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Certiorari Before Judgment; Colorado Court of Appeals, Case No. 2022CA91; District Court, Denver County, Chief Judge Michael A. Martinez, Case No. 2021CV32203

Petitioner–Appellant Chronos Builders, LLC

v.

Petitioner–Appellee Department of Labor and Employment, Division of Family and Medical Leave Insurance

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Case Number: 2022SC78

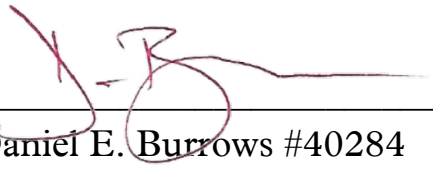
OPENING BRIEF

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 5560 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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.



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ISSUE PRESENTED FOR REVIEW

The Colorado Constitution prohibits any tax or fee that applies to Coloradans unevenly based on their income. A recently enacted statute levies a fee on some (but not all) Coloradans. The fee is measured as a percentage of those Coloradans' wages. Is that fee unconstitutional?

FACTS

In 2020, out-of-state interests funded an initiative to enact a $1.2 billion-per-year, government-run family and medical leave "insurance" program. State-run family and medical leave is a novelty. No state had such a program until California enacted a limited version in 2002. In the nearly two decades between California's experiment and Colorado's vote, only seven other states followed suit. *See* Nat'l Partnership for Women & Families, *State Paid Family & Medical Leave Insurance Laws* 2 (Nov. 2021), *available at* https://bit.ly/3HLhEAs.

Colorado's initiative (officially called the Paid Family and Medical Leave Insurance Act, but labeled Proposition 118 on the ballot) appeared after it had already failed six times in the General Assembly. Jennifer Brown, *Proposition 118 Explained: Paid-Leave Measure Would Give Colorado Workers Time Off but Cost Big Money*, Colo. Sun, Oct. 2, 2020, https://coloradosun.com/2020/10/02/proposition-118-paid-family-leave/. And it was backed by millions in contributions from out-of-state groups. *See*

Colo. Families First, Notice of Major Contributor, Oct. 30, 2020, *available at* https://bit.ly/3Cm5zRb; Colo. Families First, Notice of Major Contributor, Oct. 15, 2020, *available at* https://bit.ly/3tDPHpd.

The change in tactics worked: voters approved the program.

To fund this new entitlement, Proposition 118 levies a fee—which the law calls a "premium"—on wages throughout the state. That fee is calculated as a raw percentage of a person's wages. However, it isn't applied evenly. Persons at businesses with ten or more employees pay 0.9% of their wages.[1] Colo. Rev. Stat. § 8-13.3-507 (2021). Workers at companies with fewer than ten employees only pay 0.45%.[2] *Id.* Self-employed persons are exempt. *See id.* § 8-13.3-503(7). Local governments can opt out. *Id.* § 8-13.3-522(1). And businesses with the wherewithal to navigate the administrative process can avoid the fee by providing their own leave program that is approved by Petitioner–Appellee, the Department of Labor and Employment. *Id.* § 8-13.3-521. The premium is also subject to a cap—i.e., it only applies to the

[1] This is the rate when the premium obligation begins next year. After 2024, it can float up to 1.2%, based on program expenses. Colo. Rev. Stat. § 8-13.3-507(3)(b) (2021).

[2] Again, this is the initial rate. After 2024, this rate can rise to 0.6%. *See* § 8-13.3-507.

first so many dollars in wages that a person earns. *Id.* § 8-13.3-507(6).[3]

This funding scheme runs headlong into the Colorado Constitution. A provision known as The Taxpayer's Bill of Rights (TABOR) requires "all taxable net income to be taxed at one rate . . . with no added tax or surcharge." Colo. Const. art. X, § 20(8)(a).

That is where this lawsuit begins. Petitioner–Appellant, Chronos Builders, LLC, is a small homebuilder in Grand Junction. As of the date of its amended complaint, Chronos had ten employees. (CF, p 138.) Prior to Proposition 118, the company did not have a formal family-and-medical-leave policy. But full-time employees earned annual leave, based on a set schedule, to be used at the employee's discretion. (*Id.*) The company "also had a practice and informal policy of" (a) "not charging employees annual leave for sick days" and (b) "working with employees when a situation arose that would now be covered by Proposition 118." (*Id.*)

Beginning January 1, 2023, Chonos and its employees must begin paying Proposition 118's premium. Colo. Rev. Stat. § 8-13.3-507(2). From Chronos' perspective, this amounts to charging the company and its employees for something it was already offering for free without Proposition

[3] The precise cap is pegged to a calculation from the federal Social Security program. § 8-13.3-507. If the surcharge were assessed in 2022, the cap would be $147,000. Soc. Sec. Admin., Contribution and Benefit Base, https://www.ssa.gov/oact/cola/cbb.html (last visited Mar. 7, 2022).

118's added bureaucracy. Furthermore, this new government extraction comes at a volatile and uncertain time in the economy, making it more expensive for small businesses to operate when they are already being battered by inflation, supply chain difficulties, and an unpredictable labor market. And one can't help but be annoyed by the fact that the government can exempt itself and its own employees from the program, *see* § 8-13.3-522(1), while imposing new fees and burdens on private industry.

So Chronos sued, arguing that Proposition 118's funding mechanism violates TABOR. (CF, pp 1–4, 136–39.) The Department moved to dismiss the suit under C.R.C.P. 12(b)(5), asserting that section 20(8)(a) did not apply to Proposition 118's "premium." (CF, pp 85–95.) The district court agreed with the government and dismissed the case. (CF, p 149.)

A timely appeal followed. (*See* CF, pp 155–58, 161–62.) But while the case was still pending in the Court of Appeals, the parties jointly petitioned this Court for certiorari under C.A.R. 50. The Court granted that petition and immediately took jurisdiction over the appeal. (Order, Feb. 7, 2022, at 1.)

SUMMARY OF THE ARGUMENT

The case against Proposition 118 is simple: its funding mechanism is a surcharge on income, which is illegal under article X, section 20(8)(a) of the Colorado Constitution.

Section 20(8)(a) requires that all income "be taxed at one rate . . . with no added tax or surcharge." Proposition 118, however, is funded by a fee assessed as a percentage of a person's wages. This fee is a "surcharge" on income by any reasonable definition of that word. So it is illegal.

Alternate readings of section 20(8)(a) offered by the lower court and the government would make the flat-tax provision pointless—it could always be avoided through statutory drafting (and not even particularly clever drafting at that). Furthermore, those alternate readings do not convincingly address the text. Under standard principles of constitutional interpretation, the Court must endeavor to give meaning to every word. But the government's position—that section 20(8)(a) requires a flat tax, strictly construed, and nothing more—essentially writes words out of the Constitution. If a flat tax were all section 20(8)(a) required, the other prohibitions on "added tax[es]" and "surcharges" would be unnecessary.

The only proffered interpretation that gives meaning to every word of the relevant constitutional provision is Chronos Builders'. Under that reading, section 20(8)(a) does three things: First, the requirement that all income "be taxed at one rate" outlaws specifically denominated income taxes that are not imposed at a single rate. Second, the ban on "added tax[es]" prohibits any other taxes (beyond specifically denominated income taxes) that are imposed on income or otherwise measured as a function of income.

And, third, the prohibition on "surcharge[s]" proscribes any fees (or other non-tax government extractions) that are imposed on income or otherwise measured as a function of income. Proposition 118's "premium" is explicitly measured as a function of a person's income—to the point that, were it a tax instead of a fee, it plainly would be an income tax under this Court's prior caselaw. Thus, it falls into section 20(8)(a)'s third category of prohibited extractions and is therefore illegal.

ARGUMENT

1. Proposition 118's "Premium" Is an Unconstitutional Surcharge on Income.

1.1. *Standard of Review and Preservation of the Issue.*

Whether Proposition 118's "premium" is a constitutionally prohibited "surcharge" is a question of law. The Court therefore reviews the matter de novo. *See All. for a Safe & Indep. Woodmen Hills v. Campaign Integrity Watchdog, LLC*, 2019 CO 76, ¶ 20, 450 P.3d 282, 286 (citation omitted).

This substantive issue was raised in the Department's motion, briefed by the parties, and forms the bulk of the district court's order. (CF, pp 92–93, 99–105, 127–32) It was thus properly preserved.

The Department, in its motion, and the district court, in its order, stated that Chronos Builders had the burden to prove the unconstitutionality of the challenged portion of Proposition 118 beyond a reasonable doubt. (CF, pp 88, 148.) That is incorrect. The "beyond a reasonable doubt"

standard applies to laws passed by the legislature, but its justification—a due regard for the judgments and functions of co-equal branches of government, whose officers have all taken oaths to preserve and defend the Constitution, *Mesa Cty. Bd. of Cty. Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009); *accord Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003)—does not apply to statutes like Proposition 118, passed via citizen initiative. In fact, Colorado voters have a right to vote for blatantly unconstitutional initiatives, which are only subject to attack after the fact. *McKee v. City of Louisville*, 616 P.2d 969, 972–73 (Colo. 1980); *see also Developmental Pathways v. Ritter*, 178 P.3d 524, 533 (Colo. 2008) (noting initiative process "remove[s] the ballot provisions at issue from the normal checks and balances of American government" (internal quotes omitted)). The only case of which undersigned counsel is aware that claims the "beyond a reasonable doubt" standard applies to citizen-initiated legislation says so only in dicta. *See Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 887, 889 (Colo. 2011) (involving legislature-passed statute). Cases that have addressed the constitutionality of citizen-initiated laws have done so without mentioning the "beyond a reasonable doubt" standard. *See, e.g.*, *In re Interrogatory Propounded by Hickenlooper*, 2013 CO 62, *passim*, 312 P.3d 153, *passim*; *Dallman v. Ritter*, 225 P.3d 610, 620–36 (Colo. 2010); *Morrissey v. State*, 951 P.2d 911, *passim* (Colo. 1998); *Greeley Police Union v. City Council*, 553 P.2d 790, 791–92 (Colo. 1976). *But see*

Evans v. Romer, 854 P.2d 1270, 1274 n.6 (Colo. 1993) (applying standard to citizen-initiated constitutional amendment, partially because Court was "deal[ing] with a constitutional provision as opposed to a statute"). Thus, Chronos Builders is not subject to any heightened burden before the Court may rule in its favor.[4]

1.2. *The "Premium" in Proposition 118 Is an Illegal "Surcharge."*

Proposition 118's chosen funding mechanism violates TABOR. Section 20(8)(a) (the relevant part of that amendment) prohibits three things:

(1) specifically denominated income taxes that are not imposed at a single rate,

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[4] The "beyond a reasonable doubt" standard for constitutional questions has faced significant criticisms—not the least of which is that by staying its hand for all but the worst constitutional violations, the judiciary abdicates responsibility in an area where it is the most competent branch. *State v. Arevalo*, 470 P.3d 644, 653 (Ariz. 2020) (Bolick, J., concurring) (quotation omitted). There is also the issue of whether it makes any sense to talk about evidentiary burdens in the context of legal, rather than factual, determinations. *See, e.g.*, *Gallardo v. State*, 336 P.3d 717, 720 (Ariz. 2014); *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 319 n.20 (Colo. 1995); *Haugen v. Jaeger*, 948 N.W.2d 1, 3 (N.D. 2020) (citation omitted); *Kristensen v. City of Eugene Planning Comm'n*, 544 P.2d 591, 592 n.1 (Or. Ct. App. 1976); *State v. Williams*, 249 Wis. 2d 492, 507 (2002). In all events, the Court need not address the issue now. Whatever the merits of applying the "unconstitutional beyond a reasonable doubt" standard in other contexts, the traditional grounds for upholding that standard do not apply here.

(2) other taxes that are imposed on income or otherwise measured as a function of income, and

(3) fees that are imposed on income or otherwise measured as a function of income.

Proposition 118's premium falls into the third category because it is a fee assessed as a raw percentage of a person's wages. For that reason, it is unconstitutional.

1.2.1. *The ordinary understanding of "surcharge" includes fees like those imposed by Proposition 118.*

The fourth sentence of section 20(8)(a) says, "[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." Proposition 118, however, levies a so-called "premium" on the wages of certain Coloradans. § 8-13.3-507. This premium is precisely the sort of surcharge that section 20(8)(a) exists to prevent.

In interpreting a citizen-initiated constitutional provision like TABOR, courts do not apply hyper-technical analyses or scrutinize the text the way they would a statute passed by the legislature. *Bruce v. City of Colo. Springs*, 129 P.3d 988, 993 (Colo. 2006); *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004); *accord* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 451 (1833). Rather, a court's task is simply to determine what the People believed the amendment would do when they voted it into law.

See Havens v. Bd. of Cty. Comm'rs, 924 P.2d 517, 522 (Colo. 1996). The text itself is still paramount, but the text must be given its "ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it." *Davidson*, 83 P.3d at 654 (citation omitted).

The key in applying section 20(8)(a) here, then, is to determine the ordinary, popular meaning of "surcharge." In common parlance, a surcharge is "[a]n extra charge added to a cost or amount," *Surcharge*, Webster's II New Riverside Desk Dictionary (1988), or "an additional amount added to the usual charge," *Surcharge*, Webster's New World Dictionary (3d ed. 1988). The definition in *Black's* is similar: "an additional tax or cost onto an existing tax, cost, or charge." *Surcharge*, Black's Law Dictionary (7th ed. 1990).[5] That's what Proposition 118's "premium" is: an additional government charge, on top of the ordinary income tax but still levied as a function of a person's income. Thus, the premium in Proposition 118 is a surcharge. The only question remaining is whether it is the type of surcharge that TABOR prohibits.

1.2.2. *The surcharge imposed by Proposition 118 is unconstitutional because it's calculated based on income.*

The purpose of section 20(8)(a) is to outlaw not just graduated income taxes, but schemes to get around the constitutional mandate with

[5] The seventh edition is the one closest to TABOR's 1992 enactment.

fees or taxes that are not "income taxes" per se. That is why the provision not only states that all income must be "taxed at one rate" but also prohibits any "added tax or surcharge" on income. Art. X, § 20(8)(a).

Proposition 118's premium, however, is an attempt to do with a fee what would be illegal with a tax.[6] That premium is explicitly measured as a percentage of employee earnings. Were the premium a tax instead of a fee, this method of determining the amount due would make it an income tax. *See Mountain States Tel. & Tel. Co. v. City of Colo. Springs*, 572 P.2d 834, 835 (Colo. 1977); *Bd. of Trustees v. Foster Lumber Co.*, 548 P.2d 1276, 1278 (Colo. 1976).

But because Colorado prohibits "added tax[es] or surcharge[s]," one cannot get around the flat-tax requirement by merely calling a government

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[6] Under current caselaw, levies to fund government operations in general are taxes, but levies to fund a particular government enterprise are fees. *See Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 26, 418 P.3d 506, 513–14. Prior litigation over TABOR has sometimes focused on this distinction. *See id.* ¶¶ 18, 26, 418 P.3d at 512, 513–14; *Barber v. Ritter*, 196 P.3d 238, 248–49 (Colo. 2008). That is because, under certain parts of TABOR, the distinction is dispositive. For example, TABOR requires that voters approve most tax increases, but there is no such requirement for fees. *See* Colo. Const. art. X, § 20(4)(a). Section 20(8)(a), however, is one of the few places in TABOR where the tax/fee distinction doesn't matter. That is because section 20(8)(a) prohibits not just unequally applied income taxes, but "surcharge[s]" too—a term which includes fees.

levy a "fee," "premium" or some other word that is not "tax." If a statutory charge is levied on or measured as a function of income, it violates section 20(8)(a).[7] Because Proposition 118's premium does precisely that, it is illegal.

1.3. *The Cramped Reading of Section 20(8)(a) Offered by the Department and the Lower Court Nullifies Parts of the Constitution.*

Contrary to this straightforward application of the constitutional language—that a "premium" added on top of an individual's tax liability is an additional amount added to the usual charge (in other words, a "surcharge")—the lower court redefined the scope of section 20(8)(a) to apply only to "tax law[s]." (CF, p 148.) Focusing on the provision's reference to "any income tax law change," at the beginning of the relevant sentence, the court claimed (in agreement with the Department) that section 20(8)(a) does not apply "because [Proposition 118] was enacted as a family and medical leave law, not an income tax law." (CF, p 149.)

This interpretation of section 20(8)(a) has two problems. First, flat-tax provisions in state constitutions must be construed broadly to prevent their

[7] The basis for this limitation—why section 20(8)(a) only prohibits surcharges measured as a function of income as opposed to all surcharges anywhere—is the restrictive clause that begins the relevant sentence. This clause, which limits the rest of the sentence's application to "income tax law change[s]," is discussed in Part 1.3 below.

easy circumvention "through artful statutory draftsmanship." *Sands Bethworks Gaming, LLC v. Dep't of Revenue*, 207 A.3d 315, 333 (Pa. 2019); *accord Opinion of the Justices to the House of Representatives*, 383 Mass. 940, 944–45 (1981); *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 712–13 (Mich. 2011).[8] If all one must do to avoid the prohibition on added taxes or surcharges is to call them "health" or "welfare" bills, not "tax" bills, TABOR's prohibition would be pointless. A lawmaker seeking to fund a pet project with otherwise illegal taxes or surcharges could nearly always get around the constitutional provision.

Second, the district court and the Department's reading renders the last part of the relevant sentence superfluous. If the flat-tax provision was only meant to apply to income taxes qua income taxes, the ban on any "added tax or surcharge" would be unnecessary. The drafters could have stopped after they said all income must be "taxed at one rate." But in interpreting a constitutional provision, one must "giv[e] effect to every word and term contained therein, whenever possible." *Bd. of Cty. Comm'rs v. Vail*

[8] There are no published decisions construing Colorado's constitutionally mandated flat tax and so the Court has not had a chance to consider this rule. But it has seen wide adoption in other states with a flat-tax requirement. (Illinois, which has had a flat-tax requirement since 1970, does not appear to have any general rules of construction for it. But the other constitutional flat-tax states—Massachusetts, Michigan, and Pennsylvania—all construe the provision broadly.)

Assocs., Inc., 19 P.3d 1263, 1273 (Colo. 2001) (citations omitted).

To justify its reading, then, the Department must hypothesize something that is somehow both a tax and not a tax. Said another way, for the prohibition on "surcharges" to avoid nullification there must be something out there that is enough of a tax to be part of an "income tax law change" but not enough that it becomes just another "income tax" or "added tax." The Department wrestled with this problem in its lower court briefing, but the explanation it proposed is unconvincing. The Department argued:

> "Added tax" in the context of [subs]ection (8)(a) refers to an attempt to increase the income tax rate beyond 4.55%.[9] . . . "[S]urcharge" provides a catch-all in [subs]ection (8)(a) to prohibit the use of a flat charge (as opposed to an attempt to increase the tax rate percentage) beyond the set income tax rate.

(CF, p 130.)

This proffered explanation does not properly harmonize the three prohibited items. While it is not entirely clear what the Department thinks the "added tax" prohibition does, it seems to argue that the phrase pegs the tax rate to one particular number. That is unlikely to be correct. The tax rate itself is not in the Constitution. It can be (and has been) changed. *See* Act of June 4, 1999, sec. 1, 1999 Colo. Sess. Laws 1376, 1376; Exec. Order No. D

[9] The current income tax rate is 4.55%. Colo. Rev. Stat. § 39-22-104(1.7)(b) (2021).

2020 302, *available at* https://bit.ly/35yI8s3 (last visited Mar. 7, 2022). But if the Department doesn't mean its argument literally, it is even more unclear what it thinks the prohibition on "added tax[es]" does that the requirement of "a single rate" is not already doing.

The only other way to make sense of the government's attempt to harmonize the prohibitions is if one assumes that a "tax" is figured as a percentage and a "surcharge" is only a flat rate. But there is nothing in either practice or caselaw that supports this assumption. All sorts of taxes are levied as dollar amounts, not percentages. *See, e.g.*, Colo. Rev. Stat. §§ 39-27-102(1)(a)(II)(A), 44-3-503(1) (2021); Denver City Code § 53-203; *see also* Colo. Rev. Stat. § 39-28.5-102 (2021) (setting certain tobacco taxes as percentage of "the manufacturer's list price" but also setting dollar-measured minimum tax). Likewise, a surcharge can be figured as a percentage rate. *See* Colo. Rev. Stat. §§ 10-16-105.6(4), 24-4.2-104(1)(a)–(b) (2021); *see also* Littleton City Code § 6-11-2.A (imposing surcharge at the greater of $25 or "fifteen percent . . . of the fine imposed").

What delineates a tax from other levies is not how the levy is calculated but that its proceeds defray general governmental expenses (rather than the specific costs of a government service). *Colo. Union of Taxpayers*, 2018 CO 36, ¶ 26, 418 P.3d at 513–14; *Barber*, 196 P.3d at 248 (citations omitted). Thus by prohibiting any "added tax," the Constitution covers the entire universe

of taxes whose effect is to tax income at varying rates. How the particular tax is calculated is irrelevant. The prohibition on surcharges, then, must refer to something else—something that *is not* a tax.

The only reading of the constitutional provision that gives meaning to all of its words is Chronos Builders'. That reading agrees with the Department and the district court that "income tax law change" at the beginning of the sentence is restrictive in some sense—to say otherwise would go against "basic grammatic principles" (CF, p 148). Where the interpretations depart is in the meaning they put on that phrase. The Department believes this phrase means that the whole sentence only applies to income taxes, strictly defined. But, as just explained, that cannot be correct because it would make the prohibition of "added tax[es]" and, especially, "surcharge[s]" superfluous.

"Income tax law," therefore must be broader. *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012) ("Adhering to the *fair meaning* of the text . . . does not limit one to the hyperliteral meaning of each word in the text.") It must refer to any law that imposes a government levy measured in the same way as an income tax—no matter if that levy is technically an "income tax," an "added tax," or a "surcharge."

This reading makes every word of the provision effective. It is also the

reading that protects the purpose of the provision: every government levy that treats income in a graduated or otherwise variable manner is outlawed. And this reading is bolstered by the interpretive guidance embedded right in article X itself: the Court is supposed to favor the interpretation that "shall reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). Proposition 118 enacted a $1.2 billion-per-year program that expands state government well beyond its traditional role. The whole state budget for the current fiscal year is only $36.55 billion. J. Budget Comm., Appropriations Report Fiscal Year 2021–22, at I-15–16. If that is not "growth of government," it's not clear what is.

Thus, the text, the purpose, and the interpretive guidance all support a reading of section 20(8)(a) that renders Proposition 118's funding mechanism unconstitutional. The Court should therefore accept that reading as the most reasonable one.

1.4. *At Worst, Section 20(8)(a) Is Ambiguous, and Ambiguous TABOR Provisions Must Be Interpreted in the Way that Most Restrains the Growth of Government (i.e., in a Way that Disallows Proposition 118's Current Funding Mechanism).*

Even if the Court accepts that the Department and the lower court's reading of section 20(8)(a) is plausible, however, that still leaves two plausible readings of the text. And when there are two plausible readings of TABOR, the Court is bound to choose the reading that will most restrain

"the growth of government." Art. X, § 20(1); *accord Mesa Cty.*, 203 P.3d at 527.

"If . . . the language of an amendment is susceptible to multiple interpretations, then [the Court] 'construe[s] the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.'" *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254 (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). Here, determining the amendment's objective is easy: TABOR states it right in the first subsection. Its purpose is to "reasonably restrain . . . the growth of government." Art. X, § 20(1); *accord Barber*, 196 P.3d at 251.

As pointed out above, Proposition 118 creates a single program that expands the state budget by more than 3% in just its first year of operation—a substantial increase in the size of government.

Also, the Department's reading of TABOR would allow legislators the unfettered ability to fund government programs via "fees" on income. And the legislature could do so without the voter notice and oversight that a specifically denominated income tax increase would receive under other parts of TABOR,[10] *see* Colo. Const. art X, § 20(3)–(4); *see also id.* § 20(6)

[10] While Proposition 118 did receive a vote, it was not subject to the notice provisions that would've attended a true tax increase. And, at any rate, there

(allowing legislature to impose emergency taxes without voter approval, but only upon vote of "2/3 majority of the members of each house"), and without the safeguards that would come with a constitutional amendment to forthrightly enact a graduated or otherwise variable income tax, *see id.* art. V, § 1(2.5), (4); *id.* art. XIX.

Chronos' reading, however, requires that if such large leaps in the size of government are going to be taken, they be taken with eyes wide open, after the careful consideration and consensus-building that the Constitution encourages. In other words, government growth is not prohibited, but it is reasonably restrained.

Thus, even if the Department's reading of section 20(8)(a) is plausible, the Court is bound to side with Chronos and declare Proposition 118's funding mechanism unconstitutional.

2. Because the rest of Proposition 118 Is Inseverable from Its Funding Mechanism, the Proposition Is Unenforceable as a Whole.

2.1. *Standard of Review and Preservation of the Issue*

Severability is a question of statutory interpretation. *See People v. District Court*, 834 P.2d 181, 190 (Colo. 1992). And "[i]nterpretation of

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is no reasonable reading of TABOR that would allow initiatives like Proposition 118 but prevent the General Assembly doing the same thing via ordinary legislation.

statutes is a question of law . . . subject to de novo review." *Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009) (citation omitted).

While the severability of Proposition 118's funding mechanism was not briefed by the parties below, it was raised as part of the remedy in Chronos Builders' complaint (CF, p 138) and the district court noted that it would have been necessary to address severability if it had decided in favor of Chronos (*see* CF, p 149). Furthermore, if a Court finds portions of a law unconstitutional, it must address severability to determine the proper remedy. *See Dallman*, 225 P.3d at 638. Thus, while severability is not specifically mentioned in the Court's granted issue (*see* Order, Feb. 7, 2022), it is a necessary corollary if the Court finds in Chronos Builders' favor.

2.2. *Proposition 118 Must Be Struck Down in Its Entirety Because the Proposition's Leave Program Cannot Operate Without Its Associated Funding.*

Without funding to pay the benefits envisioned by Proposition 118, the leave program enacted by the Proposition is pointless and inoperable. So it must be struck down as well.

When a court finds a portion of a statute unconstitutional, it must decide whether the rest of the statute is severable—in other words, whether it can remain effective without the unconstitutional portion.

> If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining portions of the statute are valid, unless it appears to the court that the valid

> provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the [People] would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the [People's] intent.

Colo. Rev. Stat. § 2-4-204 (2021).[11]

Proposition 118, like much legislation, contains a severability clause that says "[i]f any provision" of it "is held invalid, the remainder . . . is not affected." Colo. Rev. Stat. § 8-13.3-523 (2021). Yet the existence of "[a] severability clause does not . . . conclusively resolve the issue. '[T]he determination, in the end, is reached by' asking 'what was the intent of the lawmakers' and 'will rarely turn on the presence or absence of such a clause.'" *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 1014 (1983) (Rehnquist, J., dissenting) (quoting *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936)); *see also Stiens v. Fire & Police Pension Assoc.*, 684 P.2d 180, 184 (Colo. 1984) (non-severability clause in statute "insufficient to resolve the issue").

Here, even a casual review of Proposition 118 dooms the statute once its funding mechanism is removed. The Proposition set up a system for

[11] The statute technically speaks of the legislature and legislative intent. Counsel has made minor edits to make it more obviously applicable to statutes enacted via citizen initiative.

paying eligible workers up to 90% of the state annual weekly wage when they take family or medical leave. *See* Colo. Rev. Stat. § 8-13.3-506(1) (2021). Those benefits are supposed to be paid by the unconstitutional "premiums" discussed above. *Id.* § 8-13.3-507(1). Furthermore, a worker's eligibility for the benefits depends on having previously paid premiums. *Id.* §§ 8-13.3-503(3), -504. Thus, with no premium payments to be made, there not only will be no benefits to pay out, there also will be no way to tell who is eligible for benefits. Indeed, the Department has already conceded that, without premium funding, the program may be inoperable. (Pet. for Cert. 12–13.)[12] When "invalid provisions in [a] statute are" this "inextricably intertwined with the other valid provisions, . . . the statute must be invalidated in its entirety." *Riverton Produce Co. v. State*, 871 P.2d 1213, 1226 (Colo. 1994) (citations omitted).

CONCLUSION

For the foregoing reasons, Chronos Builders requests that the Court reverse the district court's decision and remand the case with instructions to enter judgment for the plaintiff.

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[12] While the Department does raise the possibility of a legislative solution (Pet. for Cert. 12), any possible solution is speculative and would require new legislative action. As a result, it is irrelevant to the severability analysis. *People v. District Court*, 834 P.2d at 190 ("Resolution of a severability issue is limited to the four corners of the statute under consideration.")

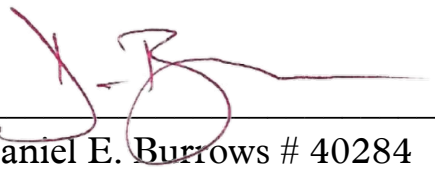
REQUEST FOR ATTORNEY FEES

Consistent with Colo. Const. art. X, § 20(1) Chronos also requests an award of attorney fees and costs in an amount to be proven later. While an attorney fee award is not automatic in a TABOR suit, *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1113–15 (Colo. 1996), victorious citizen plaintiffs should still recover a fee in most cases, *cf. Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (construing similar law regarding suits to enforce federal constitutional rights). That is because when private plaintiffs succeed in vindicating their constitutional rights, they "vindicat[e] a policy . . . of the highest priority." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). Fee awards in such cases operate not just as a deterrent to constitutional violations but as an active *encouragement* to bring suits to vindicate those rights. *Christiansburg*, 434 U.S. at 418; *Newman*, 390 U.S. at 402. *See generally Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 330 (Colo. 1994) (fee-award standards more lenient in suits over constitutional rights).

Relevant factors in determining whether such an award is appropriate "include the nature of the claims raised and the significance of the issues on which the plaintiff prevailed in comparison to the litigation as a whole. . . . [I]t is also appropriate for the . . . court to consider the factors it would weigh in adjudging what 'reasonable' attorney fees would be if fees were

awarded." *Cerveny*, 913 P.2d at 1115. "Generally, if the results obtained are excellent, [the] plaintiff's attorney should recover a fully compensable fee which will normally encompass all hours reasonably expended on the litigation." *Council Enterprises, Inc. v. Atlantic City*, 200 N.J. Super. 431, 441 (Super. Ct. Law Div. 1984).

Here, presuming Chronos Builders prevails in this appeal, it will have been victorious on the only substantive issue in the case. And it will have prevailed on an important legal issue, as evidenced by the Court granting review under Rule 50. Furthermore, Chronos will have persuaded the Court on an issue of first impression, in a specialized area of the law, with experienced and reputable counsel. All of these factors support a fee award. Therefore, if Chronos Builders prevails in this appeal, the decision should also include an award of fees and costs.



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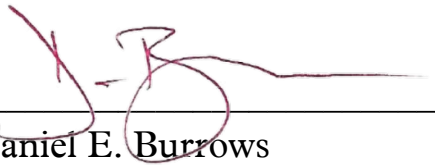
Certificate of Service

I certify that the foregoing document was delivered to the Clerk of the Court on March 7, 2022, via electronic filing. Consistent with C.A.R. 30(e), service on Petitioner–Appellee will be accomplished by the Court's E-System.



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