 20(8)(a) ("Section (8)(a)").[1] This case concerns whether the new Paid Family and Medical Leave Insurance Act ("the Act")—which features a premium calculated as a percentage of an employee's wages—violates that command.

While C.A.R. 50 includes three criteria on which the Court may grant certiorari, only *one* of them needs to be satisfied for the Court to accept the case. Here, though, all three criteria are present. First, the

[1] Article X, section 20 is officially titled "The Taxpayer's Bill of Rights" and commonly known as "TABOR."

substantive question has not been decided by this Court, nor by any appellate court. Second, the ruling in this case will have a significant impact on Colorado employers and employees and will provide guidance regarding the types of charges that TABOR allows.

While this case presents a novel question that is important (satisfying the criteria in C.A.R. 50(a)(1) and (2)), the most pressing reasons for this Court to acquire jurisdiction now are in response to C.A.R. 50(a)(3) (the "imperative public importance" criterion). Under the Act, Colorado employers and employees will need to begin remitting—and the Division will need to begin collecting—premiums in less than a year. And the Division needs to pay for the building of a technology system to collect those premiums.

This Court should acquire jurisdiction of this case now to provide guidance to Chronos Builders, other employers throughout the state, Colorado employees, and the Division regarding the constitutionality of this program. Granting certiorari under C.A.R. 50 and providing a final ruling on this issue will enable the Division to meet its statutory deadlines (if the premium is constitutional) or save significant costs (if it

is unconstitutional). Granting certiorari now will also give Chronos Builders the time it needs to perform necessary financial and operational planning (if the premium is constitutional) or save the time and expense involved with that planning (if the premium is unconstitutional).

ISSUE PRESENTED

Whether the Paid Family and Medical Leave Insurance Act's premium violates Section (8)(a) of TABOR.

DECISION BELOW

On December 13, 2021, the Denver District Court granted the Division's motion to dismiss the case (order attached as *Appendix A*). Chronos Builders filed a timely notice of appeal in the Colorado Court of Appeals on January 17, 2022 (attached as *Appendix B*). No decision has been rendered in the Court of Appeals.

JURISDICTION

This petition arises from the District Court's order granting the Division's motion to dismiss the case. This case is now pending in the Court of Appeals. This Court may accept jurisdiction over this matter

now under COLO. CONST. art. VI, § 2(2); § 13-4-109(3), C.R.S.; and C.A.R. 50.

PENDING CASES PRESENTING SAME LEGAL ISSUE

The parties are unaware of any other cases pending before this Court (or any other court) that present the same or similar legal issues.

STATEMENT OF THE CASE

I. Legal and Factual Background

This case involves a challenge to the constitutionality of the Paid Family and Medical Leave Insurance Act, also known as Proposition 118. The Act was a citizen initiative approved by voters in the November 2020 election. *See* §§ 8-13.3-501–524, C.R.S. It creates a program to provide family and medical leave benefits to certain Colorado workers. § 8-13.3-504, C.R.S. It also created the Division of Family and Medical Leave Insurance to administer the program. § 8-13.3-508, C.R.S.

The leave program will be funded by a "premium," which the Division will begin collecting in January 2023. § 8-13.3-507(2), C.R.S. The premium amount is calculated as a percentage of employee wages. § 8-13.3-507(3)(a), (b), C.R.S. The percentage is set by statute for the first

two years of the program's operation and then reset annually pursuant to a statutory calculation. *Id.*

Employers with fewer than ten employees must remit 50% of the full premium amount for an employee, but may deduct that entire amount from the employee's wages. § 8-13.3-507(5), C.R.S. Employers with ten or more employees must remit the entire premium, but may deduct up to 50% of it from the employee's wages. *Id.*

Employers may opt out of the program by providing their own qualifying family and medical leave plan that the Division approves. § 8-13.3-521(1), C.R.S. Local governments may decline to participate in the program. § 8-13.3-522(1), C.R.S. Self-employed persons are generally exempt, but may elect to participate. *See* § 8-13.3-514, C.R.S.

II. Procedural History

Chronos Builders, LLC, is a custom homebuilder in Grand Junction that will be subject to the Act's premium payment requirements

beginning in January 2023.[2] In July 2021, Chronos filed this suit, alleging that the Act's funding mechanism (i.e., the "premium" system described above) was unconstitutional under Section (8)(a).

The Division filed a motion to dismiss the case pursuant to C.R.C.P. 12(b)(5), arguing that Section (8)(a) does not apply to the premium because the premium is a fee, not a tax. Chronos Builders opposed the motion to dismiss, contending that Section (8)(a) does in fact apply because the premium is an unconstitutional surcharge on income. The district court granted the motion to dismiss, finding that Section (8)(a) is inapplicable to the Act. *See Appendix A*.

Chronos Builders filed a timely notice of appeal in the Court of Appeals on January 17, 2022. *Appendix B*. No briefs have yet been filed in that court. The deadline for the submission of the record is March 21, 2022. The record is minimal and will only consist of the Complaint, the

[2] As of the date of its amended complaint (October 4, 2021), Chronos had ten employees. Presuming it still has at least that many employees in January 2023, Chronos would have to remit 100% of the premium, but could deduct up to half of that amount from employee wages.

Amended Complaint, briefing on the motion to dismiss, the court's order on that motion, and some miscellaneous filings not relevant to the issues at hand. The parties agree that this case is ripe for certiorari under C.A.R. 50.

ARGUMENT IN SUPPORT OF THIS PETITION

Colorado Appellate Rule 50 authorizes this Court to grant a petition for writ of certiorari to review a case pending before the Court of Appeals if it meets any one of three criteria. This case satisfies all three.

Rule 50 can be invoked in "a case newly filed or pending in the court of appeals, before judgment is given in said court" if (1) "the case involves a matter of substance not yet determined by the supreme court"; (2) "the court of appeals is being asked to decide an important state question which has not been, but should be, determined by the supreme court"; or (3) "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court." *Id.*

While all three of Rule 50's criteria are satisfied here, the most pressing reasons for this Court to acquire jurisdiction now pertain to

C.A.R. 50(a)(3). Therefore, this petition addresses the first two criteria briefly but focuses on the third criterion at length.

I. This substantive question has not been decided by the Supreme Court.

The substantive question here—whether a premium calculated based on a percentage of employee wages violates Section (8)(a) of TABOR—has not been decided by this Court, nor by any appellate court.[3] Indeed, there are no published decisions interpreting Section (8)(a) at all. The question is therefore novel and merits immediate consideration by this Court.

II. This is an important state question that should be decided by this Court.

This case presents an important state question for two reasons. *First*, the program at issue will have a significant impact on Colorado

[3] While this Court has not yet decided the Section (8)(a) question, it did consider and approve the Act's title language in 2020 before the election. Order of the Court, *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2019-2020 #283* (*Brough v. Tyler*), No. 2020SA128 (Colo. June 4, 2020).

employers and employees. (This is discussed in further detail in reference to C.A.R. 50's "imperative public importance" criterion below.)

Second, the Court's answer to the question here will provide important guidance both to the General Assembly and to Colorado's voters regarding the types of charges that TABOR allows. *Accord Romer v. Bd. of Cty. Comm'rs*, 897 P.2d 779, 780–81 (Colo. 1995) (granting certiorari under C.A.R. 50 to address a novel TABOR question). This will affect not only the constitutionality of the Act itself but also any similar current or future charges in Colorado law.

III. This case has imperative public importance and is time sensitive.

While Chronos Builders and the Division agree that this case has imperative public importance, they have different perspectives on the nature of that import. Regardless of these differences, the parties agree that the importance of this case justifies "deviation from normal appellate processes" and "require[s] immediate determination in the supreme court." C.A.R. 50(a)(3).

From Chronos Builders' perspective, this matter is important to the public because it will affect many Colorado employees and employers, requiring them to pay a premium that is based on their wages regardless of whether they want to participate in the program. This not a narrow dispute over an obscure government program: the Legislative Council estimated that the Act's premium would take in $1.2 billion in the first year alone.[4] Legislative Council of the Colo. Gen. Assembly, *2020 State Ballot Information Booklet* 60 (2020). Further, from Chronos Builders' perspective, this case concerns vital TABOR protections that the State must follow. Even a momentary deprivation of constitutional rights constitutes irreparable harm. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473 (D. Colo. 1988) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

[4] This year, the entire state budget is only $36.55 billion. Colo. J. Budget Comm., Appropriations Report Fiscal Year 2021–22, at I-15–16 (2021)

Timing considerations also demonstrate public importance from Chronos Builders' perspective. In the past, this Court has considered imminent statutory deadlines in granting certiorari pursuant to C.A.R. 50. *See Ritchie v. Polis*, 2020 CO 69, ¶ 4, 467 P.3d 339, 342 (per curiam). Here, in less than a year, the Act will require Chronos Builders and other Colorado employers to begin collecting and paying premiums. This impending deadline will require Colorado businesses to perform substantial financial and operational planning. The sooner Chronos Builders and other employers can have certainty from this Court regarding whether the Act violates Section (8)(a), the sooner they can make appropriate plans (or avoid the time and expense of such planning entirely).

From the Division's perspective, this matter is one of imperative public importance because it concerns the constitutionality of a voter-approved program that will provide "a necessary safety net for all Colorado workers." § 8-13.3-502(3), C.R.S. This is especially important given the public health concerns of our time.

There are also timing considerations that demonstrate the public importance of this case from the Division's perspective. The Division has been tasked with starting premium collection by January 1, 2023, and claim processing by January 1, 2024. §§ 8-13.3-504, -507(2), C.R.S. To meet these deadlines, the Division will need to build a premium and benefits system, which will take 18–24 months. *Decl. of Daniel Chase*, ¶ 8 (attached as *Appendix C*). That process, along with other startup costs, requires $57 million in funding for the program to be ready in time to satisfy statutory deadlines. *Id.*

The Division planned to secure funding through banking institutions and pay the loan back through collection of premiums. *Id.* at ¶ 7. Absent this case, the Division would have obtained the needed financing by November 1, 2021. *Id.* However, banks will not loan funds to the Division while this litigation is pending. *Id.* at ¶ 9. The Division is diligently exploring alternate funding options, such as a legislative solution, but no alternative is certain at this point. *Id.* at ¶ 10. The Division needs a decision in this case as soon as possible to allow it to hire staff, build a premium and benefits system, and prepare for the

statutory deadlines in 2023 and 2024. *Id.* at ¶ 9. Granting certiorari under C.A.R. 50 will allow the Division to prepare for these deadlines or save those significant costs (if the Court finds the premium to be unconstitutional).

Albeit for different reasons, Chronos Builders and the Division agree that this matter has imperative public importance and that this Court should take jurisdiction now.

IV. Other things the Court should consider in the interests of justice.

No briefs have been filed in the court of appeals, and that court has expended only limited administrative resources for this case. Granting certiorari now would allow the parties to file their substantive briefs before the Supreme Court instead of the Court of Appeals, conserving judicial resources. Further, this Court's decision on the issue in this appeal now would limit the time and expense incurred by both parties. A prompt resolution of this issue would also provide certainty. That is especially important here, given the upcoming statutory deadlines discussed above.

Since the parties agree about the need for a definitive and final ruling on the question in this case, this Court should assume jurisdiction over the pending appeal under C.A.R. 50.

CONCLUSION

This appeal presents a novel substantive question of substantial public importance, satisfying the requirements of C.A.R. 50. Pursuant to C.A.R. 50, the parties jointly request that this Court assume jurisdiction now over this appeal to bring finality to this important question.

DATED this 4th day of February, 2022.

/s/ *Daniel E. Burrows*

DANIEL E. BURROWS, 40284
Advance Colorado
Attorney for Petitioner-Appellant

/s/ *Noah C. Patterson*

NOAH C. PATTERSON, 42339*
Assistant Solicitor General
DAVIN W. DAHL, Senior AAG, 40439*
SHELBY A. KRANTZ, AAG, 53866*
Revenue & Utilities Section
Attorneys for Defendants-Appellees
*Counsel of Record for Petitioner-Appellee

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, I served this **JOINT PETITION FOR WRIT OF CERTIORARI PURSUANT TO C.A.R. 50** on all parties to this case, as identified below, using Colorado Courts E-filing System and/or email.

Daniel E. Burrows
Advance Colorado
1312 17th St.
Unit 2029
Denver, CO 80202
dan@advancecolorado.org

/s/ Noah Patterson
Noah Patterson